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## Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense

Michael P. O'Shea

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# Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense

## **Abstract**

This Article sheds light on a major constitutional question opened up by the United States Supreme Court's landmark decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*: Does the Second Amendment "right to bear arms" include a right to carry a handgun for self-defense outside the home? Some courts and commentators have declared that *Heller* held that the Second Amendment right is limited to the home, so that restrictions on handgun carrying do not even fall within the scope of the Second Amendment. Others assert that the potential applicability of the right to bear arms outside the home is simply a "vast terra incognita," devoid of guidance, into which lower courts should hesitate to venture for prudential reasons.

## **Keywords**

Law

# MODELING THE SECOND AMENDMENT RIGHT TO CARRY ARMS (I): JUDICIAL TRADITION AND THE SCOPE OF “BEARING ARMS” FOR SELF-DEFENSE

MICHAEL P. O’SHEA\*

*This Article sheds light on a major constitutional question opened up by the United States Supreme Court’s landmark decisions in District of Columbia v. Heller and McDonald v. City of Chicago: Does the Second Amendment “right to bear arms” include a right to carry a handgun for self-defense outside the home? Some courts and commentators have declared that Heller held that the Second Amendment right is limited to the home, so that restrictions on handgun carrying do not even fall within the scope of the Second Amendment. Others assert that the potential applicability of the right to bear arms outside the home is simply a “vast terra incognita,” devoid of guidance, into which lower courts should hesitate to venture for prudential reasons.*

*These courts are mistaken about Heller and mistaken about the absence of guidance. As I show, Heller and McDonald have two holdings, not just one: they adopted a particular interpretation of the right to bear arms, then applied that understanding to the bans on handgun possession that were before them. The right that Heller and McDonald recognized—the individual “right to . . . bear arms for the purpose of self-defense”—has a long tradition in the state courts, and that tradition supports a right to carry outside the home. Post-Heller lower court decisions that confine the scope of the Second Amendment right to the walls of the house have reached those results, not by addressing and distinguishing this large and relevant*

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\* Associate Professor, *Oklahoma City University School of Law*. B.A., 1995, *Harvard College*; M.A. (Philosophy), 1998, *University of Pittsburgh*; J.D., 2001, *Harvard Law School*. Professor O’Shea is a co-author of the first law school casebook on gun laws and the constitutional right to arms, NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O’SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY* (2011). He thanks David Hardy, David Kopel, Nelson Lund, and George Mocsary for valuable comments on an earlier draft of this Article. He also thanks the students of the Firearms Law and Policy course at *Oklahoma City University* in the spring of 2011, for their help in developing the ideas that are expressed herein.

body of precedent, but by ignoring it.

*The centerpiece of the Article is an analysis of the past 190 years of state court constitutional precedent on arms carrying. I show that there have been two different traditions of the individual right to bear arms: a defense-based right, under which courts construe the right to bear arms as protecting a meaningful right to carry handguns for self-protection, and a “hybrid” or civic-based right, under which gun possession is protected, but courts do not view self-defense as a central purpose of the right, and therefore uphold broader restrictions on weapons carrying. I show that Heller and McDonald embraced the first tradition and rejected the second. Once lower courts and scholars look to the correct line of precedent, they will find powerful arguments that the Second Amendment’s scope includes a right of individuals to carry handguns in public for self-defense.*

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*Ab esse ad posse valet consequentia.*<sup>1</sup>

#### INTRODUCTION

If the decisions in *District of Columbia v. Heller*<sup>2</sup> and *McDonald v. City of Chicago*<sup>3</sup> have established the Second Amendment right to keep and bear arms as a “part of ordinary constitutional law,”<sup>4</sup> then we should expect important issues of Second Amendment interpretation and application to become increasingly amenable to resolution using the tools of ordinary constitutional reasoning. The purpose of this Article is to show how far that expectation can be met with respect to the most significant Second Amendment issue currently facing state

1. “From the fact that something exists, it follows that it is possible.” SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 1 (2d ed. 2005).

2. 554 U.S. 570 (2008) (holding that the Second Amendment protects an individual right to keep and bear arms for self-defense, and thus invalidating, as unconstitutional, District of Columbia bans on handgun possession and the defensive use of firearms in the home).

3. 130 S. Ct. 3020 (2010) (holding that the Second Amendment right to keep and bear arms is a constitutional right that is fully applicable, via the Fourteenth Amendment, against state and local governments).

4. Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 274 (2011) (“Perhaps the most significant consequence of *McDonald* is that the Second Amendment right to arms is now part of ordinary constitutional law.”).

and lower federal courts: whether, and to what extent, the Second Amendment<sup>5</sup> right to “bear arms for the purpose of self-defense”<sup>6</sup> includes a right to carry handguns (and perhaps other common defensive weapons) outside the home.<sup>7</sup> I will apply familiar tools of doctrinal and historical analysis<sup>8</sup> to this question, and will argue that the Second Amendment right to bear arms should be understood to protect a presumptive right to carry a handgun outside the home for self-defense. This right requires that most individuals be able, if they so choose, to obtain authority to carry a loaded defensive handgun legally at most times and in most places. The right is also subject to some forms of regulation. Important examples are likely to include the requirement of a carry permit or license (if issued on an objective, nondiscretionary basis), and regulations of the mode of carry, such as requirements that handguns must be carried openly, or that they must be carried concealed.

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5. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

6. *McDonald*, 130 S. Ct. at 3026; *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

7. *See, e.g.*, *United States v. Masciandaro*, 638 F.3d 458, 460, 467 (4th Cir. 2011) (upholding the constitutionality of a former ban on loaded firearms in vehicles in national parks, while reserving the question of whether the Second Amendment right to bear arms extends outside the home), *cert. denied*, 132 S. Ct. 756 (2011). The Fourth Circuit noted that “there now exists a clearly-defined fundamental right to possess firearms for self-defense within the home. But a considerable degree of uncertainty remains as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation.” *Id.* at 467; *see also* *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1110, 1121 (S.D. Cal. 2010) (upholding, against Second Amendment challenge, a California county sheriff’s refusal to treat the plaintiff’s desire to carry a handgun for self-defense as sufficient cause for the issuance of a concealed carry permit); *Complaint at 8, Palmer v. District of Columbia*, No. 1:09-cv-01482 (D.D.C. Aug. 6, 2009) [hereinafter *Palmer Complaint*] (challenging District of Columbia’s complete ban on carrying handguns for self-defense outside the home as a violation of the Second Amendment right to bear arms).

8. *See* PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991). Bobbitt famously identifies six principal “modalities” of constitutional argument: (1) historical, (2) textual, (3) structural, (4) doctrinal, (5) ethical, and (6) prudential. My investigation is primarily doctrinal—i.e., precedent-based—in nature, insofar as it identifies a coherent American case law tradition expounding the individual right to bear arms for the purpose of self-defense, and argues that the scope of the Second Amendment should be determined in conformity with this tradition because *Heller* and *McDonald* hold that the Second Amendment protects the same right. *See id.* at 17–18 (“[W]hen we say that a neutral, general principle derived from the caselaw construing the Constitution should apply [to a particular legal problem] . . . we make an appeal in a *doctrinal* mode.”). My investigation is secondarily historical in nature, paying particular attention to eras that are important for determining the original meaning of the Second and Fourteenth Amendments. *See id.* at 13 (noting that historical approaches to interpretation “are distinctive in their reference back to what a particular provision is thought to have meant to its ratifiers”).

These conclusions are contrary to the decisions of some post-*Heller* lower courts that have rendered restrictive opinions holding that the Second Amendment confers no protection outside the walls of an individual's home, largely because the particular laws challenged and struck down by the Supreme Court dealt with the possession and defensive use of handguns in the home.<sup>9</sup> Other lower courts have hesitated even to consider whether or not the Second Amendment right exists outside the home; they have expressed the belief that the issue is "a vast *terra incognita*" devoid of guidance.<sup>10</sup>

I will show that these lower courts are mistaken both about what *Heller* and *McDonald* held, and about the supposed absence of guidance for courts applying the Second Amendment to restrictions on defensive weapons carrying. A complete analysis of the Second Amendment's applicability to weapons carrying ought to follow the two-step sequence that has begun to emerge as orthodoxy in post-*Heller* lower court decisions.<sup>11</sup> First, there is the question of *scope*. Does the conduct protected by the right to bear arms extend to the carrying of common weapons outside the home? That question is the subject of this Article. I will show that the weight of judicial authority over the past two centuries has held that the existence of an individual constitutional right to bear arms for the purpose of self-defense implies a right to carry a handgun outside the home.<sup>12</sup> This

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9. *E.g.*, *People v. Aguilar*, 944 N.E.2d 816, 827 (Ill. App. Ct. 2011) (stating that *Heller* and *McDonald* were "specifically limited" to the right to possess a handgun in the home for self-defense), *leave for appeal granted*, 949 N.E.2d 1099 (Ill. 2011); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011), *cert. denied*, 132 S. Ct. 93 (2011).

10. *Masciandaro*, 638 F.3d at 475.

11. *E.g.*, *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (explaining the two-step approach as (1) asking "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," and (2) applying an appropriate form of "means-end scrutiny" when step one is answered in the affirmative (citation omitted) (internal quotation marks omitted)); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (same), *cert. denied*, 131 S. Ct. 958 (2011).

12. *See, e.g.*, *Kellogg v. City of Gary*, 562 N.E.2d 685, 705 (Ind. 1990) (holding that peaceable citizens are constitutionally entitled to a handgun carry permit); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 141, 148-49 (W. Va. 1988) (striking down a discretionary handgun carry permit requirement); *State v. Delgado*, 692 P.2d 610, 614 (Or. 1984) (en banc) (striking down a ban on possessing a switchblade knife in public); *City of Las Vegas v. Moberg*, 485 P.2d 737, 738-39 (N.M. Ct. App. 1971) (striking down a ban on handgun carrying); *State v. Rosenthal*, 55 A. 610, 611 (Vt. 1903) (striking down a handgun carry permit requirement); *In re Brickey*, 70 P. 609, 609 (Idaho 1902) (striking down a ban on carrying handguns); *Stockdale v. State*, 32 Ga. 225, 227 (1861) (affirming the right to openly carry a handgun in public); *Cockrum v. State*, 24 Tex. 394, 402 (1859) (affirming the right to carry a Bowie knife in public); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (holding that the Second Amendment protects the right to openly carry a handgun for self-defense); *Nunn v. State*, 1 Ga. 243, 251 (1846) (same); *Bliss v.*

type of defense-based right to bear arms is the most commonly recognized type in American state constitutions,<sup>13</sup> and has been interpreted by a rich body of case law. It is the same right that the Supreme Court interpreted the Second Amendment as guaranteeing in *Heller* and *McDonald*.<sup>14</sup>

To summarize the argument that follows:

1. *Heller* and *McDonald* “held”—the Supreme Court’s word—that the Second Amendment protects the individual “right to keep and bear arms for the purpose of self-defense.”<sup>15</sup>

2. Over the past two centuries, American courts applying the individual right to bear arms for the purpose of self-defense have held with near-uniformity that this right includes the carrying of handguns and other common defensive weapons outside the home.<sup>16</sup> Furthermore, the majority of these decisions have held that the right gives most persons the opportunity to carry a defensive handgun in most places and times. The exercise of this right can be regulated, but not frustrated or prohibited. I call this view of the right’s scope “presumptive carry.” A minority of decisions have held that the right extends only to a more limited class of places and situations (such as on one’s private property, and elsewhere when the individual can demonstrate an unusual threat), but even under this view, the right cannot constitutionally be confined to the walls of the home. I call this minority view of the right “non-presumptive carry.” Most courts that took this more restricted view did so because they were applying a different type of right: they denied *Heller* and *McDonald*’s premise that the right to bear arms is a right grounded in individual self-

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Commonwealth, 12 Ky. (2 Litt.) 90, 91–92 (1822) (affirming the right to carry both open and concealed weapons for self-defense). Many of these cases are discussed individually in Part III *infra*.

13. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 205–07 (2006) (finding that twenty-two state constitutions expressly include an individual right to self-defense through the keeping and bearing of arms, and that courts in an additional fourteen states treat the right to bear arms as individual self-defense).

14. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (*Heller* “held” that “the Second Amendment protects the right to keep and bear arms for the purpose of self-defense”); *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment) (same); *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (holding that the “central component” of the Second Amendment right to bear arms is individual self-defense); *id.* at 613 (discussing and rejecting the conception under which the right protects individual gun ownership, but is defined and limited by the civic purpose of resisting governmental tyranny rather than the personal purpose of self-defense).

15. *McDonald*, 130 S. Ct. at 3026.

16. See *infra* Part III (pointing to both pre- and post-ratification sources on the right to bear arms for the purpose of self-defense).



defense.<sup>17</sup> Finally, the tradition contains virtually no precedential support for the position that a right to bear arms for self-defense is consistent with a complete ban on public handgun carrying—the position I call “no carry.”

3. Consistent with the tradition, many details of the Supreme Court’s discussion of the Second Amendment right in *Heller* and *McDonald* suggest that the right protects the carrying of handguns for self-defense outside the home, and these details suggest in particular that it includes presumptive carry rights.

4. Furthermore, experience suggests that holding the Second Amendment protects presumptive carry would not be practically disruptive. At the level of statutory law, presumptive carry is *already* the law of the land today in a supermajority of states that represent fully two-thirds of the American population. These states allow law-abiding individuals to carry handguns for self-defense, either according to a permit-based carry licensing system that uses nondiscretionary, objective criteria for issuance (“shall-issue” licensing), or by omitting any requirement of a permit to carry a handgun.

5. Accordingly, the soundest interpretation of the Second Amendment is that its scope includes presumptive carry rights. Different jurisdictions may implement this right in different ways, such as by requiring handguns to be carried either openly or concealed, and/or by requiring a carry permit that is issued on a shall-issue basis.

Given the force of the arguments from pre-*Heller* judicial tradition and the governing Supreme Court opinions, the refusal of some lower courts to recognize any application of the right to bear arms outside the walls of one’s house should be viewed as *prima facie* evidence that these courts are *not* treating the Second Amendment as ordinary constitutional law, contrary to *Heller* and *McDonald*.<sup>18</sup>

The final step in analyzing Second Amendment carry rights is to determine what method of Second Amendment *scrutiny* courts should use to evaluate the constitutionality of gun regulations that affect conduct falling within the scope of the right. I plan to

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17. See *infra* Part III.B (discussing the “hybrid” individual right view).

18. See *McDonald*, 130 S. Ct. at 3043 (“reject[ing] th[e] suggestion” that “the Second Amendment should be singled out for special—and specially unfavorable—treatment” compared to the other liberties in the Bill of Rights); *Heller*, 554 U.S. at 634 (rejecting “a freestanding ‘interest-balancing’ approach” to the Second Amendment because that is not how the Court treats “other enumerated constitutional right[s],” and the Second Amendment should be treated the same).

undertake that task in a second article that will serve as a companion to this one.<sup>19</sup>

(To preview that article's conclusions: a critical ingredient in Second Amendment scrutiny—particularly when analyzing *general* regulations, i.e. those that apply to all peaceable individuals—should be a functional analysis of the degree to which the regulation burdens the practical ability to exercise the right.<sup>20</sup> I will argue that general regulations of activity within the scope of the Second Amendment are constitutional if they are (1) reasonable and (2) do not frustrate the right in practice by imposing a substantial burden on its exercise. This entails an inquiry similar to intermediate scrutiny, but places particular weight on the requirement that regulation must leave open ample alternative channels by which the right can be effectively exercised.)

The present Article deals with scope. Part I supplies a useful vocabulary for the discussion by distinguishing three different conceptions of the relationship between self-defense and the right to carry arms; these are the three competing “models” of the right alluded to in the Article's title. Part II examines what *Heller* and *McDonald* suggest about which model best fits the scope of Second Amendment carry rights. Part III conducts a detailed review of the long history of litigation in state courts over the carrying of weapons. This Part shows that courts applying a defense-based, individual right to bear arms have regularly held that it includes a right to carry weapons outside the home. This right was particularly well-protected in the period between the ratification of the Second Amendment in 1791 and the ratification of the Fourteenth Amendment in 1868, which *Heller* and *McDonald* teach is a critical period for originalist inquiry into the right to keep and bear arms. Finally, Part IV concludes by identifying important lessons that the Article's analysis implies for legal scholars, historians, and courts today.

### I. A TAXONOMY OF CARRY RIGHTS

There are many local variations in contemporary handgun carry laws. Some concern minor matters of detail, while others reflect serious differences of scope. The states differ in whether a permit is

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19. Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (II): The Case for Burden-Based Scrutiny* (draft).

20. See, e.g., *Nordyke v. King*, 644 F.3d 776, 784 (9th Cir. 2011) (adopting a burden-based approach to Second Amendment scrutiny), *reh'g en banc granted*, 664 F.3d 774 (9th Cir. 2011).

required to carry a defensive handgun outside the home;<sup>21</sup> whether a permit is available on a shall-issue basis to all citizens who do not fall within a limited set of specific exclusions, or is instead vested in the discretion of state or local officials;<sup>22</sup> which places are off-limits for legal handgun carry;<sup>23</sup> and the foundational question of whether carrying weapons in public is legal at all.<sup>24</sup> Judicial interpretations of state and federal constitutional right-to-arms provisions throughout American history have displayed a similar diversity. Different constitutional provisions securing a right to keep and/or to bear arms have been interpreted to protect relatively broad handgun carry rights; relatively narrow, situationally limited carry rights; or no carry rights at all.

The apparent profusion of different standards and regulations is more tractable than it may first appear. We can clarify the issue by grouping the different legal regimes into three basic models for purpose of analysis. The essential question raised by the post-*Heller* handgun carry litigation is whether the Second Amendment protects what I will call *presumptive carry* rights, *non-presumptive carry* rights, or *no carry* rights.

These three conceptions differ chiefly in the relationship they envision between the scope of the right to *carry* one's arms for self-defense and the scope of the right to actually *employ* arms in the use of force in self-defense. The latter, of course, is typically governed by the narrow limitations imposed by the doctrine of justification in criminal law: the defender must have a reasonable basis for believing

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21. Compare ARIZ. REV. STAT. §§ 13-3102, 13-3112 (2011) (allowing open or concealed carry of handguns without a permit, but also making available an optional permit), with MINN. STAT. § 624.714 (2011) (requiring a state-issued permit to lawfully carry a gun).

22. Compare MICH. COMP. LAWS ANN. § 28.425b(7) (West 2009) (stating that county concealed weapons licensing boards “shall issue” a carry permit to all applicants who meet stated requirements), with MASS. GEN. LAWS ch. 140, §§ 121, 131 (2007) (granting local officials broad discretion to issue permits only to individuals they deem “suitable”).

23. Compare KAN. STAT. ANN. § 75-7c10(a)(16) (West 2011) (prohibiting carry in places of worship), and N.C. GEN. STAT. § 14-269.3 (2009) (prohibiting permit holders from carrying firearms in any establishment where alcoholic beverages are sold and consumed), with OKLA. STAT. tit. 21, §§ 1272.1, 1277 (2011) (designating neither restaurants nor churches as a prohibited place for permit holders, though elementary schools and bars are prohibited).

24. While nearly all American jurisdictions authorize private individuals to carry handguns in public in at least some limited circumstances—and the majority are “shall-issue” jurisdictions where most individuals can obtain a permit to carry at most places and times—two jurisdictions, Illinois and the District of Columbia, are outliers. See *infra* Part I.D.2 (discussing the laws of the two “no carry” jurisdictions).

that an imminent threat of death or serious bodily harm exists.<sup>25</sup> Otherwise, the use of force is unlawful. The proper understanding of this relationship is that the two rights, while functionally related, should nevertheless differ sharply in their respective scopes.<sup>26</sup> Relatively broad rights to carry defensive weapons are appropriate because they are necessary to give the defender a genuine chance of having arms available when needed for immediate self-defense. However, some constitutional and statutory sources tend to conflate the two rights, as though the authority to have a piece of equipment available to confront an unplanned emergency should exist only during the emergency that authorizes actually *using* the equipment. Such conflation makes it unlikely that the equipment will be available when it is needed, and thus defeats the purpose of the right.

A. *Self-Defense as a Justification of the Use of Force*

In general, the justification of self-defense authorizes the otherwise-criminal use of force when “[o]ne who is not the aggressor in an encounter . . . reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.”<sup>27</sup> The use of *deadly* force (such as a firearm) in self-defense is ordinarily justified only if one reasonably believes that the other is about to inflict unlawful death or serious bodily harm, and that it is necessary to use deadly force to prevent it.<sup>28</sup>

This traditional expression of self-defense law has been qualified by so-called “Castle Doctrine” statutes enacted in numerous states in the past two decades. These statutes create a presumption that lethal force is authorized against an unlawful intruder in one’s home or, in many such laws, one’s vehicle or place of business.<sup>29</sup> Related statutes,

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25. See 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 10.4, at 142 (2d ed. 2003) (explaining that a defender is justified in using “a reasonable amount of force” against an assailant when he reasonably believes that he is “in immediate danger of unlawful bodily harm”).

26. Cf. *Use of Deadly Force for Lawful Self-Defense*, FLA. DEP’T OF AGRIC. & CONSUMER SERVS., DIV. OF LICENSING, [http://licgweb.doacs.state.fl.us/weapons/self\\_defense.html](http://licgweb.doacs.state.fl.us/weapons/self_defense.html) (last visited Jan. 5, 2012) (“In receiving a license to carry a concealed weapon for lawful self-defense, you are undertaking a great responsibility. A license to carry a concealed weapon is not a license to use it.”).

27. LAFAVE, *supra* note 25, § 10.4, at 142.

28. See *id.* § 10.4(b), at 145 (distinguishing between the use of nondeadly force for self-defense, which may be used whenever one reasonably believes another is about to inflict unlawful bodily harm upon him, and deadly force, which may generally be used only in apprehension of unlawful death or serious bodily harm).

29. See Jason Stein & Bruce Vielmetti, *Assembly to Take Up ‘Castle Doctrine’ Bill*, MILWAUKEE J. SENTINEL, Oct. 31, 2011, <http://www.jsonline.com/news/statepolitics/>

often called “Stand Your Ground” laws, abolish the requirement that a defender retreat, if possible, before using defensive force in a public place.<sup>30</sup>

*Presumptive carry* names statutory and constitutional regimes that recognize an ability of most persons to carry defensive firearms at most times and places, thereby rendering it realistically likely that they will be able to use firearms in case of a sudden, serious defensive confrontation. *Non-presumptive carry* names regimes that partially conflate the right to carry defensive arms with the right to employ defensive force: it only protects weapons carrying when a special circumstance exists showing a heightened likelihood that a particular individual will need to employ defensive arms; otherwise, carry is generally unprotected. It is also fairly common for non-presumptive carry regimes to include geographic limitations, protecting broader carry rights in a limited set of locations such as one one’s own land or business property. Finally, *no carry* regimes completely conflate the two rights: under these regimes, individuals cannot lawfully possess weapons for their defense outside the home at all, except, perhaps, if such conduct literally falls within the slender confines of a necessity defense to criminal liability.

#### B. *Presumptive Carry*

A legal provision, whether constitutional or statutory, recognizes presumptive carry rights when it gives most individuals the opportunity, if they so choose, to carry defensive weapons in most places and times. Under this conception, the individual is not confined to carrying in only special or unusual situations (such as when she can document a particularized threat to her life), nor is the individual subject to still sharper restrictions that would prevent carrying a weapon except when *immediately* confronted with a violent assailant. Such laws recognize that the assailant, not the defender,

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[assembly-to-take-up-castle-doctrine-bill-132936283.html](#) (describing pending Wisconsin legislation that would protect people who shoot intruders in their homes, vehicles, and businesses).

30. LAFAYE, *supra* note 25, § 10.4(f), at 155–57; see Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL’Y 504, 504 (2007) (describing Florida’s “Stand Your Ground” law as abrogating the duty to retreat before using deadly force); J.P. Neyland, Note, *A Man’s Car Is His Castle: The Expansion of Texas’ “Castle Doctrine” Eliminating the Duty to Retreat in Areas Outside the Home*, 60 BAYLOR L. REV. 719, 721–23, 729–33 (2008) (explaining that Texas has statutorily abolished the “duty to retreat” when (1) the defendant was rightfully in the location where deadly force was used; (2) the defendant did not provoke the person against whom deadly force was used; and (3) the defendant was not engaged in criminal activity at the time deadly force was used).

chooses the time and place of an unlawful attack; thus, recognizing presumptive carry rights gives individuals a reasonable chance to ensure that they will actually have arms for self-defense in a crisis.

Despite its relative breadth, the presumptive carry rights conception is usually understood to be consistent with a degree of regulation. A common form of regulation requires those who carry arms to use one of two main modes: either *open carry*, such as in an exposed belt holster, or *concealed carry*, under the wearer's outer clothing. Both possibilities have been reflected in recent American law.<sup>31</sup> Other states allow handguns to be either open or concealed, at the wearer's discretion.<sup>32</sup> In previous generations, "open carry" was a common requirement for lawfully carrying weapons in many American jurisdictions.<sup>33</sup>

The requirement of a carry *permit* is also ordinarily consistent with presumptive carry, as long as the permit issuance scheme is shall-issue in nature and does not impose unreasonable requirements such as high fees, onerous training requirements, or the like. Analogously, the requirement of a driver's license to operate a motor vehicle in public is not the kind of regulatory obstacle that prohibits most adults from being able, if they so choose, to drive most places at most times. Despite the driver's license requirement, it is not unreasonable to describe America as a "presumptive driving" jurisdiction at the level of statutory law.

As I will use the term here, then, presumptive carry is consistent with the limited regulations just described. Not all jurisdictions impose these restrictions. But they are common, even in pro-gun jurisdictions, and some of them have a long historical pedigree. Under these regulations, most people can still obtain the ability to carry a defensive handgun in most places and times, if they so choose.

### 1. *Constitutional law*

Most decisions that, like *Heller* and *McDonald*, treat self-defense as a

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31. *E.g.*, TEX. PENAL CODE ANN. § 46.035(a) (West 2011) (requiring concealed carry, by prohibiting a permit holder's intentional failure to conceal a handgun). Conversely, until November 1, 2011, Wisconsin lacked a concealed carry permitting law and the only way to carry a handgun legally was to carry openly. *Compare* WIS. STAT. ANN. § 941.23 (West 2005) ("Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a . . . misdemeanor."), *with* WIS. STAT. ANN. § 941.23(2)(d) (West 2011) (allowing "licensees" to lawfully carry a concealed weapon).

32. *E.g.*, TENN. CODE ANN. § 39-17-1351 (2010) (authorizing issuance of "handgun carry permit" allowing open and concealed carry).

33. *See infra* Part III.

central purpose of the constitutional right to bear arms have interpreted it to include a presumptive right to carry personal weapons outside the home.<sup>34</sup> I will survey the state courts' decision-making in this area in Part III of this Article. For now, it is sufficient to offer a few examples of constitutional decisions recognizing presumptive carry.

On rare occasions, courts have recognized an absolute right to carry arms, allowing little or no scope for regulation. The first American right to arms case, an 1822 Kentucky decision,<sup>35</sup> took this position. In the court's view, the right to bear arms provision then found in the Kentucky Constitution<sup>36</sup> established a categorical right to carry one's weapons in any manner, whether concealed or open:

[T]o be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form—it is the *right* to bear arms in defense of the citizens and the state, that is secured by the constitution, and 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.<sup>37</sup>

Scholars of the period have accurately described this absolute approach as “the road not taken,”<sup>38</sup> and it has remained unusual in American jurisprudence.

Much more common are constitutional decisions recognizing a general right to carry defensive arms while allowing some regulation, such as prohibiting concealed carry while allowing open carry. These too are presumptive carry decisions: they allow for the carrying of defensive weapons in most places and times, in a manner that is effective for self-defense. For example, a nineteenth-century Georgia Supreme Court decision struck down, as a violation of the Second Amendment, a ban on carrying pistols openly, while upholding a ban on concealed carry.<sup>39</sup> In the same vein, an early twentieth-century

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34. See *infra* Part III.

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

36. KY. CONST. of 1799, art. X, § 23 (“[T]he rights of the citizens to bear arms in defense of themselves and the State shall not be questioned.”).

37. *Bliss*, 12 Ky. (2 Litt.) at 91–92 (emphasis added).

38. 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, 1321 (1995).

39. See *Nunn v. State*, 1 Ga. 243, 251 (1846) (“[S]o far as the act . . . seeks to suppress the practice of carrying certain weapons secretly, . . . it is valid, inasmuch as it does not deprive the citizen of his natural right of self-defence, or of his constitutional right to keep and bear arms. But . . . so much of it, as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void

decision of the Idaho Supreme Court struck down a ban on carrying loaded handguns in cities and towns as a violation of the Second Amendment and the state constitution.<sup>40</sup> The court held that the legislature could lawfully regulate the manner of carry, such as by prohibiting concealed weapons, but it “ha[d] no power to prohibit a citizen from bearing arms in any portion of the state,” whether inside or outside of a city or a town<sup>41</sup>—a strong expression of presumptive carry rights. In the latter twentieth century, a series of Oregon decisions concluded that the state constitution’s right to bear arms<sup>42</sup> protects “handcarried weapons commonly used for defense.”<sup>43</sup> In subsequent cases, the Oregon courts concluded that the provision protects the carrying of common weapons outside the home,<sup>44</sup> although the legislature can regulate the exercise of the right by mandating a particular method of carrying.<sup>45</sup>

## 2. Statutory law

At the level of statutory law, presumptive carry is the supermajority rule in America, whether measured by number of jurisdictions or by population. Beginning with the adoption of shall-issue permit-based concealed carry<sup>46</sup> in Florida in 1987,<sup>47</sup> and continuing up to the adoption of shall-issue carry in Iowa and Wisconsin in 2011,<sup>48</sup> a steady

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. . .”), *quoted in* District of Columbia v. Heller, 554 U.S. 570, 612 (2008).

40. *In re Brickey*, 70 P. 609, 609 (Idaho 1902).

41. *Id.*

42. OR. CONST. art. I, § 27 (“The people shall have the right to bear arms for the defence of themselves, and the State . . .”).

43. *State v. Kessler*, 614 P.2d 94, 98 (Or. 1980).

44. *See State v. Delgado*, 692 P.2d 610, 614 (Or. 1984) (en banc) (holding that the right to bear arms protects public possession of a switchblade knife); *State v. Blocker*, 630 P.2d 824, 826 (Or. 1981) (holding that the right to bear arms protects public possession of a billy club).

45. *See State v. Smoot*, 775 P.2d 344, 345 (Or. Ct. App. 1989) (“A person may possess and carry a switchblade so long as it is not concealed.”).

46. “Shall-issue” handgun carry permitting statutes, which were enacted by dozens of states beginning in the 1980s, “enable persons who are legally allowed to possess a handgun in their own home to be eligible for a license to carry a concealed handgun for protection. The laws require that after passing a background check (and sometimes a firearms safety class), eligible persons must be granted the permit if they apply.” Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 680 (1995). Individuals may be disqualified from a permit only for specifically enumerated reasons, such as a significant criminal record, insanity, drug addiction, or the like. Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 748 (2005).

47. *See generally* Richard Getchell, Comment, *Carrying Concealed Weapons in Self-Defense: Florida Adopts Uniform Regulations for the Issuance of Concealed Weapons Permits*, 15 FLA. ST. U. L. REV. 751 (1987).

48. Traditionally, Iowa maintained a “may-issue” handgun carry permitting statute, vesting county sheriffs with wide discretion over permit issuance. On April



wave of adoptions has brought the total number of states with presumptive carry laws to a minimum of thirty-nine. Thirty-five states make available shall-issue handgun carry permits.<sup>49</sup> Four more states dispense with a permit requirement—any adult who is legally entitled to own a handgun may carry it for self-defense without needing a state-issued permit.<sup>50</sup> Arguably, one more state could be included because it does not authorize *concealed* carry on a shall-issue or permit-free basis, but does authorize *open* carrying of handguns in many situations.<sup>51</sup> But even leaving the last state out, the undisputed

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29, 2010, Iowa Governor Chet Culver signed into law new legislation creating a uniform “shall-issue” permit system for all counties. The law took effect on January 1, 2011. Rod Boshart, *Culver Signs Gun Permit Legislation*, QUAD CITY TIMES, Apr. 29, 2010, [http://qctimes.com/news/local/article\\_58dbd018-53a4-11df-934a-001cc4c002e0.html](http://qctimes.com/news/local/article_58dbd018-53a4-11df-934a-001cc4c002e0.html). Iowa had previously maintained a “may-issue” system of permit issuance that left local sheriffs with substantial discretion to issue or deny permits to particular applicants, although many sheriffs administered the statute, in practice, in a manner similar to a “shall-issue” system. See Johnson, *supra* note 46, at 748 n.186 (discussing Iowa’s pre-2011 licensing system).

Wisconsin allowed open carry, but not concealed carry, prior to adopting a “shall-issue” permit-based concealed carry law in 2011. John Rony, *Wisconsin Governor Signs Law on Concealed Carry of Guns*, REUTERS, July 8, 2011, available at <http://www.reuters.com/article/2011/07/08/us-guns-wisconsin-idUSTRE7676T620110708>.

49. The shall-issue states currently are Arkansas, Colorado, Florida, Georgia, Iowa, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Hampshire, New Mexico, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. See Johnson, *supra* note 46, at 748; *Right-to-Carry 2010*, NRA-ILA (Apr. 22, 2010, 12:00 AM), <http://www.nra.org/gun-laws/articles/2010/right-to-carry-2010.aspx>. Since Johnson’s analysis in 2005, Kansas (2006), Nebraska (2006), Iowa (2010), and Wisconsin (2011) joined the ranks of “shall-issue” states, while Arizona and Wyoming abandoned the requirement of a permit to carry a concealed handgun. See *infra* note 50.

50. The states are Alaska, Arizona, Vermont, and Wyoming. See ALASKA STAT. § 11.61.220(a) (2003) (allowing concealed carry of a deadly weapon, without permit, as long as carrier notifies law enforcement officers during police contact); ARIZ. REV. STAT. § 13-3102 (2011) (same). Vermont has not required a permit to carry a concealed handgun since the Vermont Supreme Court’s decision in *State v. Rosenthal*, 55 A. 610 (Vt. 1903), holding that such a permit requirement violated the state constitution’s right to bear arms, *id.* at 611. Wyoming has long allowed permitless open carry, and recently enacted legislation authorizes concealed carry without a permit. *Wyoming Governor Signs Concealed Gun Bill*, BILLINGS GAZETTE, Mar. 2, 2011, [http://billingsgazette.com/news/state-and-regional/wyoming/article\\_a70b73fc-452e-11e0-9751-001cc4c03286.html](http://billingsgazette.com/news/state-and-regional/wyoming/article_a70b73fc-452e-11e0-9751-001cc4c03286.html).

51. The “arguable” state is Alabama. Many authorities indicate that the open carry of a handgun is generally lawful in Alabama, without the requirement of a permit. See *C.D.J. v. State*, 671 So.2d 139, 141–42 (Ala. Crim. App. 1995) (examining precedent and concluding that a person may carry an unlicensed pistol if the pistol is carried openly and the person is on foot); Ala. Att’y Gen. Op. 2007-054, at 8–9 (Mar. 6, 2007) (citing Ala. Code §§ 13A-11-73, -75 (2006)) (concluding that county animal control officers who are not commissioned law enforcement officers may lawfully carry handguns if they “follow the same procedures as are required of other citizens”; accordingly, an animal control officer who is not “traveling in a vehicle . . . may carry

presumptive carry states represent more than three-fourths of the states, and fully two-thirds of the United States by population.<sup>52</sup>

Some readers might argue that the requirement to obtain a state-issued permit before carrying a defensive handgun makes it inapt to call that legal regime “presumptive carry,” since an individual is not able to carry without a permit. They may argue that only states that dispense with the permit requirement for carrying should qualify. There is a political movement in several states to repeal carry permit requirements and allow all individuals who may lawfully own a handgun to carry it for self-defense.<sup>53</sup> Proponents tend to refer to such laws as “constitutional carry” laws, and they have enjoyed some success in recent years. Of the four states that currently authorize citizens to carry handguns without a permit, both openly and concealed, three enacted such laws within the past decade.<sup>54</sup>

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an unlicensed and unconcealed pistol in all places except where there are specific restrictions regarding the carrying of a firearm, i.e., airline passenger planes, sports stadiums, private property”). However, there remains uncertainty about the practicability of open carry in some parts of the state. The Alabama code retains an older statutory section, Ala. Code § 13A-11-52, which broadly prohibits any private person from “carry[ing] a pistol about his person on premises not his own,” but with the disclaimer “except as otherwise provided in this article.” This provision is viewed as largely superseded by later provisions that do not prohibit open carry, *see* K.J. v. State, 690 So.2d 541, 544–45 (Ala. Crim. App. 1997), but the matter is not one of crystalline clarity. Alabama also makes available concealed carry permits issued on a discretionary, “may-issue” basis by local sheriffs. ALA. CODE § 13A-11-75(a) (2010). Such a permit is necessary in order to carry a handgun lawfully in a vehicle. Permitless open carry is lawful only on foot. *Id.* § 13A-11-73. In practice, most Alabama sheriffs administer this “may-issue” permit law similarly to a shall-issue law. *See* Johnson, *supra* note 46, at 748 nn.184, 186.

The ability to open carry for self-defense, without a permit, is one way a jurisdiction can satisfy the right to presumptive carry, as long as the restrictions on carrying do not rise to a level where they practically frustrate the exercise of the right.

52. The thirty-nine states listed in notes 49 and 50 have an estimated total population, according to the 2010 Census, of 205,903,415. Adding Alabama, the “arguable” state discussed in the preceding note, would bring the total population of presumptive carry states to 210,683,151. The population of the United States in 2010 was 308,745,538. *See Guide to State and Local Geography—Selected Data from the 2010 Census*, U.S. CENSUS BUREAU, [http://www.census.gov/geo/www/guidestloc/select\\_data.html](http://www.census.gov/geo/www/guidestloc/select_data.html) (last visited Feb. 8, 2012). Thus, by the more conservative definition, 66.7% of Americans now live in jurisdictions where presumptive carry is the law. *Id.* Using the slightly broader definition that includes Alabama, that figure is 68.2%. *Id.*

53. *See, e.g.,* Mark Stollenwerk, *Georgia Legislator Introduces Bill to Repeal Permit Requirement to Open Carry Handguns!*, EXAMINER.COM (Mar. 2, 2009), <http://www.examiner.com/gun-rights-in-washington-dc/georgia-legislator-introduces-bill-to-repeal-permit-requirement-to-open-carry-handguns> (describing a legislative push to repeal carry permit requirement in Georgia).

54. *See supra* note 50; James Heiser, *Wyoming Adopts “Constitutional Carry” of Firearms*, THE NEW AMERICAN (Mar. 4, 2011, 9:18 AM), <http://www.thenewamerican.com/usnews/constitution/6559-wyoming-adopts-constitutional-carry-of-firearms> (detailing the Wyoming legislature’s repeal of carry permit requirements in the

Nevertheless, I classify shall-issue carry permitting statutes as a form of presumptive carry because shall-issue carry still allows most individuals the ability to carry for self-defense. The difference between a jurisdiction where “a law-abiding, competent adult has a clear path to a concealed carry permit,”<sup>55</sup> and one where most individuals do *not* have any such path available—as in jurisdictions such as California or Maryland, which recognize only what I term non-presumptive carry rights—is much more significant in practice than the difference between the thirty-four states that authorize shall-issue permit-based carry and the four that have adopted permit-free carry.<sup>56</sup>

### C. *Non-Presumptive Carry*

Some statutes, and some constitutional right-to-arms guarantees, have been interpreted to secure *non-presumptive* carry rights: they recognize a right to carry arms, but one that only applies under substantially limited circumstances, or is subject to special situational requirements, such as a specifically identifiable threat.

#### 1. *Constitutional law*

Some American courts have interpreted constitutional right-to-arms provisions as securing a right to carry a handgun, but have given that right a limited scope that falls short of presumptive carry. Under this interpretation, the right to bear arms protects a right to non-presumptive carry. The right applies only under substantially limited circumstances, or in a limited set of places, or attaches only in special situations such as an identifiable and imminent threat of bodily harm.<sup>57</sup> Thus, in this view, a complete prohibition on the carrying of handguns is unconstitutional, but most individuals can

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state).

55. David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 126.

56. I do not wish to dismiss the policy differences between shall-issue carry and “constitutional carry”; real debate is possible about whether even objective licensing of defensive arms carrying accords best with constitutional values. Nevertheless, as I will argue in detail in Part III *infra*, the case law discloses a long tradition of upholding some regulation of the right to carry arms, and the shall-issue permit requirement reflects an extremely common and popular way of regulating, without frustrating, the exercise of the right today. The question whether the Second Amendment protects even a presumptive-but-regulable right of the sort consistent with permit requirements is actively controverted today. Despite the name, arguments for a constitutional entitlement to “constitutional carry” have a way to go before they arrive at ripeness.

57. See *infra* note 60 (citing the Texas constitution’s self-defense provision).

constitutionally be prohibited from carrying in most circumstances.

For example, a late nineteenth-century Texas Supreme Court decision upheld a statute that prohibited private citizens from carrying a handgun off their own property, with an exception for any person who had “reasonable grounds for fearing an unlawful attack on his person, and . . . such ground of attack shall be immediate and pressing.”<sup>58</sup> The court construed that exception as applying to “any one having reasonable grounds to fear an attack.”<sup>59</sup> It held that the statute did not violate the Texas right-to-arms provision<sup>60</sup> because, by including the exception for those who had reasonable grounds to fear an attack, the legislature had adequately “respected the right to carry a pistol openly when needed for self-defense.”<sup>61</sup> This is not a complete negation of carry rights; but neither is it a conception broad enough to allow a typical citizen to have defensive firearms available while carrying out ordinary activities. Rather, this view envisions that special factual circumstances must exist for the right-to-arms provision to apply—here, facts showing that an individual is either in a special location, such as on his own land, or subject to a specific threat of unlawful attack. Such a conception partially conflates the right to carry defensive firearms with the right to use them. It conditions the exercise of the right on a somewhat relaxed version of the imminence requirement of the law of self-defense in the actual use of force. Some courts adjudicating post-*Heller* carry rights cases have upheld similar contemporary statutes against Second Amendment challenge, noting that such “pressing self-defense” exceptions are potentially relevant to the constitutionality of carry bans.<sup>62</sup>

This interpretation was most common in Southern states during the Reconstruction and post-Reconstruction eras.<sup>63</sup> However, it has

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58. *State v. Duke*, 42 Tex. 455, 456 (1875). The statute also allowed travelers to carry handguns in their baggage. *Id.* at 456–57.

59. *Id.* at 460.

60. TEX. CONST. of 1869, art. I, § 13 (“Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the Legislature may prescribe.”).

61. *Duke*, 42 Tex. at 459.

62. *See Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1114–15 (S.D. Cal. 2010) (upholding California statute that generally bans carry of loaded handguns except with a permit issued at the discretion of local officials; concluding that any burden on conduct potentially protected by the Second Amendment “is mitigated by [other] provisions . . . that expressly permit loaded open carry for immediate self-defense,” and when the carrier is protected by a judicial restraining order).

63. *See, e.g., State v. Kerner*, 107 S.E. 222, 226 (N.C. 1921) (Allen, J., concurring) (concluding that a restrictive municipal handgun permit requirement violated the federal and North Carolina constitutional rights to bear arms because it included

been uncommon in jurisdictions where individual self-defense was understood to be an important component of the constitutional right to bear arms. Instead, as I will discuss in Part III, most decisions adopting the non-presumptive carry approach did so because they did *not* believe the right-to-arms provision at issue was importantly concerned with individual self-defense<sup>64</sup>—unlike the Second Amendment right recognized by *Heller*.

Finally, in a few cases, constitutional right-to-arms provisions have been interpreted to protect the ability to carry a handgun, but not to carry a *loaded* handgun that could be readily used to defend against a sudden assault.<sup>65</sup> Because allowing such restrictions severely impairs the ability to use the handgun for self-defense,<sup>66</sup> an interpretation of constitutional rights that countenances this kind of restriction likewise cannot be described as recognizing a presumptive right to carry.

## 2. *Statutory law*

States with permit systems that are not shall-issue are commonly grouped as “may-issue” or “capricious-issue.”<sup>67</sup> However, a distinction should be made between states that give officials unguided discretion over permit issue and states that articulate standards for permit issuance that are objective in nature but too strict to be met by average individuals in typical circumstances. Statutes of the second, more principled variety, which provide for the issuance of permits to individuals who can demonstrate a special threat to their life or

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“[n]o provision . . . for an emergency, and no exception in favor of one who carries a pistol off his premises openly, in the necessary defense of his person or property, when he has had no opportunity to secure a permit”); *State v. Workman*, 14 S.E. 9, 10–11 (W. Va. 1891) (holding that a state statute forbidding the carrying of a loaded handgun unless the defendant could show that he was “a quiet and peaceable citizen, of good character and standing in the community” and “had good cause to believe . . . that he was in danger of death or great bodily harm at the hands of another person” did not violate Second Amendment right to bear arms).

64. *E.g.*, *Haile v. State*, 38 Ark. 564, 566 (1882) (“The [state] constitutional provision sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression. It is not intended to afford citizens the means of prosecuting, more successfully, their private broils in a free government. . . . The ‘common defense’ of the citizen does not require that.”).

65. *Peruta*, 758 F. Supp. 2d at 1114–15; *State v. Boyce*, 658 P.2d 577, 579 (Or. Ct. App. 1983); *Hill v. State*, 53 Ga. 472, 475–76 (1874).

66. *See* O’Shea, *supra* note 19 (analyzing this type of restriction).

67. *Cf.* David Kopel, *Nebraska is 40th State to Enact Shall Issue Licenses for Defensive Handgun Carrying*, THE VOLOKH CONSPIRACY (Apr. 1, 2006, 12:35 AM), <http://volokh.com/posts/1143873304.shtml> (describing all states that issue permits, but are not “shall issue,” as “Capricious Issue”).

person, correspond to the non-presumptive carry model of constitutional right. Such statutes recognize a genuine entitlement to carry in some circumstances, but are far more limited in scope and availability than shall-issue or permitless carry statutes.

An example of a non-presumptive carry statute is Maryland's current carry permit law, which requires the Secretary of State Police to issue a handgun permit to an individual who can demonstrate a "good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger."<sup>68</sup> Moreover, a rejected permit applicant can appeal to the state's Handgun Permit Review Board for formal administrative review of the Secretary's decision, and the Review Board's decisions are subject to judicial review in the state's courts pursuant to the Maryland Administrative Procedure Act.<sup>69</sup> In short, issuance of authority to carry is not left to the unguided discretion of the executive, but instead is directed by some objective guideposts. However, individuals are presumed *unable* to obtain the right to carry for self-defense; the statute requires an objective demonstration of an unusual level of threat or danger in order to overcome the presumption.<sup>70</sup>

#### D. *No Carry*

*No carry* rights mean that ordinary individuals cannot lawfully carry handguns outside their homes—even under the limited circumstances typically allowed under a regime of non-presumptive carry rights.

##### 1. *Constitutional law*

On rare occasions in the nineteenth century,<sup>71</sup> then with more frequency in the twentieth century,<sup>72</sup> state and lower federal court decisions interpreted the Second Amendment, or state constitutional

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68. MD. CODE ANN., PUB. SAFETY § 5-306(a)(5)(ii) (LexisNexis 2011).

69. *Id.* § 5-312.

70. Snowden v. Handgun Permit Review Bd., 413 A.2d 295, 298 (Md. Ct. Spec. App. 1980) (establishing an objective test to determine if requisite showing of danger is met, instead of relying on applicant's assertions of subjective fear).

71. State v. Buzzard, 4 Ark. 18, 28 (1842).

72. *E.g.*, United States v. Parker, 362 F.3d 1279, 1285 (10th Cir. 2004) (holding the Second Amendment does not protect handgun carrying unless it is closely connected to participation in an organized militia); United States v. Warin, 530 F.2d 103, 106–07 (6th Cir. 1976) (holding the Second Amendment protects only collective, not individual, rights); Commonwealth v. Davis, 343 N.E.2d 847, 850 (Mass. 1976) (same with respect to both Second Amendment and state constitution); City of Salina v. Blaksley, 83 P. 619, 620 (Kan. 1905) (same).

right-to-arms provisions, to provide no protection to the individual carrying of common weapons for self-defense. The most prominent example of this approach was the lower federal courts' interpretation of the Second Amendment following the U.S. Supreme Court's decision in *United States v. Miller*,<sup>73</sup> although the cryptic *Miller* opinion did not require such a reading.<sup>74</sup>

Nearly all these no carry constitutional decisions, however, rejected the key interpretive step taken by the Supreme Court in *Heller*: they rejected carry rights because they concluded that the right to keep and bear arms was not concerned with individual self-defense. Indeed, in many cases, these courts reasoned that the constitutional right to arms did not protect an individual right at all.<sup>75</sup> *Heller*, of course, rejected both of these premises.<sup>76</sup>

In the 217 years between the ratification of the Second Amendment and the decision in *Heller*, cases where a court examined a right to bear arms grounded in self-defense, and yet interpreted that right to extend no protection outside the home, are vanishingly rare. One 1929 Oklahoma case upheld a ban on carrying handguns outside the doors of the home<sup>77</sup> but did so on the basis of an earlier (and dubious) decision holding that handguns fell outside of the scope of the right to bear arms altogether.<sup>78</sup>

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73. 307 U.S. 174, 178 (1939) (rejecting a challenge to the constitutionality of National Firearms Act's registration and taxation requirements, as applied to defendants' possession and transportation of an unregistered sawed-off shotgun).

74. See Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 352–62 (2009) (describing *Miller* as “opaque and open-ended” and identifying three different possible interpretations of *Miller*'s instruction to keep the amendment's militia purpose in view); see also Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 971–72 (1996) (suggesting a similar division of post-*Miller* interpretations).

75. See, e.g., *Buzzard*, 4 Ark. at 22 (opinion of Ringo, C.J.) (asserting that the right to bear arms does not authorize the individual to “protect and defend by individual force his private rights against . . . illegal invasion”); *id.* at 32 (opinion of Dickinson, J.) (contending that the Second Amendment does not protect “personal rights”; instead, it “is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force”).

76. *District of Columbia v. Heller*, 554 U.S. 570, 592, 599 (2008).

77. *Pierce v. State*, 275 P. 393, 395–96 (Okla. Crim. App. 1929).

78. *Id.* at 394 (citing *Ex parte Thomas*, 97 P. 260 (Okla. 1908)); cf. OKLA. CONST. art. II, § 26 (protecting “[t]he right of a citizen to keep and bear arms in defense of his home, person, or property,” while allowing the legislature to “regulat[e] the carrying of weapons”). Since the Oklahoma court held that handguns were constitutionally unprotected, there was no constitutional right to carry a handgun, even in the curtilage of one's own home.

In addition to the Oklahoma cases, a few opinions extolling the perceived extent of the legislative power to regulate the carrying of arms for self-defense have used language bordering on nullification. See *People v. Zerillo*, 189 N.W. 927, 928–

## 2. *Statutory law*

Only two American jurisdictions currently offer no legal avenue for a private citizen to obtain the ability to carry a handgun in public for self-defense: Illinois and the District of Columbia. Illinois's no carry position is fifty years old.<sup>79</sup> Prior to the adoption of the Illinois Criminal Code of 1961, state law did not criminalize the carrying of a handgun for self-defense unless the handgun was concealed.<sup>80</sup> The District of Columbia's law dates back only a handful of years, and was part of the District's response to the decision in *District of Columbia v. Heller*.<sup>81</sup> The District had previously maintained a limited statutory provision allowing for the issuance of permits to individuals at the discretion of the chief of police, although permits were rarely or never issued in practice. However, in revamping its gun laws after *Heller*, the District's City Council eliminated the authority to issue carry permits.<sup>82</sup> The constitutionality of the District's carry laws is currently under litigation in federal district court.<sup>83</sup>

Apart from these two instances, some jurisdictions have statutes allowing the issuance of carry permits, but leave so much discretion to issuing authorities that they can plausibly be argued to fall in the no-carry category rather than non-presumptive carry.<sup>84</sup> The

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29 (Mich. 1922) (striking down a statute prohibiting aliens from possessing firearms and stating in dictum that, even though the Michigan Constitution expressly guarantees individuals the right "to bear arms for the defense of himself," the legislature "has power in the most comprehensive manner to regulate the carrying and use of firearms").

79. See 720 ILL. COMP. STAT. 5/24-1(a)(4) (2010) (originally enacted in 1961 and prohibiting the carry of handgun except on one's own land or dwelling, or that of another by invitation).

80. Prior to 1961, Illinois law only prohibited the carrying of *concealed* handguns, a level of regulation consistent with presumptive carry. See *People v. McClendon*, 161 N.E.2d 584, 585 (Ill. App. Ct. 1959) (stating that the essential elements of a violation of the contemporary weapons statute were "[c]oncealment and accessibility").

81. See VIVIAN S. CHU, CONG. RESEARCH SERV., R40474, D.C. GUN LAWS AND PROPOSED AMENDMENTS 1 (2010) ("[T]wo bills from the District are the Firearms Control Amendment Act of 2008 and the Inoperable Pistol Amendment Act of 2008, which amended the D.C. Code in an effort to comply with the ruling in *Heller* as well as provide a different range of restrictions on firearm possession.").

82. D.C. CODE § 22-4506 (Supp. 2011) (repealing the pistol carry permitting provision).

83. See, e.g., *Palmer* Complaint, *supra* note 7. Oral argument on cross-motions for summary judgment was held in *Palmer* in January 2010. Thereafter, the case remained in limbo for 18 months, with no ruling or opinion issued. On July 18, 2011, the *Palmer* case was reassigned to a new federal district court judge. See *Palmer v. District of Columbia*, No. 1:09-cv-04182 (D.D.C. July 18, 2011) (order designating and assigning a senior United States judge for service in another circuit).

84. See Kopel, *supra* note 67 (noting that eight "states give local law enforcement almost unlimited discretion to issue permits, and permits are rarely issued in most jurisdictions, except to celebrities or other influentials")



difference lies in whether an applicant's objective demonstration of an unusual defensive need is sufficient to ensure issuance of a permit, or still leaves the permitting authority free to exercise its discretion. For example, New Jersey's permitting statute vests the decision in a Superior Court judge, who acts on the recommendation of the applicant's local police chief as to whether the applicant has a "justifiable need to carry a handgun."<sup>85</sup> Massachusetts requires an applicant for a carry permit to demonstrate a "good reason to fear injury to his person or property," but the law allows local police chiefs the discretion to deny or revoke a permit if they decide an applicant is not "suitable."<sup>86</sup>

### E. *The Current Litigation Over Carry Rights*

The basic question raised by the current constitutional litigation over handgun carry laws is whether the Second Amendment protects presumptive carry rights, non-presumptive carry rights, or no carry rights.

The current litigation challenges jurisdictions with non-presumptive, special threat-based carry statutes such as Maryland<sup>87</sup> and California,<sup>88</sup> as well as the pure no carry jurisdictions of Illinois<sup>89</sup> and the District of Columbia.<sup>90</sup> The plaintiffs seek to establish that the Second Amendment protects presumptive carry rights, in the sense used here.<sup>91</sup> They request an invalidation of provisions that

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85. N.J. STAT. ANN. § 2C:58-4(c) (West 2011).

86. MASS. GEN. LAWS ch. 140, § 131(a), (d)–(f) (2007).

87. See Complaint at 6, *Woollard v. Sheridan*, No. 1:10-cv-02068-JFM (D. Md. July 29, 2010) (contending that individuals cannot be required to show a level of apprehended danger as a prerequisite for their Second Amendment right to carry a handgun).

88. *Richards v. Cnty. of Yolo*, No. 2:09-cv-01235 MCE-DAD, 2011 WL 1885641, at \*1 (E.D. Cal. May 16, 2011) (discussing a challenge to the California requirement that applicants for concealed carry permits provide good cause for applying and demonstrate good moral character); *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1109–10, 1121 (S.D. Cal. 2010) (determining that California and county non-presumptive carry regime does not violate the Second Amendment).

89. Complaint at 3–4, *Shepard v. Madigan*, No. 3:11-CV-00405-WDS-PMF (S.D. Ill. May 13, 2011); Complaint at 1, *Moore v. Madigan*, No. 3:11-CV-03134-SEM-CHE (C.D. Ill. May 12, 2011) [hereinafter *Moore Complaint*]; see also *People v. Aguilar*, 944 N.E.2d 816, 819 (Ill. App. Ct. 2011) (rejecting a Second Amendment challenge to Illinois's ban on public handgun carrying), *leave for appeal granted*, 949 N.E.2d 1099 (Ill. 2011).

90. See *Palmer Complaint*, *supra* note 7, at 3 (contending that "[t]he District of Columbia may not completely ban the carrying of handguns for self-defense . . . or impose regulations on the right to carry handguns that are inconsistent with the Second Amendment").

91. See, e.g., *id.* at 5 (claiming that the plaintiff would carry a functional handgun but for the District's licensing restrictions, and should be presumed to be able to do

prevent most citizens from carrying a functional handgun for self-defense. The relief sought by the plaintiffs is generally framed so that defendant jurisdictions are left with flexibility in choosing how to implement presumptive carry rights:

Plaintiffs enjoy an individual Second Amendment right to carry a handgun for purposes of self-defense. Plaintiffs make no claim for a right to carry *concealed* handguns, any more than they claim a right to carry handguns openly. The right is merely to carry handguns for self-defense, and as the precedent makes clear, either mode of carrying, open or concealed, satisfies the interest in self-defense.<sup>92</sup>

In short, the current litigation seeks to compel state and local governments to recognize presumptive carry rights, but does not seek to constitutionalize the choice of how to recognize that right.<sup>93</sup> The guiding idea is functional: the Second Amendment requires some clear path by which a typical citizen can opt to carry a handgun in most places and times, in a way that is practically useful for self-defense. The best reading of the Supreme Court's two recent landmark Second Amendment decisions indicates that these arguments deserve to prevail.

## II. CARRY RIGHTS AND SUPREME COURT PRECEDENT

### A. District of Columbia v. Heller

Famously, *District of Columbia v. Heller* struck down the District of Columbia's ban on handgun possession and its prohibition on keeping operable firearms in the home, holding that each of these laws violated the Second Amendment.<sup>94</sup> *McDonald v. City of Chicago* held that the Second Amendment right was fully applicable to the

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so under current constitutional law).

92. Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 13, *Palmer v. District of Columbia*, No. 1:09-cv-01482 (D.D.C. Aug. 26, 2009). Similarly, the Plaintiffs in *Moore* asserted:

Plaintiffs do not seek to establish that the State should enact a licensing program, or any particular licensing program, nor do Plaintiffs contend that the State should in some other manner amend its laws. . . . Whatever the contours of a constitutional scheme might be, the Second Amendment renders a ban on carrying guns impermissible.

*Moore* Complaint, *supra* note 89, at 2.

93. *Palmer* Complaint, *supra* note 7, at 3 (asserting that a jurisdiction "basically respect[s] the Second Amendment rights to carry a handgun for self-defense" as long as "the right to carry a handgun is either unregulated, or regulated to the extent that individuals passing a background check and completing a gun safety course are, as a matter of course, licensed to carry handguns").

94. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

states,<sup>95</sup> likely rendering Chicago's municipal ban on handgun possession unconstitutional as well. The laws challenged in *Heller* and *McDonald* did not specifically govern the carrying of firearms outside the home.<sup>96</sup> However, three features of the opinions indicate that the Second Amendment does protect defensive handgun carrying outside the home.

1. *The centrality of self-defense*

First, *Heller* adopted a view of the Second Amendment that places individual self-defense at the heart of the amendment's protection. This was a critical aspect of the *Heller* opinion, and it marked a fundamental difference between the Court's interpretation of the right to keep and bear arms and the dissenters' position. Justice Stevens's dissent, drawing upon the Second Amendment's prefatory clause reference to the desirability of a "well regulated Militia," argued that the right codified by the amendment was solely a right to use weapons "for certain military purposes."<sup>97</sup> Accordingly, he rejected the view that the Second Amendment "protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense."<sup>98</sup> Justice Breyer's dissent similarly emphasized that "[t]he Second Amendment's language, while speaking of a 'Militia,' says nothing of 'self-defense.'"<sup>99</sup> Thus, for Justice Breyer, self-defense was "not the *primary* interest, but at most a subsidiary interest, that the Second Amendment seeks to serve."<sup>100</sup>

The majority, in contrast, held that the amendment protects a traditional right to own and use firearms for a variety of personal purposes, including self-defense.<sup>101</sup> The majority acknowledged that pressure leading to the inclusion of the right to arms in the proposed Bill of Rights stemmed from concern about federal disarmament of the militia. However, that political motivation for amending the

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95. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010); *id.* at 3058 (Thomas, J., concurring in part and concurring in the judgment).

96. *See id.* at 3026 (majority opinion) (describing the invalidated statutes as one that "effectively ban[s] handgun possession by almost all private citizens who reside in the City"); *Heller*, 554 U.S. at 574–75 (describing the invalidated statute as generally prohibiting handgun possession and requiring lawful handguns to be "unloaded and disassembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities" (citation omitted)).

97. *Heller*, 554 U.S. at 636 (Stevens, J., dissenting).

98. *Id.* at 636–37.

99. *Id.* at 714 (Breyer, J., dissenting).

100. *Id.*

101. *Id.* at 628 (majority opinion) ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

Constitution to protect the right did not alter the traditionally understood *content* of the right, including the keeping and use of arms for personal defense:

[T]he Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. . . . Justice Breyer's assertion that individual self-defense is merely a 'subsidiary interest' of the right to keep and bear arms . . . is profoundly mistaken. He bases that assertion solely upon the [prefatory clause]—but that . . . can only show that self-defense had little to do with the right's *codification*; it was the *central component* of the right itself.<sup>102</sup>

Accordingly, *Heller* likened the Second Amendment to state constitutional provisions that protected “the right of the people to ‘bear arms in defence of themselves and the State,’” or “the even more individualistic phrasing that each citizen has the ‘right to bear arms in defence of himself and the State.’”<sup>103</sup> The Court relied upon these self-defense-based state constitutional provisions as support for its analogous interpretation of the Second Amendment.<sup>104</sup>

Holding that the central component of the right to bear arms is self-defense suggests that the right has application outside the home, since the need for self-defense commonly arises there. Indeed, most violent crimes are committed outside the home. Less than one in

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102. *Id.*

103. *Id.* at 585 n.8, 602 (citing PA. DECLARATION OF RIGHTS § 13 (1776) (“That the people have a right to bear arms for the defence of themselves and the state . . . .”); VT. DECLARATION OF RIGHTS § 15 (“That the people have a right to bear arms for the defence of themselves and the State . . . .”); KY. CONST. of 1792, art. XII, § 23 (“That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned . . . .”); OHIO CONST. of 1802, art. VIII, § 20 (“That the people have a right to bear arms for the defence of themselves and the State . . . .”); IND. CONST. of 1816, art. I, § 20 (“That the people have a right to bear arms for the defense of themselves and the State . . . .”); MISS. CONST. of 1817, art. I, § 23 (“Every citizen has a right to bear arms, in defence of himself and the State.”); CONN. CONST. of 1818, art. I, § 17 (“Every citizen has a right to bear arms in defence of himself and the state . . . .”); ALA. CONST. of 1819, art. I, § 23 (“Every citizen has a right to bear arms in defence of himself and the State . . . .”); MO. CONST. of 1820, art. XIII, § 3 (“[T]hat [the people's] right to bear arms in defence of themselves and of the State cannot be questioned . . . .”)).

104. *See id.* at 603 (“That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right.”); *cf. id.* at 602 (describing early state constitutional right-to-arms provisions as “Second Amendment analogues”).

eight armed robberies occurs in the victim's dwelling.<sup>105</sup> Thus, a restrictive view that the constitutional right to bear arms for self-defense applies only inside the home<sup>106</sup> would deny protection to the great majority of potential armed robbery victims. Even extending the scope of the right to the curtilage and the street near the victim's home encompasses less than one in three armed robberies,<sup>107</sup> still leaving most potential victims unprotected. The statistics are similar for the crime of armed assault: less than one in five armed assaults occur within the victim's home, and less than two in five occur in or near the victim's home.<sup>108</sup> Only half of rapes and other sexual assaults occur in or near the victim's home.<sup>109</sup> More broadly, the amount of *all* violent crimes that occur in or near the victim's home is less than forty percent.<sup>110</sup>

If the "central component" of the right to bear arms is self-defense, then it is directly relevant to the right's scope that most violent crimes occur outside the home—including the types of serious crimes against which a would-be victim can typically lawfully defend herself with a firearm. There is certainly a valid sense in which, as *Heller* stated, the need for armed self-defense is "most acute" in the home.<sup>111</sup> The home is a high-value target; a defender's loved ones and valuables will usually be concentrated there. Moreover, some

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105. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007 STATISTICAL TABLES tbl.62 (2010) [hereinafter DOJ 2007 STATISTICS], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf> (combining armed robberies that occur in the home, near the home, and on the street near the home amounts to only 31.6% of armed robberies; similarly, armed assaults in the same locations amount to 38.9% of the total). A mere 12.2% of armed robberies occur inside the home. *Id.*

106. *Richards v. Cnty. of Yolo*, No. 2:09-cv-01235 MCE-DAD, 2011 WL 1885641, at \*3 n.4 (E.D. Cal. May 16, 2011) (interpreting the scope of *Heller* and *McDonald* as limited to the possession of firearms in the home for self-defense); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011) (claiming that *Heller* and *McDonald* apply only "to statutory prohibitions against home possession," and ignoring *McDonald*'s statement that the right extends further as dicta), *cert. denied*, 132 S. Ct. 93 (2011); *State v. Knight*, 218 P.3d 1177, 1189 (Kan. Ct. App. 2009) (interpreting *Heller* as "turn[ing] solely on the issue of handgun possession in the home"), *aff'd*, 241 P.2d 120 (Kan. Ct. App. 2010).

107. DOJ 2007 STATISTICS, *supra* note 105, tbl.62 (combining armed robberies that occur in the home (12.2%), near the home (17.3%), and on the street near the home (2.1%) amounts to 31.6% of all armed robberies).

108. *Id.* The DOJ statistics separate crimes "near home" from those committed "on the street near home." *Id.* I count both categories as crimes occurring near the victim's home.

109. *Id.* tbl.61 (48.9%).

110. *Id.* (35.6%).

111. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (referring to the home as a place "where the need for defense of self, family, and property is most acute").

constitutional provisions suggest a special privacy interest in the home<sup>112</sup>—although most of these provisions single out the home for protection by name,<sup>113</sup> while the Second Amendment contains no reference to the home, a fact that differentiates it from some of its state analogues.<sup>114</sup> More than sixty percent of home invasion, or “hot,” burglaries (that is, those that occur when the home’s occupants are present) occur at night,<sup>115</sup> when potential victims are likely to be asleep or otherwise unwary, which makes these intrusions especially dangerous.

Yet as public concern about “street crime” should make plain, there are multiple reasons why the world outside the home is also a critical zone for armed self-defense. The most important reason, as previously discussed, is that most violent crime is committed outside the home. An interpretation of the Second Amendment that imposes a home-based limitation upon the amendment’s “right of the people to bear arms” renders the right useless to defend against most serious criminal violence, surely a paradoxical outcome. Furthermore, individuals can obtain some protection from unlawful assaults in the home without using weapons, by fortifying the home with fences, locks, door and window bars, electronic alarms, surveillance cameras, or other devices, or keeping dogs as guardians and warning providers.<sup>116</sup> No such barricading strategy is possible when traveling about and carrying out daily activities. Defensive weapons accordingly take on even greater utility outside the home.

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112. The classic example is the Fourth Amendment’s protection against unreasonable search and seizure. See *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” (citation omitted)).

113. U.S. CONST. amend. III (providing that “[n]o soldier shall, in time of peace be quartered in any *house*, without the consent of the Owner” (emphasis added)); *id.* amend. IV (protecting “[t]he right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures” (emphasis added)).

114. Compare U.S. CONST. amend. II (recognizing a “right of the people to . . . bear Arms” without any qualification as to location), with COLO. CONST. art. II, § 13 (“The right of no person to keep and bear arms in defense of his *home, person, and property*, . . . shall be called into question . . . .” (emphasis added)), MISS. CONST. art. III, § 12 (similar), and MO. CONST. art. I, § 23 (similar).

115. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, VICTIMIZATION DURING HOUSEHOLD BURGLARY 6 tbl.9 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/vdhhb.pdf>. To be precise, from 2003 to 2007, an estimated 61.3% of robberies of occupied dwellings occurred between 6:00 PM and 6:00 AM. *Id.* An estimated annual average of 626,150 of these nighttime “hot” burglaries occurred during that five year period. *Id.*

116. See generally STAN WASILIK, ESSENTIAL HOME SECURITY: A LAYMAN’S GUIDE (2010).

## 2. *The definition of “bear arms”*

*Heller* concluded that the natural meaning of the phrase “bear arms” was to “wear, bear, or carry [weapons] upon the person or in the clothing or in a pocket, for the purpose of . . . being armed and ready for offensive or defensive action in a case of conflict with another person.”<sup>117</sup> That phrase has the same meaning, the Court concluded, when it appears in the Second Amendment.<sup>118</sup> It verges on the superfluous to note that this passage *supports* the interpretation that the Second Amendment protects a right to carry a handgun outside the home to have it available for self-defense against unlawful assault: the passage is essentially an announcement of that interpretation.

The Court offered a congruent description of the right to bear arms later in the *Heller* opinion, concluding that the Second Amendment “guarantee[s] the individual right to . . . carry weapons in case of confrontation.”<sup>119</sup> Again, an individual who carries a defensive handgun during everyday activities can be described in natural language as carrying a weapon in case of confrontation, much as one may carry a flashlight in case of darkness, or a spare cell phone battery in case of battery failure.

One would predict that lower courts analyzing claims that the Second Amendment right to bear arms includes defensive carry rights would begin, as a matter of course, by examining the passages in *Heller* that discuss the meaning of “bear arms.” Unfortunately, some of the post-*McDonald* lower court opinions that reject carry rights do not quote or discuss these passages from *Heller*, and would not even disclose the passages’ existence to an attentive reader.<sup>120</sup> The *Heller* Court’s discussion of the right to bear arms suggests that carrying in the home is, at most, a subset of a right that extends presumptively to individuals who must move among other persons in public to live, and who accordingly face the possibility of

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117. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)) (ellipses omitted) (internal quotation marks omitted).

118. *Id.*

119. *Id.* at 592.

120. *See, e.g.*, *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1113, 1117 (S.D. Cal. 2010) (rejecting Second Amendment challenge to California county sheriff’s refusal to treat the desire to carry a handgun for lawful self-defense as good cause for the issuance of a concealed carry permit); *Williams v. State*, 10 A.3d 1167, 1168–69 (Md. 2011) (rejecting Second Amendment challenge to Maryland concealed carry permit system that requires a special justification beyond the desire to carry for lawful self-defense for issuance of a handgun carry permit), *cert. denied*, 132 S. Ct. 93 (2011).

“confrontation” that the Supreme Court emphasized.<sup>121</sup>

### 3. *The focus on handguns*

*Heller* held that handguns are a major category of arms commonly owned and used for personal defense and that, therefore, a handgun ban violates the Second Amendment.<sup>122</sup> The Court rejected the District of Columbia’s argument that long guns (rifles and shotguns) were a constitutionally adequate substitute with which to exercise the right, emphasizing several functional advantages that handguns possess in a defensive scenario: they are easier to store in a way that is accessible in an emergency; they are what defensive trainers call “retainable,” that is, more difficult than a long gun to wrest away from a defender during a struggle; they are light in weight; and they leave the defender with an arm free to perform other tasks, such as dialing the police.<sup>123</sup>

Although the *Heller* Court focused on the functional advantages of handguns for defense in the home, most of these traits apply with equal or greater force outside the home. The handgun’s ease of storage and light weight reflect its special advantage as a defensive tool: it is the *carryable* firearm. Handguns are the only firearms that can be conveniently “stored,” and indeed concealed, on the user’s person for long periods. This is their most important advantage over long guns.<sup>124</sup> Likewise, the handgun’s retainability in a struggle, and the user’s ability to deploy the handgun while keeping another hand free, are especially important in a confrontation outside the home.

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121. *Accord* United States v. Masciandaro, 638 F.3d 458, 468 (4th Cir. 2011) (opinion of Niemeyer, J.) (noting that *Heller* held the Second Amendment protects a right to “carry weapons in case of confrontation,” and concluding that “[b]ecause ‘self-defense has to take place wherever [a] person happens to be,’ it follows that the right extends to public areas beyond the home” (quoting 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, 1515 (2009))), *cert. denied*, 132 S. Ct. 756 (2011); *Ex parte* Nido Lanausse, No. G PA2010-0002, 2011 WL 1563927, at \*7 (P.R. Cir. Jan. 31, 2011) (holding that petitioner who expressed a desire to protect his personal safety outside the home had a fundamental Second Amendment right to obtain a Puerto Rico permit to carry a handgun that could not be restricted in non-sensitive public places).

122. *Heller*, 554 U.S. at 628–29.

123. *Id.* at 629.

124. See JOHN S. FARNAM, *THE FARNAM METHOD OF DEFENSIVE HANDGUNNING* 38–39 (2d ed. 2005) (“Of all firearms, handguns are probably the most useful in the domestic [i.e. nonmilitary] defensive role. They are made for those situations where an innocent person is attacked suddenly at close range and without warning or provocation. . . . A handgun is an instantly reactive defensive firearm. It makes a poor offensive weapon. . . . A handgun has the advantage of being able to be comfortably carried concealed on one’s person.” (emphases omitted)).



The defender in a violent assault on the street is far less likely than a home defender to be able to put walls, barriers, or cover between herself and her attacker. A home defender will often have at least a few seconds of warning that an intruder is present, and thus can often face an assailant from a strong, braced position behind furniture or other cover or concealment.<sup>125</sup> A light-weight, retainable, portable firearm is less likely to be necessary in this kind of confrontation, although a handgun may still present useful advantages for many users. In contrast, the defender outside the home faces a very different situation, and the advantages of the handgun rise to paramount importance. The defender requires a compact, easily stored firearm, because it can be carried regularly while performing other tasks. The defender is likely to need the firearm instantly, in a sudden and unexpected confrontation, and thus needs a one-handed weapon that can be drawn rapidly while the other hand fends off the attack.

In short, inside the home, the handgun's primacy in self-defense is equivocal. It has both pros and cons compared to a long gun, such as a repeating shotgun or semiautomatic carbine; it is not clearly superior to these other common firearms.<sup>126</sup> Outside the home, however, the handgun is the only viable option. The strong protection that *Heller* extends to ownership of handguns is at least suggestive evidence that the defensive role for which handguns are uniquely suited—routine carry outside the home—is also constitutionally protected.

4. *The use of regulation of public weapons carrying as an example of regulation of the conduct protected by the right*

*Heller* acknowledges that some forms of regulation of the right to keep and bear arms have historically been treated as constitutional.<sup>127</sup>

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125. See NAT'L RIFLE ASS'N OF AM., NRA GUIDE TO THE BASICS OF PERSONAL PROTECTION IN THE HOME 71–73 (2000) (discussing recommended strategies for self-defense with a firearm in the home, and stating that taking cover or concealment is the “most immediate tactical response” a defender should take).

126. Long guns typically deliver more ballistic energy than handguns, and thus can have greater “stopping power” against an assailant than a handgun does. Some users also find long guns easier to aim accurately than handguns, because a long gun is held with both hands and braced against the shoulder when fired. However, long guns, especially shotguns, often have heavy recoil that makes them uncomfortable for some people to use and practice with. See NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY ch. 1 (forthcoming 2012).

127. *Heller*, 554 U.S. at 626 (stating that, “[f]rom Blackstone through the 19th-century cases,” legal commentators and court decisions agreed that the right to bear arms was not absolute).

The Second Amendment right is “not a right to keep and carry any weapon whatsoever in any manner and for whatever purpose.”<sup>128</sup> But what sort of regulation is envisioned? The Court’s first historical example of permissible regulation involves the public carrying of weapons; the Court notes that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment.”<sup>129</sup> As authority for this proposition, the Court cites an 1850 Louisiana Supreme Court case and an 1846 Georgia Supreme Court case.<sup>130</sup> Each of these opinions upheld the prohibition on concealed carry on the basis that, while the Second Amendment *does* protect a right to carry defensive weapons, the right extends to carrying them in public in an *open* manner, such as in a visible holster or scabbard; it does not protect concealed carrying.<sup>131</sup> Thus, to illustrate the constitutionality of restrictions on concealed handgun carry, the Court chose examples of cases that do affirm a right to carry a defensive handgun in some mode. The Court suggests through these examples that defensive weapons carrying is part of the scope of the Second Amendment right, and may be regulated, but not frustrated, in its exercise.

To similar effect is the Court’s discussion of other permissible traditional forms of regulation:

[N]othing 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.<sup>132</sup>

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128. *Id.*

129. *Id.* (citing *State v. Chandler*, 5 La. Ann. 489, 489–90 (1850); *Nunn v. State*, 1 Ga. 243, 251 (1846)). The first reported American right-to-arms case, *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), held that a prohibition on the carrying of concealed weapons violated the right to bear arms provision of the Kentucky Constitution.

130. *Heller*, 554 U.S. at 626 (citing *Chandler*, 5 La. Ann. at 489–90; *Nunn*, 1 Ga. at 251).

131. See *Chandler*, 5 La. Ann. at 490 (concluding that a statute banning concealed carry was constitutional because such a law “interfere[s] with no man’s right to carry arms . . . in full open view, which places men upon an equality” (internal quotation marks omitted)); *Nunn*, 1 Ga. at 251 (“[S]o far as the act . . . seeks to suppress the practice of carrying certain weapons *secretly*, . . . it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But . . . so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . .”).

132. *Heller*, 554 U.S. at 626–27.

Again, what is significant is that the Court does not sanction general prohibitions on carrying firearms in public, but only limited forms of regulation of such carrying, namely bans on carrying in special “sensitive places.”<sup>133</sup> While the list of presumptively valid regulations is not exhaustive,<sup>134</sup> the list suggests that weapons carrying outside the home is a basic part of the conduct protected by the right, which may be regulated by restricting carry in some places, but not to the extent that “under the pretence of regulating, [the regulation] amounts to a destruction of the right.”<sup>135</sup>

### B. *McDonald v. City of Chicago*

The invalidation of the District of Columbia’s handgun ban in *Heller* set the stage for a parallel constitutional challenge to the gun laws of Chicago, the only other significant American jurisdiction that maintained a prohibition on the private ownership of handguns. Plaintiffs’ counsel in *Heller* filed the complaint in *McDonald v. City of Chicago* in federal district court on the same day the Supreme Court handed down the *Heller* decision.<sup>136</sup> The plaintiffs in the suit were Chicago residents who desired to keep a handgun in their residences for self-defense;<sup>137</sup> one was a resident of a high-crime neighborhood who had been threatened by drug dealers, and another had been the victim of a home burglary.<sup>138</sup> Because Chicago’s handgun ban was essentially identical to the District of Columbia ban struck down in *Heller*,<sup>139</sup> the only issue in the case was whether the individual right to keep and bear arms recognized by the Second Amendment was made applicable, or “incorporated,” against state and local governments by

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133. *Id.*; see also *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (opinion of Niemeyer, J.) (reasoning that *Heller*’s explicit mention of “sensitive places” implies a right to carry handguns in at least some non-sensitive places outside the home), *cert. denied*, 132 S. Ct. 756 (2011).

134. *Heller*, 554 U.S. at 627 n.26.

135. *Id.* at 629 (quoting *State v. Reid*, 1 Ala. 612, 616–17 (1840)) (internal quotation marks omitted).

136. Compare Complaint at 1, *McDonald v. City of Chicago*, No. 08-CV-3645, 2008 WL 5111112 (N.D. Ill. Dec. 4, 2008) [hereinafter *McDonald* Complaint] (complaint filed on June 26, 2008), with *Heller*, 554 U.S. at 570 (decided June 26, 2008).

137. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010); *McDonald* Complaint, *supra* note 136, at 3–4.

138. *McDonald*, 130 S. Ct. at 3027; *McDonald* Complaint, *supra* note 136, at 1–2.

139. Compare *Heller*, 554 U.S. at 574–75 (explaining that the District of Columbia regulations at issue prohibited both the registration of handguns and the carrying of an unregistered handgun), with *McDonald*, 130 S. Ct. at 3026 (detailing how the Chicago ordinances required a “valid registration certificate” for lawful possession of firearms, and “then prohibit[ed] registration of most handguns” (internal quotation marks omitted)).

the Fourteenth Amendment of the Constitution.<sup>140</sup>

Ultimately, a majority of the Supreme Court<sup>141</sup> agreed that the Second Amendment “right to keep and bear arms for the purpose of self-defense” is a fundamental constitutional right that is protected, through the Fourteenth Amendment, against infringement by state or local governments to the full extent that the Second Amendment protects the same right against federal infringement.<sup>142</sup> In an opinion for a four-Justice plurality, Justice Samuel Alito concluded that the right to keep and bear arms was made applicable against the states by the Due Process Clause of the Fourteenth Amendment.<sup>143</sup> The plurality followed the Fourteenth Amendment “selective incorporation” due process framework developed in the mid-twentieth century, which the Warren Court had previously used to incorporate numerous provisions of the Bill of Rights against the states.<sup>144</sup> In a separate concurring opinion, Justice Clarence Thomas concluded that it was the Privileges or Immunities Clause of the Fourteenth Amendment, rather than its Due Process Clause, that rendered the right to keep and bear arms applicable against the States.<sup>145</sup>

Because *McDonald* focused on the issue of incorporation, the plurality and concurring opinions discussed the scope of the right to arms at less length than *Heller* did. Nevertheless, what *McDonald* did say about the right is fully consistent with the reading of *Heller* presented above. Justice Alito begins by stating broadly that *Heller*

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140. *McDonald*, 130 S. Ct. at 3026, 3028.

141. Justice Samuel Alito authored the opinion of the Court. Chief Justice John Roberts and Justices Antonin Scalia and Anthony Kennedy joined Justice Alito’s opinion in full, and Justice Clarence Thomas joined it in part. *Id.* at 3026. Justice Scalia also wrote a separate concurring opinion, *id.* at 3050 (Scalia, J., concurring), and Justice Thomas wrote a separate opinion concurring in part and concurring in the judgment, *id.* at 3058 (Thomas, J., concurring in part and concurring in the judgment).

142. *Id.* at 3042 (majority opinion); *see also id.* at 3026 (“[T]he Second Amendment right is fully applicable to the States.”); *id.* at 3058 (Thomas, J., concurring in part and concurring in the judgment) (“I agree with the Court that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment ‘fully applicable to the States.’”).

143. *Id.* at 3050 (plurality opinion); *see also id.* at 3042 (majority opinion) (“[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”). The Due Process Clause states: “No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. XIV, § 1.

144. *McDonald*, 130 S. Ct. at 3044–50 (plurality opinion); *see also id.* at 3032–36 (majority opinion) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 & n.14 (1968)).

145. *Id.* at 3058–59 (Thomas, J., concurring in part and concurring in the judgment).

“held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense.”<sup>146</sup> At the same time, the opinion notes that *Heller* applied that right to strike down laws prohibiting handgun possession and the defensive use of firearms in the home.<sup>147</sup> Justice Thomas’s concurrence carefully repeated Justice Alito’s broad description of *Heller*’s holding: “*Heller* . . . held that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense,” and then applied that broad right in the context of the home.<sup>148</sup>

The five-Justice *McDonald* majority agreed that the right to keep and bear arms for self-defense had deep roots in English and American history, and that this interest emerged as the most important single component of the Second Amendment’s right to arms.<sup>149</sup> While the colonial militia system had decayed considerably by the mid-nineteenth century, the right to keep and bear arms was still “highly valued for purposes of self-defense.”<sup>150</sup> The Court examined the post-Civil War Black Codes enacted by many Southern states, which contained provisions prohibiting African-American freedmen and other free blacks from possessing weapons.<sup>151</sup> It concluded that these provisions were seen as violating the constitutional right to keep and bear arms for self-defense, and that protecting that right was one of the principal purposes of both Reconstruction-era civil rights legislation and the Fourteenth Amendment itself.<sup>152</sup> *McDonald* also reinforced the connection between the Second Amendment and state constitutional guarantees of bearing arms in self-defense. To support its holding that the right protected by the Second Amendment is a fundamental right that fully binds the states, the Court observed that, when the Fourteenth Amendment was ratified in 1868, “[q]uite a few . . . state constitutional guarantees . . . explicitly protected the right to keep and bear arms as an individual right to self-defense.”<sup>153</sup>

Justice John Paul Stevens wrote a free-wheeling, separate dissenting opinion that sought to frame the question before the Court as an

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146. *Id.* at 3026 (majority opinion).

147. *See id.* (“In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home.”).

148. *Id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

149. *Id.* at 3036–42 (majority opinion).

150. *Id.* at 3038.

151. *Id.* at 3038–40, 3043.

152. *Id.* at 3038–42.

153. *Id.* at 3042.

independent, substantive due process question that turned not on whether the Second Amendment was incorporated against the states, but on whether the liberty claim made by the plaintiffs—which Justice Stevens described as an individual right to possess a functional handgun within the home—should be deemed a matter of fundamental fairness protected by the Due Process Clause.<sup>154</sup> Justice Stevens's opinion rejected much of the post-1960 consensus on how to carry out the incorporation inquiry, yet he sought somehow to preserve the results of all the Court's major incorporation cases<sup>155</sup>—a source of obvious intellectual strain which Justice Scalia criticized at length in his own separate concurrence.<sup>156</sup> The Stevens dissent also expressed concern that the majority opinions in *Heller* or *McDonald* might be read to recognize a right to carry defensive firearms outside the home.<sup>157</sup> Justice Stevens urged that the holdings of the cases be read as strictly confined to home possession and use.<sup>158</sup>

Justice Stephen Breyer's dissenting opinion, which spoke for three Justices,<sup>159</sup> expressed doubt that the Second Amendment protects a right to keep and bear arms for the purpose of personal defense.<sup>160</sup> Justice Breyer went on to argue that, even assuming the correctness of *Heller's* adoption of a self-defense-centered Second Amendment, the right should not be treated as sufficiently fundamental to be incorporated by the Fourteenth Amendment.<sup>161</sup> The Breyer dissent

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154. *Id.* at 3088–90 (Stevens, J., dissenting).

155. *Id.*

156. Justice Scalia sharply criticized Justice Stevens's approach, stating:

Rights that pass [Justice Stevens's] test include not just those 'relating to marriage, procreation, contraception, family relationships, and child rearing and education,' but also rights against '[g]overnment action that shocks the conscience, pointlessly infringes settled expectations, trespasses into sensitive private realms or life choices without adequate justification, [or] perpetrates gross injustice.' Not *all* such rights are in, however, since only '*some* fundamental aspects of personhood, dignity, and the like' are protected. Exactly what is covered is not clear. But whatever else is in, he *knows* that the right to keep and bear arms is out, despite its being as 'deeply rooted in this Nation's history and tradition' as a right can be. . . . I can find no other explanation for such certitude except that Justice Stevens, despite his forswearing of 'personal and private notions,' deeply believes it should be out."

*Id.* at 3051 (Scalia, J., concurring) (citations omitted).

157. *Id.* at 3104 (Stevens, J., dissenting) (opining that "[t]he majority opinion [in *Heller*] contained some dicta suggesting the possibility of a more expansive arms-bearing right, one that would travel with the individual to an extent into public places, as 'in case of confrontation'").

158. *Id.* at 3104–05.

159. Justices Ruth Bader Ginsburg and Sonia Sotomayor also joined Justice Breyer's dissent. *Id.* at 3120 (Breyer, J., dissenting).

160. *Id.* at 3120–22.

161. *Id.* at 3120.

also discussed the possible recognition of Second Amendment carry rights in the aftermath of *Heller* and *McDonald*.<sup>162</sup> Justice Breyer offered a noticeably brief discussion of American case law and commentary on the right to arms during the antebellum period, the critical years spanning the ratifications of the Second Amendment and the Fourteenth Amendment.<sup>163</sup> Justice Breyer simply asserted that during this period, “[s]tates began to regulate the possession of concealed weapons,” and that “[s]tate courts repeatedly upheld the validity of such laws.”<sup>164</sup>

As I will document in Part III, this description does not adequately reflect the state decisional law of the antebellum period—especially as it relates to the question in *McDonald*. Most state courts of that period treated the constitutional right to bear arms as an important individual right that was significantly concerned with personal defense, including carrying common weapons outside the home.<sup>165</sup>

Justice Breyer’s dissent also emphasized that state constitutions and judicial decisions in the postbellum, late-nineteenth century period allowed for considerable regulation of weapons carrying.<sup>166</sup> However, Part III will show that most of these deferential judicial decisions rested upon a conclusion that the right to bear arms was *not* concerned with individual self-defense, but was instead intended only to serve civic purposes such as deterring governmental tyranny.<sup>167</sup> Because *Heller* explicitly rejected this narrow, civic-focused conception of the right to arms, these authorities are of little persuasive value in interpreting the self-defense-focused Second Amendment right that *Heller* recognized.<sup>168</sup>

To summarize: *McDonald* explicitly instructs that *Heller* “held” the Second Amendment protects the individual “right to . . . bear arms for the purpose of self-defense.”<sup>169</sup> *Heller* concluded that the meaning of “bear arms” is to “wear, bear, or carry [weapons] upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready . . . in a case of conflict with another person.”<sup>170</sup> The Court

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162. *Id.* at 3126.

163. *Id.* at 3123–24.

164. *Id.* at 3132.

165. *See infra* Part III.A.

166. *McDonald*, 130 S. Ct. at 3132–34 (Breyer, J., dissenting).

167. *See infra* Part III.B.1.

168. *See infra* Part III.B (discussing the postbellum era).

169. *McDonald*, 130 S. Ct. at 3026; *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

170. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (citation omitted) (ellipsis omitted) (internal quotation marks omitted).

therefore concluded that the Second Amendment right to “bear arms” is an “individual right” to “carry weapons in case of confrontation.”<sup>171</sup> The “*central component*” of the right to bear arms, *Heller* holds, is self-defense.<sup>172</sup> It is a statistical truth that most violent crimes that can be lawfully defended against with firearms occur outside the home, not in or near the home.<sup>173</sup> Moreover, *Heller* holds that handguns—the only type of firearm practical to carry outside the home for self-protection—are protected against prohibition under the Second Amendment, and that handguns are “overwhelmingly chosen” by Americans for the purpose of self-defense.<sup>174</sup> Finally, as an example of permissible regulation of the Second Amendment right, the Court approvingly cites nineteenth-century cases holding that certain modes of public carry of handguns can be prohibited when other modes are allowed.<sup>175</sup>

Thus, even when confining one’s attention to the four corners of the two landmark opinions, there is a strong case that *Heller* and *McDonald* protect an individual right to carry handguns outside the home for self-defense. The decisions hold the Second Amendment protects the individual right to keep and bear arms for the purpose of self-defense—and then apply that right to a specific set of facts: the bans on home handgun possession and use that were challenged in those cases. The question now raised by the carry rights litigation is simply how the kind of right recognized in *Heller* and *McDonald* should be applied to defensive handgun carrying *outside* the home. Rather than asserting the supposed intractability of this question, courts should follow ordinary, precedent-based constitutional methods to resolve it. The next Part of this Article seeks to demonstrate that the type of right-to-arms recognized in *Heller* has been commonplace in state constitutions for more than two centuries. A large body of relevant precedent affirms that the right to bear arms extends outside the home. Thus, courts already have many of the resources they need to resolve the carry rights cases.

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171. *Id.* at 592.

172. *Id.* at 599.

173. *See supra* notes 105–116 and accompanying text.

174. *Heller*, 554 U.S. at 628.

175. *Id.* at 610–14.



### III. THE TWO TRADITIONS: PRE- AND POST-RATIFICATION SOURCES ON THE INDIVIDUAL RIGHT TO CARRY ARMS

The case for carry rights becomes most persuasive when *Heller* and *McDonald* are read against the backdrop of two centuries of American case law on the individual right to bear arms. This Part surveys that history, analyzing the major decisions, and several important historic commentators, in light of the taxonomy of carry rights defined in Part I. How often, and in what circumstances, have American jurists concluded that the existence of a right to bear arms entails presumptive carry rights? What about non-presumptive carry rights? No carry?

While I will discuss cases from the entire historical span between the Founding era and today, my discussion will focus chiefly upon two eras. The first is the antebellum, or “early Republic” period from the ratification of the Bill of Rights through the beginning of the Civil War in 1861. The second is the postbellum period, encompassing Reconstruction in the South and the early Jim Crow era, stretching from the ratification of the Fourteenth Amendment in 1868 to approximately the 1930s. This period effectively culminates with the United States Supreme Court’s ambiguous 1939 decision in the Second Amendment case *United States v. Miller*.

#### A. *The Antebellum Period: 1791–1860*<sup>176</sup>

##### 1. *Case law*

###### a. *Cases construing the right to bear arms for self-defense*

Seventy-seven years separate the ratification of the Second Amendment in 1791 from the ratification of the Fourteenth Amendment in 1868. During this period, most courts interpreting constitutional guarantees of the right to bear arms concluded that it encompassed presumptive carry rights: in other words, citizens were constitutionally entitled to carry common weapons outside the home. *Every* court of this period that interpreted the right to bear arms in the same way *Heller* interpreted the Second Amendment—as a personal right concerned with self-defense—viewed it as including public weapons carrying, and the clear weight of this authority supported the presumptive carry model.

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<sup>176</sup> Further background on this period is presented in JOHNSON ET AL., *supra* note 126, ch. 5.

*Kentucky 1822.* The strongest expression of this view appeared in the first published appellate decision on the right to arms, *Bliss v. Commonwealth*,<sup>177</sup> an 1822 opinion of the Kentucky Court of Appeals, then the state's highest court.<sup>178</sup> The court struck down a state statute that prohibited the concealed carrying of weapons, holding that it violated the "right of the citizens to bear arms in defense of themselves and the state" as recognized in the Kentucky Constitution.<sup>179</sup> The Kentucky court viewed the right to bear arms as a categorical right to carry personal weapons in any manner the owner deemed appropriate, whether concealed or openly.

That the provisions of the act in question do not import an entire destruction of the right of the citizens to bear arms in defence of themselves and the state, will not be controverted by the court; for though the citizens are forbid wearing weapons concealed in the manner described in the act, they may, nevertheless, bear arms in any other admissible form. But . . . 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. . . . The right [adopted in] the constitution . . . consisted in nothing else but in the liberty of the citizens to bear arms. . . . For, in principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise.<sup>180</sup>

*Tennessee 1833.* The second published opinion to analyze the right to bear arms was *Simpson v. State*,<sup>181</sup> an 1833 decision of the Tennessee Supreme Court.<sup>182</sup> Simpson appeared in public "arrayed in a warlike

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177. 12 Ky. (2 Litt.) 90 (1822), cited in *Heller*, 554 U.S. at 585 n.9.

178. *Id.*

179. *Id.* at 91, 93; see KY. CONST. of 1799, art. X, § 23 ("[T]he rights of the citizens to bear arms in defense of themselves and the State shall not be questioned."). In 1850, Kentucky adopted a new constitution with a right to bear arms provision that allowed the legislature to ban concealed carry. KY. CONST. of 1850, art. XIII, § 25 ("[T]he rights of the 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.").

180. *Bliss*, 12 Ky. (2 Litt.) at 91–92.

181. 13 Tenn. (5 Yer.) 356 (1833), cited in *Heller*, 554 U.S. 603, 615.

182. A case decided in the same year as *Simpson*, *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833), upheld an Indiana statute banning concealed carrying of weapons, against a claim that it violated the right of "the people . . . to bear arms for the defence of themselves, and the state." IND. CONST. of 1816, art. I, § 20. The *Mitchell* opinion was a single sentence that upheld the statute without analysis. 3 Blackf. at 229. Thus, there is no way to discern how broadly the Indiana Supreme Court viewed the scope of carry rights in this early decision, other than that it viewed prohibiting concealed carry as constitutional. As discussed below, many courts of this era interpreted the right to bear arms as a right to presumptive carry, yet still

manner,” that is, armed, and was convicted for the common law crime of affray.<sup>183</sup> However, the Tennessee Supreme Court reversed his conviction.<sup>184</sup> It concluded that the crime of affray required proof of acts of actual violence involving two or more people, and thus quashed the indictment against Simpson.<sup>185</sup> This holding was in tension with an important eighteenth-century English treatise that asserted there could be an affray without actual violence, such as “whe[n] a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people.”<sup>186</sup>

The court rejected a broad view of the offense of affray, giving two reasons. First, it argued, the relevant common law authorities did not support the broad view.<sup>187</sup> But, second, if the common law *did* allow one to be criminally punished merely for being armed in public, then it was abrogated by the Tennessee Constitution, which guaranteed the right of freemen to “keep and to bear arms for their common defence.”<sup>188</sup> *Simpson* described the right to bear arms in terms similar to the Kentucky decision in *Bliss*—as a broad, even unqualified, right of citizens to carry weapons:

[T]his clause of our constitution fully meets and opposes the passage or clause in Hawkins, of “a man’s arming himself with dangerous and unusual weapons,” as being an independent ground of affray . . . . By this clause of the constitution, an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature . . . neither, after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed such a necessarily consequent operation as terror to the people to be incurred thereby; we must attribute to the framers of it the absence of such a view.<sup>189</sup>

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upheld bans on concealed carry, on the theory that the ability to carry arms openly for self-defense was sufficient to satisfy constitutional requirements. *Cf.* *Walls v. State*, 7 Blackf. 572, 573 (Ind. 1845) (suggesting that a defendant would not be in violation of Indiana law if “he exhibited his pistol so frequently that it could not be said to be concealed”).

183. *Simpson*, 13 Tenn. (5 Yer.) at 357.

184. *Id.* at 363.

185. *Id.* at 357 (“[A]ffrays . . . are the fighting of two or more persons, in some public place, to the terror of his majesty’s subjects . . .”).

186. *Id.* at 358 (quoting WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 135 (1716)).

187. *Id.* at 359–61.

188. *Id.* at 360 (quoting TENN. CONST. of 1796, art. XI, § 26) (internal quotation marks omitted).

189. *Id.*

Thus, the Tennessee court agreed with the earlier Kentucky decision that the right to carry arms must remain unabridged.

*Alabama 1840.* The Alabama Supreme Court weighed in next, taking a similar view of the right to bear arms, but also allowing for a significant degree of regulation of the right's exercise. *State v. Reid*<sup>190</sup> upheld an 1839 Alabama ban on the concealed carrying of pistols and Bowie knives as a permissible regulation of the right of "[e]very citizen . . . to bear arms, in defence of himself and the State."<sup>191</sup> In the court's view, the legislature retained considerable discretion to regulate "the manner in which arms shall be borne";<sup>192</sup> thus, it could require that firearms be carried openly, on the rationale that keeping one's weapons concealed from view "is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others."<sup>193</sup>

*Reid* takes a less categorical view of the right to bear arms for self-defense than the cases before it. There are some passages in *Reid* that might suggest the court viewed the right to carry weapons as limited to situations of special necessity,<sup>194</sup> a reading that would place it under the category of non-presumptive carry rights, as used in this Article. However, other parts of *Reid* are more suggestive of presumptive carry, particularly when the opinion refers to bearing arms for self-defense as synonymous with "wearing" them in some "manner."<sup>195</sup> Importantly, *Reid* states that a law would violate the right to bear arms if it restricted the bearing of weapons in a way that frustrated the ability to use them effectively in self-defense:

We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render

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190. 1 Ala. 612 (1840), cited in *District of Columbia v. Heller*, 554 U.S. 570, 585 n.8, 629 (2008).

191. *Id.* at 614–15 (quoting ALA. CONST. of 1819, art. I, § 23) (internal quotation marks omitted).

192. *Id.* at 616.

193. *Id.* at 617.

194. The court states that concealed carry is unnecessary for defense because when "the emergency is pressing" there would not be time to conceal one's weapons anyway. *Id.* at 621; cf. *id.* at 616 ("The right guaranteed to the citizen, is not to bear arms upon all occasions and in all places, but merely 'in defence of himself and the State.'").

195. *Id.* at 617.

them wholly useless for the purpose of defence, would be clearly unconstitutional.<sup>196</sup>

Thus, *Reid* is compatible with the presumptive carry mainstream of the antebellum nineteenth century, in which concealed carry can be banned if open carry is respected. However, *Reid* is closer to non-presumptive carry than the other cases in this line; it contemplates a greater license for legislative regulation of the exercise of carry rights than some other defense-based decisions do.

*Georgia 1846.* No case, historic or recent, is discussed more prominently or positively in *Heller* than the Georgia Supreme Court's 1846 decision in *Nunn v. State*.<sup>197</sup> *Heller* describes *Nunn* as “perfectly captur[ing]” the relationship between the Second Amendment's operative clause and its prefatory clause;<sup>198</sup> it cites *Nunn* as an example of permissible regulation of the right to arms;<sup>199</sup> and it also cites *Nunn* as an example of the willingness of courts to enforce Second Amendment limits on gun control legislation that goes too far.<sup>200</sup>

*Nunn* affirmed presumptive carry rights in strong terms. It involved a constitutional challenge to an 1837 Georgia statute that made it unlawful for individuals “to keep or have about their persons” any pistol.<sup>201</sup> Because Georgia's constitution lacked a right-to-arms provision at that time, the case was decided directly under the Second Amendment.<sup>202</sup> The court concluded that the Second Amendment protected a broad right of all citizens to keep and bear a wide variety of arms:

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree . . . . Our opinion is, that any law, State or Federal, is

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196. *Id.* at 616–17.

197. 1 Ga. 243 (1846).

198. *District of Columbia v. Heller*, 554 U.S. 570, 612 (2008).

199. *Id.* at 626.

200. *Id.* at 629.

201. *Nunn*, 1 Ga. at 246 (internal quotation marks omitted).

202. *Nunn* thus rejected the doctrine of *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which stated that the provisions of the federal Bill of Rights did not apply, of their own force, to the states. See *Nunn*, 1 Ga. at 250 (asserting that the Second Amendment applies to both federal and state governments). For a discussion of *Nunn* as a leading instance of the minority tradition of “*Barron* contrarianism” in some antebellum state courts, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 145–56 (1998).

repugnant to the Constitution, and void, which contravenes this right . . . .<sup>203</sup>

The court made clear that “bear arms” meant “carrying weapons,” and concluded that a prohibition on carrying handguns openly for self-defense violated the Second Amendment:

[S]o far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, . . . it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But . . . so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . . .<sup>204</sup>

Given *Nunn*'s place of honor in *Heller*, and its obvious relevance to the question of whether the Second Amendment protects a right to carry handguns for self-defense, it is regrettable to note that one state supreme court recently issued a twenty-three page opinion concluding that the Second Amendment has no application outside the home, that omits any mention of *Nunn* or the other nineteenth century weapons carrying cases upon which the Supreme Court relied in *Heller*.<sup>205</sup> Another lower court that recently upheld restrictions of carry rights incorrectly quoted, as if they were *Nunn*'s views, a passage from a different court's opinion that *Nunn* discussed, but did not follow on this point.<sup>206</sup>

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203. *Nunn*, 1 Ga. at 251.

204. *Id.*

205. *Williams v. State*, 10 A.3d 1167 (Md. 2011), *cert. denied*, 132 S. Ct. 93 (2011). The *Williams* decision also omits discussion of the portions of *Heller* in which the United States Supreme Court interpreted the meaning of “bear arms” in the Second Amendment. In one of these passages, the Court described the right to bear arms as “the individual right to . . . carry weapons in case of confrontation.” *Heller*, 554 U.S. at 592. In another, it concluded that to “bear arms” means to “wear, bear or carry [them] . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.” *Id.* at 584 (internal quotation marks omitted). These portions of *Heller* were not discussed in a case in which the lower court's task was to decide whether the Second Amendment right to bear arms includes an individual right to carry a gun on one's person for self-defense. *Williams*, 10 A.3d at 1177 (“If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly.”); *see also* *Richards v. Cnty. of Yolo*, No. 2:09-cv-01235 MCE-DAD, 2011 WL 1885641, at \*2–4 (E.D. Cal. May 16, 2011) (upholding, against Second Amendment challenge, a discretionary concealed carry scheme that denies individuals the ability to carry a loaded handgun for self-defense until an “immediate, grave” danger arises, without discussing any of the right-to-carry cases relied upon in *Heller*, any state case law, or any case decided prior to 2008).

206. In *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011), a panel of the Fourth Circuit held that, if the Second Amendment right to bear arms extends outside the home, it is subject to intermediate scrutiny. In support of the view that “a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home,”

*Nunn*'s holding that the open carry of a handgun was constitutionally protected was affirmed by the same court fifteen years later, in a decision that reversed a conviction for openly wearing a loaded handgun before witnesses.<sup>207</sup>

*Louisiana 1850.* The Louisiana Supreme Court took a track similar to *Nunn* a few years later, upholding a ban on concealed carry but interpreting the Second Amendment to protect the carrying of weapons for self-defense.<sup>208</sup> In *State v. Chandler*,<sup>209</sup> a homicide prosecution, the Louisiana Supreme Court rejected a proposed jury instruction stating that both the concealed and open carry of weapons were constitutionally protected in Louisiana.<sup>210</sup> Like Georgia, Louisiana had no state constitutional right-to-arms provision until after the Civil War, so the case directly involved the federal Constitution.<sup>211</sup> The court upheld Louisiana's 1813 ban of concealed carry, holding that it was consistent with the Second Amendment.<sup>212</sup> However, the court made clear that presumptive carry rights were protected:

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the Court cited *Nunn* as "one of the principal cases relied upon in *Heller*," and averred that *Nunn* upheld a state concealed carry law "after applying review of a decidedly less-than-strict nature." *Id.* at 470–71. It then quoted a passage that appeared in *Nunn*, as if it reflected the *Nunn* court's views:

"[A] law which is merely intended to promote personal security, and to put down lawless aggression and violence, and to this end prohibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, . . . does not come in collision with the Constitution."

*Id.* (quoting *Nunn*, 1 Ga. at 249). Unfortunately, this passage was *not* penned by the *Nunn* court, but by the Alabama Supreme Court in *State v. Reid*, 1 Ala. 612 (1840), and the Georgia court made it clear that it was merely quoting *Reid* as part of a survey of the various views of carry rights that had been expressed by different prior courts—not adopting or agreeing with it. *See Nunn*, 1 Ga. at 247–48 ("This question has occasionally come before the courts of the Union for adjudication. . . . [I]n the State vs. Reid, the same question came up, but was differently adjudged . . . ." (citation omitted)).

When the *Nunn* court expressed its own view of Second Amendment scrutiny—the point for which the Fourth Circuit cited it as supporting a deferential level of review outside the home—the Georgia court expressed the *opposite* view of *Reid*: *Nunn* upheld the right to carry a wide range of weapons for self-defense, and stressed that the Second Amendment right was a "comprehensive" and "valuable" right that must not "be . . . curtailed, or broken in upon, in the smallest degree." *Id.* at 251. That is not the language of deference, or even of intermediate scrutiny.

207. *See Stockdale v. State*, 32 Ga. 225, 227 (1861) (reasoning that, since Georgia had banned concealed carry, to disallow the open, holstered carry of a loaded handgun "would be to prohibit the bearing of those arms altogether, and to bring the Act within the decision in *Nunn*'s case").

208. *State v. Chandler*, 5 La. Ann. 489 (1850).

209. 5 La. Ann. 489 (1850), *cited in Heller*, 554 U.S. at 613, 626.

210. *Id.* at 489.

211. *See id.* at 490; LA. CONST. of 1852 (lacking a right-to-arms provision).

212. *Chandler*, 5 La. Ann. at 489–90.

This law [banning concealed carry] . . . interfere[s] with no man's right to carry arms . . . 'in full open view,' which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.<sup>213</sup>

*United States 1857.* Even the infamous decision in *Dred Scott v. Sandford*<sup>214</sup> indirectly suggested that the Constitution protected presumptive carry rights. *Scott* held that blacks could not be United States citizens, and that a slave-owner's right to property in human slaves was constitutionally protected against legislative abrogation.<sup>215</sup> The *Scott* Court supported this conclusion, in part, by what it viewed as a *reductio ad absurdum* argument: it enumerated several important "privileges and immunities" enjoyed by American citizens, and argued that it would be inconceivable that blacks would enjoy such liberties; therefore, blacks could not be citizens.<sup>216</sup> The Court's list of liberties that blacks would enjoy if they were citizens included "the full liberty of speech in public and private upon all subjects upon which . . . citizens might speak; to hold public meetings upon political affairs," and the right "to keep and carry arms wherever they went"<sup>217</sup>—a strong colloquial expression of presumptive carry rights. As Justice Thomas argued in *McDonald*,<sup>218</sup> one of the purposes of the

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213. *Id.* The Louisiana court echoed this view in *State v. Jumel*, 13 La. Ann. 399 (1858), which upheld a revised version of the concealed weapon statute against a similar Second Amendment challenge. *See id.* at 399–400 ("The statute . . . prohibit[s] only a particular mode of bearing arms which is found dangerous to the peace of society." (citing *Chandler*, 5 La. Ann. at 489)).

A similar approach is implied by the mention of the constitutional right of the people "to bear arms in defence of themselves and the State," MO. CONST. of 1820, art. XIII, § 3, in *State v. Schoultz*, 25 Mo. 128 (1857), cited in *Heller*, 554 U.S. at 585 n.9. Schoultz was convicted of capital murder after he tried to goad one Inkamp into assaulting him at a bar, failed, and then drew a pistol and shot Inkamp. *Schoultz* at 130. The Missouri court held that Schoultz was not entitled to an instruction reminding the jury of his constitutional right to bear arms because the only issue was whether the shooting was in self-defense: "This right is known to every jury man in our State, but nevertheless the right to bear does not sanction an unlawful use of arms. The right is to bear arms in defense of ourselves." *Id.* at 155.

214. 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV.

215. *See id.* at 404, 425–26 (declaring that blacks are not "citizens," but the property of owners whose constitutional property rights should be protected).

216. *Id.* at 417–18.

217. *Id.* at 417.

218. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3060, 3068 (2010) (Thomas, J., concurring in part and concurring in the judgment) (arguing that, as the Fourteenth Amendment's initial Citizenship Clause undoes *Scott*'s holding that blacks were not American citizens, similarly, its Privileges or Immunities Clause should be



Fourteenth Amendment was to overturn the *Scott* decision. *Scott*'s list of fundamental liberties that were to be withheld from black Americans provides evidence of rights that were considered fundamental, and what the Fourteenth Amendment would logically be understood as securing for all.<sup>219</sup> In offering what it saw as a relatively uncontroversial list of important American liberties, *Scott* included the personal carrying of arms outside the home.

*Texas 1859*. In the final antebellum case, *Cockrum v. State*,<sup>220</sup> the Texas Supreme Court upheld a presumptive right to carry arms for defense, including even the Bowie knife, "the most deadly of all weapons in common use."<sup>221</sup> *Cockrum* upheld a statute providing that all unlawful killings committed with a Bowie knife would be punished as murder, the most serious degree of criminal homicide, rather than manslaughter.<sup>222</sup> The court's opinion reflected serious concern about the destructive capacity of the Bowie knife, yet still affirmed the right to carry it, and other common weapons, for use in self-defense.<sup>223</sup> The legislature could impose special penalties for the *misuse* of particularly dangerous weapons, but even this sort of regulation would become unconstitutional if it deterred individuals from exercising the right to carry a constitutionally protected weapon.

The right to carry a bowie-knife for lawful defense is secured, and must be admitted. . . . [A]dmonitory regulation of the abuse [of the right] must not be carried too far. It certainly has a limit. For if the legislature were to affix a punishment to the abuse of this right, so great, as in its nature, it must deter the citizen from its lawful exercise, that would be tantamount to a prohibition of the right.<sup>224</sup>

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understood to ensure that they, like other American citizens, enjoy the characteristic rights of citizens, including the right to bear arms).

219. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1435 ("The purpose in discussing *Dred Scott* is not to cite it as binding precedent, but to acknowledge it as one of several nineteenth-century Supreme Court cases involving the right to arms . . . which . . . treat the Second Amendment as an individual right.").

220. 24 Tex. 394 (1859).

221. *Id.* at 403. The case involved a constitutional challenge under the Texas right to bear arms. See TEX. CONST. of 1845, art. I, § 13 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself and the State.").

222. *Cockrum*, 24 Tex. at 401, 403.

223. *Id.* at 395, 402.

224. *Id.* at 403. *Cockrum* also presented a challenge involving the Second Amendment. The Texas court viewed the Second Amendment as primarily concerned with perpetuating a free government by keeping up an armed populace as a deterrent to tyranny, rather than the personal defense central to the Texas right-to-arms provision. *Id.* at 401–02. This reading would become more popular in the postwar nineteenth century, see *infra* Part III.B, but was rejected by *Heller*.

*Cockrum* illustrates the thesis that, when an antebellum court concluded that a constitutional right to bear arms had a self-defense component, then this normally entailed presumptive carry rights, even as applied to a very potent and dangerous weapon such as the Bowie knife.

*b. Cases recognizing a right to bear arms that did not include self-defense*

Three other important weapons carrying cases of the period reflect a different stance.<sup>225</sup> They affirm wide (although not necessarily unlimited) authority to regulate the carrying of handguns and other weapons outside the home. But most importantly, each of these cases rejected the central conclusion adopted in *Heller*: that the constitutional right to bear arms was closely connected with individual self-defense. Their rejection of that connection was a key premise for their rejection of broad carry rights. Some of these courts emphasized language in constitutional provisions that limited the right to bear arms to civic purposes by stating that only firearms “for the common defense” or “in defense of the state” were protected. Some concluded that the provisions did not protect personal rights of any kind. Thus, these cases did not address the question now facing post-*Heller* courts: whether a right to bear arms that is individual and closely connected with self-defense accordingly encompasses a right to presumptive carry.

*Tennessee 1840.* The most thoughtful antebellum opinion in this line is the Tennessee Supreme Court’s 1840 decision in *Aymette v. State*.<sup>226</sup> *Aymette* is the origin of the so-called “hybrid-right” view of the constitutional right to bear arms, which exercised wide influence during some periods of American history. As discussed in more detail in Part III.B of this Article, the hybrid-right view construed the right to bear arms as a genuinely individual right, protecting certain kinds of weapons possession and use by citizens, even when they were not directly participating in a state-regulated military organization. Yet this view also construed the right as intended to serve purely civic purposes rather than personal ones, and it deemed those civic

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225. *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843); *State v. Buzzard*, 4 Ark. 18 (1842); *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

226. 21 Tenn. (2 Hum.) 154 (1840), *distinguished by* *District of Columbia v. Heller*, 554 U.S. 570, 613, 623 (2008).

purposes to imply limits on both which firearms could be kept and how they could be borne.<sup>227</sup>

*Aymette* upheld a prohibition on the concealed carrying of any “bowie knife, or Arkansas tooth-pick”<sup>228</sup> against a claim that the act violated the right-to-arms provision of the Tennessee Constitution of 1834, which provided that “the free white men of this State have a right to keep and to bear arms for their common defence.”<sup>229</sup> The Tennessee Supreme Court concluded that the “common defence” language of the state constitutional guarantee showed that the right’s primary purpose was civic in nature—namely, ensuring the ability to deter and resist tyrannical acts of government: “[t]he object . . . for which the right of keeping and bearing arms is secured is the defence of the *public* . . . to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution.”<sup>230</sup> *Aymette* thus viewed collective defense, rather than “private defen[s]e,” as the primary purpose of the right.<sup>231</sup>

The *Aymette* court concluded that the civic-only purpose of the right to arms meant that citizens enjoyed the right to keep only such weapons “as are usually employed in civilized warfare, and that constitute the ordinary military equipment.”<sup>232</sup> This category included swords, muskets, and rifles, but it excluded non-military weapons “usually employed in private broils,” such as a spear concealed in a cane—or, evidently, the Bowie knife that *Aymette* was convicted for carrying.<sup>233</sup>

Similarly, *Aymette* concluded that the carrying of concealed weapons could constitutionally be prohibited because such prohibitions would not interfere with the kinds of arms bearing necessary for the people to act in their common defense.

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227. See discussion *infra* Part III.B.1.

228. *Aymette*, 21 Tenn. (2 Hum.) at 155. The term “Arkansas tooth pick” is far from exactly defined, but was generally used in the nineteenth century to refer to a long-bladed, formidable type of dagger, narrower and more sharply pointed than the typical “Bowie knife.”

229. TENN. CONST. of 1834, art. I, § 26. This was one of a handful of Southern state constitutional right to arms provisions that expressly confined the right to “free white men.” See also ARK. CONST. of 1836, art. II, § 21 (same); FLA. CONST. of 1838, art. I, § 21 (same). These provisions were all adopted in the decade following Nat Turner’s bloody 1831 slave rebellion in Virginia and its suppression. See *Mosby v. Devine*, 851 A.2d 1031, 1060–61 & n.46 (R.I. 2004) (Flanders, J., dissenting) (describing *Aymette*’s historical context and criticizing the majority opinion’s reliance on the case).

230. *Aymette*, 21 Tenn. (2 Hum.) at 158 (emphasis added).

231. *Id.* at 157.

232. *Id.* at 158.

233. *Id.* at 159–61.

The citizens may bear [arms] 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. And, as the manner in which they are worn and circumstances under which they are carried indicate to every man the purpose of the wearer, the Legislature may prohibit such manner of wearing as would never be resorted to by persons engaged in the common defence.<sup>234</sup>

This language holds concealed carry to be unprotected but is ambiguous as to whether open carrying—the manner “resorted to” by soldiers and militiamen—might be protected in some circumstances, as long as the purpose was not for “terrifying the people” or assassination.<sup>235</sup> However, *Aymette’s* emphasis that carrying for the common defense means for “the defense of the *public*” suggests that a legislature would have considerable authority to restrict carrying for the defense of the individual, regardless of whether weapons were carried openly or concealed.

*Aymette* thus marked a considerable shift from the same court’s opinion in *Simpson v. State* seven years earlier, which interpreted the right to bear arms provision of the Tennessee Constitution as protecting a broad right of the people to “carry weapons.”<sup>236</sup> *Aymette* argued that the contrary passages from *Simpson* had merely been dicta.<sup>237</sup> However, this was an inaccurate description of the earlier opinion. *Simpson* had interpreted the crime of affray narrowly to avoid a conflict with the constitutional right to bear arms, and the constitutional issue was one of two alternative grounds that the court offered to justify its holding.<sup>238</sup>

*Aymette* would exercise considerable influence on other courts in the decades following the Civil War, but it represented a minority position among antebellum courts,<sup>239</sup> and its holding depended on the conclusion that the right to bear arms was not concerned with private defense.

*Arkansas 1842.* Arkansas’s state constitutional right to arms, which

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234. *Id.* at 160 (emphasis added).

235. *Id.*

236. See *supra* notes 183–189 and accompanying text.

237. See *Aymette*, 21 Tenn. (2 Hum.) at 161 (arguing that the contrary passages from *Simpson* were simply “an incidental remark of the judge who delivered the opinion”).

238. *Simpson v. State*, 13 Tenn. (5 Yer.) 356, 359–60 (1833); see *District of Columbia v. Heller*, 554 U.S. 570, 613–14 (2008) (rejecting *Aymette’s* interpretation of the right to bear arms and noting that *Aymette* conflicted with *Simpson* on this point).

239. See also *State v. Smith*, 11 La. Ann. 633, 633 (1856) (opining that the Second Amendment protects only “arms . . . such as are borne by a people in war, or at least carried openly”).

was similar to Tennessee's, protected only the right of "free white men . . . to keep and bear arms for their common defence."<sup>240</sup> In *State v. Buzzard*,<sup>241</sup> a divided Arkansas Supreme Court held that the state's prohibition of the concealed carrying of pistols and large knives (except by travelers) did not violate either the state constitution or the Second Amendment.<sup>242</sup>

The two judges in the majority, writing separately, concluded that the right to bear arms did not protect individual defense.<sup>243</sup> One judge took the same view as *Aymette*, denying that either the Second Amendment or the Arkansas Constitution enabled the individual "to protect and defend by individual force his private rights against . . . illegal invasion."<sup>244</sup> To the contrary, the "sole object" of the right to arms was "to provide, beyond the power of legal control, adequate means for the preservation and defence of the State and her republican institutions."<sup>245</sup> The second judge went further, writing that the Second Amendment did not secure individual rights at all; it was merely "an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force."<sup>246</sup>

Meanwhile, the dissenting judge concluded that the constitutional right to bear arms *was* concerned with individual self-defense, and therefore—as we might predict by now, having examined the judicial consensus of the era—went on to conclude that it protected presumptive carry rights.<sup>247</sup> The dissent took the same broad view of the right to bear arms for self-defense as the Kentucky court in *Bliss v. Commonwealth*: it was a liberty to carry any personal weapon for defense, and the individual could carry the weapon openly or concealed.<sup>248</sup>

*North Carolina 1843.* In *State v. Huntly*,<sup>249</sup> the North Carolina Supreme Court expressed hostility to presumptive carry, but it noted

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240. ARK. CONST. of 1836, art. II, § 21.

241. 4 Ark. 18 (1842).

242. *Id.* at 18, 28 (opinion of Ringo, C.J.).

243. *Id.* at 24; *id.* at 32 (opinion of Dickinson, J.).

244. *Id.* at 22 (opinion of Ringo, C.J.).

245. *Id.* at 27.

246. *Id.* at 32 (opinion of Dickinson, J.).

247. *Id.* at 40, 43 (opinion of Lacy, J.). The dissent argued that the government already possessed an inherent power to arm the militia. Thus, the concurrence's interpretation of the right to bear arms as protecting government power rendered the right "valueless and not worth preserving; for the State unquestionably possesses the power, without the grant, to arm the militia, and direct how they shall be employed . . . [W]hy give that which is no right in itself, and guaranties a privilege that is useless?" *Id.* at 35.

248. *Id.* at 43.

249. 25 N.C. (3 Ired.) 418 (1843).

that not all carry of firearms was illegal. Huntly was a poor claimant for constitutional protection: he had taken to the public roads on horseback, armed with “a double barrell’d gun,” and had uttered threats to kill one Ratcliff and his family members in a dispute over title to slaves.<sup>250</sup> The North Carolina Supreme Court easily upheld Huntly’s conviction for “going about armed with unusual or dangerous weapons, to the terror of the people,” which it equated with the common law offense of affray.<sup>251</sup> The court noted that the North Carolina Constitution guaranteed the right of the people “to bear arms for the defence of the State”<sup>252</sup>—a form of language that, like the Tennessee and Arkansas constitutions, arguably excluded bearing arms for the defense of the individual. The court interpreted the provision as serving civic purposes only.<sup>253</sup>

What if Huntly had *not* been carrying his gun for what was evidently an intended criminal assault, but instead had been carrying merely for lawful self-defense? The *Huntly* opinion acknowledges that “the carrying of a gun, *per se*, constitutes no offence,”<sup>254</sup> but expresses a skeptical view of the routine carrying of a gun for self-defense.

It has been remarked that a . . . 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.<sup>255</sup>

*Huntly* states that there are some lawful purposes to carry a gun, such as “business or amusement,” but makes no express mention of self-defense.

It is difficult to read *Huntly* as supporting presumptive carry, and this is as we might expect, given the court’s narrow focus on the civic

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250. *Id.* at 418–19.

251. *Id.* at 420–22.

252. N.C. CONST. of 1776, Declaration of Rights § 17.

253. *See Huntly*, 25 N.C. (3 Ired.) at 422 (“While it secures to him a *right* of which he cannot be deprived, it holds forth the *duty* in execution of which that right is to be exercised: If he employ those arms, which he ought to wield for the safety and protection of his country, to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege, with which he has been invested.”).

254. *Id.* at 422–23.

255. *Id.* at 422.

purpose of the North Carolina right to bear arms. The case conforms to the pattern we have seen in the antebellum case law. In the decades between the ratification of the Second Amendment and the Fourteenth Amendment, the judicial consensus was that if the right to bear arms had the purpose of self-defense, then it included presumptive carry rights.<sup>256</sup> If a given right to bear arms did *not* serve the purpose of self-defense, then it permitted a more sweeping regulation of weapons carrying.

## 2. Commentators

### a. *St. George Tucker*

The first major academic commentator on the American Constitution was St. George Tucker, a William & Mary law professor and future federal district court and Virginia Court of Appeals judge.<sup>257</sup> Tucker's American edition of Blackstone's *Commentaries on the Common Law of England*<sup>258</sup> was published in 1803, a dozen years after the ratification of the Second Amendment. The Supreme Court looked to Tucker as a source for the original understanding of the Second Amendment in both *Heller* and *McDonald*.<sup>259</sup>

Tucker viewed the American right to arms as an individual right importantly concerned with self-defense, and one that encompassed the public carrying of firearms.<sup>260</sup> He advocated the exercise of judicial review to ensure that legislation remained in conformity with the Constitution.<sup>261</sup> As a hypothetical example of an unconstitutional statute that would require a federal court to intervene, Tucker chose a statute "prohibiting any person from bearing arms."<sup>262</sup>

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256. See *supra* Part III.A.1.

257. See *St. George Tucker*, THE COLONIAL WILLIAMSBURG OFFICIAL HISTORY SITE, <http://www.history.org/almanack/people/bios/biotuck.cfm> (last visited Feb. 8, 2012).

258. ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (Philadelphia, William Young Birch & Abraham Small 1803).

259. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3037 (2010) (citing Tucker's description of the right to arms as "the true palladium of liberty" in support of the conclusion that the right is fundamental); *District of Columbia v. Heller*, 554 U.S. 570, 594–95, 606 (2008) (citing Tucker's view that the right-to-arms provision was based on the principle of individual self-defense).

260. See TUCKER, *supra* note 258, vol. 1, pt. 1, app., at 300 (arguing that "the right of the people to keep and bear arms" is the "true palladium of liberty" and that the right of self-defense is the "first law of nature").

261. *Id.* at 289.

262. Tucker believed that courts should actively enforce the requirement that Congressional statutes be "necessary and proper" for carrying out an enumerated

Elsewhere, Tucker offered a concrete illustration of the “bearing arms” protected by the Second Amendment: an individual carrying a firearm outside the home for hunting or self-defense.<sup>263</sup> The illustration arose in a discussion of the law of treason. Tucker noted that English law imposed a rebuttable presumption that any gathering of men where weapons were present was motivated by treason.<sup>264</sup> But Tucker doubted that it would be proper for the bearing of weapons to give rise to such a presumption in America, “where the right to bear arms is recognized and secured in the constitution itself.”<sup>265</sup> Tucker observed that “[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side.”<sup>266</sup>

Tucker thus perfectly fits the antebellum pattern: early American sources that treated self-defense as an important purpose of the right to bear arms accordingly viewed it as protecting presumptive carry rights.

*b. William Rawle*

The next major constitutional commentator, the prominent Pennsylvania lawyer and former United States Attorney William Rawle, published his *A View of the Constitution of the United States of America* in 1825; the second edition appeared in 1829.<sup>267</sup> Rawle viewed the Second Amendment as an individual right to possess weapons, which served the purpose of enabling citizens to protect their liberties and the civic order.<sup>268</sup> He viewed the use of forest and game laws in England to “disarm[] the people” as an example of

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power, U.S. CONST. art. I, § 8, cl. 18, and that a statute infringing upon important liberties could not be deemed constitutionally “proper,” even if it was intended to achieve a laudable purpose. TUCKER, *supra* note 258, vol. 1, pt. 1, app., at 288–89. He elaborated: “If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of these means.” *Id.* at 289.

263. TUCKER, *supra* note 258, vol. 5, app., n.B, at 19.

264. *Id.*

265. *Id.*

266. *Id.*

267. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (Philadelphia, Philip N. Nicklin, 2d ed. 1829).

268. *See id.* 125–26 (distinguishing between the clause of the Second Amendment that relates to a “well regulated Militia,” and the clause that states that the right of the people to bear arms “shall not be infringed,” implying that the former is a collective expression of the right and the latter is more individual).



infringement of the right to arms.<sup>269</sup> Rawle believed the Second Amendment was enforceable to restrain not only federal laws, but also state laws that attempted to disarm the people.<sup>270</sup>

It is less clear whether Rawle thought personal defense was an important component of the right. Rawle believed legislatures had authority to regulate the carrying of weapons to prevent the right to bear arms from being “abused to the disturbance of the public peace.”<sup>271</sup> Yet he stopped short of affirming legislative authority to enact a general prohibition of carrying weapons in public for self-defense. Instead, Rawle merely argued that carrying could be restricted when it occurred in circumstances objectively suggesting an unlawful purpose:

An assemblage of persons with arms, for an unlawful purpose, is an indictable offence, and even the carrying of arms abroad by a single individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace. If he refused he would be liable for imprisonment.<sup>272</sup>

Rawle’s analysis is consistent with defensive carry rights, but it does not affirm them in Tucker’s clear fashion.

*c. Joseph Story*

Supreme Court Justice Joseph Story, perhaps the leading constitutional commentator of the first half of the nineteenth century, discussed the Second Amendment in his 1833 *Commentaries on the Constitution of the United States*<sup>273</sup> and in his 1840 *A Familiar Exposition of the Constitution of the United States*.<sup>274</sup> Story does not discuss defensive weapons carrying, or the permissible scope of carrying regulation. Instead, his exposition of the right to bear arms focuses mainly upon the civic purposes served by an armed and trained

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269. *Id.* at 126.

270. *See id.* at 125–26 (“No clause in the Constitution could . . . be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.”).

271. *Id.* at 126.

272. *Id.*

273. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Hilliard, Gray, & Co. 1833).

274. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES (Boston, Marsh, Capen, Lyon, & Webb 1840).

populace in deterring both “domestic insurrections, and domestic usurpations of power by rulers.”<sup>275</sup>

Yet Story makes clear that the right is individual.<sup>276</sup> Like Rawle, he describes a tyrant’s action of “disarming the people, and making it an offence to keep arms” as a paradigmatic violation of the right to arms.<sup>277</sup> Story’s exposition of the Second Amendment is compatible with a right that includes a strong component of individual self-defense, but his focus on civic purposes makes it most natural to read Story as a leading academic proponent of the hybrid-right view of *Aymette v. State*. Indeed, both Story and *Aymette* were drawn upon extensively decades later in *Andrews v. State*,<sup>278</sup> an 1871 decision that was the most influential postbellum expression of the hybrid-right view.<sup>279</sup>

### 3. Summary

The foregoing encompasses the body of American case law, and the three most important constitutional commentators, addressing the nature and scope of the constitutional right to bear arms between the ratification of the Second Amendment in 1791 and the Fourteenth Amendment in 1868. As we have seen, every court in this era that interpreted a federal or state constitutional right to bear arms as an individual right closely connected with self-defense—as the Supreme Court did when it interpreted the Second Amendment in *Heller*—also interpreted the right as protecting a right to carry outside the home, and most also clearly viewed it as protecting presumptive carry rights. Within this consensus, courts did differ about the permissible scope of regulation of the right: most, but not all, judges concluded that concealed carrying of common weapons could be prohibited as long as open carry remained legal,<sup>280</sup> while a few believed concealed carry was also protected.<sup>281</sup>

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275. *Id.* at 264–65. However, Story’s *Commentaries* cite Tucker’s criticisms of English laws that Tucker believed had narrowed the right to arms. See STORY, *supra* note 273, at 747 (citing Tucker for the proposition that “under various pretences the effect of [the English right to arms] has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege”). This brief reference suggests that Story did contemplate a self-defense component to the right to arms.

276. See STORY, *supra* note 274, at 264–65 (stating that the right of citizens to bear arms is a fundamental liberty of individuals in a free nation by “offer[ing] a strong moral check against the usurpations and arbitrary powers of rulers”).

277. *Id.*

278. 50 Tenn. (3 Heisk.) 165 (1871).

279. *Id.* at 183–85.

280. See *supra* note 193 and accompanying text.

281. See *supra* notes 179–180 and accompanying text.

There is a discernible tendency for the earliest American courts and commentators to affirm defensive carry rights in the strongest, most categorical terms. As decades passed, a somewhat greater scope for regulation was recognized, though still within the presumptive carry paradigm. Finally, a minority of courts embodied the obverse side of the antebellum consensus: they concluded that the right to bear arms did *not* relate primarily to private self-defense—and accordingly, rejected presumptive carry.<sup>282</sup> In rare cases, these courts rejected individual rights altogether.<sup>283</sup>

The methods of originalist constitutional interpretation adopted by the Supreme Court in *Heller* and *McDonald* suggest that the antebellum period is an especially valuable source for interpreting the Second Amendment as made enforceable against the states by the Fourteenth Amendment. This period is doubly relevant because it is simultaneously the immediate *post-enactment* history of the Second Amendment and the *pre-enactment* history of the Fourteenth Amendment. It illuminates what Americans thought they had done in 1791 by adopting a constitutional right to bear arms in the Bill of Rights, and what kind of right they understood themselves to be making enforceable against the states by adopting the Fourteenth Amendment in 1868. Thus, it is no surprise that the *Heller* Court devoted nearly nine full pages of the United States Reports to examining antebellum case law and commentary.<sup>284</sup> This material is especially relevant to applying the right to bear arms to defensive weapons carrying: that was the most common subject the antebellum courts addressed.

B. *The Postbellum Era: The Late-Nineteenth and Early-Twentieth Century*<sup>285</sup>

In the aftermath of the Civil War, judicial interpretations of the right to bear arms began to shift, especially in the South.<sup>286</sup> A new era began, enduring for perhaps half a century before its foundations began to shift again in the early-twentieth century.<sup>287</sup> During this

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282. See *supra* notes 228–233, 252–253 and accompanying text.

283. See *supra* notes 243–246 and accompanying text.

284. See *District of Columbia v. Heller*, 554 U.S. 570, 605–14 (2008) (examining antebellum sources “to determine the *public understanding* of [the Second Amendment] in the period after its enactment or ratification” and describing this inquiry as “a critical tool of constitutional interpretation”).

285. Further background on this period is presented in JOHNSON, ET AL. *supra* note 126, ch. 6.

286. *Id.*; Cottrol & Diamond, *supra* note 38, at 1324–33.

287. One may think of this era as approximately bookended by the important

postbellum period, the presumptive carry consensus received its first major challenge; numerous courts adopted views of the right that protected only a *non-presumptive* right to carry. Many state constitutions, especially in the South, were amended after the war by adding provisos that allowed more restrictions on weapons carrying.<sup>288</sup> Decisions increasingly held that legislatures could impose significant limits on the situations in which individuals could carry, on the places where individuals could carry, and/or on the mode in which defensive arms could be carried.

### 1. *Cases applying a hybrid right*

Most of these postbellum cases, however, do not bear closely on the question *Heller* raises—whether a right to bear arms for self-defense includes presumptive carry rights—because they did not interpret the right to bear arms as importantly concerned with self-defense. Instead, most of this era’s decisions followed a distinctive conception of the right to bear arms that does not exactly fit either the typical pro-individual rights attitude or the typical pro-regulation attitude of today. Adopting a term of David Hardy’s, one may call it the *hybrid view*.<sup>289</sup>

According to the hybrid view, the chief function of the right to bear arms was to support civic purposes such as military readiness,<sup>290</sup> and/or to deter tyrannical acts by government.<sup>291</sup> Because the right

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decisions of the Tennessee Supreme Court in *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871), and the North Carolina Supreme Court in *State v. Kerner*, 107 S.E. 222 (N.C. 1921), a half century later.

288. See, e.g., TENN. CONST. art. I, §26 (“[T]he citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.” (emphasis added)); TEX. CONST. of 1869, art. I, § 13 (“Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the Legislature may prescribe.” (emphasis added)).

289. See David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL’Y 559, 618 (1986) (defining the “‘hybrid’ interpretation” of the constitutional right to arms as recognizing an individual right, but one that is limited to the private possession or use of arms that are suited for military or militia use). Hardy identifies the postbellum decades as “the period of ascendancy of the ‘hybrid’ interpretation of the right to keep and bear arms.” *Id.*

290. See, e.g., *Hill v. State*, 53 Ga. 472, 476 (1874) (“The right to bear arms [exists] in order that the state may, when its exigencies demand, have at call a body of men, having arms at their command, belonging to themselves and habituated to the use of them, [but] is in no fair sense a guarantee that the owners of these arms may bear them at concerts, and prayer-meetings, and elections.”); *Andrews*, 50 Tenn. (3 Heisk.) at 177–78 (“What was the object held to be so desirable as to require that its attainment should be guaranteed by being inserted in the fundamental law of the land? It was the efficiency of the people as soldiers, when called into actual service for the security of the State, as one end . . .”).

291. See, e.g., *Carlton v. State*, 58 So. 486, 488 (Fla. 1912) (asserting that the state

was closely tied to these civic purposes, they implied certain limitations on the scope of the right's protection. The main limitations, as I discuss below, concerned the types of weapons protected by the right, and the carrying of weapons for personal defense. Under the hybrid right, only those small arms appropriate for use in civilized warfare were protected.<sup>292</sup> The right to carry weapons for self-defense outside the home was subject to substantial regulation.<sup>293</sup> Nevertheless, courts following this view treated the right to arms as a genuine individual right: it extended to members of the entire citizenry and protected certain kinds of personal keeping and use. This feature differentiated the postbellum courts' approach from the "collective right" and "sophisticated collective right" views of post-New Deal federal courts, which sought to justify a "right of the people" that left most of the people with no protection of their ability to own or use firearms.<sup>294</sup>

The hybrid view, in the hands of some courts, was capable of exercising constraint on legislation. It was not inherently a mere make-weight or pretext for upholding any kind of regulation. The most widely influential postwar judicial expression of the hybrid right came in *Andrews v. State*, an 1871 decision of the Supreme Court of Tennessee.<sup>295</sup> In many ways, *Andrews* is a clarification of the same court's antebellum decision in *Aymette v. State*, the first hybrid-right case.<sup>296</sup> As the most careful articulation of the hybrid view of the right to arms, particularly as it applies to handgun carrying, *Andrews* deserves a full examination.

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constitutional right to bear arms "was intended to give the people the means of protecting themselves against oppression and public outrage"); *Haile v. State*, 38 Ark. 564, 566 (1882) ("The constitutional provision sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression. It is not intended to afford citizens the means of prosecuting, more successfully, their private broils in a free government."); *Andrews*, 50 Tenn. (3 Heisk.) at 184–85 ("If the citizens have these arms in their hands, they are prepared in the best possible manner, to repel any encroachments upon their rights by those in authority." (quoting *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840))).

292. See, e.g., *English v. State*, 35 Tex. 473, 477 (1872) (distinguishing the holster pistol of the cavalry and the sidearm of the artilleryman from "dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives"); *Andrews*, 50 Tenn. (3 Heisk.) at 179 (holding that "the rifle of all descriptions, the shot gun, the musket, and repeater" are constitutionally protected).

293. See, e.g., *Haile*, 38 Ark. at 566 (stating that the "habitual" carrying of arms in public is unnecessary for the "common defense," and may therefore be regulated).

294. See generally O'Shea, *supra* note 74, at 354–57.

295. *Andrews*, 50 Tenn. (3 Heisk.) 165, cited in *District of Columbia v. Heller*, 554 U.S. 570, 608, 614, 629 (2008).

296. See *supra* notes 226–235 and accompanying text for a discussion of *Aymette*.

The decision reversed a conviction obtained under an 1870 statute that forbade the carrying of handguns except by police officers and travelers.<sup>297</sup> Andrews challenged the carry ban as a violation of the Second Amendment and of Tennessee's postwar Constitution of 1870, which eliminated the racially discriminatory language of the former constitution and provided instead that "the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."<sup>298</sup>

The Tennessee Supreme Court concluded that the Second Amendment did not bind the states of its own force.<sup>299</sup> However, it viewed the Second Amendment and the Tennessee right-to-arms provision as equivalent in nature and scope, and so interpreted them together.<sup>300</sup> The court's analysis embraced every major feature of the hybrid-right view. First, the right to arms is mainly intended to preserve military readiness and the public liberty. Second, this purpose implies limitations on the scope of the right, specifically: (1) only militia-useful weapons are protected, and (2) carrying weapons for individual self-defense against crime is peripheral to the right, not central to it, so carrying can be heavily regulated. Third, the right to have arms nevertheless belongs to each individual citizen, not only to militiamen.

What was the object held to be so desirable as to require that its attainment should be guaranteed by being inserted in the fundamental law of the land? It was the efficiency of the people as soldiers, when called into actual service for the security of the State, as one end; and in order to this, they were to be allowed to *keep* arms. What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted; and . . . the right to practice their use, in order to attain to . . . efficiency.<sup>301</sup>

The underlying theory of the right to keep arms, as *Andrews* saw it, was that a people whose members own common weapons and

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297. The act made it unlawful "for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver". *Andrews*, 50 Tenn. (3 Heisk.) at 171.

298. TENN. CONST. art. I, § 26.

299. See *Andrews*, 50 Tenn. (3 Heisk.) at 177 (stating that the federal and state constitutions stand together, providing the same rights for the same reasons and protecting them from invasion by both the federal and state legislatures).

300. *Id.*

301. *Id.* at 177-78.

practice with them will be skilled in their use and able to function effectively as a popular militia when the good of the polity demands it.<sup>302</sup>

As a consequence, *Andrews* followed the earlier conclusion in *Aymette* that not all hand-carried weapons were constitutionally protected. Only those useful in “civilized warfare” fell within the scope of the right.<sup>303</sup> This category included “the rifle of all descriptions, the shot gun, [and] the musket”—the major categories of long guns.<sup>304</sup> It also included, in an important development for later cases, the “repeater,” which the court defined as a large, military-type handgun—presumably such as the Colt Army and Navy revolvers that had played prominent roles in cavalry actions during the Civil War.<sup>305</sup>

Thus, the constitutional right to keep arms included the right to own, acquire, and practice with weapons useful in “civilized warfare,” including some handguns. What about the right to “bear arms,” which antebellum courts had frequently deemed to protect individual carrying of weapons for self-defense? *Andrews* saw the matter differently:

It is insisted by the Attorney General, that the right to keep and bear arms is a political, not a civil right. [T]his . . . fails to distinguish between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to *keep* them . . . is

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302. *Id.* at 178, 194.

303. Compare *id.* at 179 (finding that constitutionally protected arms are those a soldier uses and trains with), with *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840) (concluding that the right to bear arms encompasses only those weapons that “are usually employed in civilized warfare”).

304. *Andrews*, 50 Tenn. (3 Heisk.) at 179. Note that when *Andrews* was decided, “the rifle of all descriptions” included rapid-firing, repeating rifles with large ammunition capacities, such as the Henry and Spencer lever-action rifles, which had gained prominence on the battlefield in the last years of the Civil War, and were commercially manufactured by Winchester after the war. See O’Shea, *supra* note 74, at 381–83.

305. See *Andrews*, 50 Tenn. (3 Heisk.) at 179, 186–87.

As to the pistol designated as a revolver, we hold this may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such . . . . We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier’s weapon—skill in the use of which will add to the efficiency of the soldier. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand . . . .

*Id.* at 186–87.

a private individual right, guaranteed to the citizen, not the soldier.<sup>306</sup>

If “bear arms” was a “political right” referring to participation in the common defense, then the right to carry handguns for personal defense was not protected by the right to bear arms. But it could only be protected by the personal right to “keep arms.” *Andrews* concluded that the right to keep arms did include a right to carry full-sized, military-type handguns in some circumstances. Accordingly, to the extent the challenged statute prohibited all carrying of all handguns, it was unconstitutional.<sup>307</sup>

*Andrews* went on to say quite a bit about the circumstances in which gun carrying was likely to be constitutionally protected, reflecting a distinctly narrower view of the right to carry than most antebellum cases recognized. A citizen could be prohibited from carrying firearms to church, or to other “public assemblages,” since such carrying was neither appropriate “nor necessary in order to his familiarity with them, and his training and efficiency in their use.”<sup>308</sup> On the other hand, the right to carry a handgun “on his own premises” was likely protected: one’s own land thus differed from a public assemblage.<sup>309</sup> *Andrews*, however, declined to resolve the issue of when a citizen was entitled to carry a handgun off of his own premises for self-defense. The court admitted the issue was difficult,<sup>310</sup> but it suggested that the right did not protect habitual carrying of a handgun.<sup>311</sup> Instead, some sort of unusual situation of necessity had to exist for handgun carrying to be protected. For example, a man could carry a revolver into the street “to shoot a rabid dog that threatened his child.”<sup>312</sup> Likewise, an individual who could make a sufficient showing of a threat to life likely would be entitled to carry and use a handgun for self-defense, but this would be subject to a requirement that the threat be sufficiently specific and imminent.<sup>313</sup> In general, the *Andrews* court stressed, the individual

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306. *Id.* at 182.

307. *Id.* at 180–81, 192.

308. *Id.* at 182.

309. *Id.* at 187.

310. *Id.* at 188.

311. *See id.* at 190 (explaining that, because *Andrews* had been in the habit of carrying a gun, he could not prove that he was in imminent danger and was therefore unprotected by the right to bear arms).

312. *Id.* at 187.

313. The court considered *Andrews*’s argument that “there was a set of men in the neighborhood” who were “seeking the life of the defendant.” *Id.* at 190 (internal quotation marks omitted). It noted that the evidence suggested he had carried a pistol habitually for several years, which (in the court’s view) tended to undermine



must trust the government to provide protection and safety, rather than providing for his own safety by carrying defensive weapons in routine activities.<sup>314</sup>

The opinion embodies each key idea of the model of the right to bear arms that I have termed non-presumptive carry. Even under this model, as *Andrews* demonstrates, the notion that the right to arms is confined to the interior of the home is rejected. Outdoor locations such as one's curtilage and other private "premises" are strong candidates for protection of carry rights. Habitual carry in public locations is not protected, but public carrying is likely to be justified when the carrier can show a special threat to personal (or a dependent's) safety, perhaps subject to an imminence requirement. The *Andrews* view of the right-to-arms left the government with broad powers to prohibit handgun carrying in "public assemblages," variously defined.

The canonical expression of the hybrid view in the scholarly literature was Justice Thomas Cooley's *General Principles of Constitutional Law*, originally published in 1880 and subsequently revised.<sup>315</sup> In this work, Cooley cited *Andrews v. State* prominently and adopted a similar view of the right.<sup>316</sup> He understood the Second

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his claim of self-defense. *Id.* But it declined to decide whether under what circumstances an individual could make a showing that he was "in peril of life or limb or great bodily harm, so imminent as to present [an] element of self-defense in justification of his carrying his pistol." *Id.* at 190–91.

314. *Id.* In a partial concurrence, two judges rejected the majority's adoption of the hybrid view, and argued for a self-defense-based right to bear arms that included presumptive carry rights. In the concurrence's view, Tennessee's right to bear arms encompassed carrying all common weapons, not just militia-type weapons. *See id.* at 194 (Nelson, J., concurring in part) ("The word 'bear' was not used alone in the military sense of carrying arms, but in the popular sense of wearing them in war or in peace. The word 'arms,' means 'instruments or weapons of offense or defense,' and is not restricted, by any means, to public warfare.").

Adhering to the antebellum consensus, the concurrence acknowledged that the legislature could require that weapons be carried "in a public manner," that is, openly, *id.* at 195, but denied that it could prevent individuals from carrying weapons regularly for self-defense. *See id.* at 197 ("I hold that when a man is really and truly endangered by a lawless assault, and the fierceness of the attack is such as to require immediate resistance in order to save his own life, he may defend himself with any weapon whatever, whether seized in the heat of the conflict, or carried for the purpose of self-defense. . . . It is deeply to be regretted that any peaceful citizen should be placed in a condition making it necessary for him to carry arms for his own protection . . . . But some of the most important elements in nature, such, for example, as fire and water, may be . . . misused and perverted. Yet we do not prohibit or destroy their use. We endeavor only to regulate it.").

315. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* (Alexis C. Angell ed., Boston, Little, Brown, & Co., 2d ed. 1891).

316. *Id.* at 282–83.

Amendment right to arms as centrally concerned with deterring government tyranny. As Cooley explained, the amendment was adopted from the English Bill of Rights of 1688, which “was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.”<sup>317</sup>

Yet, Cooley stressed, the right was one enjoyed by all individuals, and it protected their ownership and use of a delimited class of common weapons adapted to civilized warfare.<sup>318</sup> Cooley viewed the individual right to “bear arms” as a right to practice and train with one’s personal weapons.

*The Right is General.*—It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use . . . .

*What Arms may be kept.*—The arms intended by the Constitution are such as are suitable for the general defence of the community against invasion or oppression, and the secret carrying of those suited merely to deadly individual encounters may be prohibited.<sup>319</sup>

Neither *Andrews* nor Cooley’s *Principles* rules out protection for the defensive carrying of firearms. Yet much of the case law—especially Southern—of this half century moved away from presumptive carry rights, and toward recognizing narrower, circumstantially limited non-presumptive carry rights. In some ways, the hybrid-right conception naturally leads to such a result, since it conceives the right

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317. *Id.* at 281–82.

318. *Id.* at 282–83.

319. *Id.* In *Ezell v. City of Chicago*, the Seventh Circuit relied heavily upon Cooley’s quoted analysis of the corollary implications of the right to arms, and struck down a Chicago municipal ordinance banning firing ranges from the city as unconstitutional. 651 F.3d 684, 704, 711 (7th Cir. 2011) (quoting the above passage from Cooley’s *General Principles* for the proposition that the right to keep and bear arms “implies the learning to handle and use them . . . ; it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order” (citation omitted) (internal quotation marks omitted)). The *Ezell* court mistakenly attributed the quote to Cooley’s famous treatise on *Constitutional Limitations* published in 1868. *Id.* at 704.

to arms as defined and limited by civic, not personal, purposes. If individual defense against violence is not a central purpose of the right, then the routine bearing of arms outside the home for defense is also only peripheral to the right. Accordingly, the bearing of arms may be regulated to a greater extent.

The cases following in *Andrews's* wake reflect this logic. Again and again, postbellum courts upheld heavy restrictions on weapons carrying on the basis that the right (in their view) was ultimately intended to protect the common defense, *not* personal defense.

An 1874 Georgia decision opined that the legislature could constitutionally require one's firearms to be "borne" unloaded, or strapped to the back, so as to be useless for self-defense.<sup>320</sup> Such a restriction would be constitutional, according to the court, because the purpose of the right to arms was military familiarization, not personal defense.<sup>321</sup>

The Arkansas Supreme Court in 1882 upheld a statute that banned carrying any handgun except for an army pistol, and required that the army pistol be carried "uncovered in the hand" only.<sup>322</sup> (A similar statute was also enacted, and sustained against constitutional challenge, in Tennessee.<sup>323</sup>) In effect, the provision made it impossible for a law-abiding citizen to carry a pistol for any extended period of time, since the gun could not legally be holstered.<sup>324</sup> However, the user was able to carry the pistol for brief periods near his dwelling, in response to a perceived necessity. Again, the basis for this decision was that, although the right to arms protected individual firearms possession, it was founded upon civic purposes rather than

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320. *Hill v. State*, 53 Ga. 472, 481 (1874).

321. *See id.* ("[N]o act is in violation of [the right] that leaves the citizen the right to keep arms, and so to carry and use them as will render him familiar with their use, so . . . that he will be prepared for public service as a militiaman when needed."). The court stressed the distinction between self-defense and militia participation:

[T]he object of the provision was to secure to the state a well regulated militia. The simple right to carry arms upon the person, either openly or secretly, would not answer the declared purposes in view. Skill and familiarity in the use of arms was the thing sought for. The right to "tote" them, as our colored people say, would be a bootless privilege, fitting one, perhaps, for playing soldier upon a drill ground, but offering no aid in that knowledge which makes an effective . . . shooting soldier.

*Id.* at 480. *Hill's* disdain for the carrying of firearms by nonwhites displays a further leitmotif of the postbellum cases: their connection with the reimposition of white racial domination in the South. *See Cottrol & Diamond, supra* note 38, at 1325, 1333.

322. *Haile v. State*, 38 Ark. 564, 566–67 (1882).

323. *State v. Wilburn*, 66 Tenn. 57, 62 (1872).

324. *See Haile*, 38 Ark. at 566 (explaining that carrying pistols uncovered in the hand is "a very inconvenient mode of carrying them habitually").

private ones: personal defense was not an important aspect of the right.<sup>325</sup>

Eight years later, a West Virginia decision interpreted the Second Amendment as reflecting the hybrid right: its core purpose was the preservation of “the public liberty,” as reflected by the reference in its prefatory clause to a well regulated militia.<sup>326</sup> The court therefore upheld, against constitutional challenge, a state statute that criminalized all handgun carrying unless the defendant could prove that he was a quiet and peaceful citizen of “good character and standing,” and had “good cause to believe . . . he was in danger of death or great bodily harm.”<sup>327</sup>

## 2. *Cases substituting a hybrid (or even collective) right for a broad right*

The pull of the hybrid view in this period was so strong that a few courts adopted it even when the text of the constitutional provisions they were applying specified a broad, self-defense-based right. The Texas Supreme Court initially interpreted Texas’s postwar constitution using the hybrid view, though the text protected the right of each person “to keep and bear arms, in the lawful defence of himself,” suggesting that the right would encompass weapons appropriate for self-defense.<sup>328</sup> In the 1872 decision *English v. State*,<sup>329</sup> the Texas court held that only militia-suitable firearms were protected by the right, leaving most handguns and knives constitutionally unprotected.<sup>330</sup> It upheld a far-reaching ban on

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325. *Id.* at 566. The Arkansas Supreme Court made clear that its holding turned on the distinction between self-defense and the common defense.

The constitutional provision sprung from the former tyrannical practice . . . of disarming the subjects, so as to render them powerless against oppression. . . . It would be a perversion of its object, to make it a protection to the citizen, in going, with convenience to himself . . . prepared at all times to inflict death upon his fellow-citizens, upon the occasion of any real or imaginary wrong. The “common defense” of the citizen does not require that.

*Id.*

326. *State v. Workman*, 35 W. Va. 367, 372–73 (1891).

327. *Id.* at 371–73 (“The second amendment . . . should be construed . . . in consonance with the reason and spirit of the amendment itself, as defined in what may be called its ‘preamble.’ . . . The keeping and bearing of arms, therefore, which at the date of the amendment was intended to be protected . . . was such a keeping and bearing as the public liberty and its preservation commended as lawful, and worthy of protection.”).

328. TEX. CONST. of 1869, art. I, § 13 (“Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the Legislature may prescribe.”).

329. 35 Tex. 473 (1872), *cited in* *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

330. *Id.* at 476–77.

weapons carrying in an opinion that suggested there was little social value in armed self-defense.<sup>331</sup>

The court first suggested that the statute was constitutional because it regulated, rather than prohibited, the bearing of arms, but the court then appeared to recoil from the idea that carrying weapons for self-defense might enjoy any constitutional protection, despite the words of the Texas Constitution.<sup>332</sup> The judges in *English* repeatedly protested (perhaps too much) that the decision was not the result of a personal hostility to the traditional practice of carrying weapons.<sup>333</sup> A few decades later, in *Ex parte Thomas*,<sup>334</sup> the Oklahoma Supreme Court superimposed hybrid-right limitations on self-defense-based constitutional language. Although the Oklahoma Constitution protected the “right of a citizen to keep and bear arms in defense of his home, person, or property,”<sup>335</sup> the state supreme court, relying exclusively on hybrid-right case law, concluded that only militia

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331. *See id.* at 479–80 (“The law under consideration has been attacked upon the ground that it was contrary to public policy, and deprived the people of the necessary means of self-defense; that it was an innovation upon the customs and habits of the people, to which they would not peaceably submit. We do not think the people of Texas are so bad as this, and we do think that the latter half of the nineteenth century is not too soon for Christian and civilized states to legislate against any and every species of crime.”).

Some scholars have suggested that *English’s* hostility to weapons carrying reflected a reaction to the violent disturbances that shook Texas in the immediate aftermath of the Civil War. *See* David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1146–47 (2010).

332. *English*, 35 Tex. at 478–79.

Our constitution . . . confers upon the legislature the power to regulate the privilege. The legislature may regulate it without taking it away—this has been done in the act under consideration. But we do not intend to be understood as admitting for one moment, that the abuses prohibited [i.e., carrying handguns and other concealable weapons] are in any way protected either under the state or federal constitution. . . . [I]t appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly . . . .

*Id.* at 478.

333. *Id.* at 479 (“It is not our purpose to make an argument in justification of the law. The history of our whole country but too well justifies the enactment of such laws.”). The court continued its criticism of weapons carrying: “We are far from believing that the ultimate results of the law under consideration will not be beneficial to the people of the state. But however much we might desire to sustain the law on the grounds of public policy and expediency, such is not our reason for sustaining it.” *Id.* at 480.

334. 97 P. 260 (Okla. 1908).

335. OKLA. CONST. art. II, § 26 (“The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.”).

firearms useful for the common defense were protected.<sup>336</sup> It then concluded that “pistols” were not militia firearms, and thus were not constitutionally protected.<sup>337</sup> While the cases the court relied upon had held that full-sized, military handguns *were* protected arms,<sup>338</sup> the Oklahoma courts later read the *Thomas* decision as holding that all handguns were categorically unprotected. Thus, not surprisingly, the state’s courts went on to uphold draconian restrictions on handgun carrying as constitutional.<sup>339</sup>

Similarly, the Florida Supreme Court upheld the state’s prohibition of concealed carrying of handguns against a challenge under the state’s constitutional right to arms, which used clear self-defense based language.<sup>340</sup> While this result was likely defensible under a self-defense-based conception of the right to arms (as long as open carry was allowed), the court went further, suggesting that the Florida right to arms was not based in self-defense, but was instead a hybrid right “intended to give the people the means of protecting themselves against oppression and public outrage,” with the limits suggested by its civic purposes.<sup>341</sup>

One court of the period went to still greater lengths. In 1905, the Kansas Supreme Court avoided applying a broadly worded, defense-based individual right to bear arms by effectively reading the relevant provision out of the state constitution. That court declared in *City of Salina v. Blaksley*<sup>342</sup> that the Kansas Bill of Rights provision stating that “[t]he people have the right to bear arms for their defense and

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336. *Thomas*, 97 P. at 262.

337. *Id.* at 264–65.

338. *See, e.g.*, *Fife v. State*, 31 Ark. 455, 460–61 (1876) (distinguishing protected military “repeater” handguns from unprotected small pistols that may be concealed on the person); *English*, 35 Tex. at 476 (limiting the definition of “arms” to military weapons, but including the cavalryman’s “holster pistols” and the artilleryman’s “side arms” in that definition).

339. *See Pierce v. State*, 275 P. 393, 394–96 (Okla. Crim. App. 1929) (rejecting defendant’s constitutional challenge to his conviction for openly carrying a Colt revolver in the curtilage of his own home and citing *Thomas* for the proposition that handguns could be completely banned); *Shepherd v. State*, 192 P. 235, 236 (Okla. Crim. App. 1920) (per curiam) (citing *Thomas*, 97 P. 260) (upholding a conviction for the concealed carrying of a Colt Army revolver).

340. *Carlton v. State*, 58 So. 486, 488 (Fla. 1912); *see* FLA. CONST. of 1885, art. I, § 20 (“The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne.”).

341. *Carlton*, 58 So. at 488. The court concluded that the right to bear arms “was not designed as a shield for the individual man, who is prone to load his stomach with liquor and his pockets with revolvers or dynamite, and make of himself a dangerous nuisance to society.” *Id.*

342. 83 P. 619 (Kan. 1905).

security”<sup>343</sup> did not confer any individual rights, but was a mere recognition of the government’s power to organize the militia.<sup>344</sup> (Kansans regained a meaningful state constitutional right to arms in 2010, when they voted to ratify a newly worded, broad individual right to bear arms provision by a margin of nearly eight to one.<sup>345</sup>)

Decisions like *English*, *Thomas*, *Carlton* and *Blaksley* have little relevance to determining the scope of Second Amendment carry rights today. Even when confronted with constitutional language that seemed to compel a defense-based reading, courts of this period sometimes substituted a hybrid right to arms, or nullified the right altogether.<sup>346</sup> But the question presented by current carry litigation is whether firearms that *are* constitutionally protected, as *Heller* holds handguns to be, may be carried outside the home pursuant to a constitutional right to bear arms that is *not* a hybrid individual right (let alone a fictive “collective right” as in *Blaksley*), but instead is centrally concerned with self-defense.<sup>347</sup>

### 3. *Cases applying a defense-based right*

Most of the postbellum period’s decisions arose from the South, which remained the center of American gun control laws.<sup>348</sup> However, a handful of decisions were issued from Northern and Western states, which tended to adhere to the pre-war tradition of presumptive carry.

At the turn of the twentieth century, the Idaho Supreme Court held that both the Second Amendment and the Idaho Constitution’s right to bear arms were violated by a state law that prohibited the

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343. KAN. CONST. of 1859, Bill of Rights § 4.

344. See *Blaksley*, 83 P. at 620 (stating that the provision “deals exclusively with the military,” and that “[i]ndividual rights are not considered in this section”).

345. See KAN. CONST. BILL OF RIGHTS § 4 (“A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose . . . .”); Jan Biles, *Kansans Back Two Amendments*, TOPEKA CAPITAL-JOURNAL (Nov. 2, 2010, 10:31 PM), [http://cjonline.com/news/local/2010-11-03/kansans\\_back\\_two\\_amendments](http://cjonline.com/news/local/2010-11-03/kansans_back_two_amendments) (noting that the measure amending the right to arms received 88% support).

At least one Kansas Supreme Court decision from the later twentieth century also suggested an individual right to bear arms in the Kansas Constitution, notwithstanding *Blaksley*. *City of Junction City v. Mevis*, 601 P.2d 1145, 1150–51 (Kan. 1979) (applying constitutional overbreadth analysis to a local gun control law).

346. Or, as in *Blaksley*, a spurious right drained of any individual protections at all. See *supra* note 344 and accompanying text.

347. See *supra* Part I.E for a discussion of the issues currently pending in carry rights litigation.

348. See Cottrol & Diamond, *supra* note 38, at 1333 (providing a background of the history of postbellum gun-control case law).

carrying of handguns in cities, towns, or villages.<sup>349</sup> The court treated the constitutional violation as straightforward: the legislature could regulate the exercise of the right by requiring that defensive handguns be carried openly, but it had “no power to prohibit a citizen from bearing arms in any portion of the state of Idaho,” whether inside a city or not.<sup>350</sup>

The next year, the Vermont Supreme Court struck down a municipal law requiring a permit to carry a concealed handgun, holding the law violated the constitutional right to bear arms for self-defense.<sup>351</sup> As a result, the legal, permitless carrying of a concealed handgun often takes the colloquial name of “Vermont carry.”<sup>352</sup>

The Ohio Supreme Court upheld a World War I-era prohibition on concealed carry of handguns, even prohibiting a citizen from wearing a concealed handgun within the interior of a private residence.<sup>353</sup> However, the court noted that open carry of handguns was still legal, and that the statute contained an exception that allowed for concealed carry when circumstances justified a prudent person in carrying a handgun for self-defense.<sup>354</sup> It characterized the prohibition on concealed carrying as a regulation, but not a prohibition, of the constitutional right to bear arms for self-defense.<sup>355</sup>

One of the few post-Civil War Southern courts to address the defense-based right to arms was the Texas Supreme Court in *State v. Duke*,<sup>356</sup> an 1875 decision upholding a conviction for carrying a revolver.<sup>357</sup> *Duke* adjudicated a challenge under the postwar Texas

349. *In re Brickey*, 70 P. 609 (Idaho 1902); see IDAHO CONST. of 1889, art. I, § 11 (“The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law.”).

350. *Brickey*, 70 P. at 609. The “no power to prohibit . . . in any portion” passage is important to parse correctly. The court’s point was *not* merely that the law was overbroad, i.e., that the statute went too far by banning individuals from carrying in *any* portion of the state—a sense that might have been consistent with non-presumptive carry. That was not the meaning of the *Brickey* opinion, because, as the court noted, the challenged law did *not* forbid carrying everywhere in Idaho; it applied only in cities, towns, and villages. *Id.* Thus, *Brickey*’s point was that the right to bear arms for self-defense extends to both urban and rural locales, and cannot be prohibited in either. It affirms presumptive carry as the constitutional norm.

351. *State v. Rosenthal*, 55 A. 610, 611 (Vt. 1903); see VT. CONST. art. I, § 16 (“[T]he people have a right to bear arms for the defence of themselves and the State . . .”).

352. DAVID NASH, UNDERSTANDING THE USE OF HANDGUNS FOR SELF-DEFENSE 14 (2011).

353. *State v. Nieto*, 130 N.E. 663, 664 (Ohio 1920).

354. *Id.* at 664.

355. *Id.*; see OHIO CONST. art. I, § 4 (“The people have the right to bear arms for their defense and security . . .”).

356. 42 Tex. 455 (1875).

357. *Id.* at 460–62.



constitution, which, as noted before, recognized an individual right to bear arms for self-defense, but with the restrictive proviso that the right was subject to “such regulations as the Legislature may prescribe.”<sup>358</sup> The statute challenged in *Duke* did not entirely ban handgun carrying outside the home; it allowed carrying a handgun on one’s own land and one’s own place of business, and it also allowed an individual to openly carry a handgun for self-defense when there were “reasonable grounds for fearing an unlawful attack on his person” that were “immediate and pressing.”<sup>359</sup> In other words, the statute reflected the non-presumptive carry model: strong carry rights in one’s curtilage and business property, and public carry rights conditioned on an individual showing of necessity. Notably, the Texas court appeared to quietly apply a limiting construction on the statute, imposing a somewhat less severe requirement of necessity: it glossed the statute as allowing defensive handgun carrying by anyone “having reasonable grounds to ‘fear an attack.’”<sup>360</sup>

The *Duke* court upheld the statute thusly interpreted, reasoning that it was constitutional because it “respected the right to carry a pistol openly when needed for self-defense . . . and the right to have one at the home or place of business.”<sup>361</sup> Therefore, even *Duke*, an outlier which marks perhaps the most restrictive interpretation that any nineteenth-century court gave to the defense-based right to bear arms, implicitly rejected no-carry laws as unconstitutional and held that the right to bear arms for self-defense entails at least non-presumptive carry rights.<sup>362</sup>

In summary, the case law of the postbellum period was dominated by the hybrid conception of the right to bear arms, under which individual defense is not a central purpose of the right. Many decisions from this era upheld substantial restrictions on weapons carrying, but to reach that result, they relied explicitly on the premise that self-defense was only a peripheral aspect of the right.<sup>363</sup> *Heller*

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358. TEX. CONST. of 1869, art. I, § 13.

359. *Duke*, 42 Tex. at 456–57.

360. *Id.* at 460.

361. *Id.* at 459. *Duke* abrogated the earlier holding in *English v. State*, 35 Tex. 473 (1872), that the Texas Constitution protected only a hybrid right to arms. *Duke*, 42 Tex. at 459. *Duke* declared that pistols were protected arms, at least such “as are not adapted to being carried concealed.” *Id.* at 458.

362. *Duke*, 42 Tex. at 458 (holding that citizens have the right to keep and bear “such arms as are commonly kept . . . and are appropriate for open and manly use in self-defense”).

363. Even under this view, most courts agreed that non-presumptive carry rights were protected; an outright ban on handgun carrying in public was unconstitutional. *See id.*

unambiguously rejected that premise, adopting the broad view of the right to bear arms, for which self-defense is a central purpose, and dismissing the hybrid view.<sup>364</sup>

Second, many state constitutions were weakened in the postwar era (particularly in the South) by the addition of textual provisos that affirmed heightened legislative authority over the right to carry arms. Courts often relied on these provisos in upholding severe carry restrictions. The Second Amendment, however, dates from an earlier period and lacks a proviso of this sort.

Only a few postbellum opinions applied a broad right to bear arms grounded in self-defense. Of those that did, several affirmed presumptive carry rights, in continuity with the antebellum consensus. The others affirmed at least non-presumptive carry rights, and these more limited interpretations arose in states whose constitutions had been amended to include anti-carry provisos. Not a single decision from the first 130 years of American history supports the proposition that no-carry laws are constitutionally permissible as applied to a protected category of weapons (which *Heller* holds includes handguns), under a defense-centered individual right to bear arms.

#### 4. *Interlude: A requiem for the hybrid right to arms*

What made the hybrid right so compelling? Having examined its postbellum heyday, we should grapple with this question, because *Heller's* rejection of the hybrid right has important consequences for the scope of Second Amendment carry rights.

The source of the hybrid right's rise is not simple, and probably depended upon a combination of interests, some invidious and some legitimate. It seems likely that racial conflict contributed to the hybrid right's reception by courts of the late-nineteenth and early-twentieth century American South. Professors Cottrol and Diamond note that "[t]he South's history of slavery, its passage of post-war black codes, and its collective resistance to racial equality render suspicious" the changes in the understanding of the right's purposes that followed Reconstruction in many Southern states.<sup>365</sup> And some of the implications of the hybrid conception of the right to arms had disparate effects on whites and blacks. Limiting protection to war weapons, such as full-sized revolvers (the "repeaters" of *Andrews v.*

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364. *District of Columbia v. Heller*, 554 U.S. 570, 599, 613 (2008).

365. Cottrol & Diamond, *supra* note 38, at 1327.

*State*<sup>366</sup>), had the predictable effect of “render[ing] safe the high quality, expensive, military issue handguns that many former Confederate soldiers still maintained but that were often out of financial reach for cash poor freedmen.”<sup>367</sup> At the same time, the move to a civic-purpose focus may have also reflected a race-neutral concern about the prevalence of armed violence in Southern society;<sup>368</sup> by removing self-defense from the core of the right, courts could clear the way for wider restrictions on weapons carrying by all segments of society.<sup>369</sup>

Causes of the hybrid right’s rise are not confined to past cultural influences, pernicious or otherwise. Textually, it is a plausible interpretation of those right-to-arms provisions that confine their purpose to “the common defense.” And perhaps it is also a textually plausible interpretation of the Second Amendment, which secures a right of the people that is not immediately limited as to purpose (in fact, a provision limiting the right to the “common defence” was proposed and rejected during the debate over the Second Amendment in Congress<sup>370</sup>)—but *does* contain a prefatory reference to the importance of the militia.

The hybrid interpretation protects individual possession of militia-useful weapons, with the purpose of protecting the public liberty. This gives clear, easily explained legal meaning and effect to *both* the prefatory clause reference to a “well regulated Militia” as the “security of a free State,” *and* the operative clause’s recognition that the right “to keep and bear arms” inheres in the people, not state governments.<sup>371</sup> From a textual standpoint, the hybrid right is noticeably more persuasive than any of the various collective-rights theories adhered to by gun rights skeptics. The *Heller* dissenters, and academic critics of the decision, would have a stronger position if they had set aside the “sophisticated collective right” position of

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366. See *supra* text accompanying note 305.

367. Cottrol & Diamond, *supra* note 38, at 1333.

368. *Id.* at 1323, 1327 (citing DICKSON D. BRUCE, JR., *VIOLENCE AND CULTURE IN THE ANTEBELLUM SOUTH* (1979)).

369. In this respect, the two authors also find suggestive the proliferation of anti-dueling laws and even anti-dueling constitutional provisions in the postbellum South, as “dueling was a problem among whites and not blacks in the South.” *Id.* at 1328.

370. Specifically, the proposal was to add the words “for the common defence” after “the right of the people to keep and bear arms” in what became the Second Amendment. The proposal was considered and rejected by the United States Senate. S. JOURNAL, 1st Cong., 1st Sess. 71, 77 (1789).

371. Cf. U.S. CONST. amend. X (expressly distinguishing the powers that the Constitution reserves to “the States” from those reserved to “the people”).

Justice Stevens's dissent<sup>372</sup> and focused on the hybrid right as a proposed alternative to the majority's adoption of the defense-based right.

In fact, the *Heller* dissenters did also join Justice Breyer's dissent, which espoused a form of the hybrid right under which firearms possession enjoyed some protection, but self-defense was not a primary purpose.<sup>373</sup> Yet Justice Breyer's application of the hybrid right in his *Heller* dissent was far from rigorous. Even the hybrid-right tradition usually held that a ban on handgun possession was unconstitutional,<sup>374</sup> but Justice Breyer concluded that the prevalence of handguns in crime was a sufficient basis to ban them.<sup>375</sup> A more historically grounded application of the hybrid view would have acknowledged the unconstitutionality of the District of Columbia's blanket ban on handguns, though it might have sought to uphold the ban on loaded firearms in the home on the ground that individual self-defense was not a core purpose of the right.<sup>376</sup> This might have been a powerful intellectual counterweight to the majority opinion.

The scarcity of hybrid-right adherents today, relative to the plausibility of the view, is probably due to perceived pragmatic considerations. If militia utility is the primary criterion of

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372. *District of Columbia v. Heller*, 554 U.S. 570, 651 (2008) (Stevens, J., dissenting) (arguing that the Second Amendment only secures "a right to use and possess arms *in conjunction with service in a well-regulated militia*" (emphasis added)). The difference is that the hybrid right, in its classical nineteenth-century form, protects the keeping and practicing with arms by the citizenry in general, not only those serving in an organized militia. *See, e.g., Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 182 (1871) (reasoning that, although the purpose of the right to arms is to ensure a citizen militia, and bearing arms for self-defense can therefore be restricted, "the right to *keep* [arms], with all that is implied fairly as an incident to this right, is . . . guaranteed to the citizen, not the soldier" (emphasis added)).

373. *Heller*, 554 U.S. at 681–82, 706 (Breyer, J., dissenting) (arguing that the Amendment's "first and primary objective" was to preserve the militia). The dissenting Justices argued this view in the alternative, as a fallback from the weaker, sophisticated collective right. *Id.* at 682.

374. *See, e.g., State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921) (adopting hybrid view, and affirming right to own a military handgun and carry it under some circumstances); *Wilson v. State*, 33 Ark. 557, 560 (1878) (same); *Andrews*, 50 Tenn. (3 Heisk.) at 186–87, 192 (same). *But see Ex parte Thomas*, 97 P. 260, 260, 264–65 (Okla. 1908) (holding that "pistols" were not militia firearms, and thus were not subject to constitutional protection).

375. *Heller*, 554 U.S. at 714–19 (Breyer, J., dissenting).

376. However, leading hybrid right sources do affirm a constitutional right to use handguns for self-defense in and around the home. *See, e.g., Andrews*, 50 Tenn. (3 Heisk.) 165; *supra* text accompanying notes 308–314 (noting that the right to arms would protect an individual who carried a full-sized handgun outdoors to protect his child from an attacking dog). It is a measure of the weakness of the dissenting position in *Heller* that even the more limited hybrid-right tradition offers only doubtful support for the dissenters' conclusions.

constitutional protection, then it is at least arguable that the sweeping federal restrictions on private possession of machine guns<sup>377</sup> violate the Second Amendment. The United States government took this possibility seriously enough to devote large portions of its amicus brief in *Heller* to arguing against it.<sup>378</sup> Moreover, while the emblematic violation of a *self-defense*-based right to arms is a ban on handguns, as in *Heller*, the exemplary violation of a hybrid right in the twenty-first century would be so-called “assault weapons” bans restricting the ownership of modern semiautomatic rifles such as the AR-15.<sup>379</sup> These are commonly owned, less destructive versions of the standard American military rifle used today; their utility for a popular militia is clearer than that of any other firearm.<sup>380</sup>

These feared pragmatic consequences, as well as the strong support that many state cases and constitutions give to the self-defense component of the right, may have influenced the *Heller* majority to reject the hybrid right in clear terms.

### C. *The Modern Era: 1930–2008*

For similar reasons, perhaps, the hybrid view disappeared in the state courts around 1930. This change may have been motivated in

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377. See 18 U.S.C. § 922(o) (2006) (criminalizing the private possession of any machinegun that was not registered with the federal government prior to the statute’s effective date of May 19, 1986).

378. See O’Shea, *supra* note 74, at 360–62 (discussing the role of the “machine gun specter” in the *Heller* litigation, where the presence of the precedent in *United States v. Miller* raised the prospect that the Supreme Court would affirm a hybrid right to arms).

379. See *id.* at 380 (discussing the “uniquely powerful claim to Second Amendment protection” that modern semi-automatic rifles would enjoy under the hybrid approach); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995) (“[T]he much-vilified ‘assault rifle’ would be protected under this interpretation—not in spite of its military character, but because of it.”).

Note that there are still serious arguments for the protection of these arms under a self-defense-based approach because they are commonly owned by private citizens and police officers for that purpose. O’Shea, *supra* note 74, at 380–93. However, the shift from hybrid right to self-defense-based right moves the constitutionality of “assault weapons” bans from clearly invalid to a close question. Compare *Heller v. District of Columbia*, No. 10-7036, 2011 WL 4551558, at \*12–16 (D.C. Cir. Oct. 4, 2011) (applying intermediate scrutiny and holding that the District’s post-*Heller* ban on the AR-15 and most other modern semi-automatic rifles does not violate the Second Amendment as construed in *Heller*), with *id.* at \*35–41 (Kavanaugh, J., dissenting) (arguing that semi-automatic rifles are an important category of arms in common use for self-defense and other legitimate purposes, and thus, a ban on them is analogous “to a ban on a category of speech” under the First Amendment, and is violative of the Second Amendment under *Heller*).

380. *Andrews* supplies powerful categorical language for this point. The court there stressed that “the rifle of all descriptions” is a protected arm under the hybrid right. 50 Tenn. (3 Heisk.) at 179 (“[T]he right to keep such arms, can not be infringed or forbidden by the Legislature.”).

part by technological advancement in hand-held firearms. Some of the perceived advantages that postbellum courts might have seen in adopting the hybrid right—allowing considerable regulation of carrying concealable firearms, melee weapons, etc.—were increasingly outweighed by the potentially alarming implication that individuals might have a right to own the formidable and destructive new small firearms that were being developed, such as individually portable machine guns.

### 1. *United States v. Miller*

The history of nineteenth and early-twentieth century cases does much to illuminate *Heller's* predecessor, the Supreme Court's 1939 decision in *United States v. Miller*.<sup>381</sup> *Miller* involved a constitutional challenge to the first major federal gun control statute, the National Firearms Act of 1934 (NFA).<sup>382</sup> The NFA reflected the growing concern over technological advancements in personal weaponry by imposing highly restrictive taxation and registration requirements on weapons such as machine guns and short-barreled shotguns, as well as firearms accessories such as silencers.<sup>383</sup> In *Miller*, the Supreme Court reversed a lower federal court's decision that dismissed an NFA prosecution for possession of an unregistered sawed-off shotgun on the ground that the NFA violated the Second Amendment.<sup>384</sup> The Court concluded that the Second Amendment had to be both "interpreted and applied" with reference to the militia purpose referred to in its preface,<sup>385</sup> and thus the individual possession or use of weapons would not be constitutionally protected unless it had "some reasonable relationship to the preservation or efficiency of a well regulated militia."<sup>386</sup> *Miller* did not specify what the "reasonable relationship" standard required, but the Court did observe that the defendant had not presented evidence that his sawed-off shotgun "[wa]s any part of the ordinary military equipment or that its use could contribute to the common defense."<sup>387</sup>

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381. 307 U.S. 174 (1939).

382. National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (currently codified as amended at 26 U.S.C. §§ 5801–72 (2006)).

383. 26 U.S.C. §§ 5841, 5845, 5861.

384. See Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 55–60 (2008) (recounting the procedural history of *Miller*, including suggestions that it was a collusive "test case" involving a district court judge who was actually a strong political supporter of gun control).

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

386. *Id.*

387. *Id.* (citing *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)).

*Miller* faithfully reflected the trends of the case law in decades leading up to the decision. It showed clear influence of the hybrid view of the right to bear arms that had been adopted by many postbellum courts.<sup>388</sup> In fact, the only case relied upon as authority in the Supreme Court's opinion was *Aymette v. State*, the 1840 Tennessee decision that gave birth to the hybrid interpretation.<sup>389</sup> Yet *Miller* also contained a number of ambiguities and even contrary signals, reflecting the breakdown of the hybrid-right consensus that was also occurring at the time.<sup>390</sup> It is difficult to read *Miller*'s discussion of the Second Amendment as strong support for presumptive carry, but the most plausible reading of the case is that *Miller* supported an individual, hybrid right that included at least non-presumptive carry rights.<sup>391</sup>

Whatever the Supreme Court really meant in *Miller*, the decision was seized upon in a way that effectively removed the federal courts from the task of applying and interpreting the individual right to bear arms for self-defense.<sup>392</sup> For six decades, lower federal courts consistently read *Miller* in a narrow fashion, either as reducing the Second Amendment to a collective right, or as recognizing only a narrow individual right to participate in a government-organized militia.<sup>393</sup>

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388. See *supra* Part III.B.1.

389. *Miller*, 307 U.S. at 178; see also *supra* notes 226–231 and accompanying text for a discussion of *Aymette*'s significance.

390. In a cryptic footnote titled “Concerning The Militia,” *Miller* string-cited an eclectic group of cases that reflected varying (not to say incompatible) aspects of the right-to-arms tradition that had developed over the preceding hundred years. Some were hybrid-right cases: *State v. Workman*, 14 S.E. 9 (W. Va. 1891), *Fife v. State*, 31 Ark. 455 (1876), and *Aymette* itself. See *Miller*, 307 U.S. at 182 n.3. Two were defense-based cases, including one that construed the right to bear arms to protect only non-presumptive carry rights. See *id.* (citing *People v. Brown*, 235 N.W. 245 (Mich. 1930) (upholding a prohibition on possession of a blackjack, and stating that the possession and use of ordinary handguns was constitutionally protected, but that the legislature retained power to “reasonably regulate” handgun carrying under the police power); *State v. Duke*, 42 Tex. 455 (1875) (upholding the constitutionality of a statute that banned carrying handguns except on one’s own property or business premises, or in response to a specific and pressing danger)). Finally, the Court cited one pure collective rights case, *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905), leaving the implications of the cited body of cases profoundly unclear.

391. O’Shea, *supra* note 74, at 352–62.

392. Cf. Denning, *supra* note 74, at 352–62 (arguing that some lower courts strayed from the likely meaning of *Miller* to the point of being intellectually dishonest, and that Second Amendment case law was not as settled pre-*Heller* as some commentators believed).

393. *Id.* at 971–72, 988; see also *District of Columbia v. Heller*, 554 U.S. 570, 624 n.24 (2008) (noting that after *Miller*, many lower federal courts concluded that the Second Amendment did not protect individual rights, but responding that if so, those courts simply “overread *Miller*” and “[t]heir erroneous reliance upon an

## 2. *Modern state case law applying a defense-based right*

Yet even as the federal courts removed themselves, the defense-centered, individual right to bear arms became the clear majority position of state constitutions in the mid- and late-twentieth century. Nineteen states have adopted new constitutional right-to-arms provisions since 1930.<sup>394</sup> Thirteen of these new provisions expressly protect the right to bear arms for self-defense,<sup>395</sup> bringing the total number of state constitutions that expressly protect a defense-based right to bear arms to thirty.<sup>396</sup>

The modern cases have generally remained consistent with the norms of previous eras. At a minimum, it remains a widely affirmed principle that no-carry laws violate the right to bear arms for self-defense: governments must allow the carrying of defensive weapons outside the home in some circumstances. State and local bans on weapons carrying have been frequently litigated, and remain the type of gun restriction most often struck down under state constitutions.<sup>397</sup> As in previous eras, the real point of controversy has been deciding whether the individual right to bear arms protects presumptive carry

uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms”).

394. See Johnson, *supra* note 46, at 735–44. Since Professor Johnson’s article was published, Kansas has also adopted a new constitutional right to bear arms that clearly protects the broad right. See KAN. CONST. BILL OF RIGHTS § 4 (“A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose . . .”).

395. See Volokh, *supra* note 13, at 193–204. This compendium of state provisions lists the twelve states of Delaware, Florida, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Utah, West Virginia, and Wisconsin as having adopted constitutional provisions after 1930 that expressly protect a right to “bear arms” for “self-defense,” for “the defense of [one]sel[f],” for “defense of [one]’s home, person, and property,” or other similar language. *Id.*

Kansas’s 2010 constitutional provision protects the right of each person to “bear arms for the defense of self, family, home and state.” KAN. CONST. BILL OF RIGHTS § 4.

396. See Volokh, *supra* note 13, at 193–204. The seventeen states whose current constitutional right-to-arms provisions were adopted *before* 1930 and explicitly protect the bearing of arms for self-defense are Alabama, Arizona, Colorado, Connecticut, Indiana, Kentucky, Mississippi, Montana, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Washington, and Wyoming.

397. See *State v. Hamdan*, 665 N.W.2d 785, 799–810 (Wis. 2003) (striking down a ban on carrying a concealed handgun in one’s place of business; suggesting that individuals may have a right to concealed carry in public under certain circumstances); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 141–49 (W. Va. 1988) (striking down requirement of a discretionary, “may issue” permit in order to carry a handgun in public); *State v. Delgado*, 692 P.2d 610, 610–14 (Or. 1984) (en banc) (striking down ban on possessing a switchblade knife in public); *City of Junction City v. Mevis*, 601 P.2d 1145, 1152 (Kan. 1979) (striking down municipal ban on handgun carrying); *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971) (same).



rights, or only the geographically and situationally limited model of non-presumptive carry rights.

On the presumptive carry side, several courts have specifically endorsed the right of citizens to carry handguns, either without a permit or subject to a shall-issue permit system.<sup>398</sup> At the same time, most courts upheld regulations of the right to bear arms for self-defense that do not frustrate the practical ability to exercise the right, such as requirements that defensive weapons be carried openly,<sup>399</sup> or prohibiting the carrying of weapons by persons who are intoxicated<sup>400</sup> or engaged in threatening or violent behavior.<sup>401</sup>

A handful of courts applying a defense-based right have taken a more limited view of carry rights. One Texas decision upheld a state handgun carrying ban with exceptions that brought it into non-presumptive carry territory: the statute allowed carrying on one's own property and in cases of pressing need.<sup>402</sup> The decision followed the holding of a postbellum-era decision by the state supreme court,<sup>403</sup> and involved a state constitutional provision with an anti-carry proviso.<sup>404</sup>

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398. *Kellogg v. City of Gary*, 562 N.E.2d 685, 705 (Ind. 1990) (recognizing that right to bear arms gave citizens a constitutionally protected interest in obtaining a concealed handgun carrying permit on "shall issue" terms); *Buckner*, 377 S.E.2d at 141-49 (striking down "may issue" carry permit requirement on the ground that it threatened to "frustrate" the ability to carry a handgun for self-defense, and suggesting that shall-issue permit requirement would be constitutional); *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. Ct. App. 1980) (explaining that the right to bear arms gave citizens a constitutionally protected interest in obtaining a concealed carry permit on a "shall issue" basis); *see also* *Rabbitt v. Leonard*, 413 A.2d 489 (Conn. Super. Ct. 1979) (holding that defense-based state constitutional right to bear arms gave citizen a constitutionally protected due process interest in the resolution of his handgun carry permit application).

399. *See, e.g., Klein v. Leis*, 795 N.E.2d 633, 637-38 (Ohio 2003) (upholding concealed carry ban as a regulation of the right to bear arms); *State v. McAdams*, 714 P.2d 1236, 1236 (Wyo. 1986) (same); *State v. Hart*, 157 P.2d 72, 73 (Idaho 1945) (same).

400. *See, e.g., State v. Rivera*, 853 P.2d 126, 129 (N.M. Ct. App. 1993) (holding that a defendant's constitutional right to bear arms was not infringed when evidence indicated he was intoxicated and a potential danger to the public); *People v. Garcia*, 595 P.2d 228, 230-31 (Colo. 1979) (en banc) ("It is clearly reasonable for the legislature to regulate the possession of firearms by those who are under the influence of alcohol or drugs.").

401. *See, e.g., State v. Enos*, C.A. No. 8251, 1977 WL 198812, at \*1, \*3 (Ohio Ct. App. Mar. 23, 1977) (holding that a "[d]efendant cannot claim the protection of the constitution when his bearing of arms is done under such circumstances as give rise to a clear and present danger that his conduct" will cause the evil the challenged regulation seeks to avoid).

402. *Collins v. State*, 501 S.W.2d 876, 878 (Tex. Crim. App. 1973).

403. *State v. Duke*, 42 Tex. 455, 456 (1875).

404. TEX. CONST. art. I, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.").

Finally, one Missouri intermediate appellate court squared the circle in 1994.<sup>405</sup> The court upheld a municipal statute that prohibited all handgun carrying, on the theory that it was a “time, place, and manner” restriction on the right to bear arms for self-defense.<sup>406</sup> Postbellum-era Missouri decisions had upheld authority to prohibit concealed carrying in certain public gatherings,<sup>407</sup> and carrying when intoxicated,<sup>408</sup> but the appellate court’s holding passed over into nullification of the individual right.<sup>409</sup>

### 3. *Cases applying a non-defense-based or otherwise restricted right*

Another set of carrying decisions reflects non-defense-based conceptions of the right to bear arms. One state court, taking a cue from lower federal court Second Amendment decisions, denied that the right to bear arms was an individual right at all.<sup>410</sup> Illinois’s state constitutional right to bear arms is saddled with the most pro-restriction proviso in American constitutional history, expressly declaring the right to arms to be subordinate to “the police power.”<sup>411</sup> Unsurprisingly, in light of this unique constitutional language, the state supreme court held that the Illinois Constitution allowed handguns to be banned, which would also imply the constitutionality of a ban on their carrying.<sup>412</sup>

Finally, one recent Rhode Island decision harkened back to the

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405. *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33 (Mo. Ct. App. 1994).

406. *Id.* at 35.

407. *See State v. Wilforth*, 74 Mo. 528, 531 (1881) (“[W]e . . . hold the act in question to be valid and binding, and as intending only to interdict the carrying of weapons concealed.”).

408. *See State v. Shelby*, 90 Mo. 302, 305 (1886) (holding that, if the legislature may regulate the manner in which arms are borne, it may also regulate the condition of the bearer).

409. In a passage that is difficult to see as reflecting an adequate respect for an enumerated constitutional right, the *Joyce* court went on to state that the defendant’s right to bear arms for self-defense was not violated by the ban because he could wear his handgun in public—as long as he left all of its ammunition at home. 884 S.W.2d at 35.

410. *Commonwealth v. Davis*, 343 N.E.2d 847, 849 (Mass. 1976) (interpreting the Massachusetts Constitution’s right-to-arms provision as “not directed to guaranteeing individual ownership or possession of weapons”); *see also Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987) (upholding conviction for handgun carrying under District of Columbia law on the basis that Second Amendment protected only a “collective right” of state governments), *abrogation recognized by Herrington v. United States*, 6 A.3d 1237, 1246 n.33 (D.C. 2010).

411. ILL. CONST. art. I, § 22 (“Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.”).

412. *See Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 268–69, 278–79 (Ill. 1984) (upholding a village ordinance banning “the possession of all operable handguns” after determining the right to bear arms is not fundamental, and therefore applying a rational basis test).

nineteenth century, adopting the hybrid view of the state constitutional right to arms. In *Mosby v. Devine*,<sup>413</sup> the state supreme court concluded that the right to “bear arms” in Rhode Island’s constitution referred only to military participation, and thus did not connote the carrying of weapons for personal defense.<sup>414</sup> Interestingly, however, the court did not hold weapons carrying to be completely unprotected, but instead evaluated the state’s handgun carrying laws for conformity with what it described as “an individual right flowing to the people to keep and bear arms.”<sup>415</sup> It held that the state’s discretionary “may issue” handgun carry permitting statute was constitutional, though it stressed that, to give effect to the right to arms, the Attorney General’s application of discretionary permit criteria—such as whether the applicant had demonstrated a need to carry a handgun, and was a “suitable person” to receive a permit—must be subject to judicial review.<sup>416</sup> “The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of an unreviewable unrestricted licensing scheme.”<sup>417</sup>

As with other cases decided outside the dominant, defense-based individual rights paradigm, the cases in this subsection offer little guidance on the scope of the defense-based right to bear arms because they did not consider it. The *Mosby* case is a notable example of a pattern that has been pointed out before: even under the hybrid right, which is less carry-protective than the defense-based right adopted by *Heller*, the right to arms in no sense terminates at one’s doorway. The existence of an individual right to bear arms, of any stripe, entails that carrying outside the home cannot be prohibited.

#### IV. LESSONS FROM THE STATE COURT TRADITION

The Supreme Court’s method of interpretation in *Heller* and *McDonald* suggests that the most important period of American history for determining the scope of the Second Amendment right to bear arms is the early-nineteenth century, which spans the time between the ratifications of the Second Amendment in 1791 and the

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413. 851 A.2d 1031 (R.I. 2004).

414. *Id.* at 1041–42. *Mosby*’s hybrid-view credentials were unmistakable: it identified the right to “keep arms” with individual gun ownership, but “bear arms” only with military activity, one of the distinctions characteristic of the hybrid right. *Id.* at 1040–42. Moreover, *Mosby* relied upon the 1840 Tennessee decision that birthed the hybrid view. *Id.* at 1041 (citing *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840)).

415. *Id.* at 1043, 1047–51.

416. *Id.* at 1048–51.

417. *Id.* at 1050.

Fourteenth Amendment in 1868. This period is, simultaneously, the immediate post-ratification history of the Second Amendment and the immediate pre-ratification history of the Fourteenth Amendment. During this period, most sources treated the right to bear arms as the right recognized by *Heller*, an individual right importantly concerned with self-defense.<sup>418</sup> The majority of sources recognizing a defense-based right viewed it as protecting the right to carry arms in public; indeed, they viewed it as protecting presumptive carry.

What about the Reconstruction and early Jim Crow eras—the post-ratification history of the Fourteenth Amendment? Few authorities from this period turn out to be relevant to the scope of Second Amendment carry rights after *Heller* and *McDonald*. This is because the American tradition has included not one, but two basic views of the individual right to arms: the broad/defense-centered right and the hybrid right. From 1870 to 1920, numerous courts and commentators adopted the view that the constitutional right to arms was a hybrid right.<sup>419</sup> This meant that the constitution protected individual arms ownership to preserve the public liberty, but was not primarily motivated by a concern for individual self-defense. These postbellum courts upheld many restrictions on personal weapons carrying because they adopted the premise that self-defense was, at most, a secondary and peripheral aspect of the constitutional right to arms. *Heller* considered and explicitly rejected the hybrid view.

Many later twentieth century authorities support presumptive carry rights, consistent with the antebellum nineteenth-century tradition.<sup>420</sup> Presumptive carry is also the position most consistent with the holdings and reasoning of *Heller* and *McDonald*. Finally, at the level of statutory law, it is the supermajority position of American jurisdictions today.<sup>421</sup>

This survey of state court practice holds lessons for legal scholars and for historians of the right to bear arms. Most importantly, it holds lessons for post-*Heller* courts applying the Second Amendment, and I shall conclude this Article by discussing those lessons.

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418. See *supra* Part II.A for a discussion of *Heller*.

419. See *supra* Part III.B for a discussion of the hybrid view of the right to bear arms in the postbellum period.

420. See *supra* Part III.C.2 for a discussion of modern state case law that applies a defense-based right supporting presumptive carry.

421. See *supra* Part I.B.2.

A. *For Legal Scholars*

Some recent scholarly discussions of the Second Amendment and carry rights are undermined by their failure to engage with the constitutional tradition of the individual right to bear arms for self-defense.

Darrell Miller contends that “[t]he home is a fault line that runs deep within the text, context, and history of the Second Amendment.”<sup>422</sup> But the text of the Second Amendment does not say anything about the home.<sup>423</sup> Indeed, a naïve textualist might think that the most significant feature of the Second Amendment’s text for carry rights is that it recognizes a right of the people to “bear arms,” expressly distinguishing that from their correlative right to “keep arms,” which suggests that what is meant is a right not only to possess arms at home, but also to carry them somewhere else.<sup>424</sup> Miller, however, argues that the right to bear arms to defend oneself should terminate as soon as one goes to a place where one is likely to encounter other people: it “should extend no further than the front porch.”<sup>425</sup> He likens the private possession of firearms for self-defense to the private possession of obscene sexual material and, noting that the Supreme Court has held that governments cannot enforce obscenity bans against the simple possession of such material in the home,<sup>426</sup> suggests that this would also be appropriate as a measure of the Second Amendment’s protection.

As others have pointed out, however, the premise of the First Amendment obscenity-in-the-home doctrine is not that the materials in question are generally valuable; rather, they are protected in the home because allowing their seizure is too severe an intrusion on other interests that we value, such as individual dignity and privacy.<sup>427</sup>

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422. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1310 (2009).

423. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

424. See Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. COLLOQUY 85, 90 n.32 (2010) (“Whatever the merits of [Prof. Miller’s home-only] view in terms of policy, however, it is hard to reconcile with *Heller*’s textualism. As we have seen, *Heller* defined the right to bear arms to include carrying them for purposes of confrontation, and it does not seem particularly plausible to understand this analysis of the text as recognizing only a right to ‘bear’ arms from the bedroom to the living room.”).

425. Miller, *supra* note 422, at 1282.

426. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

427. See Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 98 (2009) (“*Guns as Smut* does something peculiar: It analogizes a core

But the premise of a constitutional amendment protecting the right to keep and bear arms is that arms are valuable.<sup>428</sup> A further problem with Miller's thesis is that the relationship of defensive gun ownership to privacy is at best limited and indirect. The consumer of controversial written or filmed literature can derive the full value of the material, whatever that may be, while literally "sitting alone in his own house."<sup>429</sup> But the purpose of defensive firearms is to respond to external threats from others, collapsing the privacy analogy. This is why there is such a paradoxical quality to the claim that the right to bear arms for self-defense should exclude the places where most violent crimes occur—in public, away from the home and its curtilage.

Miller engages somewhat with the state judicial tradition, but his discussion is patchy and impressionistic. He writes that his concern is "the federal Second Amendment right, not . . . state constitutional rights to keep and bear arms, which may be more expansive."<sup>430</sup> But the Second Amendment was in a deep freeze for most of American history, especially in the federal courts. In the pre-incorporation era, it had little work to do because there were no national gun laws. Next, the Supreme Court issued the opaque *Miller* decision in 1939, then withdrew from the field for seven decades while the lower federal courts invoked *Miller* to reject every claim to an individual Second Amendment right. Thus, to understand the elaboration of the American right to arms as an individual guarantee, one has to look elsewhere. The state court tradition is not the only possible source of guidance, but it is an essential one. Engagement with the state court tradition is not optional. This Article has shown that there is a great deal of American constitutional law about carrying arms for

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category of private arms to one of the *least* protected and marginal categories of speech (obscenity). It's hard to see any justification for such an analogy, other than a purely instrumental one."); see also *Stanley*, 394 U.S. at 564–65 ("[I]n the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—th[e] right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.").

428. Cf. *Miller*, *supra* note 422, at 1278 n.\* ("I do not use the word 'smut' pejoratively, or as a term of contempt, but rather because it stimulates interest, and because obscenity jurisprudence fairly describes what the resulting doctrinal limits of a home-bound Second Amendment would look like. I could have used the word 'obscenity,' but frankly it just isn't as catchy."). Most users of the language would also recognize "obscenity" as a term of contempt, of course.

429. *Stanley*, 394 U.S. at 565.

430. *Miller*, *supra* note 422, at 1280 n.4.

self-defense. Indeed, carrying in public has been the single most litigated and discussed aspect of the right. Not all the courts that addressed the topic have thought the right protected self-defense, but those that did have overwhelmingly rejected the notion that the home was a “fault line” beyond which the right vanished.

A plausible list of the leading state cases on the individual right to bear arms, based on their influence, the extent to which later authorities discuss them, and whether *Heller* relied on them, might include *Bliss*, *Reid*, *Aymette*, *Nunn*, *Chandler*, *Andrews*, *Workman*, *Kerner*, and probably one of the twentieth-century Oregon cases.<sup>431</sup> Not every scholar would agree completely with this list, but most would accept its general outlines. Only one of these sources is mentioned in Miller’s *Guns as Smut*: *Chandler* appears in footnote 396.<sup>432</sup> Likewise, Miller’s article does not mention St. George Tucker, William Rawle, or Thomas Cooley, to name three of the four leading nineteenth-century commentators on the right to arms, each of whom discussed the practice of weapons carrying.<sup>433</sup> The fourth, Joseph Story, is mentioned in passing, not for the discussion of the Second Amendment in his *Commentaries* and *Popular Exposition*, but for his participation in treason trials arising from Dorr’s Rebellion.<sup>434</sup>

A final serious omission in the article is any realistic discussion of the manner in which firearms are actually carried for self-defense today. *Guns as Smut* rings with references to topics such as insurrections,<sup>435</sup> Confederate secession,<sup>436</sup> shooting law enforcement agents,<sup>437</sup> Klan rampages,<sup>438</sup> the dissolution of the social compact,<sup>439</sup> the Oklahoma City bombing,<sup>440</sup> and recurrent musings on whether enforcing the Second Amendment might end up protecting a right to own “tactical nuclear ordnance and nerve gas,”<sup>441</sup> or to own

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431. See *supra* Parts III.A–C.

432. Miller, *supra* note 422, at 1341 n.396. Miller also discusses two hybrid-right cases, *State v. Huntly*, 25 N.C. 418 (1843), and *English v. State*, 35 Tex. 473 (1872), both of which are notable for their unusually pronounced hostility to weapons carrying. He also mentions *State v. Duke*, 42 Tex. 455, 459 (1875), a fairly important defense-based case. Miller, *supra* note 422, at 1341 n.396, 1344–45.

433. See *supra* Part III.A.2 for a discussion of Tucker and Rawle; *supra* notes 315–318 and accompanying text for a discussion of Cooley.

434. Miller, *supra* note 422, at 1316 n.237.

435. *Id.* at 1315–50.

436. *Id.* at 1328–29.

437. *Id.* at 1316 & n.236.

438. *Id.* at 1331–32.

439. *Id.* at 1308–09.

440. *Id.* at 1314 n.228.

441. *Id.* at 1294 n.117.

“landmines, hand grenades, shoulder-fired missiles, anthrax,”<sup>442</sup> or perhaps “armor piercing rounds,” “dynamite” or “rocket launchers.”<sup>443</sup> But there is glaringly little discussion of the actual handgun carrying practices of Americans today, or of the experiences of the states—encompassing a supermajority of the American population—where all citizens without a serious criminal record have a clear path to lawfully carrying a handgun. Yet this shall-issue, permit-based approach is one of the most likely forms that a Second Amendment right to bear arms outside the home for self-defense is likely to take. That this social practice is already an everyday fact in most of America gives the article’s predictions of chaos an air of unreality.

Law professors are privileged to engage in provocative flights of imagination. In doing so, however, it is possible to lose sight of the concrete issue at hand. Miller’s lurid dialectics ignore the ordinary clerk, parent, or pizza deliverer in a rough part of Chicago, D.C., or Los Angeles who would like to carry a firearm for protection while walking home from shopping or from a place of employment.<sup>444</sup> If these jurisdictions were constitutionally required to adopt some kind of presumptive carry law, as thirty-nine other states have already done without problem, then those individuals could have protection without risking arrest and jail. Pretty simple. Authors who argue for the non-enforcement of half of the Second Amendment, from a fear of possible dire consequences to democracy if millions of Americans begin carrying firearms in public, should bear in mind that millions of Americans already carry firearms in public.<sup>445</sup>

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442. *Id.* at 1314 n.227.

443. *Id.* at 1353–54 n.474.

444. There is also an odd quality to Miller’s inveighing about the antidemocratic implications of a possible “right to freely brandish firearms.” *Id.* at 1310. “Brandishing” typically means drawing and holding, as with a sword, not mere carrying. *See, e.g.*, Mich. Att’y Gen. Op. No. 7101 (Feb. 6, 2002) (defining brandishing as “waving or displaying in a threatening manner” and concluding that holstered carry is not brandishing). Brandishing is illegal (outside of self-defense situations) in most right-to-carry states. *See, e.g.*, W. VA. CODE § 61-7-11 (2011). For that matter, it is common knowledge that the vast majority of Americans who carry defensive handguns prefer to carry them *concealed*. They are not interested in “brandishing,” or even exposing, anything.

445. A recent report estimates six million licensed carriers, and that does not include all the residents of the states that allow permitless carry. Mike Stuckey, *Record Numbers Licensed to Pack Heat: Millions Obtain Permits to Carry Concealed Guns*, MSNBC.COM (June 24, 2010, 7:05 PM), [http://www.msnbc.msn.com/id/34714389/ns/us\\_news-life/t/record-numbers-licensed-pack-heat/#](http://www.msnbc.msn.com/id/34714389/ns/us_news-life/t/record-numbers-licensed-pack-heat/#). I agree with Eugene Volokh’s appraisal:

*Guns as Smut* . . . argues that “the presence of a gun in public has the effect of chilling or distorting . . . public deliberation and interchange.” . . . This is



B. *For Historians*

A second lesson is that historians ignore the state judicial tradition at their peril. It should be uncontroversial that when historical claims are made about the existence or nonexistence of a particular tradition in American legal history, the decisions and opinions of American courts are important evidence of that tradition. Thus, it is surprising to read a new publication by an academic historian that charges that the *Heller* majority “has rewritten the past,” has “invent[ed] a version of the past and anoint[ed] it as ‘tradition,’” and has emulated “societies [that] distort history to create ‘a suitable historic past’” by recognizing an individual right to arms for self-defense<sup>446</sup>—yet does not substantiate this charge by discussing any pre-*Heller* judicial opinions on the constitutional right to keep and bear arms.<sup>447</sup> Words like “rewrite,” “invent,” and “distort” usually mean to fabricate, to make up something that is not there. But this Article has documented generations of American court decisions, stretching from the 1820s to the 1990s, that support the interpretation of the right to arms adopted in *Heller*. This tradition was not hidden behind the scenes in *Heller*; the Court relied upon many of these sources at length. To criticize *Heller*’s historicism as “invented” while saying nothing about its most powerful source of support in American legal history reflects a serious gap in knowledge, or an abuse of language and the presumed authority of the historian.<sup>448</sup>

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an intriguing speculation. . . . But fortunately we don’t need speculation; we have ample experience. In Vermont, people have long been free to carry concealed weapons without a license. In New Hampshire and the state of Washington, law-abiding adults have been legally entitled to concealed carry licenses for over 50 years. Today, law-abiding adults can get such licenses in [forty] states . . . . In many states, . . . law-abiding adults may carry guns openly, even without licenses. Is public debate on balance especially inhibited in any of these categories of states? . . . I know of no evidence for this, and *Guns as Smut* doesn’t point to any.

Volokh, *supra* note 427, at 102–03.

446. David Thomas Konig, *Heller, Guns, and History: The Judicial Invention of Tradition*, 3 NORTHEASTERN U. L.J. 175, 176–77 (2011).

447. In fact, the only pre-2008 cases mentioned in this twenty-two-page article with even a roundabout connection to the Second Amendment are an 1877 Indiana Supreme Court decision on the criminal law of self-defense and a 1903 U.S. Supreme Court decision on the same topic. Neither discusses the right to arms. *See id.* at 192 nn.81–84 (citing *Brown v. United States*, 256 U.S. 335 (1921); *Runyan v. State*, 57 Ind. 80 (1877)). Then there is the article’s discussion of the *Dred Scott* case. *See infra* text accompanying notes 451–453.

448. Parts of the article withdraw from the implications of words like “invent” and “distort,” suggesting instead a process, perhaps inevitable, of selection and emphasis rather than fabrication. *See* Konig, *supra* note 446, at 176 (approving a historian’s definition of “invented tradition” as “a set of practices, normally governed by overtly

Professor Konig also attempts to draw a parallel between *Heller* and the infamous decision in *Dred Scott*.<sup>449</sup> However, the most obvious relationship between the two cases is that *Scott* acknowledged American citizens generally had the right to bear arms in public—in Chief Justice Taney’s phrase, “to carry arms wherever they went”<sup>450</sup>—

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or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behavior,” often by “attempt[ing] to establish continuity with a suitable historic past” (citation omitted) (internal quotation marks omitted)). But this nuance soon passes, and the article reverts to criticism of the *Heller* Court for inventing traditions that assertedly fail to reflect “the reality of the past.” *Id.* at 179.

Different, more measured and supported criticisms of *Heller*’s use of history are presented by the same author in an earlier article, David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009). The argument there is that in the late-eighteenth century culture, constitutions played an important role as exhortations to participation in civic institutions such as the militia and the jury, and their preambles and explanatory provisions expressed norms of republican governance that were addressed to the people as a whole, not merely, or primarily, to judges. Accordingly, originalists should hesitate to adopt a view of an eighteenth-century provision that gives its preamble a sharply different legal effect from that given to its enacting or operative clause—which is arguably what *Heller* did with the Second Amendment. *Id.* at 1317–37. That is an interesting and thoughtful observation—though it is a leap to say it supports a “collective right” interpretation of the Second Amendment such as the one in Justice Stevens’s *Heller* dissent. *See id.* at 1299, 1321. Why not the *hybrid* view of the right, which combines a militia purpose with a personal guarantee against disarmament, thereby treating the Second Amendment “right of the people” in the same way the other rights of the people in the Bill of Rights have been treated? *See supra* Part III.B. The hybrid view is conspicuously absent from the arguments of many of *Heller*’s critics, even in contexts where it would seem to offer a powerful alternative.

In any event, the earlier article concedes that in the nineteenth century, the right to keep and bear arms was widely conceived as an individual right; it claims that this reflected a switch from the view of the Founding. Konig, *supra*, at 1338 (“The need felt by nineteenth-century Americans to articulate what that right had become—an individual right—proves what that right had not been when ratified in 1791.”).

If there was a switch, it must have occurred soon indeed after the ratification of the Bill of Rights. Konig cites the work of Saul Cornell as having “moved th[e] change [from a collective to an individual right] back several decades [from Reconstruction] to the years after the War of 1812.” *Id.* In fact, the broad individual right is evident much earlier than that: the prominent early constitutional commentator St. George Tucker employed the example of an individual’s carrying a gun for self-defense or hunting to illustrate the constitutional “bear[ing of] arms” in his *Commentaries* of 1803. *See supra* text accompanying notes 258–266.

But if we take the “switch” thesis of Konig’s earlier article as true, then it makes it puzzling to read the claim, in Konig’s later article, that the *Heller* majority perniciously invoked an “invented tradition” that lacks a basis in reality. *See Konig, supra* note 446, at 189. After all, what is the switch asserted by Konig and Cornell, if it is not the emergence of an American tradition—not an “invented” one, but an actual one—that supports the holding in *Heller*?

449. *See Konig, supra* note 446, at 179 (arguing that *Heller* reflects an “invented tradition” of gun rights analogous to the invented tradition of racism in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV).

450. *Scott*, 60 U.S. at 417.

but used this conclusion as the basis for a supposed *reductio ad absurdum* argument that blacks, therefore, could never be American citizens. *Heller* and *McDonald*, of course, reached a conclusion diametrically opposed to *Scott*'s holding: they held that the individual right to bear arms for self-defense belongs to *all* Americans, regardless of race. Indeed, the leitmotif of Justice Thomas's *McDonald* concurrence is that the Fourteenth Amendment's Privileges or Immunities Clause (on his reading) completed the Reconstruction Republicans' deliberate undoing of *Scott*, by guaranteeing both black and white Americans the privileges and immunities of American citizenship, including the right to bear arms.<sup>451</sup> How does this affect the alleged parallel between *Heller* and *Scott*? We are not told: the author does not tell the reader what *Scott* said about race and the right to carry arms, or that *Heller* and *McDonald* categorically rejected that view.

These omissions of relevant evidence, in the form of legal sources, are serious enough to vitiate the historical claims that depend upon those omissions.<sup>452</sup> Criticism of *Heller*'s adherence to the technical tenets of 1791-focused, "original public meaning" originalism will continue,<sup>453</sup> and may prove merited. But if there is one thing the *Heller* Court demonstrably did not need to "invent" to bolster its holding, it is a supportive tradition in American history. Rather, the Court found such a tradition, strongly in existence.

### C. For Courts

Finally, it is incorrect to describe the individual right to bear arms for the purpose of self-defense as a novel or unexplored constitutional topic, a "vast *terra incognita*" in the words of one recent circuit opinion.<sup>454</sup> Quite the contrary: the right recognized in *Heller*

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451. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3060, 3068, 3083 (2010) (Thomas, J., concurring in part and concurring in the judgment).

452. Cf. Mike Rappaport, *History Office Law*, THE ORIGINALISM BLOG (Dec. 27 2010, 12:37 AM), <http://originalismblog.typepad.com/the-originalism-blog/2010/12/recently-i-linked-to-this-op-ed-by-distinguished-historian-pauline-meier-the-piece-defended-justice-breyers-comments-on-the.html> (criticizing the lack of sophistication of some academic historians' efforts to engage with the originalist arguments in *Heller* by stating "[h]istorians can complain all they want to about 'law office history,' but at least as big a problem in this area is 'history office law'").

453. See, e.g., Konig, *supra* note 446, at 178. Such criticisms are not limited to opponents of the individual right to keep and bear arms. See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009).

454. See *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (declining to decide whether the Second Amendment right exists outside the home), *cert. denied*, 132 S. Ct. 756 (2011); see also *id.* at 476 (opining that "[i]f ever there was an occasion for restraint, this would seem to be it").

and *McDonald* has been recognized and applied by a vast number of state courts and other sources throughout the past two centuries. Courts that undertake this task have routinely concluded that the right protects the ability to carry handguns for self-defense outside the home. Decisions confining the right to the home have been unusual outliers. From the standpoint of judicial tradition, the real question to be addressed after *Heller* and *McDonald* is not *whether* the right to bear arms for self-defense applies outside the home; that is one of the right's most firmly established features. At most the debate should center upon how broadly Second Amendment carry rights extend: do they follow the model of presumptive carry or non-presumptive carry? Either way, post-*Heller* lower court opinions that assert that the Supreme Court "defin[ed] the protected right to be to keep and bear arms in the home for the purpose of self-defense,"<sup>455</sup> or that prohibitions on handgun carrying are "outside of the scope of the Second Amendment, as articulated in *Heller* and *McDonald*,"<sup>456</sup> reflect a serious misunderstanding of what *Heller* and *McDonald* said and did.

It is particularly disturbing to note that post-*Heller* lower courts confining the Second Amendment to the walls of the home have not done so based on a reasoned consideration and rejection of the judicial tradition. Instead, they have simply ignored it. Recent decisions of the Maryland Court of Appeals<sup>457</sup> and the Illinois Appellate Court<sup>458</sup> have announced no-carry interpretations of the Second Amendment in opinions that (1) omit an analysis of

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455. *People v. Dawson*, 934 N.E.2d 598, 607 (Ill. App. Ct. 2010), *appeal denied*, 942 N.E.2d 457 (Ill. 2010), *cert. denied*, 131 S. Ct. 2880 (2011).

456. *Williams v. State*, 10 A.3d 1167, 1178 (Md. 2011), *cert. denied*, 132 S. Ct. 93 (2011).

457. *Id.* The United States Supreme Court's decision not to grant certiorari in *Williams* is likely explained by the procedural features of the case. The defendant in *Williams* was convicted for carrying a handgun without a permit, but he had never attempted to apply for a handgun carrying permit under Maryland's restrictive (non-presumptive) permit issuance statute. *Id.* at 1169. Thus, the case presented a standing problem; Williams's failure to seek a permit arguably foreclosed him from mounting a Second Amendment attack on Maryland's permit issuance requirement. *Cf. id.* at 1169–70. Similarly, the defendant in *Dawson* carried a firearm in conjunction with an illegal shooting where he opened fire on an occupied vehicle—conduct prohibitable on any conception of the right to bear arms. *See supra* note 455.

458. *People v. Aguilar*, 944 N.E.2d 816, 827 (Ill. App. Ct. 2011), *leave for appeal granted*, 949 N.E.2d 1099 (Ill. 2011); *Dawson*, 934 N.E.2d 598. The author is the principal writer of a brief amici curiae in the *Aguilar* case now before the Illinois Supreme Court. The brief presents arguments congruent to the ones offered in this Article. *See generally* Amended Brief for Amici Curiae Professors Nicholas J. Johnson, David B. Kopel, and Michael P. O'Shea in Support of Defendant-Appellant, *People v. Aguilar*, No. 112116 (Ill. Nov. 30, 2011).

historical evidence about the meaning of the Second or the Fourteenth Amendment, and (2) do not examine pre-*Heller* state court decisions on the individual right to bear arms for self-defense—not even the ones expressly relied upon in *Heller*. That is an extraordinary, and in the end an intellectually unsound, way to respond to a pair of landmark decisions as saturated in history and tradition as were *Heller* and *McDonald*.<sup>459</sup>

The Supreme Court has rendered *two* major holdings about the protection of the Second Amendment right to keep and bear arms, not one. First, the Court held that the right the Second Amendment protects is an “individual right to keep and bear arms for the purpose of self-defense”<sup>460</sup>—thus rejecting not only all variants of the collective rights view, but also rejecting the hybrid individual right. That was holding, not dictum: we know this both because a majority of the Court explicitly instructed lower courts that it was a holding in *McDonald*,<sup>461</sup> and because it was the reason the District of Columbia’s ban on loaded firearms was struck down in *Heller*.<sup>462</sup> The Court repeatedly likened the Second Amendment right to state constitutional rights that “secured an individual right to bear arms for defensive purposes,”<sup>463</sup> and particularly to those that “enshrined a right of citizens to ‘bear arms in defense of themselves and the state’ or ‘bear arms in defense of himself and the state.’”<sup>464</sup> The Court prominently relied upon early state court decisions involving defensive arms-bearing.<sup>465</sup> It did not hold that the Second Amendment protected some *sui generis* alternative version of the defense-based right; rather, it emphasized that the right has analogues and antecedents in a larger American tradition. This

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459. See *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (“[T]he threshold inquiry in some Second Amendment cases will be a ‘scope’ question: Is the restricted activity protected by the Second Amendment in the first place? The answer requires a textual and historical inquiry into original meaning.” (citation omitted)).

460. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010); *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment); *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (determining that the Second Amendment protects an individual right with the “*central component*” of self-defense).

461. *McDonald*, 130 S. Ct. at 3059 (Thomas, J., concurring in part and concurring in the judgment) (identifying this as a “holding” of the Court in *Heller*).

462. *Heller*, 554 U.S. at 630 (holding that the prohibition on loaded firearms “makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional”).

463. *Id.* at 602.

464. *Id.* at 584–85 (noting that nine state constitutional provisions from the late-eighteenth and early-nineteenth centuries adopted this formulation, and identifying it with a self-defense based right to bear arms).

465. *Id.* at 610–14; see *supra* Part III.A–B.

Article has sought to present that tradition, and the consistency with which it has recognized a right to carry outside the home. The Second Amendment should be interpreted with the same scope.

Second, the Court *applied* the right that it recognized to the particular set of facts before it. It held the challenged laws (the District of Columbia's handgun ban and the ban on defensive use of firearms in the home) to be violative of the right it recognized. To consider this as evidence that the right's scope is *confined* to the specific facts is a misunderstanding of how constitutional rights and their elaboration works.

Courts concerned about the need for guidance in applying the Second Amendment can seek it, among other places, in the state court tradition interpreting the right to bear arms, as this Article has explicated. If this body of precedent seems too large to navigate, courts may usefully simplify their inquiry by focusing upon the subset of right-to-arms cases that are the most relevant to the application of the Second Amendment as interpreted in *Heller*. These are the decisions that: (1) recognize an individual right to bear arms; (2) treat self-defense as a central purpose of the right; and (3) employ a meaningful standard of review, comparable to those that federal courts apply to fundamental rights,<sup>466</sup> such as intermediate scrutiny, strict scrutiny, or a substantial burden-based criterion such as the "frustration of the right" standard. In addition, (4) it may be appropriate to give particular weight to defense-based decisions from the antebellum period, since the Court's originalist methodology in *Heller* and *McDonald* suggests that this period is especially relevant. When courts undertake this reasoned approach, they will find that the case law tradition does *not* leave them without guidance. It supports applying the presumptive carry rights model to the Second Amendment right to bear arms.

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466. See *Heller*, 554 U.S. at 628–29 & n.27 (rejecting rational basis or "interest-balancing" modes of scrutiny as incompatible with an express guarantee of the Bill of Rights).