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NATURAL RIGHTS, POSITIVE RIGHTS, AND THE RIGHT TO KEEP AND BEAR ARMS

JUD CAMPBELL*

INTRODUCTION

Speaking to Congress in 1789, James Madison defended his proposed bill of rights as a list of "simple acknowledged principles," and not ones of "a doubtful nature."[1] And true to form, his inclusion of a right to keep and bear arms received little debate at the time.[2] By the mid-nineteenth century, however, judicial interpretations of that right were in disarray. Some judges interpreted the right based on its ostensible purpose of preserving the independence and effectiveness of militias. Others ruled that governmental power extended only to imposing modest restraints on personal firearms—not outright bans. Still more held that all weapons regulations were unconstitutional. So why had Madison's "simple" declaration of the right to keep and bear arms become so hard to interpret?

One possibility is a lack of any genuine original consensus.[3] Another is that Americans were changing their views. Saul Cornell, for instance, argues that by the mid-nineteenth century an individualistic conception of the right to keep and bear arms had begun to supplant the former linkage between that right and civic obligations, like militia service.[4] Meanwhile, Robert Leider treats Antebellum decisions as largely just tracking public opinion, with judges essentially making up doctrine as they went along.[5] This Article embraces elements of each of these stories. But it argues that right-to-bear-arms cases also reflected the complicated

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1. Statement of James Madison (Aug. 15, 1789), *in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1270, 1270 (Charlene Bangs Bickford et al. eds., 1992).

2. Most of the debate in the First Congress turned on whether to exempt conscientious objectors from militia service. *See* Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1102–09 (2008).

3. *See, e.g.*, MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS, at xv (2007) ("[T]here's no definitive answer to what the Second Amendment means.").

4. *See* SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 139 (2008) (stating that, during the Jacksonian era, the "new culture of individualism had a profound impact on legal thinking about the right to bear arms, the militia, and the idea of self-defense").

5. *See* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1587–88 (2014).

and often contested relationship between natural rights and positive rights that shaped American rights jurisprudence more broadly.[6]

In part, this Article aims to show how an understanding of American rights discourse can illuminate the first judicial decisions interpreting the right to keep and bear arms.[7] Though seemingly in disarray, these opinions exhibited exactly the sorts of disagreements that one would expect given prevailing understandings of natural rights and positive rights. This does not disprove that other factors were at play. But it suggests a potentially broader consensus about certain aspects of the right than scholars have appreciated.[8]

More broadly, this Article argues that the first right-to-bear-arms decisions exemplify a tension that emerged when judges confronted claims about natural rights and positive rights in a changing social and legal landscape. These tensions arose partly from the problems of "vagueness" and "open texture" that constantly appear in interpretive disputes, especially when the context shifts.[9] But as we will see, matters were even trickier in the nineteenth century because of changing conceptions of the judicial role.

This story begins in Part I with a survey of Founding-Era rights discourse, and particularly the complex relationship between natural and positive rights. Natural-rights reasoning was open-ended and flexible, permitting the government to regulate natural rights in promotion of the public good. Natural rights therefore sounded more in the register of political philosophy than law, with legislatures and juries—not judges—giving them practical effect. Positive-rights discourse, on the other hand, was more formalist and conservative, using a backward-looking

6. I use the term "natural rights" advisedly, recognizing that Americans sometimes described natural rights as being surrendered upon entering into a political society. Historical disagreements over how to talk about natural rights, though, should not distract from a broadly shared consensus about the implicit limits on governmental authority imposed by social-contract theory. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 95–96 (2017).

7. My methodology is to present a historical framework for understanding rights and then show how that framework is consistent with the earliest right-to-bear-arms decisions. My argument thus presumes, without attempting to prove here, that judges were operating within this larger conceptual framework.

8. I do not dispute that "Antebellum case law on the right to bear arms was deeply divided on the scope of the right." Saul Cornell, *Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1714–15 (2012). But I do think that judges shared some basic premises about rights and that we can better understand these cases, including their conflicts, by recovering those premises.

9. *See generally* Frederick Schauer, *Second-Order Vagueness in the Law*, *in* VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 177 (Geert Keil & Ralf Poscher eds., 2016). Vagueness refers to a lack of clarity in how to apply a particular term. For example, the term "tall" is somewhat vague because people may disagree about whether a man who is just under six feet in height is "tall." By contrast, "open texture" refers to "the ineliminable *possibility* of vagueness." *Id.* at 183. For instance, although it may be beyond debate today that a man who is just under seven feet in height is "tall," that would not be true if all other men suddenly grew an extra foot in height. In other words, even terms and applications of terms that seem clear today might become unclear in light of changed circumstances.

historical method for identifying limits on governmental power.[10] Positive rights were therefore more amenable to judicial enforcement. But judges intervened only after the polity itself—through a political settlement—had already rejected a particular type of regulation. Judicial review thus served as only a partial check against abuses of legislative power.[11]

Decades later, however, American judges increasingly viewed themselves as the anointed guardians of the constitutional order. This shift created a dilemma for judges—particularly when legislatures began to innovate in response to novel problems. The tension was stark. Emergent norms of judicial review counseled against absolute deference to legislative judgments. But natural rights lacked legal specificity, and customary law rarely supplied clarity about how to address new problems.

As will be discussed in Part II, the first cases involving the right to keep and bear arms perfectly illustrate this tension. In response to rampant violence, state legislatures in the nineteenth century began to restrict the concealed carry of weapons. In some respects, these laws were unprecedented—particularly by suddenly converting widely practiced and otherwise innocent behavior into a crime. If legislatures could do *that*, one wondered, was there anything they could not do? Yet while history did not directly support the validity of concealed-carry bans, it did not directly undermine them, either.[12] Customary positive law did not settle the issue because the question had not previously emerged in these terms.

Absent a clear textual or historical basis for invalidation, one judicial option was simply to uphold these laws. And some judges did that. Yet this approach had the significant downside of allowing legislatures to run roughshod over natural rights, and over the protection of customary rights that arguably applied. Another response was to disregard legislative acts that limited freedom in novel ways, or to draw some other line demarcating legislative power. And some judges did that. But doing so conflicted with the judicial task of merely locating, not inventing, constitutional limits on legislative power.

This Article concludes with a brief discussion of how this history might bear on contemporary debates about the Second Amendment. Any use of early decisions requires staying attuned to premises about rights and about judicial review

10. My statement that the "discourse" was conservative is deliberate. The actual interpretive practice was often quite dynamic. For an exploration of this conflict between conservative rhetoric and dynamic practice in rights jurisprudence, see Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517 (2019).

11. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

12. *See* CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM 2–3 (1999) (discussing the history of concealed-carry laws). This is not to say, however, that regulations of weaponry were novel. *See* JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 17–18 (2018) (pointing out a host of other types of arms regulations).

that may differ substantially from our own.[13] But while unpacking earlier rights decisions can lead to a better understanding of the past, it also reveals the extraordinary challenge of using history to answer modern questions. Just decades into the nineteenth century, the first right-to-bear-arms decisions were already revealing latent tensions in the law. The Founders simply had not anticipated that changing circumstances and broader conceptions of judicial review would transform rights jurisprudence.

I
NATURAL AND POSITIVE RIGHTS

For its first hundred years, American constitutionalism was grounded on a theory of political authority known as social-contract theory.[14] Rather than resting political authority on military force or divine will, social-contract theory posited that governmental authority depended on the consent of the people.[15] In essence, the theory sought to justify—and to limit—governmental authority by considering why people would agree to form a political society in the first place.[16] And the starting point in this thought experiment was the concept of natural rights.

A. Natural Rights

Americans understood natural rights as human capacities in an imagined state of nature without a government. These "rights" thus included any human ability that did not depend on governmental authority—thinking, reading, talking, eating, and so on, as well as the enjoyment of the fruits of one's labor.[17] Thomas Paine succinctly described these rights as "animal right[s]."[18] By contrast, positive rights were those defined in terms of governmental authority, like rights of habeas corpus, jury trials, and voting.[19]

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13. For a broader discussion of judicial failures to appreciate the undergirding assumptions behind earlier decisions, see Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 645 (2015).

14. *See* Campbell, *supra* note 6, at 87. The term "social compact" was more common—and perhaps more reflective of the authoritative and enduring nature of the agreement—but I prefer "social contract" to avoid confusion with the separate historical debate over the nature of the federal union, in which one side advocated a "compact theory" that essentially viewed the federal constitution as a treaty.

15. *See id.* at 88.

16. *See id.* (stating that "[s]ocial-contract theory . . . hypothesized that individuals, recognizing the benefits of collective action" each agreed to create a society to promote the common good, which "had powerful implications for the proper scope of governmental power" (citations omitted)).

17. *Id.* at 91.

18. *See* Thomas Paine, *Candid and Critical Remarks on Letter 1, Signed Ludlow*, PA. J. & WEEKLY ADVERTISER, June 4, 1777, at 1.

19. "The Founders sometimes referred to positive rights as *adventitious* or *social* rights." Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 252 n.14 (2017). As used in this Article, positive rights contrasted with natural rights, not with negative rights.

Importantly, the state of nature was hypothetical, not historical.[20] It was "abstract" and did not dispute that "men come into the world and into society at the same instant."[21] Accordingly, natural rights were not limited to the freedom that existed at a particular historical moment. Instead, natural rights included the possession and use of technologies—like firearms and printing presses—regardless of whether those technologies were developed after the creation of the political society.

Social-contract theory next posited that humans in a state of nature would unanimously agree to create a political society in a social contract, with each member being an equal citizen of the polity.[22] This body politic, commonly known as "the people," would then, by majority consent, agree to a constitution that vested political authority in a government. In other words, social-contract theory described a two-stage process for establishing political authority: a social contract to create a polity, followed by a constitution to create a government.

Although governmental powers were created in the constitution, individual rights could be recognized at either stage. Many Founders thus thought it unnecessary to include rights in a constitution.[23] Rather, legislative or constitutional restatements of rights were often viewed as merely *declaratory*, without creating the rights they recognized.[24] Indeed, the Ninth Amendment evinces this non-positivist conception of rights.[25] Back then, the primary purpose of enumerating rights was to remind the government and the people about their existence and importance. Enumerating a natural right was irrelevant to its legal status.[26]

Recognizing a natural right, however, did not deny governmental power to restrict that right.[27] Rather, the retention of natural rights shaped the constitutional scheme in more structural terms. First, only the people themselves could limit their own natural rights through laws passed by a representative legislature and enforced by a representative jury.[28] Second, social-contractarian thinking

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20. Campbell, *supra* note 6, at 87 (citations omitted).

21. JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 28 (Boston, Edes & Gill 1764).

22. Campbell, *supra* note 6, at 88 (citations omitted).

23. *See, e.g.*, Statement of Roger Sherman (Aug. 13, 1789), *in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 1, at 1230 ("[T]he people are secure in [their rights], whether we declare them or not.").

24. *See* Campbell, *supra* note 19, at 299 n.237 (collecting sources).

25. *See, e.g.*, Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 197 ("Our written Constitution presupposes an established set of fundamental rights not *created* by the Constitution but *protected* or *preserved* by it.").

26. *See* Jud Campbell, *Judicial Review and the Enumeration of Rights*, GEO. J.L. & PUB. POL'Y 569, 572–76 (2017) (explaining that "judges never directly enforced state constitutional provisions that affirmed the inviolability of the natural rights of life, liberty, and property").

27. Indeed, as discussed below, social-contract theory posited that one of the primary purposes of government was to defend against the *private* infringement of natural rights.

28. Of course, while everyone agreed that legislatures and juries had to represent the people, there were ongoing debates about how representative these institutions should be, both in terms of demography and in terms of whether they should exercise independent, deliberative judgment that might depart from the wishes of the people at large.

about natural rights posited that the people could restrict natural rights only in promotion of the common good, rather than for the private benefit of certain individuals.[29]

It is no surprise, then, that the Founders viewed discretionary royal licensing as a quintessential violation of natural rights. If the King or his agents could decide who could operate a printing press and who could possess certain firearms, that would plainly violate natural-rights principles. First, it would privilege the interests of some individuals over others, without equally considering everyone's interests. Second, it would consolidate power in the hands of royal officials rather than representative legislatures and juries.[30]

These principles, however, did not point toward a libertarian conception of rights. Legislatures, after all, still had power to regulate these rights. The English Bill of Rights explicitly recognized this power with respect to the right to keep and bear arms, declaring that "the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law."[31] Or, as Massachusetts jurist George Thatcher stated, the "use of arms . . . being a natural right, and not surrendered by the constitution," was one that "the people still enjoy, and must continue to do so till the legislature shall think fit to interdict."[32] The natural right to possess and carry weapons required the legislature to act impartially, but it did not correspond to determinate, legalistic restrictions on legislative power. Rather, the constitutional lodestar was the public good.

With this understanding of social-contractarian limits, one can easily see how the scope of general legislative power varied according to circumstances and was not defined by a particular set of policy tools. Rather, the authority that came to be known as the "police powers" was simply governmental power to promote the common good.[33] At one time and place, this principle might warrant a ban on carrying concealed weapons in public. At another time and place it might not. But social-contract theory trained Americans to think about these questions of natural rights and legislative powers in flexible and dynamic terms.[34]

To be sure, lawmakers lacked rightful authority to do whatever they wanted. Social-contractarian principles dictated that "all civil authority delegated by the people"—including legislative power—"must be at all times subservient to the public good."[35] And judges sometimes determined that legislation was invalid on

29. Campbell, *supra* note 19, at 272–73.

30. Notably, this logic did not make *all* licensing regimes unlawful. For a later discussion, see Commonwealth v. Blackington, 41 Mass. 352, 358–59 (1837).

31. Bill of Rights 1689, 1 W. & M., c. 2 (Eng.)

32. CORNELL, *supra* note 4, at 26–27 (quoting George Thatcher, *Scribble Scrabble*, CUMBERLAND GAZETTE (Jan. 26, 1787)).

33. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 20 (1996).

34. For an example of the flexible and dynamic nature of natural rights, see *Brick Presbyterian Church v. City of New York*, 5 Cow. 538 (N.Y. 1826), which describes how changing habitation patterns over time functionally changed the government's power to regulate burials in certain areas.

35. Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 631 (1853).

precisely this basis.[36] In general, however, natural rights did not impose precise limits on legislative power.

In my view, then, it makes little sense to delimit specific categories of firearms regulations as being within or beyond the police powers.[37] Tracking weapons regulations in one period—shaped by the prevailing circumstances and attitudes of that period—would tell us little about the scope of the police powers in different circumstances. Nor did social-contract theory impose any categorical bar on "prohibiting" as opposed to merely "regulating" various forms of natural liberty.[38] The Founders recognized governmental authority to ban theater performances, billiards halls, lotteries, profanity, various consensual sexual activities, and so on, based on the authority to promote the general welfare.[39]

Finally, it is worth considering the much-confused issue of self-defense. A central feature of social-contractarian thought was that upon leaving the state of nature, individuals could no longer employ self-help remedies to defend their private rights.[40] In general, then, the natural right of self-defense was effectively transformed into a positive right known as the protection of the law. Preventing and remedying private violations of rights was now the responsibility of the body politic, not each individual. A well-recognized exception arose in cases of imminent danger when resort to legal remedies was impossible.[41]

Individuals thus ceded authority to a body politic to defend their rights, but practical considerations required the body politic to delegate some of these responsibilities to a government. The people themselves would remain in control of legislating, but they would do so indirectly by electing representatives. And an

36. *See, e.g.*, Austin v. Murray, 33 Mass. (16 Pick.) 121, 125 (1834) (recognizing the invalidity of a burial regulation but noting that a similar restriction would be valid if "made in good faith for the purpose of preserving the health of the inhabitants").

37. *But see* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 161–65 (2007) (using historical firearms regulations to draw general inferences about governmental power to regulate firearms). To be sure, some historians might care whether the Founders, in their own time and place, viewed certain types of policies as conducive or not conducive to the public good.

38. *But see* Randy E. Barnett, *Who's Afraid of Unenumerated Rights*, 9 U. PA. J. CONST. L. 1, 19 (2006) ("If the conduct is not, in itself, necessarily rights-violating, then it may not be prohibited, but it may still be regulated.").

39. I take less issue with scholars who insist that the Founders understood the common good in terms of better securing the equal rights of all. *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1587–88 (2003); Joseph Postell, *Regulation during the American Founding: Achieving Liberalism and Republicanism*, 5 AM. POL. THOUGHT 80, 96–97 (2016). My views on their arguments are beyond the scope of this Article. But the crucial point to recognize—as illustrated by the bans mentioned above—is that governmental power existed even when particular rights holders were made worse off and even when those rights holders were not directly impinging upon the rights of others.

40. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. XXVIII, § 10, at 194 (3d ed. 1695) ("[M]en uniting into politic societies have resigned up to the public the disposing of all their force, so that they cannot employ it against any fellow-citizens, any farther than the law of the country directs . . . .").

41. *See* Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 245 (2000) (stating that people give up "the right to use force . . . only" when they can "appeal to the law for protection").

executive branch and court system were established to enforce the law and settle private disputes. In all of these roles, however, members of the government would merely act as *agents* of the body politic.[42]

But here is where Founding-Era views become especially foreign to modern observers. Although the Founders favored creating an executive and judicial branch, they also thought that the body politic should retain substantial *direct* control over the protection of law, without fully delegating this responsibility to the government. In the judicial branch, for instance, juries were prized primarily because they allowed for direct control by the people themselves.[43] Citizens also played a key role in executive functions through institutions like the *posse comitatus* and militia.[44] And to exercise these responsibilities citizens needed training and weaponry.

It was in this sense that the Founders often exalted the right of citizens to maintain weapons in "defense of themselves."[45] This right was part and parcel of the protection of law provided directly by the body politic rather than by governmental agents. It was not limited to a military context, such as defense against foreign invasions or domestic insurrections. Indeed, some even described personal self-defense as falling within the scope of this civic duty.[46] Nor was the right to maintain weapons in self-defense a "collective" right held by state governments. Far from it.[47] But none of this suggested that the public responsibility of protecting private rights was somehow beyond the power and control of the body politic. Social-contract theory posited exactly the opposite.

The natural right of self-defense was thus an integral part of Founding-Era discourse about the right to keep and bear arms, but not in the way that we might

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42. Campbell, *supra* note 6, at 90.

43. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 295 (1996) (describing the representative function of juries); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 50–52 (1986) (explaining how people believed that "jurors represent . . . the public" (citations omitted)).

44. *See* FEDERAL FARMER NO. 18 (1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1070, 1072 (John P. Kaminski et al. eds., 2004) ("A militia, when properly formed, are in fact the people themselves, and render regular troops in a great measure unnecessary."); Gautham Rao, *The Federal* Posse Comitatus *Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 2 (2008) (describing the role of the *posse comitatus* and its connection to citizenship).

45. Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 RUTGERS L.J. 1041, 1042 (2007) (quoting Parker v. District of Columbia, 478 F.3d 370, 385 (D.C. Cir. 2007)); *see id.* at 1045 (arguing that the right to bear arms was tied to militia service and thus primarily intended for the defense of society as a whole). *But see* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 137 (2008) ("Recognition of the people's right to bear arms 'for the defence of themselves' meant that individuals were entitled to carry arms for personal protection.").

46. James Wilson, for instance, treated the use of force "for the defence of one's person and house" as a duty connected to citizenship. *See* James Wilson, *Of Crimes Against the Right of Individuals to Personal Safety*, *in* 2 COLLECTED WORKS OF JAMES WILSON 1142 (Kermit L. Hall & Mark David Hall eds., 2007).

47. Recall that Americans championed civic participation in militias and juries because they did *not* view militias and juries as instrumentalities of the government.

now expect. Unlike most other natural rights, the right of self-defense was surrendered almost entirely to the body politic.[48] Crucially, however, Americans did not think that the body politic then fully assigned that responsibility to the government. Rather, the right and duty of self-defense was largely retained by the people themselves—but principally *as a body politic*, not as disaggregated individuals.[49]

B. Positive Rights

But Americans did not have a unimodal understanding of rights. In addition to natural rights, the Founders also recognized certain fundamental *positive* rights that prohibited the government from acting in particular ways. Positive rights were thus defined in reference to governmental action or inaction.[50] The right to a jury trial and the right against prior restraints, for instance, were fundamental positive rights because they operated as determinate rules about what the government had to do or could not do, regardless of legislative assessments to the contrary. And because these positive rights were generally legalistic, they were more judicially enforceable than natural rights.[51]

Positive rights also contrasted with natural rights in terms of how they were recognized. As mentioned above, natural rights were liberties in a hypothesized state of nature, and therefore understanding the concept was enough to perceive the breadth of natural rights. By contrast, positive rights had to be created by each political society. One way of doing so was through constitutional enumeration.[52] But many Founders thought that some fundamental positive rights were created in the imagined social contract and could be identified through custom, without any need for constitutional enumeration.[53]

Because of these different points of origin, the method for defining the scope of positive rights naturally depended on whether a written constitution had cre-

48. Rights like expressive freedom and religious freedom were retained *by individuals*, even though they could generally be collectively controlled through laws passed in promotion of the public good. By contrast, the natural right to defense of one's person and property was largely surrendered to the body politic.

49. Along similar lines, the right of revolution was held by the people as a body politic, not as individuals. Of course, as noted above, Anglo-American law long recognized the necessity of *personal* self-defense, too. But modern scholarship too often focuses solely on that right without appreciating the broader significance of the role of the people, as a body politic, directly providing for their own defense.

50. *See An Old Whig IV*, INDEPENDENT GAZETTEER, Oct. 27, 1787, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 497, 502 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (describing fundamental positive rights as "particular engagements of protection, on the part of government," in contrast to "natural liberty . . . retain[ed]").

51. *See* Campbell, *supra* note 26, at 576–78.

52. *See id.*

53. *Id.* at 577.

ated that right. Customary rights were defined historically—typically by determining the meaning of that right at common law.[54] For new rules, however, textual analysis was far more important. The members of the First Congress, for instance, carefully drafted the Establishment Clause—a new rule—whereas their revisions of other enumerated rights proceeded with little debate. With limited exception, the First Congress was articulating "simple acknowledged principles."[55]

In theory, then, Founding-Era rights discourse featured two types of rights that carried distinct meanings. In practice, however, matters were even more complicated, particularly because some terms—like "freedom of the press"—could readily refer to a natural right and a fundamental positive right.[56] And with this framing in mind, we can better appreciate the content of—and potential for unresolved tensions within—the right to keep and bear arms.

Insofar as the right to keep and bear arms was a fundamental positive right, American elites naturally viewed that right historically. For example, if a legislature authorized executive officials to arbitrarily disarm the citizenry, as English Kings had done in the seventeenth century, that legislation would abridge a customary positive right.[57] But while this right provided security against the problems of the past, it could not necessarily resolve the problems of the future because its application to those problems was not yet settled.[58]

In theory, of course, fundamental positive rights could be defined broadly or narrowly enough to clarify their application to unanticipated problems. For instance, if one determined that the right to keep and bear arms categorically denied governmental power to regulate the possession or carrying of weapons in any manner, then that understanding would resolve all sorts of unanticipated questions. By contrast, if the right prevented only arbitrary disarmament by royal officials, then its inapplicability to exercises of legislative power would be similarly clear. As it turns out, though, fundamental positive rights were rarely defined with such specificity in advance. Rather, they usually emerged from historical episodes involving opposition to particular policies, thus giving these rights

54. Consequently, those who advocated for the enumeration of positive rights often relied on English authorities like Blackstone. *See, e.g.*, Letter from Richard Henry Lee, Va. Delegate, Cong. of the Confederation, to Edmund Randolph, Governor of Va. (Oct. 16, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 61, 62–63 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

55. *See* Statement of James Madison, *supra* note 1, at 1270.

56. *See* Campbell, *supra* note 19, at 290–94.

57. Charles II and James II had attempted to use the Militia Act of 1662 and Game Act of 1671 as tools of disarmament. *See* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 105, 115–16 (1994). The right to keep and bear arms was included in the English Bill of Rights in response to this experience. *See id.* at 117–21.

58. *See* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 112 (2000) ("No coherent intention or understanding of the existence and scope of a private, individual right to keep and bear arms could accordingly be derived, because that question did not present itself for public debate in the form in which we now know it.").

clear application to some types of governmental acts without necessarily supporting or rejecting their extension to others. Consequently, the scope of fundamental positive rights was often contested.

II
NINETEENTH-CENTURY DECISIONS

The interplay between natural rights and customary positive rights may seem foreign to us, but it was familiar to Americans who had grown up in the customary constitutional tradition and had recently justified a political revolution based on blended assertions of natural and positive rights. Yet with subsequent developments in American constitutional law, and particularly the ascension of more robust judicial review,[59] tensions soon emerged over how to construe natural and positive rights.

Police-powers cases were harder for precisely the reasons described earlier. Social-contract theory stipulated that the government could limit natural rights only in pursuit of the public good, and only possessed the powers conducive to that role. Yet exactly what this entailed was highly contestable. As Joseph Priestley summarized:

> That the happiness of the whole community is the ultimate end of government can never be doubted, and all claims of individuals inconsistent with the public good are absolutely null and void; but there is a real difficulty in determining what general rules, respecting the extent of the power of government, or of governors, are most conducive to the public good.[60]

As a matter of principle, legislative power had to be limited. Yet the "real difficulty" that Priestley identified was hardly within the judicial ken. Judges, after all, were not supposed to assess questions "of mere expediency or policy."[61]

A tempting judicial response might be to define the limits of legislative power using a historically grounded approach, borrowing from the tradition of customary constitutionalism. But what, then, should judges do when new social problems emerged, leading to novel legislation? A tradition-based interpretive approach only works if relevant traditions provide direction.

In sum, judges had to make judgments about how to maintain fidelity to constitutional principles without surpassing limits on the judicial role.[62] Leaving legislatures free to determine the scope of their own powers was increasingly seen as a dangerous abdication of judicial responsibility. Yet these issues were not *legal* in nature—at least not until judges started pretending so. Enforcing natural

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59. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 145–89 (2004).

60. JOSEPH PRIESTLY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT, AND ON THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY 57 (2d ed. 1771).

61. Letter from James Madison, Former U.S. President, to Spencer Roane, Judge, Va. Court of Appeals (Sept. 2, 1819), *in* 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 501 (David B. Mattern et al. eds., 2009).

62. For a broader discussion of how this tension shapes doctrine, see LAWRENCE LESSIG, FIDELITY AND CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION (2019).

rights and underdeterminate positive rights thus inevitably required judges to adopt rules that were overinclusive, underinclusive, or a combination of both. And that is precisely what one sees in the first Antebellum right-to-bear-arms cases.

A. *Bliss v. Commonwealth* (Kentucky, 1822)[63]

In response to escalating violence, the Kentucky legislature in 1813 made it a crime to "wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when traveling on a journey."[64] Nearly a decade later, the Kentucky Court of Appeals held that the statute was unconstitutional under the state constitutional guarantee "that the right of the citizens to bear arms in defence of themselves and the state, shall not be questioned."[65]

Whether the right was "regulated" or "prohibited" was irrelevant, the court stated, because "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."[66] "[I]n principle," the court explained, "there is no difference between a law prohibiting the wearing [of] concealed arms, and a law forbidding the wearing [of] such as are exposed."[67] Consequently, the justices concluded, any statutes that "diminish or impair [the right] as it existed when the constitution was formed, are void."[68]

The *Bliss* majority then engaged in an extended defense of judicial review. "Whether or not an act of the legislature conflicts with the constitution," it observed, "is, at all times, a question of great delicacy, and deserves the most mature and deliberate consideration of the court."[69] Yet this question "is a judicial one," and "the court would be unworthy [of] its station, were it to shrink from deciding it whenever, in the course of judicial examination, a decision becomes material to the right in contest."[70] Nonetheless, judges should do so only upon a "clear and strong conviction" of unconstitutionality.[71]

The extended discussion of judicial review was no coincidence. Kentucky was in the midst of a massive political upheaval after lower courts had struck down recently enacted debt-relief legislation.[72] And with judicial review under attack, judges in Kentucky likely had little appetite for defending contestable judgments on questions of degree. The only historically grounded line the court could—and did—draw with respect to concealed-carry laws was to recognize legislative

63. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822).
64. *Id.* at 90.
65. *Id.* (internal quotations omitted).
66. *Id.* at 91–92.
67. *Id.* at 92.
68. *Id.* at 90.
69. *Id.* at 94.
70. *Id.*
71. *Id.*
72. *See generally* Theodore W. Ruger, *A Question Which Convulses a Nation: The Early Republic's Greatest Debate about the Judicial Review Power*, 117 HARV. L. REV. 826, 847–55 (2004).

power to regulate weapons only as far as was done under existing law when the constitution was ratified.[73] Any other approach would pull judges into the unenviable task of coming up with those lines.[74]

In sum, *Bliss* nicely illustrates the importance of formalism and historicism to nineteenth-century judicial appraisals of rights, even as judges more widely—and more aggressively—viewed themselves as responsible for identifying and enforcing constitutional limits on legislative power. The right to keep and bear arms, the *Bliss* court insisted, could not allow for any new regulations since the judiciary had no other way of policing the boundaries.

B. *Aymette v. State* (Tennessee, 1840)[75]

As in *Bliss*, the defendant in *Aymette* was convicted of violating a state law that barred the concealed carrying of certain weapons.[76] On appeal, he argued that his conviction violated the state constitutional declaration that "the free white men of this State have a right to keep and bear arms for their common defence."[77] This time, however, the argument failed.

Rather than reading this right as a prohibition against new restrictions of weapons, the Tennessee Supreme Court turned to "the state of things in the history of our ancestors" to determine the meaning of the right.[78] That right was based on a denial of the King's authority to disarm Englishmen "by his own arbitrary power, and contrary to law."[79] The historical meaning of the right, in other words, was grounded on a concern about self-rule—not a libertarian notion of freedom from any legal restraint. Moreover, the additional "evil" that Englishmen feared was that the King, through disarming the people and quartering soldiers in their midst, would "compel them to submit to the most arbitrary, cruel, and illegal measures."[80]

Tennessee's constitutional provision, the court explained, was "adopted in reference to these historical facts," which therefore shaped its meaning.[81] It supplied a right of all free white men to possess arms.[82] But the constitutional text and its undergirding history indicated a right limited to weapons used "by the people in a body, for their common defense."[83] Consequently, this right covered

73. *See Bliss*, 12 Ky. at 90 (concluding that statutes that "diminish or impair [the right] as it existed when the constitution was formed, are void").

74. Notably, the pending debt-relief controversies raised a similar question of whether rights could be limited through regulation. *See* Blair v. Williams, 14 Ky. (4 Litt.) 34, 35 (1823); Lapsley v. Brashears, 14 Ky. (4 Litt.) 47, 47 (1823).

75. 21 Tenn. 154 (1840).

76. *See id.* at 155 (stating that the defendant "was convicted . . . for wearing a bowie-knife concealed under his clothes, under the act of 1837-1838").

77. *Id.* at 156 (internal quotations omitted).

78. *Id.*

79. *Id.*

80. *Id.* at 157.

81. *Id.* at 157–58.

82. *Id.* at 158.

83. *Id.*

arms "usually employed in civilized warfare, and that constitute the ordinary military equipment."[84] By contrast, "those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin," were outside the scope of the right.[85] Moreover, the court continued in dicta, the legislature could "regulat[e] the manner in which [militia-related] arms may be employed," though it would be "somewhat difficult to draw the precise line where legislation must cease."[86]

Aymette thus reflected a historically grounded interpretive approach, supplemented by natural-rights reasoning. The history of the right to bear arms in England, the court thought, focused on a particular harm or evil—namely, the disarmament of the populace with respect to their means of resisting arbitrary power—and it was that evil that the constitution prohibited the state from repeating.[87] In this regard, the Tennessee Supreme Court was invoking the classic interpretive canon that statutes should be interpreted in light of the mischief or evil to which the legislature was responding.[88]

Aymette thus employed what had been the standard approach to mediating the relationship between natural rights, positive rights, and governmental power. In part, the court recognized clear historical limits on legislative power. The government, it held, could not generally or arbitrarily disarm the white male citizenry with respect to keeping weapons used by militias because of the historical scope of the positive right.[89] But otherwise legislatures had leeway to restrict natural rights, including the possession and use of firearms. Thus, although individuals had a natural right to carry a concealed Bowie knife, the legislature could restrict that right in order to maintain public safety. Here, the *Aymette* court was firmly rebutting the *Bliss* approach.[90] So long as statutes did not repeat these errors of the past or otherwise undermine the militia, the legislature was free to regulate weapons in promotion of the common good.

84. *Id.*

85. *Id.*

86. *Id.* at 159.

87. *See id.* at 157.

88. *See* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. (forthcoming) (describing the mischief rule and explaining how it is not the same as modern purposivist interpretation); Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 152–53 (2007) (stating that Blackstone and some of the Founders interpreted statutes based on "the evil a provision was intended to remedy"). For a similar approach in another right-to-bear-arms case decided the same year, see *State v. Reid*, 1 Ala. 612, 615 (1840) ("The evil which was intended to be remedied . . . was a denial of the right of Protestants to have arms for their defence . . . . Such being the mischief, the remedy must be construed only to extend so far as to effect its removal.").

89. I use the term "positive" right for consistency. The *Aymette* court's reference to "political" rights connoted a subset of positive rights relating to the exercise of political power, as with voting and jury service, whereas other positive rights, such as the rule against ex post facto laws, operated merely as procedural guarantees or as immunities against a particular type of governmental act.

90. *See Aymette*, 21 Tenn. at 160 (stating that the *Bliss* opinion "is far too limited for a just construction of the meaning of the clause of the constitution they had under consideration").

C. *State v. Buzzard* (Arkansas, 1842)[91]

As in *Bliss* and *Aymette*, the defendant in *Buzzard* argued that the state ban on concealed carry of weapons violated his right to keep and bear arms.[92] A two-to-one majority rejected this claim.[93]

Chief Justice Ringo began his opinion by returning to first principles. The legislature may restrict liberty to advance "the general interests or welfare of the whole community," he explained, and it had wide discretion to choose "the means best calculated to attain the object."[94] Thus, for example, although individuals have a natural right to speech, the legislature generally had authority to enact "such limitations as have been found necessary to protect the character and secure the rights of others, as well as to preserve good order and the public peace."[95] But an exception arose when "some fundamental law . . . expressly, or by necessary or reasonable implication, prohibited the Legislature from [doing so]."[96] This was textbook social-contract theory.

Turning to the right to keep and bear arms, Ringo defined the right broadly, perhaps implicitly recognizing it as a natural right.[97] Yet this right was subject to regulation under law.[98] The crucial question, then, was whether the right also entailed any specific limits on legislative power.

Ringo swiftly rejected the defendant's claim that the right to keep and bear arms disabled the state from regulating weapons.[99] History easily disproved this assertion, he reasoned, since governments had long regulated weaponry.[100] To be sure, the people had a right to defend themselves and their property. But this right was regulated by law and was inextricably tied to the role that individuals performed *as citizens* when defending life, liberty, and property through institutions like the militia.[101] The constitutional recognition of a right to keep and bear

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91. 4 Ark. 18 (1842).

92. The various opinions refer to the Second Amendment and to the Arkansas Bill of Rights, which stated that "the free white men of this State shall have a right to keep and bear arms in their common defense." *Id.* at 27 (internal quotations omitted). Both Chief Justice Ringo and Justice Lacy agreed that the two rights were comparable in scope, notwithstanding their textual differences. *See id.* at 27 (opinion of Ringo, C.J.); *id.* at 34 (Lacy, J., dissenting).

93. *See id.* at 27 (opinion of Ringo, C.J.) (concluding that the ban was not "invalid").

94. *Id*. at 19–20.

95. *Id.* at 20.

96. *Id.* at 19.

97. *See id.* at 21 (claiming that "the term 'arms' . . . probably includes every description of weapon or thing which may be used offensively or defensively").

98. *See id.* (arguing that "if the right . . . be subject to no legal control or regulation whatever, it might, and in time to come doubtless will, be so exercised as to produce in the community disorder and anarchy").

99. *See id.* at 28 (concluding that the ban was not "repugnant either to the Constitution of the United States or the Constitution of this State").

100. *See id.* at 22 (pointing out numerous "instances, in which the right to keep and bear arms has been . . . subjected to legal regulations and restrictions, without any question as to the power so exercised").

101. *Id.* at 23–24.

arms, Ringo thus insisted, referred specifically to bearing arms in the performance of this civic responsibility.[102] Consequently, the legislature could prohibit "keeping and bearing arms for any purpose whatever," but this power was "limited or withdrawn" insofar as it would effectively disarm the militia.[103]

In dissent, Justice Lacy relied largely on consequentialist reasoning, which was central to natural-rights discourse. A right limited to the context of militia service, Lacy insisted, would be "valueless and not worth preserving."[104] But a broader right of the people to keep and bear arms for any lawful purpose, without any legal diminution, was "the only security and ultimate hope that they have for the defense of their liberties and their rights."[105] Otherwise, he observed, a legislature could "control or regulate it in any manner that they think proper,"[106] thus allowing that right to be "not only abridged, but literally destroyed."[107]

Lacy's sweeping policy judgments fit comfortably within natural-rights reasoning. To identify the terms of the social contract, one had to reconstruct what the people would decide when forming a political society. Consequently, if legislative power to regulate weapons were truly destructive of the ends of the political society, then that power did not exist. Lacy's conclusion, however, was only as strong as his underlying policy assessment. He was not starting with a deontological, libertarian conception of rights.

Lacy also grounded the right to bear arms on the right of personal self-defense. "Has not every man a natural and an unalienable right to defend his life, liberty, or property, when a known felony is attempted to be committed upon either by violence or surprise?," he rhetorically asked.[108] "Upon what principle has he a right to use force to repel force, and even to slay the aggressor," Lacy then inquired, "if he can not make a successful repulsion otherwise?"[109] Preserving adequate means of defense, he insisted, called for a right to possess and carry arms.

From a natural-rights standpoint, however, this argument was delusory. The rationale of Lacy's critique—namely, the insufficiency of legal remedies as a way of preserving private rights—was *precisely the same* rationale that underpinned the Arkansas statute. Lacy's argument about lives potentially *saved* because of weapons was certainly relevant, but it failed to consider the equal worth of lives

102. *Id.* at 24.
103. *Id.* at 25.
104. *Id.* at 35 (Lacy, J., dissenting).
105. *Id.* at 36.
106. *Id.*
107. *Id.* at 35.
108. *Id.* at 37.
109. *Id.* at 38.

potentially *lost*. A natural-rights analysis should have evaluated both.[110] Nonetheless, Lacy's argument highlights the increased prominence of personal self-defense in nineteenth-century discourse.[111] And it reflects a tried and true way to avoid judicial balancing: prioritize some interests and simply ignore the others.

But Lacy's view of the right to keep and bear arms acknowledged limits. Should a person, "in the exercise of [constitutional rights], commit any unlawful act, and prejudice the rights of others," Lacy explained, "then he would be answerable for their unwarrantable use and indulgence."[112] Thus, for instance, "it would be unlawful so to keep arms and ammunition of any kind, as to endanger the lives or property of others."[113]

This was *yet another* approach to constraining legislative power. Lacy's method was far more limiting than history or general social-contractarian principles supported. But it also had the virtue of being more amenable to judicial enforcement. The majority's approach, as Lacy rightly pointed out, effectively left the legislature free to "control or regulate [weapons] in any manner that they think proper,"[114] which enabled the legislature to restrain liberty in ways that did not promote the public good.

D. *Nunn v. Georgia* (Georgia, 1846)[115]

The final case discussed here was an appeal of a conviction in Georgia for *openly* carrying a pistol.[116] Georgia's constitution did not mention a right to keep and bear arms, but the court deemed this omission irrelevant. The right was "one of the fundamental principles, upon which rests the great fabric of civil liberty," Judge Lumpkin wrote, and constitutional declarations of that right merely "reiterated a truth announced a century before, in the act of 1689."[117] This reasoning comported with the court's approach to other unenumerated rights.[118]

In terms of scope, Lumpkin described the right to keep and bear arms as a "right of the whole people, old and young, men, women and boys, and not militia only."[119] Moreover, that right covered "arms of every description, and not such

110. *Accord* Heyman, *supra* note 41, at 245–46. Importantly, the social-contractarian principles at work here put no importance on the idea of state action. The body politic had an affirmative responsibility to protect against private harm just as much as it had a negative responsibility not to unnecessarily restrict rights.

111. *See* CORNELL, *supra* note 4, at 137–208.

112. *Buzzard*, 4 Ark. at 41 (Lacy, J., dissenting).

113. *Id.* at 42.

114. *Id.* at 36.

115. 1 Ga. 243 (1846).

116. *See id.* at 243.

117. *Id.* at 249.

118. *See, e.g.*, Young v. McKenzie, 3 Ga. 31 (1847); *see generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1 (2007).

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

merely as are used by the militia."[120] It was this right, Lumpkin insisted that "originally belong[ed] to our forefathers, trampled under foot by Charles I and his two wicked sons and successors."[121] Thus, he concluded, "so far as the [Georgia statute] seeks to suppress the practice of carrying certain weapons secretly, that it is valid, inasmuch as it does not deprive the citizen of his natural right of self-defence, or of his constitutional right to keep and bear arms."[122]

Thus far, we have seen a variety of ways that judges navigated the relationship between natural rights, positive rights, and governmental power. *Nunn* adds another approach: *ipse dixit*. To be sure, Lumpkin had carefully surveyed legal precedents and explained why the fundamental law of Georgia recognized a right to keep and bear arms. But he provided no analysis whatsoever about the right's scope. Maybe his methodology was historical. Or perhaps it was based on a more formalist effort to draw a line between "prohibitions" and "regulations." Or maybe something else. The opinion, however, does not say anything about how the court arrived as its halfway conclusion. It refers to a "natural right of self-defense" and a "constitutional right to keep and bear arms," but Lumpkin did not explain how either concept limited legislative power.[123]

From a judicial-process standpoint, *ipse dixit* has clear drawbacks. From a historical standpoint, however, it had obvious appeal for judges struggling to apply underdeterminate rules. *Ipse dixit* did not, of course, offer a way of avoiding the jurisprudential problem. But it at least enabled Lumpkin to keep it concealed, particularly when shrouded in an erudite discussion of prior cases and the nature of American constitutional rights.

In this regard, it is worth remembering *Nunn's* jurisprudential context. Previous studies have argued that the Georgia Supreme Court was trying to chart a middle path that reflected contemporary public opinion about weapons regulation.[124] And that may be right. But we should not forget that Lumpkin and his colleagues had a broader interest in articulating limits on the police powers in other ways—including protection of economic rights.[125] *Nunn* did not involve those other rights directly, of course. But broader concerns were at play.

III

CONCLUSION

Like grammatical rules, the conventions of social-contract theory shaped discourse about the right to keep and bear arms, even when unstated. But what can Antebellum right-to-bear-arms cases tell us about the topic of this symposium—whether there is a right to carry weapons outside the home? Modern norms of

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *See, e.g.*, Leider, *supra* note 5, at 1610.

125. For discussion of various Georgia Supreme Court decisions that relied on similar reasoning, see Mazzone, *supra* note 118, at 37–40, 43, 48–50.

judging continue to prize historical analysis and disfavor judicial lawmaking, so it would be nice if these cases supplied a simple answer. But I am skeptical that they can.

To see why, consider the logic of Judge O'Scannlain's opinion in *Peruta v. County of San Diego*.[126] The question presented was whether the Second Amendment protects a right to carry handguns outside of the home.[127] O'Scannlain explained that courts must approach questions like this by "look[ing] to the original public understanding of the Second Amendment right as evidence of its scope and meaning."[128] And he recognized, "in a broad sense," that under an originalist approach "every historical gloss on the phrase 'bear arms' furnishes a clue of that phrase's original or customary meaning."[129] Nonetheless, he explained,

> with *Heller* on the books, the Second Amendment's original meaning is now settled in at least two relevant respects. First, *Heller* clarifies that the keeping and bearing of arms is, *and has always been*, an individual right. Second, the right is, *and has always been*, oriented to the end of self-defense. Any contrary interpretation of the right, whether propounded in 1791 or just last week, is error.[130]

"What that means for our review," O'Scannlain observed, "is that historical interpretations of the right's scope are of varying probative worth" depending on their consistency with *Heller*'s understanding of Second Amendment history.[131] Arguments by those who denied an individual right to bear arms were "of no help."[132] And even when historical figures supported an individual right to bear arms, their discussions of the right's scope were "only marginally useful" when they "embrace[d] the premise that the right's purpose is deterring tyranny" rather than enhancing self-defense.[133] "Since one needn't exactly tote a pistol on his way to the grocery store in order to keep his government in check," O'Scannlain colorfully opined, "it is no surprise (and, thus, of limited significance for purposes of our analysis) when these courts suggest that the right is mostly confined to the home."[134]

Describing historical figures as having erred in their constitutional views might appear contrary to the historical method. But it seems perfectly sensible to me that modern judges—who constantly have to assess the persuasiveness of conflicting factual evidence and legal opinions—should disregard an argument or conclusion that rests on a faulty premise.[135] This logic, however, is precisely the reason for my skepticism about the modern usefulness of Antebellum right-to-

126. 742 F.3d. 1144 (9th Cir. 2014), *rev'd en banc*, 824 F.3d. 919 (9th Cir. 2016).
127. *Id.* at 1147.
128. *Id.* at 1153 (citations omitted).
129. *Id.* at 1155.
130. *Id.* (citations omitted).
131. *Id.*
132. *Id.* at 1156.
133. *Id.*
134. *Id.*
135. *See generally* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809 (2019) (discussing the relationship between historical and originalist methodology).

bear-arms decisions. All of these decisions rested on embedded assumptions about facts and law that we would now reject.

Some of these assumptions relate to the judicial role. In *Bliss*, for instance, the Kentucky Court of Appeals assumed that constitutional protections of rights must be all or nothing.[136] One might prefer that view, but it runs against nearly all modern rights jurisprudence, including *Heller* itself.[137] Yet so does the broad deference to legislative judgments exhibited in cases like *Aymette* and *Buzzard*.[138]

Other assumptions relate to facts. Consider Judge Lacy's dissent in *Buzzard*. If gun control actually leads to tyranny,[139] the opinion has much to recommend it from the standpoint of natural-rights reasoning. But while many people may agree with that proposition, its empirical foundation is hardly clear two hundred years later.

In fact, all of the judicial opinions discussed in this Article contain embedded assumptions that we do not share. Back then, for instance, citizens played a direct role in defending themselves and the state through the *posse comitatus* and the militia, whereas professionalized police forces and the armed services perform these functions today.[140] Moreover, *all* of the foregoing cases came out of the South, which had a unique culture with respect to firearms. Southern hostility toward the concealed carrying of weapons, for instance, was shaped by norms of masculinity and honor that treated concealing weapons as unmanly and dishonorable.[141] And when we consider attitudes toward the rights of the male citizenry, we cannot forget the ever-present fear of slave revolts that shaped the Southern mindset.[142] Natural-rights reasoning made all of these factors highly salient.

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136. *See* Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 91–92 (1822) (stating that "whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution").

137. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (recognizing traditional categories of permissible regulation that have no apparent connection to Founding-Era history).

138. The modern attitude toward judicial enforcement of constitutional rights is perhaps best reflected in Justice Jackson's statement that judges have a duty "of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century." W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

139. *See* State v. Buzzard, 4 Ark. 18, 36 (Ark. 1842) (Lacy, J., dissenting) (arguing that depriving men of the right to keep and bear arms "amounts to tyranny and oppression").

140. *But see* David B. Kopel, *The* Posse Comitatus *and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 764 (2014) ("[A]lmost all states continue the longstanding legal tradition that armed citizens may be summoned to aid of law enforcement.").

141. *See* Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 126 (2015) (stating that "[a]s a result of the distinct cultural phenomena of . . . honor, Southern men carried weapons" (citations omitted)); *see also* Robert J. Cottrol & Raymond T. Diamond, *Never Intended to Be Applied to the White Population: Firearms Regulation and Racial Disparity*, 70 CHI.-KENT L. REV. 1307, 1318–23 (1995) (stating that "the use of arms to resolve personal disputes . . . helped lend a different flavor to the Southern experience with arms" and explaining how that experience manifested itself in the courts).

142. *See* Ruben & Cornell, *supra* note 141, at 126 (stating that "Southern men carried weapons . . . as a protection against the slaves" (citations omitted)).

My goal here is not to engage with broader debates over the merits of originalism. Rather, my point is that accurately understanding the content of law at some point in the past requires appreciating the imbedded assumptions in earlier decisions and then considering whether those assumptions were themselves part of the law. This is important even when reading modern decisions. As Michael McConnell puts it, "[w]hen translating constitutional text into judicially enforceable doctrine, a responsible court necessarily takes into consideration not only the meaning of the constitutional provision at issue, but also the institutional implications of the doctrine for the allocation of power between the courts and the representative branches."[143] Failure to appreciate this ordinary feature of judging can lead to serious category errors even when interpreting modern precedents.[144] This problem is far more serious, though, when reading decisions from two hundred years ago—written at a time when underlying conceptions of rights were sometimes radically different than our own.

Unpacking the earliest right-to-bear-arms decisions does reveal that the right to possess and carry weapons extended beyond the home.[145] But recognition of a natural right to possess and carry weapons does not answer questions about the scope of governmental power. The enforcement of these rights, many Americans thought, was coterminous with ensuring limits on the police powers. And assessing those limits required a host of embedded judgments about things like the dangers of private arms-bearing, the role of citizens in law enforcement, and the potential perils of disarmament. Yet even as judges increasingly saw themselves as arbiters of constitutional limits, norms of judicial behavior counseled against open reliance on the policy judgments that natural-rights reasoning required. The wide variety of judicial responses in early right-to-bear-arms cases reflect this tension.

At the same time, the scope of the fundamental positive right to keep and bear arms was still being worked out, too. The right to keep and bear arms was widely recognized as a historically grounded rule—not something created through its enumeration in state and federal constitutions. Its force and meaning therefore depended on its historical scope—not on its textual enumeration. But history did not supply clear answers about how the right should apply in new circumstances.

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143. Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 155 (1997); *see also* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 196–202 (1988).

144. *See generally* Masur & Ouellette, *supra* note 13 (discussing judicial failures to appreciate the interpretive assumptions in earlier decisions).

145. This Article focuses on historical understandings of rights—not on the linguistic meaning of the Second Amendment. Modern originalists generally search for the semantic meaning of written constitutional texts. In my view, this approach significantly departs from the way that Americans conceptualized most of their rights two centuries ago. The text of a constitutionally enumerated right might be probative of its meaning, but it was generally not *constitutive* of the right. *Cf.* Stephen E. Sachs, *Originalism without Text*, 127 YALE L.J. 156, 160 (2017) (recognizing the potential difference between written law, on the one hand, and written texts that refer to unwritten law, on the other).

Nor does history tell us what to do now. Founding-Era judges generally dealt with constitutional uncertainty by deferring to democratic decisions. Judicial review existed, to be sure, but it was highly constrained. As judges became more involved in enforcing underdeterminate natural and positive rights, however, they increasingly had to make choices, even though accepted methods of legal reasoning prevented expressing the contingency of their decisions. The Antebellum right-to-bear-arms cases thus presaged a central dilemma of American constitutional jurisprudence ever since.