

Restrictions "Our Ancestors Would Never Have Accepted": The Historical Case Against Assault Weapon Bans

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Restrictions “Our Ancestors Would Never Have Accepted”: The Historical Case Against Assault Weapon Bans

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ABSTRACT

The debate around what types of “arms” the Second Amendment protects is revitalized in the wake of *Bruen*’s renewed focus on our historical tradition as the determinative factor in Second Amendment cases. Thus far, several district courts have upheld state “assault weapon” bans in part by relying on an overly sanitized version of the Second Amendment that our founders, as well as their immediate descendants in the 19th century, would consider unrecognizable. While prior generations of Americans undoubtedly believed self-defense, hunting, and sport were all important components of the right to keep and bear arms, an overriding purpose frequently dominated their discussion of that right: preventing and responding to tyranny. This Article aims to bring renewed attention to the overwhelming amount of founding-era and 19th-century commentary that emphasizes the importance of the Second Amendment right as a tool to resist tyranny. In light of the clear history, so-called “assault weapon” bans and similar laws are incompatible with our historical tradition and should be struck down.

I. INTRODUCTION

When it comes to the scope of the Second Amendment’s protection of the individual right to keep and bear arms, a key question courts now face is which specific “arms” the text of the Second Amendment protects.¹ Most courts, including the United States Supreme Court, have agreed handguns are protected due to their popularity among Americans as the “quintessential self-defense weapon.”² However, when the discussion shifts to common semiautomatic rifles such as the AR-15 and the like, the debate is far more contentious.

Some states, like California and Illinois, have argued that such “arms” are not covered by the Second Amendment’s text, and so the government can ban many of the most popular firearms in the country, even though they are owned by millions of Americans for various lawful purposes.³

¹ See 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.”).

² *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

³ Even just going by the most high-profile firearm affected by such bans, the AR-15, there can be no doubt it is commonly owned for lawful purposes. According to recent research by the Washington Post, 6% of American adults (approximately 16 million citizens) own an AR-15-style rifle. Emily Guskin, Aadit Tambe & Jon Gerberg, *Why Do Americans Own AR-15s?*, WASH. POST (May 22, 2023, 6:12 AM), https://www.washingtonpost.com/nation/interactive/2023/american-ar-15-gun-owners/?itid=co_enhanced_ar15_0 [<https://perma.cc/DU4M-V92E>].

The Supreme Court’s decisions in *District of Columbia v. Heller* and *New York State Rifle & Pistol Ass’n Inc., v. Bruen* require the government to use historical analogue gun laws to justify a legislature’s modern laws.⁴ Unable to find any history of bans on commonly owned firearms, state governments have turned to 19th-century regulation of weapons such as Bowie knives, various blunt weapons, and sometimes small concealable pistols to try to justify modern gun laws banning common rifles.⁵ For its part, the Supreme Court has only tiptoed around the topic of the Second Amendment’s anti-tyranny purpose. In *Heller*, the Court acknowledged early generations of Americans “understood across the political spectrum that the [Second Amendment] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”⁶ But in the years since *Heller*, the Court has been silent on this history, even as *Bruen* corrected the errant circuit courts by returning the focus to historical tradition.⁷

The historical laws the state governments cite typically did not outright ban the possession of certain weapons. Rather than banning the possession of these items completely, these laws generally addressed the manner of carry,⁸ or specific places where possession can be restricted.⁹ Nonetheless, some state governments argue the historical restrictions on the carry of “unusually dangerous” weapons are the equivalent of laws regulating modern “weapons of war” (a euphemism referring to semiautomatic rifles

⁴ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022). (“We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’ [citation omitted].”); *Heller*, 554 U.S. at 634 (rejecting the application of a “judge-empowering interest balancing inquiry”).

⁵ David Kopel, *The Legal History of Bans on Firearms and Bowie Knives Before 1900*, REASON MAG. (Nov. 20, 2022 12:55 PM), <https://reason.com/volokh/2022/11/20/the-legal-history-of-bans-on-firearms-and-bowie-knives-before-1900/> [https://perma.cc/KMR9-74R8].

⁶ *Heller*, 554 U.S. at 599.

⁷ *Bruen*, 142 S. Ct. at 2127 (“Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context.”).

⁸ For example, Georgia made it illegal to carry, “unless in an open manner and fully exposed to view, any pistol, (except horseman’s pistols,) dirk, sword in a cane, spear, bowie-knife, or any other kind of knives, manufactured and sold for the purpose of offence and defence.” GA. CODE § 4413 (1861).

⁹ See, e.g., 1870 Tex. Gen. Laws 139, ch. 73 (Prohibited carrying “any gun, pistol, bowie-knife or other dangerous weapon, concealed or unconcealed,” within a half mile of a polling place while the polls are open).

and their magazines).¹⁰ Because, they contend, the AR-15 and other semi-automatic firearms are such “weapons of war,” the government can restrict or outright ban citizens from possessing them. As California Attorney General Rob Bonta wrote in a recent brief defending California’s “assault weapon” law, the banned rifles are most useful in military service; therefore, as weapons of war, they “cannot be deemed ‘in common use’ for lawful purposes.”¹¹ In other words, California’s contention, is that the banned rifles are not “arms” that are within the scope of the Second Amendment.¹²

An Oregon district court, ruling on a challenge to the state’s large capacity magazine law, agreed that these rifles are not “arms” under the protection of the Second Amendment.¹³ The court declared the only “lawful purpose” that receives any constitutional protection is armed self-defense, and any arms not actively used for that purpose may be banned.¹⁴ This view would provide protection to handguns given they are most often used in self-defense incidents but little else.¹⁵ An appellate panel in the Seventh Circuit went further, ruling that “military weapons lie outside the class of Arms to which the individual right applies.”¹⁶

Arguments from these California, Oregon, and Illinois cases reveal a profound misunderstanding of our historical tradition, not to mention what arms the Second Amendment’s text covers. They fail to examine what both Americans of the founding generation as well as Americans of the 19th century had to say about the Second Amendment. For our

¹⁰ See *Duncan v. Bonta*, No. 17-CV-1017-BEN (JLB), 2023 WL 6180472, at *16 (S.D. Cal. Sept. 22, 2023) (referring to the State of California arguing that weapons “most useful in military service” can be banned).

¹¹ Defendant’s Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 12, *Rupp v. Bonta*, No. 8:17-cv-00746-JLS-JDE (C.D. Cal. May 26, 2023), ECF No. 149-1.

¹² See *id.*

¹³ *Or. Firearms Fed’n v. Kotek Or. All. for Gun Safety*, No. 2:22-CV-01815-IM, 2023 WL 4541027, at *30 (D. Or. July 14, 2023).

¹⁴ *Id.* at *30.

¹⁵ See WILLIAM ENGLISH, 2021 NATIONAL FIREARMS SURVEY: UPDATED ANALYSIS INCLUDING TYPES OF FIREARMS OWNED 1 (2022), (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494) (“Handguns are the most common firearm employed for self-defense (used in 65.9% of defensive incidents) . . .”).

¹⁶ *Bevis v. City of Naperville*, No. 23-1353, 2023 WL 7273709, at *14 (7th Cir. Nov. 3, 2023). The dissent noted some considerable problems with the majority’s view, including how popular handguns would be unprotected by the Second Amendment because the military adopted them. *Id.* at *36 (Brennan, J., dissenting). Indeed, the Seventh Circuit’s standard would leave muskets unprotected by the Second Amendment in 1791. See *id.* at *14. After all, they were military arms that the Continental Army had used to defeat the British.

predecessors, at least one other purpose was just as important as self-defense: the ability to resist tyranny.¹⁷

Simply put, this Article examines American historical tradition to show that the commonly owned civilian firearms of the era that are also optimal in warfare are the *most protected of all* when it comes to firearm regulation. An overwhelming amount of historical commentary bears this out. Part II presents a few modern-era judicial opinions to demonstrate the idea that the Second Amendment is meant as a last resort against tyranny.¹⁸ Part III includes a sampling of 18th-century sources which confirm the founding generation saw the Second Amendment as a defense against tyranny.¹⁹ Part IV focuses on 19th-century commentary, which explains “arms of modern warfare” are most protected by the Second Amendment.²⁰ Finally, Part V briefly looks at how these principles were put into practice by the early civil rights movement in the Jim Crow era.²¹

II. THE SECOND AMENDMENT IS INTENDED TO BE A FINAL GUARD AGAINST TYRANNY

There is no doubt the Second Amendment protects gun owners for the lawful purposes of hunting, sport shooting, recreation, and self-defense.²² However, it *also* exists as a final defense against tyranny, whether

¹⁷ Resisting tyranny is itself also a form of self-defense, but on a more societal level. To avoid confusion, for the purposes of this Article the phrase “self-defense” refers to *personal* self-defense only. However, the reader should keep in mind that “[t]he right of self-preservation, in turn, was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government.” *Parker v. District of Columbia*, 478 F.3d 370, 383 (D.C. Cir. 2007), *aff’d sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁸ See *infra* Part II.

¹⁹ See *infra* Part III.

²⁰ See *infra* Part IV.

²¹ See *infra* Part V.

²² This is not a close question, as numerous courts and judges have agreed that the Second Amendment applies to more than just strictly self-defense uses. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008) (discussing “lawful purposes *like* self-defense,” thereby implying the existence of other such lawful purposes); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (striking down Chicago ordinance that barred firing ranges within city limits, and stating that “[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use.”); *Heller v. District of Columbia*, 670 F.3d 1244, 1260 (2011) (“Of course, the [Supreme Court] also said the Second Amendment protects the right to keep and bear arms for other ‘lawful purposes,’ such as hunting”); *Friedman v. City of Highland Park*, 577 U.S. 1039, 1039–40 (2015) (Thomas, J., dissenting) (discussing other lawful purposes such as hunting and target shooting). Even the dissenting opinion in *Bruen* seemed to acknowledge this when it explained that “Some Americans use guns for legitimate purposes, such as sport (e.g., hunting or target shooting), certain types of employment (e.g., as a private security guard), or self-defense.” N.Y. State Rifle & Pistol

that tyranny comes in the form of a foreign invader or a homegrown autocrat who attempts to overthrow our constitutional order. Several judges of the modern era embrace the need for a failsafe against tyranny. For example, in 2003, the Ninth Circuit erroneously ruled the Second Amendment did not recognize an individual right to keep and bear arms.²³ But a dissenting judge whose own family had fled the Soviet Bloc explained:

All too many of the other great tragedies of history—Stalin’s atrocities, the killing fields of Cambodia, the Holocaust, to name but a few—were perpetrated by armed troops against unarmed populations If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

My excellent colleagues have forgotten these bitter lessons of history. The prospect of tyranny may not grab the headlines the way vivid stories of gun crime routinely do. But few saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Fortunately, the Framers were wise enough to entrench the right of the people to keep and bear arms within our constitutional structure. The purpose and importance of that right was still fresh in their minds, and they spelled it out clearly so it would not be forgotten.²⁴

Ass’n v. Bruen, 142 S. Ct. 2111, 2167 (2022) (Breyer, J., dissenting). Indeed, if a State could ban any firearms except those most commonly used for self-defense, then many hunting rifles as well as long-barrel shotguns could be banned without violating the Second Amendment.

²³ *Silveira v. Lockyer*, 312 F.3d 1052, 1056 (9th Cir. 2002), *as amended* (Jan. 27, 2003).

²⁴ *Silveira v. Lockyer*, 328 F.3d 567, 569–70 (9th Cir. 2003) (Kozinski, J., dissenting). Several judges of the Supreme Court of the State of Washington, another state that has recently banned common rifles, also previously agreed with this view. “The

Much more recently, an Illinois district court agreed, and enjoined Illinois’s own assault weapons ban. The court pointed to *Heller* for support:

During the founding era, “[i]t was understood across the political spectrum that the right . . . might be necessary to oppose an oppressive military force if the constitutional order broke down.’ Therefore, although ‘most undoubtedly thought [the Second Amendment] even more important for self-defense and hunting’ the additional purpose of securing the ability of the citizenry to oppose an oppressive military, should the need arise, cannot be overlooked.²⁵

In *Heller*, the Supreme Court, while careful to note there is no unfettered right to own *any* military weapon and suggesting that modern technology may now limit the capabilities of a citizen militia, did not reject the possibility of defending against an oppressive government:

[T]he conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit

right to keep and bear arms has long been recognized by the common law as essential to enable individuals to resist tyranny and defend themselves.” *State v. Schelin*, 55 P.3d 632, 645 (Wash. 2002) (Sanders, J., dissenting). And years later, a Ninth Circuit panel would acknowledge that the history supported Judge Kozinski’s dissent as well. “Early American legislators and commentators understood the Second Amendment and its state predecessors as protecting Americans against tyranny and oppression.” *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 686 (9th Cir. 2017). A Sixth Circuit judge likewise acknowledged that “the Founding-era fears of tyranny and defenselessness . . . provided the impetus behind the Second Amendment.” *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 707 (6th Cir. 2016) (Batchelder, J., concurring).

²⁵ *Barnett v. Raoul*, No. 3:23-CV-00209-SPM, 2023 U.S. Dist. LEXIS 74756, at *19–20 (S.D. Ill. Apr. 28, 2023), *vacated sub nom.*, *Bevis v. City of Naperville*, Nos. 23-1353, 23-1793, 23-1825, 2023 U.S. App. LEXIS 29332 (7th Cir. Nov. 3, 2023) (quoting *Heller*, 554 U.S. at 599). Another District Court recently agreed with the Barnett court, explaining that “[o]nce one understands the history of tyrants resorting to taking away people’s arms to suppress political opposition, *Heller* explains, one can see that the militia clause fits perfectly with the operative clause.” *Duncan v. Bonta*, No. 17-CV-1017-BEN (JLB), 2023 WL 6180472, at *6 (S.D. Cal. Sept. 22, 2023).

between the prefatory clause and the protected right cannot change our interpretation of the right.²⁶

None of this is to say the United States is near a situation *today* where violent armed resistance is necessary to protect our constitutional order. Hopefully, no such day ever comes. But this “doomsday provision” is an inseparable part of why the Second Amendment exists. And people do not typically resist a tyrant with small pistols or slow-firing hunting rifles, which even governments have acknowledged when faced with invasion and distributing weapons to civilians.²⁷ Resistor do it with the prevailing common long guns of the day—AR-15s and other similar so-called “assault weapons” that are owned by millions of regular citizens across the country.²⁸ These are “the sorts of lawful weapons that they possessed at home”²⁹ that would be brought to bear in the horrible circumstance of a tyrant upsetting our constitutional order or a foreign invader occupying our country.³⁰

III. THE FOUNDERS AND THEIR CONTEMPORARIES SAW THE SECOND AMENDMENT AS A DEFENSE AGAINST TYRANNY

The idea the Second Amendment is intended to be a protection against tyranny is derided by modern-day gun control advocates as an

²⁶ *Heller*, 554 U.S. at 627–28. If anything, the Court may have been a bit too pessimistic on the capabilities of guerilla fighters armed mostly with only small arms. Given the modern military’s failure to bring the Taliban to heel across two decades of fighting despite massive technological advantages, it’s clear common rifles are far from useless in modern-day insurgencies, even against long odds.

²⁷ When faced with Russian invasion, the Ukrainian government quickly distributed 10,000 automatic rifles to civilians so they could help resist the invaders. Stephen Gutowski, *Ukraine Distributes 10,000 Automatic Rifles to Civilians as Capitol City Fights Russian Invasion*, RELOAD (February 24, 2022, 5:44 PM), <https://thereload.com/ukraine-distributes-10000-automatic-rifles-to-civilians-as-capitol-city-fights-russian-invasion/> [<https://perma.cc/R8QB-BU67>].

²⁸ No doubt such firearms in the wrong hands can—and have—led to tragic results. States can implement various measures to reduce the likelihood of such tragedies by stopping violent criminals and others from getting AR-15s or other weapons. But banning the most popular rifles in the country goes too far. “We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the [government] a variety of tools for combating that problem But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008).

²⁹ *Id.* at 627.

³⁰ Arguably, their mere existence in civilian hands lessens the odds of tyranny in the first place. “[A]s an anti-tyranny tool, widespread citizen arms ownership works most effectively when it functions as a deterrent.” David B. Kopel, *Guns Kill People, and Tyrants with Gun Monopolies Kill the Most*, 25 GONZ. J. INT’L L. 29, 55 (2021).

“insurrectionist theory,” invented by the NRA in the 1970s.³¹ That is hogwash. The “theory” was not invented by the NRA, nor is it a fringe theory. It is instead the most historically supported view of the Second Amendment’s purpose, going back to even before our founding.

Blackstone noted the right to keep and bear arms is a “natural right of resistance and self-preservation, when the sanctions of society and law are found insufficient to restrain the violence of oppression.”³² The Supreme Court itself, in explaining what “arms” meant in the context of the Second Amendment, pointed to the 1773 edition of Samuel Johnson’s dictionary, which defined arms as “[w]eapons of offence, or armour of defence.”³³ The very definition of the word “arms” in the relevant time period thus encompasses “offence” and cannot be limited strictly to firearms most useful for self-defense as various gun-banning states now argue.³⁴

The Bill of Rights was written by people who had just violently overthrown their former government. They were understandably very fearful the new government they were forming would likewise become tyrannical. Because of their recent fight for freedom, the authors included the Second Amendment, at least in part, as a fail-safe.

The authors of the Bill of Rights said so themselves. James Madison tried to assuage fears of a tyrannical federal army running roughshod over the people by explaining that because Americans had the “advantage of being armed,” which people of other countries did not have, they could form citizen militias that could counter any regular army:

³¹ See, e.g., Olivia Li, *The Gun Rights Rhetoric That Helped Seed the Insurrectionist Mindset*, THE TRACE, (January 9, 2021), <https://www.thetrace.org/2021/01/gun-rights-rhetoric-insurrectionist-mindset-capitol-trump/> [<https://perma.cc/MH48-N6YQ>] (“There’s a theory of the Second Amendment called the insurrectionist theory. According to it, the Second Amendment preserves civilians’ right to bear arms so that they can take up arms against a tyrannical government, should the need arise. . . . Now, there are other historians who would say that that’s a tendentious reading of the history, at best, and that really nothing about the idea of the Second Amendment is actually designed to empower the people to overthrow the government. The insurrectionist theory wasn’t part of modern legal discourse until the 1970s, at the earliest. . . . That was when the National Rifle Association went from being a sportsman’s organization to a very strong and inflexible gun-rights organization.”).

³² 2 WILLIAM BLACKSTONE, COMMENTARIES *139.

³³ *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (citing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 106 (4th ed. 1773)).

³⁴ Similarly, an 1852 book by Joseph Bartlett Burleigh explained “[The term] *Arms* . . . is used for whatever is intentionally made as an instrument of offence . . .” JOSEPH BARTLETT BURLEIGH, THE AMERICAN MANUAL: CONTAINING A BRIEF OUTLINE OF THE ORIGIN AND PROGRESS OF GOVERNMENT, THE NATURE OF LIBERTY, AND THE LAW OF NATIONS 31 (1852). He contrasted that from the term “weapons”, which are instruments of offence or defense. *Id.* “We say fire-arms, but not fire-weapons; and weapons offensive or defensive, but not arms offensive or defensive.” *Id.*

Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. *Besides the advantage of being armed, which the Americans possess over the people of almost every other nation*, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.³⁵

Similarly, Alexander Hamilton added, should a large army ever be raised, “that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens.”³⁶

Tench Coxe, a friend of Madison and himself a delegate to the Constitutional Convention, in discussing the Second Amendment, wrote “civil rulers . . . may attempt to tyrannize,” and rulers might use the power of the military to injure fellow citizens, thus, “the people are confirmed by the article in their right to keep and bear their private arms.”³⁷ He had earlier also written that “Congress ha[s] no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birthright of an American.”³⁸

³⁵ THE FEDERALIST NO. 46 (James Madison) (emphasis added).

³⁶ THE FEDERALIST NO. 29 (Alexander Hamilton).

³⁷ *Tench Coxe*, JAMES MADISON RSCH. LIBR. & INFO. CTR., https://www.madisonbrigade.com/t_coxe.htm [<https://perma.cc/E4UC-8QC7>] (last visited Nov. 22, 2023) (quoting Tench Coxe in ‘Remarks on the First Part of the Amendments to the Federal Constitution’ under the Pseudonym ‘A Pennsylvanian’ in the Philadelphia Federal Gazette, June 18, 1789, at 2 col. 1).

³⁸ *Id.* (quoting Tench Coxe, The Pennsylvania Gazette, Feb. 20, 1788). Tench Coxe would reaffirm these views again in 1813, when he wrote that the “militia” referenced in the Second Amendment “embraces all the free white males of the proper ages.” Calling

Noah Webster, the famous early American lexicographer and a member of the Connecticut House of Representatives from 1802–1807, was also a strong advocate for adoption of the United States Constitution. He wrote, “[b]efore a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe.”³⁹ Unlike in Europe, the United States is less susceptible to tyrants enforcing unjust laws “because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States.”⁴⁰

William Patterson, who held many positions of power in the founding era resulting in him being one of the first Associate Justices of the Supreme Court from 1793 until his death in 1806,⁴¹ wrote a militia is “the people themselves prepared to act as soldiers for the purpose of resisting oppression and securing their rights. . . . Tyrants dread freemen, when freeman not only have arms in their hands, but know how to use them.”⁴²

St. George Tucker, who was later appointed to the federal bench by President Madison,⁴³ wrote an American version of Blackstone’s *Commentaries on the Law of England*, which was the first treatise for American

it “the army of the constitution”, Coxe wrote that “[t]hey have all the right, even in profound peace, to purchase, keep and use arms of every description.” 1 DAVID BREWSTER, SECOND AMERICAN EDITION OF THE NEW EDINBURGH ENCYCLOPEDIA pt. 2, at 652 (1813) (citing Tench Coxe). Coxe also referred to the “right to own and bear arms” as one of the constitutional liberties “extended to all the people of the United States.” *Id.*

³⁹ NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA (1787) reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 56 (Paul Ford ed., 1888).

⁴⁰ *Id.*

⁴¹ From 1776 to 1783, Patterson was the Attorney General of the then-colony of New Jersey. After the revolution, he represented New Jersey in the Constitutional Convention, where he proposed the “New Jersey Plan.” While the plan was rejected, it helped precipitate the Connecticut Compromise that gave us our bicameral legislature. He then served as one of New Jersey’s first two Senators before becoming resigning from the Senate so that he could serve as Governor of New Jersey, a job he retained from 1790 until President Washington appointed him to the Supreme Court in 1793. Richard P. McCormick, *Political Essays of William Patterson*, 18 J. RUTGERS U. LIBR. 38, 38 (1955); see also *Who Was William Patterson?*, WILLIAM PATTERSON UNIV., https://www.wpunj.edu/about-us/history/william-patterson_bio.html (last accessed Nov. 22, 2023).

⁴² McCormick, *supra* note 41, at 41.

⁴³ David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYUL REV. 1359, 1373 (1998) (citing ST. GEORGE TUCKER, THE POEMS OF HENRY ST. GEORGE TUCKER OF WILLIAMSON, VIRGINIA 1752-1827 5 (William S. Prince ed., 1977)).

lawyers on general common law.⁴⁴ Tucker explained the Second Amendment

may be considered as the true palladium of liberty . . . in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.⁴⁵

While he wrote just after the founding era, Joseph Story, who served as an associate justice of the Supreme Court from 1812 to 1845, cautioned that “[o]ne of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms.”⁴⁶

Those quotes represent just a handful of examples. Covering the many founding-era Americans who spoke on the dangers of tyranny and the merits of an armed populace would take an entire book.⁴⁷ Yet the examples presented should be enough to make clear the founding generation of Americans were deeply concerned with the prospect of tyranny, and the Second Amendment was, at least in part, a response to those concerns.

The Supreme Court summarized when it came to founding era views, “when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”⁴⁸ The founders and their contemporaries would thus consider it utterly bizarre that a state

⁴⁴ *Id.* at 1372.

⁴⁵ 1 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, pt. 1, at 300 (1803). Tucker’s adoptive son, Henry St. George Tucker, would share these views as well. To him, the right of bearing arms is “among [the] most valuable privileges, since it furnishes the means of resisting, as a freeman ought, the inroads of usurpation.” *See* Kopel, *supra* note 46, at 1400 (citing David Cobin & Paul Finkelman, *Introduction* to 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAW OF VIRGINIA, 42–43 (3d ed. 1846)).

⁴⁶ JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1842).

⁴⁷ For more on the founding era history of the Second Amendment, *see generally* STEPHEN P. HALBROOK, THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS (2008).

⁴⁸ *Heller*, 554 U.S. at 598.

government believes that the Second Amendment does not protect the types of common firearms most useful for that purpose.⁴⁹

IV. LATER 19TH CENTURY COMMENTARY CONFIRMS THE “ARMS OF MODERN WARFARE” ARE PROTECTED BY THE SECOND AMENDMENT

Given the protective purpose of the Second Amendment, excluding the right to bear so-called modern “weapons of war” makes no historical sense, particularly in a country where there is a long tradition of widespread lawful ownership of such arms.⁵⁰ The American tradition of permissive ownership perpetuates a need for modern ownership because citizens must be able to effectively protect themselves.

Arms analogous to the modern-day AR-15 and similar rifles certainly existed in the 19th century. Around the time of the Civil War, new technologies yielded mass-produced rifles that could be fed self-contained metallic cartridges from a magazine.⁵¹ Using a lever action, arms like the Henry repeater allowed users to fire as fast as they could operate the lever and pull the trigger—a rate of 15 rounds in 10.8 seconds for the Henry.⁵²

The Henry repeater was obviously a dramatic technological leap over the single-shot firearms that came before. By the end of the Civil War, repeating, cartridge-fed firearms were ubiquitous, yet never regulated or banned. Many of the most popular rifle models had magazines that held more than ten or fifteen rounds, while revolvers gave Americans five or

⁴⁹ While some may argue that the founders may have thought differently had they known about the capabilities of modern firearms, such an argument assumes that the founders could not envision technological advancement in firearms. In fact, not only could they envision such advancement, but they also almost purchased repeating arms. Joseph Belton invented the Belton flintlock musket some time prior to 1777, which could fire eight rounds before reloading. The Continental Congress commissioned Belton to build or modify 100 muskets for the military on May 3, 1777, but the order was cancelled on May 15, when Congress received Belton’s bid and considered it far too expensive. U.S. CONT’L CONG., JOURNAL OF THE CONTINENTAL CONGRESS (1777), *reprinted in* JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 V7 324, 361 (Worthington Chancy Ford ed., 1907).

⁵⁰ *Staples v. United States*, 511 U.S. 600, 610 (1994) (referring to the AR-15 semiautomatic rifle in the context of discussing the “long tradition of widespread lawful gun ownership” in America.); *see also* *United States v. Williams*, 872 F.2d 773, 776–77 (6th Cir. 1989) (holding that because magazine-fed semiautomatics like the AKS rifle are “quite prevalent in today’s society” and often look identical to automatic versions, “the government was required to prove defendants’ knowledge of the weapon’s automatic quality”).

⁵¹ David B. Kopel, *The History of Firearms Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 854–55 (2015).

⁵² NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT 437 (3d ed. 2018).

six rounds in a compact package. These firearms were therefore exponentially more capable than the single-shot flintlock rifles and pistols the founding generation had used. Yet despite this tremendous jump in individual firepower, no state outright banned lever-action rifles or revolvers.⁵³

Undoubtedly, the fact that the most clearly analogous firearms to modern rifles went almost entirely unregulated in the 19th century is a major problem for “assault weapon” bans under *Bruen*.⁵⁴ That is why states like California compare their contemporary rifle bans to 19th-century restrictions pertaining to Bowie knives and small pistols.⁵⁵ Unlike the repeating rifles of the era, these weapons were regulated in *some* limited ways, a fact hostile courts have relied on to uphold rifle bans.⁵⁶ One district

⁵³ See *Duncan v. Bonta*, No. 17-CV-1017-BEN (JLB), 2023 WL 6180472, at *24 (S.D. Cal. Sept. 22, 2023) (“Though it is the State’s burden, even after having been offered plenty of opportunity to do so, the State has not identified any law, anywhere, at any time, between 1791 and 1868 that prohibited simple possession of a gun or its magazine or any container of ammunition (unless the possessor was an African-American or a slave or a mulatto).”).

⁵⁴ Despite the massive advances over the single-shot firearms that came before, repeating arms were only regulated by one state. And even then, it was not a ban - just a licensing requirement that came at the end of the 19th century: “The closest historic analogue to twenty-first century bans on semiautomatic rifles is an 1893 Florida statute that required owners of Winchesters and other repeating rifles to apply for a license from the board of county commissioners.” David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS., 82–83 (forthcoming 2024), (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393197) [<https://perma.cc/UUP5-Q6M2>]. What’s more, the history makes clear the law was written for racist reasons, as Black Americans were using things like Winchester rifles “to drive off lynch mobs, such as in famous 1892 incidents in Paducah, Kentucky and Jacksonville, Florida.” *Id.* at 86. A Florida state supreme court judge who had previously served in the legislature confirmed its racist intentions: “I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied.” *Watson v. Stone*, 4 So.2d 700, 703 (1941) (Buford, J., concurring). Regardless of the reasoning for the adoption of the Florida law, it is the only one of its kind. Such a lone outlier does not constitute a historical tradition of firearm regulation. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2153 (2022).

⁵⁵ See Defendant’s Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 25, *Rupp v. Bonta*, No. 8:17-cv-00746-JLS-JDE (C.D. Cal. May 26, 2023), ECF No. 149-1.

⁵⁶ See, e.g., *Del. State Sportsmen’s Ass’n v. Del. Dep’t of Safety & Homeland Sec.*, 2023 WL 2655150 at *12 (D. Del. Mar. 27, 2023); *Herrera v. Raoul*, No. 23-CV-532, 2023 WL 3074799 (N.D. Ill. Apr. 25, 2023), *aff’d sub nom.* *Bevis v. City of Naperville*, No. 23-1353, 2023 WL 7273709 (7th Cir. Nov. 3, 2023) (emphasis added).

court in the Northern District of Illinois stated that laws governed the most dangerous weapons of the era, including Bowie knives.⁵⁷ “At the start of the twentieth century, every state except one regulated Bowie knives . . .”⁵⁸

The trouble with the suggestion that common rifle bans are like historical Bowie knife restrictions is that those who lived in the 19th century would have rejected that comparison.⁵⁹ Americans from this era were not silent, and indeed wrote quite a bit about this topic. While there was some disagreement at the time about the scope of the individual right the Second Amendment protects, the available commentary largely agrees the “arms of modern warfare” were the most protected type of weapon of all.

That does not mean 19th-century Americans felt there was no room for some gun control;⁶⁰ many commentators distinguished the possession or carrying of military-style firearms from the carrying of concealed weapons like Bowie knives and small pistols, the latter of which they felt could be restricted without offending the Second Amendment. As one example, the Supreme Court of Georgia ruled that while an 1837 law did not err in banning concealed carry of certain weapons, it went too far in barring open carry because the Second Amendment protects

⁵⁷ *Bevis v. City of Naperville*, No. 22-C-4775, 2023 U.S. Dist. LEXIS 27308, at *26 (N.D. Ill. Feb. 17, 2023). That court did not explain how bowie knives were the “most dangerous” weapons of the era, *see id.*, a ridiculous notion considering revolvers (and later, repeating rifles) proliferated around the same time.

⁵⁸ *Id.*

⁵⁹ The Supreme Court has rejected this comparison as well. *See* Kopel & Greenlee, *supra* note 54, at 191 (“Bans on modern rifles and magazines cannot be rescued by diverting attention away from the legal history of firearms law, and instead pointing to laws about other arms. Dozens of state and territorial legislatures enacted laws about Bowie knives, as well as dirks and daggers. Prohibitory laws for these blades are fewer than the number of bans on carrying handguns, and Bruen found the handgun laws insufficient to establish a tradition constricting the Second Amendment.”); *Bruen*, 142 S. Ct. at 2154 (“the bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry.”).

⁶⁰ Where exactly to draw the line on the modern-day limits of firearms protected by the Second Amendment is an article for another day. That said, one court has recently ruled that “commonly owned weapons that are useful for war and are reasonably related to militia use are also fully protected, *so long as they are not useful solely for military purposes.*” *Duncan v. Bonta*, No. 17-CV-1017-BEN (JLB), 2023 WL 6180472, at *17 (S.D. Cal. Sept. 22, 2023) (emphasis added). This would suggest that common rifles are protected because they are useful for self-defense, sport, and other lawful purposes, and their being useful in military combat as well does not change that. *See id.* However, weaponry which is not commonly owned by civilian and has no uses besides military ones (e.g., explosives, missiles, and the like) is unprotected under this interpretation. *See id.*

[t]he right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.⁶¹

Many commentators of the 19th century shared this view. Henry Campbell Black, most famous for being the original author of *Black's Law Dictionary*, wrote “arms” here, meant

those of a soldier. They do not include dirks, bowie knives, and such other weapons as are used in brawls, fights, and riots. The citizen has at all times the right to keep *arms of modern warfare* This right is not infringed by a state law prohibiting the carrying of concealed deadly weapons. . . . But a law which should prohibit the wearing of *military weapons* openly upon the person, would be unconstitutional.⁶²

Black would think it nonsensical that a modern court would analogize Bowie knife *carry* restrictions to complete *possession* bans on modern rifles, which he believed were the most protected arms of all.

Joel Bishop, writing in 1868, explained “the [Second Amendment] protects only the right to ‘keep’ such ‘*arms*’ as are used for purposes of war, in distinction from those which are employed in quarrels and brawls and fights between maddened individuals”⁶³

⁶¹ Nunn v. State, 1 Ga. 243, 251 (1846); accord Aymette v. State, 21 Tenn. (2 Hum.) 154, 157 (1840) (“The grievances to which they were thus forced to submit were for the most part of a public character, and could have been redressed only by the people rising up for their common defence, to vindicate their rights.”).

⁶² HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 403–04 (1895) (emphasis added). The modern Supreme Court has rejected the contention that only military arms are protected repeatedly. In striking down a ban on stun guns, it explained it “has held that ‘the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.’” Caetano v. Massachusetts, 577 U.S. 411, 411 (2016) (quoting District of Columbia v. Heller, 554 U.S. 570, 582 (2008)). Regardless of these modern debates on the scope of the Second Amendment, the “arms of modern warfare” were considered core to the Second Amendment in the 19th century.

⁶³ 2 JOEL BISHOP, COMMENTARIES ON THE CRIMINAL LAW 75 (1868) (emphasis added).

John Norton Pomeroy agreed, writing “a militia would be useless unless the citizens were enabled to exercise themselves in the use of *warlike weapons*.”⁶⁴ The Second Amendment, according to Pomeroy, was meant to secure to the people “the ability to oppose themselves in military force against the usurpations of government, as well as against enemies from without.”⁶⁵ Yet, like several of his contemporaries, Pomeroy was quick to add “this constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons.”⁶⁶

Benjamin Vaughan Abbott, a lawyer who served as the secretary of the New York Code Commission (which drew up the state’s penal code in 1864), explained the Second Amendment “does not extend to carrying bowie knives, fire-arms . . . concealed upon the person; or prohibit legislative regulations of the manner in which arms may be carried. . . . The constitutional provision means such *weapons as are used for the purposes of war*.”⁶⁷

Anna Laurens Dawes, the daughter of Massachusetts Senator Henry Laurens Dawes, added that while laws prohibiting the carrying of concealed weapons were acceptable, “[a] law prohibiting the use of weapons would take away all possibility of resisting any injustice, and this method of depriving freemen of their rights was by no means without precedent in English history.”⁶⁸

Several more commentators of the era echoed their fear of a deprivation of rights and freedom.⁶⁹ Other constitutional commentators

⁶⁴ JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 152 (1868) (emphasis added).

⁶⁵ *Id.*

⁶⁶ *Id.* at 152–53.

⁶⁷ 1 BENJAMIN VAUGHAN ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 83 (1879) (emphasis added).

⁶⁸ ANNA LAURENS DAWES, HOW WE ARE GOVERNED: AN EXPLANATION OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES. A BOOK FOR YOUNG PEOPLE 313 (1885).

⁶⁹ *See, e.g.*, HERMANN EDUARD VON HOLST, THE CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA 230 (Alfred Bishop Mason trans., 1887) (“It has therefore been argued that the [The Second Amendment] refers only to arms necessary or suitable for the equipment of militia; although it must not be inferred from this that the right is restricted to those citizens who belong to the militia. . . . It is, however, generally admitted that the secret carrying of arms can be prohibited.”); 2 CHARLES CHADMAN, CONSTITUTIONAL LAW FEDERAL AND STATE: BEING A CLEAR AND COMPLETE ANALYSIS OF THE CONSTITUTION, TOGETHER WITH A SUMMARY OF THE LEADING DECISIONS AND BASIC PRINCIPLES WHICH GO TO MAKE UP THE FUNDAMENTAL LAW OF THE STATE AND NATION 159 (1899) (“The right of the people to bear arms was a practical recognition of their right to demand with force that the government as constituted observe Constitutional restraints. The right is general and extends to all

were silent on the carry of concealable weapons but did see the Second Amendment as protecting a right that existed so the people could effectively resist tyranny, and explained that despotic governments did not allow their citizens to be armed. The notion of overthrowing despotic governments was so common it could even be found in schoolbooks of the mid-19th century, such as one in 1848 instructing that the Second Amendment “is so plainly proper that its propriety need not be argued. It will be sufficient to contrast it with the practice of despotic governments, who, while they maintain large standing armies, at all times subservient to their pleasure, will not allow arms in the hands of the common people.”⁷⁰

Another commentator, who published in 1852, similarly stated “[s]ome tyrannical governments resort to disarming the people, and making it *an offence* to keep arms, or participate in military parades. In all countries where despots rule with standing armies, the people are not allowed to keep guns and other warlike weapons.”⁷¹

In 1855, Furman Sheppard (who would later serve as District Attorney of Philadelphia) shared the same sentiments: “If citizens are allowed to keep and bear arms, it will be likely to operate as a check upon their rulers, and restrain them from acts of tyranny and usurpation.”⁷² Several other textbooks of the 19th century would say the same.⁷³

citizens, whether enrolled in the militia or not. But it is held that it does not authorize the carrying of weapons that are concealed”); LAURA DONNAN, OUR GOVERNMENTS: BRIEF TALKS TO THE AMERICAN YOUTH ON OUR GOVERNMENTS, GENERAL AND LOCAL 238 (1900) (“The Second Amendment] does not mean that only organized state militia may keep and bear arms, but it means that every citizen may do so. . . . However, it does not mean that men are allowed to carry concealed weapons.”); HORACE JEWELL FENTON, CONSTITUTIONAL LAW: AN INTRODUCTORY TREATISE DESIGNED FOR USE IN THE UNITED STATES NAVAL ACADEMY, AND IN OTHER SCHOOLS WHERE THE PRINCIPLES OF THE CONSTITUTION ARE STUDIED 254–55 (“The purpose of this amendment evidently is twofold: first, to check the government from arbitrarily disarming the people and reducing them to the condition of serfs; secondly, to allow men so to familiarize themselves with weapons as to keep the nation ever ready for emergencies. . . . [but] statutes forbidding private citizens to carry concealed weapons are constitutional.”).

⁷⁰ DANIEL PARKER, THE CONSTITUTIONAL INSTRUCTOR: FOR THE USE OF SCHOOLS 155 (1848).

⁷¹ BURLEIGH, *supra* note 34, at 212.

⁷² FURMAN SHEPPARD, THE CONSTITUTIONAL TEXT-BOOK: A PRACTICAL AND FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES, AND OF PORTIONS OF THE PUBLIC AND ADMINISTRATIVE LAW OF THE FEDERAL GOVERNMENT: DESIGNED CHIEFLY FOR THE USE OF SCHOOLS, ACADEMIES, AND COLLEGES 247 (1855).

⁷³ HENRY FLANDERS, AN EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 258 (1860) (“With arms in their hands, the people will not be likely to permit the overthrow of their institutions by the unscrupulous ambition of a civil magistrate or military chieftain. The very fact of their being armed will serve as a check to any arbitrary or forcible invasion of their constitutional rights.”); EDWARD D. MANSFIELD, THE

Ideas of the inalienable right to bear arms were repeated by members of Congress as well. Abolitionist Representative Edward Wade said in a speech given in the House of Representatives that the “right to ‘keep and bear arms,’ is thus guaranteed, in order that if the liberties of the people should be assailed, the means for their defence shall be in their own hands.”⁷⁴ Similarly, Senator Charles Sumner’s speech *The Crime Against Kansas* bristled at the mere suggestion that citizens in Kansas who opposed slavery should be disarmed of their Sharps rifles by the proslavery government: “Never was this efficient weapon more needed in just self defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached.”⁷⁵

Thomas M. Cooley, who served on the Michigan Supreme Court for two decades, wrote the Second Amendment “was meant to be a strong moral check against the usurpation and arbitrary powers of rulers, and as necessary and efficient means of regaining rights when temporarily overturned by usurpation.”⁷⁶ In case there was any doubt, Cooley added the meaning of the Second Amendment “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.”⁷⁷

POLITICAL MANUAL: BEING A COMPLETE VIEW OF THE THEORY AND PRACTICE OF THE GENERAL AND STATE GOVERNMENTS OF THE UNITED STATES, ADAPTED TO THE USE OF COLLEGES, ACADEMIES, AND SCHOOLS 205 (1861) (“It is scarcely necessary to say, that the right of the people thus to bear arms is the foundation of their liberties; for, without it, they would be without any power of resistance against the existing government.”); GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED 256 (1868) (“[The Second Amendment] is based on the idea, that the people cannot be oppressed or enslaved, who are not first disarmed.”); WILLIAM C. ROBINSON, NOTES ON ELEMENTARY LAW 103 (1875) (“The constitution of the United States secures the right to keep and bear arms, such as are used for purposes of war, in defence of the citizens or the state.”); ANDREW W. YOUNG & SALTER S. CLARK, THE GOVERNMENT CLASS BOOK: A YOUTH’S MANUAL OF INSTRUCTION IN THE PRINCIPLES OF CONSTITUTIONAL GOVERNMENT AND LAW 185 (1880) (“Right to Keep Arms—This means the right of every one to own and use, in a peaceful manner, warlike weapons It was thought that without it, ambitious men might, by the aid of the regular army, overthrow the liberties of the people and usurp the powers of government.”)

⁷⁴ Edward Wade, U.S. Representative of Ohio, Speech in the House of Representatives (Aug. 2, 1856), https://digitalcommons.cedarville.edu/cgi/viewcontent.cgi?article=1025&context=pamphlet_collection.

⁷⁵ See Kopel, *supra* note 43, at 1446–47 (citing CHARLES SUMNER, THE KANSAS QUESTION: SENATOR SUMNER’S SPEECH, REVIEWING THE ACTION OF THE FEDERAL ADMINISTRATION UPON THE SUBJECT OF SLAVERY IN KANSAS 22–23 (1856)).

⁷⁶ THOMAS M. COOLEY & ANDREW C. McLAUGHLIN, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298 (3d ed. 1898).

⁷⁷ *Id.*

These commentaries assert the prevailing combat firearms of the day cannot be banned because they are exactly what would best serve the goal of defeating a tyrant or foreign invader. In their era, effective firearms were arms like Winchester rifles, Colt revolvers, and shotguns. Today, it would be the exact kind of firearms usually affected by “assault weapon” bans. If Americans who *actually lived* in the 19th century would not have considered their laws restricting the carry of Bowie knives and other concealed weapons analogous to a possession ban on common rifles, then neither can we today.

More similar excerpts exist, but the point should be made by now: Americans of the 19th century spoke clearly on this topic, and the guns some deride today as “weapons of war” are what the Second Amendment protects most of all.⁷⁸ Notice how matter-of-fact each of these entries are written; these are not people advancing what they see as a controversial argument, they are instead stating something they perceive as obvious and undisputed.⁷⁹ Hence why so many of these excerpts are from school textbooks of the day.⁸⁰ Given *Bruen*’s emphasis on historical tradition as determinative in the Second Amendment analysis, their commentary at a

⁷⁸ The *Bevis* district court (which upheld the Illinois Assault Weapon Ban in part by analogizing to bowie knife carry laws) should have understood all of this, considering it cited to a Tennessee Supreme Court decision of the 19th century which explained that “[Legislatures] have a right to prohibit the wearing or keeping *weapons dangerous* to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence [sic].” *Bevis v. City of Naperville*, No. 22 C 4775, 2023 U.S. Dist. LEXIS 27308, at *27 (N.D. Ill. Feb. 17, 2023) (citing *Aymette v. State*, 21 Tenn. 154, 159 (1840)). Another Tennessee Supreme Court case from the era drew this distinction even more clearly in ruling on a law that completely prohibited the carry of a dirk, sword cane, Spanish stiletto, belt or pocket pistol or revolver. The court mostly upheld the law, but found that as to revolvers, the prohibition under the Act was too broad and contradicted the constitutional right to bear arms. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 170–71 (1871). “In a word, as we have said, the statute amounts to a prohibition to keep and use such weapon for any and all purposes. It therefore, in this respect, violates the constitutional right to keep arms, and the incidental right to use them in the ordinary mode of using such arms and is inoperative.” *Id.* at 187.

⁷⁹ That some people today may disagree is not relevant, barring a constitutional amendment. The Supreme Court did not consider twentieth century evidence whatsoever in ruling on *Bruen*. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2154 n.28 (2022) (“We will not address any of the 20th-century historical evidence brought to bear by respondents or their *amici*. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their *amici* does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence.”).

⁸⁰ Some critics may argue that these quotes, despite the large number of them presented here, are cherry-picked. While we cannot prove a negative to show the opposite view did not exist, the fact that no state banned repeating rifles or revolvers (even though they dramatically increased the firepower a single person was capable of compared to the single-shot firearms they supplanted) is further evidence that this was the prevailing view of the time.

time when firearms technology was advancing rapidly is critical evidence that modern bans on common rifles are unconstitutional.⁸¹

V. ABOLITIONISTS AND FREE BLACK AMERICANS PROVIDE AN EXCELLENT ILLUSTRATION OF SUCH “ARMS OF MODERN WARFARE” BEING USED TO RESIST OPPRESSION

The Second Amendment being used as a tool to resist tyranny and oppression is not an abstract idea that has never been tested. Thankfully, it has not yet been needed on a national level, but it was much discussed among abolitionists and critical to the early civil rights movement.

For instance, Lysander Spooner, a famous American political philosopher and ardent abolitionist, wrote the Second Amendment “obviously recognize[s] the natural right of all men ‘to keep and bear arms’ for their personal defence; and prohibit[s] both Congress and the State governments from infringing the right of ‘the people’—that is, of *any* of the people—to do so.”⁸² Spooner’s point was that slaves were men with natural rights, and the natural right to keep and bear arms is “palpably inconsistent with the idea of his being a slave.”⁸³

The idea of slaves having a right to bear arms was obviously one the pro-slavery side deeply opposed, and this sentiment made its way into the infamous *Dred Scott* decision.⁸⁴ There, Chief Justice Taney explained if Black Americans were deemed to be people and not mere property, they would be entitled to a whole series of rights, including the individual right to keep and bear arms. If Blacks were citizens, Taney wrote, they would have the right “to keep and carry arms *wherever they went*.”⁸⁵ “Thus, even Chief Justice Taney recognized (albeit unenthusiastically in the case of blacks) that public carry was a component of the right to keep and bear arms—a right free blacks were often denied in antebellum America.”⁸⁶

Following the Civil War, Horace Greeley, the famous newspaper editor and firebrand abolitionist, explained in a speech:

⁸¹ See *Bruen*, 142 S. Ct. at 2131 (“[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.”).

⁸² LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 98 (1856).

⁸³ *Id.*

⁸⁴ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁸⁵ *Id.* at 417 (emphasis added).

⁸⁶ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2154 n.28 (2022). (citing *Dred Scott*, 60 U.S. 393).

[T]he moment slavery had passed away, all possible pretexts for disarming Southern blacks passed away with it. Our Federal Constitution gives the right to the people everywhere to keep and bear arms; and every law whereby any State legislature undertakes to contravene this, being in conflict with the Constitution of the United States, had no longer any legal force.⁸⁷

Yet the Jim Crow South would reject what Greeley saw as the obvious truth. In the Postbellum period, Black Americans were victimized both by their own state governments as well as by terrorist groups like the Ku Klux Klan. President Grant himself complained in a letter to Congress that the Klan's objectives were, "by force and terror, to prevent all political action not in accord with the views of the members, to deprive colored citizens of the right to bear arms . . . and to reduce the colored people to a condition closely akin to that of slavery."⁸⁸ Because of this fear of now-armed former slaves,

Black veterans returning home were considered dangerous, and disarming them was a priority for the white supremacists of the defeated Confederacy. . . . There is an ironic similarity between the claims made by southern whites then and the argument made by gun control proponents today. Sheriffs and white posses raided black homes to seize 'illegal' guns and declared such seizures were not infringements of blacks' Second Amendment right to possess guns as part of a militia.⁸⁹

Frederick Douglass wrote gaining freedom in the South would require "the ballot-box, the jury-box, and the cartridge-box."⁹⁰ Winchester rifles were particularly popular among marginalized groups who naturally wanted the best small arms technology available for their self-defense. John R. Mitchell, Jr., Vice President of the National Colored Press Association, encouraged Black people to buy Winchesters to protect their families from the "two-legged animals . . . growling around your home in the dead of the night."⁹¹ Similarly, Ida B. Wells, a prominent early leader in the civil rights movement, wrote in 1892, a "Winchester rifle should

⁸⁷ JAMES PARTON, *THE LIFE OF HORACE GREELEY* 535–36 (1869).

⁸⁸ H.J., 42nd Cong., 2d Sess. 716 (1872).

⁸⁹ CHARLES E. COBB JR., *THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE* 30 (2014).

⁹⁰ *Id.* at 31.

⁹¹ NICHOLAS J. JOHNSON ET AL., *FIREARMS LAW AND THE SECOND AMENDMENT* 521 (3d ed. 2021) (quoting PAULA J. GIDDINGS, *IDA: A SWORD AMONG LIONS* 153–54 (2008)).

have a place of honor in every black home, and it should be used for the protection which the law refuses to give.”⁹²

The full history of armed resistance to the state-sanctioned white supremacist terrorism of the 19th century is abundantly documented. Suffice it to say the “Reconstruction era is full of examples of black people raising their voices—and brandishing their weapons—to express their intention to fight for the rights due them as free citizens.”⁹³

VI. CONCLUSION

The Supreme Court instructs lower courts to look for “distinctly similar” historical laws to justify modern regulations or, when new societal concerns or large advances in technology have presented themselves, historical analogues that are “relevantly similar” to the challenged law.⁹⁴ Whichever degree of similarity is required here, laws that ban popular rifles cannot possibly meet it. Americans of the 18th and 19th centuries made their voices clear: whatever other regulations on guns they may have found permissible, they would never have accepted restrictions on the prevailing rifles of the day.

Self-defense is undoubtedly inherent to the Second Amendment. The firearms affected by “assault weapon” bans are also undoubtedly useful for self-defense, which is why millions of Americans own them for that purpose.⁹⁵ But the Second Amendment protects arms used for many “lawful purposes,”⁹⁶ and one of those lawful purposes is the “doomsday provision” in case our constitutional republic threatens to be toppled by tyranny, whether foreign or domestic.⁹⁷

⁹² *Id.* (citing IDA B. WELLS, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1892) reprinted in IDA B. WELLS, THE LIGHT OF TRUTH: WRITINGS OF AN ANTI-LYNCHING CRUSADER 84 (Henry Louis Gates, Jr. ed., 2014).

⁹³ COBB, *supra* note 89, at 31.

⁹⁴ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2131–32 (2022).

⁹⁵ Del. State Sportsmen’s Ass’n v. Del. Dep’t of Safety & Homeland Sec., No. 1:22-CV-00951-RGA, 2023 WL 2655150, at *14–15 (D. Del. Mar. 27, 2023) (“Gun owners seek such rifles for a variety of lawful uses, including recreational target shooting, self-defense, collecting, hunting, competition shooting, and professional use. . . . Taken together, these data suggest that the banned assault long guns are indeed ‘in common use’ for several lawful purposes, including self-defense.”). A Washington Post survey also found that AR-15s are owned for a variety of lawful purposes such as self-defense (33% of respondents), target shooting (15%), recreation (15%), and hunting (12%). Guskin, Tambe & Gerberg, *supra* note 3.

⁹⁶ District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

⁹⁷ Silveira v. Lockyer, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

Tyranny is not fought with a pocket pistol. History demands Americans be allowed to be far better equipped than those who suffered before us. We too often ignore this clear precedent in favor of a sanitized and ahistorical modern interpretation of the Second Amendment. The modern interpretation does the Second Amendment a disservice by limiting it so profoundly.

With *Bruen* now demanding we look to history in construing the scope of the Second Amendment, it is finally time we listened to what Americans of the past had to say. Their writings make clear that modern bans on the prevailing small arms of the day constitute laws that they “would never have accepted.”⁹⁸

⁹⁸ *Bruen*, 142 S. Ct. at 2133 (quoting *Drummond v. Robinson Twp.*, 9 F.4th 217, 226 (3d Cir. 2021)).