

Restrictions that “our ancestors would never have accepted”: The Historical Case Against Assault Weapon Bans

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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 in the wake of *Bruen* is which specific “arms” the text of the Second Amendment protects. Some states, like California and Illinois, have argued that many “arms” are not covered by the Second Amendment’s text, and so the government can ban many of the most popular rifles and handguns in the country, even though these firearms are owned by millions of Americans for various lawful purposes.¹

Because the Supreme Court’s decisions in *Heller* and *Bruen* require the government to use historical analogue gun laws to justify their modern laws, state governments have turned to historical regulation of weapons such as bowie knives,² various blunt weapons, and sometimes small concealable pistols to try to justify modern gun laws. States that ban common rifles have primarily used these historical laws, which are mostly 19th century restrictions on concealed carry, to argue that these are adequate historical analog laws that justify modern gun possession bans.

Tellingly, the historical laws that the government cites 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, or specific places where possession can be restricted. Nonetheless, state governments argue that the historical restrictions on the carry of “unusually dangerous” weapons are the equivalent of laws regulating modern “weapons of war.” And since, they argue, the AR-15 and other semi-automatic firearms are such “weapons of war,” government can restrict or outright ban citizens from possessing them. As California put it in a recent brief, “[s]emiautomatic rifles regulated by the AWCA are like the M16 and are most useful in military service; thus, they cannot be deemed ‘in common use’ for lawful purposes.”³ In California’s view then, the banned rifles are not “arms” in the Second Amendment sense of the term.

A ruling from a district court in Oregon deciding a challenge to that state’s large capacity magazine law went further, declaring that the only “lawful purpose” that gets any constitutional protection is armed self-defense, and any arms not mostly used for that purpose may be banned.⁴

¹ Even just going by the most high-profile firearm affected by such bans, the AR15, 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, et al., Wash. Post, *Why Do Americans Own AR-15s?* (May 22, 2023) (available at [bit.ly/3G0vbG9](https://www.washingtonpost.com/news/energy-environment/wp/2023/05/22/why-do-americans-own-ar-15s/)).

² David Kopel, Reason Magazine, *The legal history of bans on firearms and Bowie knives before 1900*, available at <https://shorturl.at/gLRT2> (last accessed September 7, 2023).

³ <https://shorturl.at/cdeL6>

⁴ *Oregon Firearms Fed’n v. Kotek Oregon All. for Gun Safety*, No. 2:22-CV-01815-IM, 2023 WL 4541027, at *30 (D. Or. July 14, 2023).

These arguments reveal a profound misunderstanding of our historical tradition, not to mention what arms the Second Amendment's text covers. The arguments fail to examine what Americans of the founding generation as well as Americans of the 19th century had to say about the Second Amendment. To them, at least one other purpose was just as important as self-defense: the ability to resist tyranny.⁵

Simply put, our historical tradition stands for the proposition that the commonly owned civilian firearms of the era that are also useful in warfare are the *most protected of all* when it comes to firearm regulation. An overwhelming amount of historical commentary bears this out.

I. The Second Amendment is intended to be a Final Guard Against Tyranny.

While the Second Amendment no doubt protects guns owned for the lawful purposes of hunting, sport shooting, recreation, and of course self-defense, it *also* exists as a final defense against tyranny, whether 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 have embraced this view. For example, in 2003 the Ninth Circuit erroneously ruled that the Second Amendment did not recognize an individual right. 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

⁵ 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. D.C.*, 478 F.3d 370, 383 (D.C. Cir. 2007), *aff'd sub nom. D.C. v. Heller*, 554 U.S. 570 (2008).

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.⁶

Much more recently, a district court that enjoined Illinois's own assault weapons ban agreed, and pointed out that the Supreme Court did too:

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.' [citation omitted] 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.⁷

As the district court cited, the Supreme Court itself, while careful to note that there is no unfettered right to own *any* military weapon, has not denied this purpose, even as it discussed that modern technology may now limit the capabilities of a citizen militia:

[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

⁶ *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc). 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 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*, 147 Wash. 2d 562, 587 (2002) (Sanders, J., Johnson, J., and Chambers, 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).

⁷ *Barnett v. Raoul*, No. 3:23-cv-00209-SPM, 2023 U.S. Dist. LEXIS 74756, at *19-20 (S.D. Ill. Apr. 28, 2023) (citing *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

of fit between the prefatory clause and the protected right cannot change our interpretation of the right.⁸

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. They do it with the prevailing common long guns of the day – AR15s and other similar so-called “assault weapons” that are owned by the millions by regular citizens across the country. These are “the sorts of lawful weapons that they possessed at home”⁹ that would be brought to bear in the horrible circumstance of a tyrant upsetting our constitutional order or a foreign invader occupying our country.¹⁰

II. The Founders and their Contemporaries Saw the Second Amendment as a Defense Against Tyranny.

This idea that the Second Amendment is intended to be a protection against tyranny has been derided by modern-day gun control advocates as an “insurrectionist theory” that was invented by the NRA in the 1970s.¹¹ 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.”¹² The Supreme Court itself, in explaining what “arms” meant in the context of the Second Amendment, pointed to the 1773 edition

⁸ *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 that common rifles are far from useless in modern-day insurgencies, even against long odds.

⁹ *Heller*, 554 U.S. at 627-28.

¹⁰ 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.” Kopel, David B., *Guns Kill People, and Tyrants with Gun Monopolies Kill the Most* (November 6, 2022). Available at SSRN: <https://ssrn.com/abstract=3942071>.

¹¹ See, e.g., Olivia Lee, *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/>> (as of November 11, 2022) (“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.”).

¹² *State v. Schelin*, 147 Wash. 2d at 588 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *139) (Sanders, J., Johnson, J., and Chambers, J., dissenting).

of Samuel Johnson's dictionary, which defined "arms" as "[w]eapons of offence, or armour of defence."¹³ 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.¹⁴

Embarrassing as it may be to admit for some polite society academics of the modern era, the Bill of Rights was written by people who had just violently overthrown their former government. They were understandably very fearful of the new government they were forming would likewise become tyrannical. Because of that, they included the Second Amendment, at least in part, as a fail-safe.

They said so themselves. James Madison, for example, 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:

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...¹⁵

Similarly, Alexander Hamilton added that, 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."¹⁶

¹³ *Heller*, 554 U.S. at 581 (citing 1 Dictionary of the English Language 106 (4th ed.) (1773) (reprinted 1978)).

¹⁴ Similarly, an 1852 [book](#) by Joseph Bartlett Burleigh explained "[The term] *Arms*...is used for whatever is intentionally made as an instrument of offence". He contrasted that from the term "weapons", which are instruments of offence or defense. "We say fire-*arms*, but not fire-*weapons*; and *weapons* offensive or defensive, but not *arms* offensive or defensive."

¹⁵ The Federalist No. 46 (James Madison) (bold added).

¹⁶ The Federalist No. 29 (Alexander Hamilton).

Tench Coxe, a friend of Madison and himself a delegate to the Constitutional Convention, wrote regarding Madison's first draft of the Second Amendment that "[w]hereas civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the article in their right to keep and bear their private arms."¹⁷ He had earlier also written that "Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birthright of an American."¹⁸

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 that "[b]efore a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that can be, on any pretense, raised in the United States."¹⁹

St. George Tucker, who was later appointed to the federal bench by President Madison,²⁰ wrote an American version of Blackstone's Commentaries on the Law of England, "the first treatise on common law written for the needs and conditions of the American legal profession".²¹ Tucker explained that 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."²²

¹⁷ *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, p. 2 col. 1 (As quoted in the *Federal Gazette*, June 18, 1789).

¹⁸ Tench Coxe, letter to the *Philadelphia Gazette*, 20 February 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 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." Samuel Whiting, et al., *Second American Edition of the New Edinburgh Encyclopædia*, Volume 1 Part 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.*

¹⁹ Noah Webster, *An Examination into the Leading Principles of the Federal Constitution*, 1787, a pamphlet aimed at swaying Pennsylvania toward ratification, in Paul Ford, ed., *Pamphlets on the Constitution of the United States*, at 56 [New York, 1888].

²⁰ David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 *BYU L. Rev.* 1359, at 1372 (1998). Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1998/iss4/2> (citing William S. Prince, *The Poems of Henry St. George Tucker of Williamson, Virginia 1752-1827*, at 5 (1977)).

²¹ *Id.*

²² 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. In Five Volumes. With an Appendix to Each Volume, Containing Short Tracts Upon Such Subjects as Appeared Necessary to Form a Connected View of the Laws of Virginia, as a Member of the Federal Union* · Book

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...”²³

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 and is thus beyond the scope of this article. Yet the examples presented should be enough to make clear that the first 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.

As 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.”²⁴ The founders and their contemporaries would thus consider it utterly bizarre that a state government believes that the Second Amendment does not protect the types of common firearms most useful for that purpose.

III. Later 19th Century Commentary Resoundingly Confirms that the “Arms of Modern Warfare” are Protected by the Second Amendment

Given this guiding purpose of the Second Amendment, it follows that excluding from the right so-called modern “weapons of war” (i.e. common semiautomatic rifles and their magazines) makes no historical sense, particularly in a country where there is a long tradition of widespread lawful ownership of such arms.²⁵

Arms analogous to the modern-day AR15 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.²⁶ 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 28 rounds per minute for the Henry, even when accounting for reloading time.²⁷

1, Part 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 20, at 1400 (citing David Cobin & Paul Finkelman, *Introduction to 1 Henry St. George Tucker, Commentaries on the Law of Virginia: Comprising the Substance of a Course of Lectures Delivered to the Winchester Law School*, at 42-43 (The Lawbook Exchange, Ltd. 1998) (3d ed. 1846)).

²³ Joseph Story, *A Familiar exposition of the Constitution of the United States*, 264-65 (1842).

²⁴ *Heller*, 554 U.S. at 598.

²⁵ *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, 777 (6th Cir. 1989) (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”).

²⁶ David B. Kopel, *The History of Firearms Magazines and Magazine Prohibitions*, 78 Albany L. Rev. 849, 854 (2015).

²⁷ Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment* 403 (2d ed. 2018).

This 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 10 or 15 rounds, while revolvers gave Americans 5 or 6 rounds in a compact package, both of which were orders of magnitude more capable than the single-shot flintlock rifles and pistols their parents and grandparents used. Yet despite this tremendous jump in individual firepower, no state outright banned lever-action rifles or revolvers.

Undoubtedly, the fact that the most clearly analogous firearms to modern rifles went almost entirely unregulated²⁸ in the 19th century is a major problem for “assault weapon” bans under *Bruen*. That’s why states like California compare their rifle bans to 19th-century restrictions pertaining to bowie knives and small pistols. 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. One district court in the Northern District of Illinois stated that laws governed “the most dangerous” weapons²⁹ of the era, including Bowie knives.³⁰ “At the start of the twentieth century, every state except one regulated Bowie knives.”³¹

The trouble with the suggestion that common rifle bans are like historical bowie knife restrictions is we already know that those who lived in the 19th century would have rejected that comparison. 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 that the “arms of modern warfare” were the most protected type of weapon of all.

²⁸ 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 and Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, p. 72 (2023). 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 p. 75. 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*, 148 Fla. 516, 524 (1941) (Buford, J., concurring). Regardless of the reasoning for the adoption of the Florida law, it is the only one of its kind, and a lone outlier does not constitute a historical tradition of firearm regulation. *Bruen*, 142 S. Ct. at 2153.

²⁹ That court did not explain how bowie knives were the “most dangerous” weapons of the era, a ridiculous notion considering revolvers (and later, repeating rifles) proliferated around the same time.

³⁰ *Bevis v. City of Naperville*, No. 22 C 4775, 2023 U.S. Dist. LEXIS 27308, at *26 (N.D. Ill. Feb. 17, 2023).

³¹ *Id.*

That does not mean they felt there was no room for some gun control; 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 “[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.”³²

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 of the Second Amendment that “[t]he **‘arms’ here meant are 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 and bear **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.”³³ Black would clearly think it nonsensical that a modern court would analogize bowie knife *carry* restrictions to complete *possession* bans on modern rifles, which he clearly believed were the most protected arms of all.

Joel Bishop, writing in 1868, explained that “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.”³⁴

John Norton Pomeroy agreed, writing that “a militia would be useless unless the citizens were enabled to exercise themselves in the use of **warlike weapons**. To preserve this privilege, and 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, that government is forbidden by any law or proceeding to invade to destroy the right to keep and bear arms...[but] this constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons.”³⁵

³² *Nunn v. State*, 1 Ga. 243, 251 (1846); see also *Aymette v. State*, 21 Tenn. 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.”)

³³ Henry Campbell Black, M.A., *Handbook of American Constitutional Law*, at 403 (1895) (bold added).

³⁴ Joel Bishop, *Commentaries on the Criminal Law*, at 75 (1868) (bold added).

³⁵ John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States Especially Designed for Students, General and Professional*, at 152-153 (1868) (bold added).

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 that "[the Second Amendment] has given rise to some question as to what descriptions of weapons are included. The constitutional right...does not extend to carrying bowie knives, firearms...concealed upon the person; or prohibit legislative regulations of the manner in which arms may be carried...the constitutional provisions means such **weapons as are used for the purposes of war...**"³⁶

Anna Laurens Dawes, the daughter of Massachusetts Senator Henry Laurens Dawes, added that "[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...But it has been carefully explained by statute that this does not allow the carrying about of pistols and other concealed weapons."³⁷

Dr. Hermann Eduard von Holst, a German-American historian and author who wrote extensively on our Constitution, wrote that "[i]t 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."³⁸

Several more commentators of the era echoed these views.³⁹ Others 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 a tyrant who overthrew our constitutional order and explained that despotic governments did not allow their citizens to be armed. This sentiment was so common it could even be found in

³⁶ Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American Or English Jurisprudence Volume 1*, at 83 (1879) (bold added).

³⁷ Anna Laurens Dawes, *How We are Governed: An Explanation of the Constitution and Government of the United States. A Book for Young People*, at 313 (1885).

³⁸ Dr. Hermann Eduard von Holst, *The Constitutional Law of the United States of America*, at 230 (1887).

³⁹ See, e.g., 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*, at 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 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 Government: Brief Talks to the American Youth on Our Governments, General and Local*, at 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*, 254-255 (1914) ("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.")

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.”⁴⁰

Another published in 1852 similarly stated that “[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.”⁴¹

A third in 1855 by 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.”⁴² Several other textbooks of the 19th century would say the same.⁴³

These ideas 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 guarantied, in order that if the liberties of the people should be assailed, the means for their defence shall be in their own hands.”⁴⁴ Similarly, Senator Charles Sumner’s speech “The Crime Against Kansas”

⁴⁰ Daniel Parker, *The Constitutional Instructor: For the Use of Schools*, at 155 (1848).

⁴¹ Joseph Bartlett Burleigh, *The American Manual: Containing an Outline of the Origin and Progress of Government; the Nature of Liberty; the Law of Nations; a Clear Explanation of the Constitution of the United States, and of the Duties of Voters, Jurors, and Civil Magistrates, with Synonymous Words Applied and Practically Illustrated in Sentences, and the Census of 1850 ... Adapted to the Use of Schools, Academies, and General Readers*, at 212 (1852).

⁴² 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*, at 245 (1855).

⁴³ Henry Flanders, *An Exposition of the Constitution of the United States Designed as a Manual of Instruction*, at 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 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*, at 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 Washington Paschal, *The Constitution of the United States Defined and Carefully Annotated*, at 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*, at 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 White Young and Salter Storrs Clark, *The Government Class Book: A Youth's Manual of Instruction in the Principles of Constitutional Government and Law*, at 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.”)

⁴⁴ Rep. Edward Wade of Ohio, in the House of Representatives, August 2, 1856.

bristled at the mere suggestion that citizens in Kansas that 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.”⁴⁵

Thomas M. Cooley, who served on the Michigan Supreme Court for two decades, wrote that “[t]he right declared 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.”⁴⁶ In case there was any doubt, Cooley added that 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.”⁴⁷

These commentaries stand for the proposition that 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, that would be things 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 they said the Second Amendment protects most of all.⁴⁸ Notice too how matter-of-factly each of these entries are written; these are not people advancing what they see as a controversial argument, they are instead stating

⁴⁵ See [Kopel, supra note 20, 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*, at 22-23 (Cincinnati, G.S. Blanchard, 1856)).

⁴⁶ Thomas M. Cooley, LL.C., *The General Principles of Constitutional Law in the United States of America*, at 298 (1898).

⁴⁷ *Id.*

⁴⁸ 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, because it even 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*, 2023 U.S. Dist. LEXIS 27308, at *27, citing *Aymette*, 21 Tenn. at 159 (emphasis added). 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. 165, 170 (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.

something they perceive as obvious and undisputed. Hence why so many of these excerpts are from school textbooks of the day.⁴⁹

IV. 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 some abstract idea that has never been tested. Thankfully, it has not yet been needed on a whole-of-society 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 of the Second Amendment that it “obviously recognizes the natural right of all men ‘to keep and bear arms’ for their personal defence; and prohibit both Congress and the State governments from infringing the right of ‘the people’ – that is, of *any* of the people – to do so...This right of a man ‘to keep and bear arms’ is palpably inconsistent with the idea of his being a slave.”⁵⁰

This idea was obviously one the pro-slavery side was concerned with, and it made its way into the infamous *Dred Scott* decision. There, Chief Justice Taney explained that 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 fretted, they would be entitled to the privileges and immunities of citizens, including the right ‘to keep and carry arms *wherever they went*. 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.”⁵¹

Following the civil war, Horace Greeley, the famous newspaper editor and firebrand abolitionist, explained in a speech that “the 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.”⁵²

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

⁴⁹ Some critics may argue that these quotes, despite the large number of them presented here, are cherrypicked. 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.

⁵⁰ Lysander Spooner, *The Unconstitutionality of Slavery*, at 98 (1856).

⁵¹ *Bruen*, 142 S. Ct. at 2150-51 (citing *Dred Scott v. Sandford*, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691 (1857)).

⁵² James Parton, *The Life of Horace Greeley*, at 535-536 (1869).

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...”⁵³ Because of this fear of now-armed former slaves,

“[b]lack 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.”⁵⁴

Frederick Douglass wrote that gaining freedom in the South would require “the ballot-box, the jury-box, and the cartridge-box”.⁵⁵ 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.”⁵⁶ Similarly, Ida B. Wells, a prominent early leader in the civil rights movement, wrote in 1892 that a “Winchester rifle should have a place of honor in every black home, and it should be used for the protection which the law refuses to give.”⁵⁷

While the full history of armed resistance to the state-sanctioned white supremacist terrorism of the 19th century is obviously well beyond the scope of this article, suffice it to say that 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.”⁵⁸

V. Conclusion

The Supreme Court has instructed lower courts that they must 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. Whichever degree of similarity is required here, laws that ban popular rifles cannot possibly meet it. Americans of the

⁵³ U.S. *House Journal*. 42nd Cong., 2nd sess., 19 April 1872, 716 (bold added).

⁵⁴ Charles E. Cobb Jr, *“This Nonviolent Stuff’ll Get You Killed”: How Guns Made the Civil Rights Movement Possible*, at 44 (Duke University Press, 2014).

⁵⁵ *Id.* at 47.

⁵⁶ Johnson et al. *Firearms Law and Second Amendment Regulation, Rights, and Policy* (3rd ed. 2021), pg. 521, referencing Giddings, Paula J. *Ida: A Sword Among Lions* (2008), pg. 153-154.

⁵⁷ *Id.*, referencing Wells, Ida B. *Southern Horrors*. N.Y. Age June 25, 1892. Reprinted in Wells, Ida B. *The Light of Truth: Writings of an Anti- Lynching Crusader*, pg. 84.

⁵⁸ Cobb, *supra* note 53, at 47.

18th and 19th centuries have made their voices thoroughly clear: whatever other regulations on guns they may have found permissible, they would never have accepted restrictions on the prevailing rifles of the day. They said so themselves, repeatedly.

Self-defense is undoubtedly important to the Second Amendment. The firearms affected by “assault weapon” bans are also useful for self-defense, no doubt, which is why millions of Americans own them for that purpose.⁵⁹ But the amendment protects arms used for many “lawful purposes”,⁶⁰ and one of those is, as Judge Kozinski put it, the “doomsday provision” in case our constitutional republic threatens to be toppled by tyranny, whether foreign or domestic.

You do not fight tyranny with a pocket pistol. Our historical tradition demands we be allowed to be far better equipped than that. We too often ignore this clear history in favor of a sanitized and ahistorical modern interpretation of the Second Amendment. But that does the true nature of the right 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.”⁶¹

⁵⁹ “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.” *Del. State Sportsmen's Ass'n, Inc v. Del. Dep't of Safety & Homeland Sec.*, Civil Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at *14-15 (D. Del. Mar. 27, 2023); 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%). Emily Guskin, Aadit Tambe, and Jon Gerberg, The Washington Post, *Why do Americans own AR-15s?* (March 27, 2023) (available at bit.ly/3G0vbG9).

⁶⁰ 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 II*, 399 U.S. App. D.C. 314, 330 (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*, 577 U.S. 1039, 1039 (Thomas, J., and Scalia, J., dissenting from the denial of certiorari) (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.” *Bruen*, 142 S. Ct. at 2167 (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.

⁶¹ *Bruen*, 142 S. Ct. at 2133 (citing *Drummond v. Robinson Twp.*, 9 F.4th 217, 226 (3d Cir. 2021)).