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# The Second Amendment Wild Card: The Persisting Relevance of the "Hybrid" Interpretation of the Right to Keep and Bear Arms

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# THE SECOND AMENDMENT WILD CARD: THE PERSISTING RELEVANCE OF THE “HYBRID” INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS

MICHAEL P. O’SHEA\*

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## INTRODUCTION: IS THERE A “NAÏVE TEXTUALIST” READING OF THE SECOND AMENDMENT?

Those who teach and write about the Second Amendment<sup>1</sup> (and say so as part of the answer when asked, “What do you do?”) know a distinctive feature of the subject is the strong interest it provokes from nonlawyers and other nonspecialists. Compared to scholars in other legal fields, the Second Amendment scholar is quite likely to field questions from open-minded inquirers in social settings. When this happens, I find that each of the two principal interpretations

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

argued for in *District of Columbia v. Heller*<sup>2</sup>—Justice Scalia’s majority opinion and Justice Stevens’s dissent<sup>3</sup>—can provoke objections based on a perceived disconnect between the judges’ interpretations and the plain text of the amendment. In this introduction I’ll try to boil down these objections, which I’ll call “naïve textualist” for clarity.<sup>4</sup> They offer a natural introduction to my topic.

In *Heller* and the later decision in *McDonald v. Chicago*, a majority of the United States Supreme Court concluded that the Second Amendment guarantees an “individual right to keep and bear arms for the purpose of self-defense.”<sup>5</sup> The *Heller* court held that, as used in the Second Amendment, the “right of the people to keep and bear Arms” means a right “to possess and carry weapons in case of confrontation.”<sup>6</sup> Further, the “central component” of the right to keep and bear arms is personal defense.<sup>7</sup> At the same time, the right was and is also valued for other “traditionally lawful” purposes such as hunting,<sup>8</sup> so these are probably also constitutionally protected purposes for owning guns.

When told of this interpretation, an interlocutor may point out that the text of the Second Amendment does not expressly speak of self-defense. Rather, to the extent that it designates a purpose to be served by the right to arms, it does it by stating that a “well

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

3. Justice Breyer’s separate dissent in *Heller* raises different issues. *See id.* at 706-707, 714 (Breyer, J., dissenting) (assuming that the Second Amendment protects individual gun possession but declining to recognize self-defense as a central purpose of the right). I discuss this opinion in Part II.A *infra*.

4. As the discussion will show, I respect these objections and think they can lead to useful insights. I call the textualism that underpins them “naïve” to distinguish it from the more elaborated textualist theories of interpretation that legal scholars typically call by that name. *See, e.g.*, Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 872–82 (2009) (arguing that the content and internal structure of the United States Constitution establish that the correct method of interpreting it is “objective, original-public-meaning written textualism”); Eugene Volokh, *Textualism and District of Columbia v. Heller*, 37 HARV. J.L. & PUB. POL’Y 729 (2014) (discussing the contextually informed methods of modern textualism and how the Supreme Court applied them to interpret the Second Amendment).

5. *See McDonald v. Chicago*, 130 S.Ct. 3026 (2010) (plurality opinion) (identifying this as one of *Heller*’s “h[o]ld[ings]”); *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment) (same).

6. *Heller*, 554 U.S. at 592.

7. *Id.* at 599.

8. *Id.* at 577, 599.

regulated Militia” is “necessary to the security of a free State.”<sup>9</sup> Why then did a majority of the Court conclude that self-defense was the right’s central purpose?

The answer must involve historical context and tradition. It’s often argued that any valid textualist approach to interpretation *requires* resort to context.<sup>10</sup> *Heller* held that the Second Amendment codifies a “pre-existing” English right derived from the 1689 Declaration of Right,<sup>11</sup> and that this right was understood to include personal defense along with civic purposes like deterring tyranny. This reading of the English right to arms is the subject of an ongoing dispute among historians.<sup>12</sup>

*Heller* also drew heavily on early nineteenth century *American* sources, which clearly show that many courts and commentators viewed the American right to keep and bear arms as an individual right with a strong component of self-defense, including the carrying of personal weapons.<sup>13</sup> As St. George Tucker, the first major commentator on the Bill of Rights, wrote in 1803, it would be improper for an American court to presume that a citizen was up to

9. U.S. CONST. amend. II.

10. See Volokh, *supra* note 4, at 729 (arguing that, at times, “good textualists must go beyond the text of the particular document being considered.”).

11. *Heller*, 554 U.S. at 592–94.

12. Compare JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 134 (1994) (arguing that the English right included personal defense) with Patrick J. Charles, *Arms for Their Defence: An Historical, Legal and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. Chicago*, 57 CLEV. ST. L. REV. 351, 381–83 (2009) (arguing that the right was for Parliament to arm the organized militia).

I will not address the historical dispute about the English right to arms here. Rather, one of my goals is to show that, even if the skeptical historians should prove *correct* about the content of the English right, this would still fail to establish that the Second Amendment poses no obstacle to gun control. A significant number of early American courts reached views about the English right similar to today’s *Heller* skeptics, and likewise rejected *Heller*’s idea that the Second Amendment sounds in personal defense—and yet these courts had no difficulty concluding that the Second Amendment protected a personal right to possess and use a variety of common firearms, in order to enable the citizenry to serve as a bulwark against governmental tyranny. See *infra* Part I.

13. See *Heller*, 554 U.S. at 606 (discussing the commentaries of St. George Tucker); Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 623–32 (2012) (presenting the extensive, early nineteenth century state court precedent recognizing an individual right to bear arms for self-defense under the federal and/or state constitutions).

treasonous activity simply because he wore a gun in public, since the “right to bear arms is recognized and secured in the [C]onstitution itself,” and individual Americans regularly exercised it; as Tucker explained in his next sentence: “In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.”<sup>14</sup> Later in this era, judicial

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14. 5 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 app. n.B at 19 (1803); see *Peruta v. County of San Diego*, 742 F.3d 1144, 1154–55 (9th Cir. 2014) (recognizing that Tucker here contemplates a Second Amendment right to bear arms outside the home for personal purposes).

Arguing in the teeth of this passage, one academic historian avers that—even though Tucker discusses an individual American habitually carrying a gun off his property “on any occasion,” and likens this to the way a European aristocrat might routinely wear a sword in public—the passage actually has a “clear military context” that, once recognized, transforms it into a narrow reference to activity in an organized militia. Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths From Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1710–11 (2012).

Cornell’s stated reason for this conclusion is that five pages prior to the passage in question, Tucker began by criticizing Justice Chase’s conduct of the treason trial of the participants in Fries’s Rebellion; and Tucker cites (often in critical terms) the Fries trial in several places in this section. *Id.* at 1711; see TUCKER, *supra* note 14, at 14–15. But Tucker’s purpose in the whole section is simply to “consider the offense of treason” in its general scope, *id.* at 20, so it is hardly surprising that he includes several references to what was, at the time he wrote, the most prominent treason case in American jurisprudence. Tucker’s thesis is that the offense of treason, when not held in check by judicial restraint and constitutional limits, has been read so broadly by pro-government judges and other “technical men” that it encompasses a wide range of conduct that properly has no connection with treason—such as the simple carrying of arms. See *id.* at 18–19. Thus, Tucker criticizes English common law authorities who held that “the very use of weapons by . . . an assembly” could be prosecuted as treason because “the bare circumstance of having arms” would create a presumption that subjects sought to wage war against the crown. *Id.* at 19. This is what Tucker is arguing is incompatible with American practices, and particularly with the Second Amendment’s recognition of the right to bear arms. See *id.*

Cornell makes other odd claims about the Tucker passage. He writes that Tucker “is quite clear that muskets and rifles, not pistols, are protected by this constitutional right.” Cornell, *supra* note 14, at 1711. In fact, Tucker says nothing about pistols being excluded from the right to bear arms. I encourage readers to consult the relevant text for themselves. An online version of the fifth volume of Tucker’s *Blackstone* is available at <http://www.constitution.org/tb/tb5.htm> (last visited August 4, 2014).

Tucker’s influential early writings remain a stumbling block to pro-gun

decisions declared that the Second Amendment protected an individual “right to carry arms . . . in full open view,” enabling citizens to make “a manly and noble defence of themselves, if necessary.”<sup>15</sup>

Context may persuade an interlocutor that the civic purpose stated in the Second Amendment’s first clause is not the right’s *only* purpose. Still, the text seems to highlight that purpose as very important. And, if an important goal of recognizing the right to arms is to ensure that the American people could function as an effective militia to ensure “the security of a free State,” then this might seem to imply a personal right to own ordinary military equipment—which today includes fully automatic rifles classified as machine guns by federal law.<sup>16</sup> (“So, do I have a right to an M16?” is a typical response.)

Now one has to explain another interpretive move by the Court. According to *Heller*, machine guns probably are not Second Amendment “arms” at all. The Supreme Court majority thought it would be “startling” if machine guns were constitutionally protected<sup>17</sup> and suggested that such weapons fall into a category of “dangerous and unusual” weapons that are not commonly kept by law-abiding citizens today and thus are constitutionally unprotected.<sup>18</sup>

But if the Second Amendment no longer protects the right to own standard military equipment, then how is the right to keep and bear arms supposed to serve its civic purpose of ensuring the security of a free state? *Heller* replies:

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control historical readings of the Second Amendment. See David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. 1527, 1533–34 (2009) (responding to an earlier article cited by Justice Stevens in *Heller* in which Cornell asserted that Tucker’s 1791–92 lecture notes on the Second Amendment differed sharply from his 1803 BLACKSTONE). Hardy documents that, on the contrary, the lecture notes contain a discussion of the Second Amendment very similar to the one in Tucker’s later BLACKSTONE and that Cornell’s article omitted to disclose the existence of that discussion to his readers. *Id.*; cf. *Heller*, 554 U.S. at 666 n.32 (Stevens, J., dissenting) (relying on Cornell’s work to claim that Tucker believed the Second Amendment dealt with the allocation of federal and state military power, but showing no awareness of the passage in Tucker’s early lecture notes where he actually takes up and analyzes the Second Amendment).

15. *State v. Chandler*, 5 La. Ann. 489, 490 (1850), cited in *Heller*, 554 U.S. at 613, 626.

16. See 18 U.S.C. § 922(o)(1) (2012) (banning private ownership of “machineguns” not registered prior to May 1986).

17. *Heller*, 554 U.S. at 624.

18. *Id.* at 627.

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 between the prefatory clause and the protected right cannot change our interpretation of the right.<sup>19</sup>

*Heller* has been sharply criticized on this score for a perceived departure from originalism:

*Heller* holds that government . . . may ban civilian use of military weapons, even if this means that the right to bear arms may no longer be effectively exercised for the republican purpose of resisting tyranny that the “prefatory clause” discusses. It is . . . striking that an *originalist* interpretation of the Second Amendment would . . . refuse to protect the arms a militia needs to defend against tyranny.<sup>20</sup>

Erwin Chemerinsky has made a similar charge that *Heller* departs from textualism:

...Justice Scalia repeatedly has emphasized the importance of focusing on the text in interpreting legal documents. [But] Justice Scalia could find an individual right to have guns only by effectively ignoring the first half of the Second Amendment. Yet a cardinal rule of interpretation is that every clause of a provision must be given meaning.”<sup>21</sup>

The naïve textualist’s qualms about this side of *Heller* reflect a similar view. (Notice, though, that Chemerinsky’s criticism assumes that an interpreter who gives independent effect to the civic language in the Amendment’s preface must therefore reject “an individual right to have guns.” Much of this article is devoted to arguing that this inference is an error.)

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19. *Id.* at 627–28.

20. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 193 (2008).

21. See, e.g., Erwin Chemerinsky, *The Heller Decision: Conservative Activism and Its Aftermath*, CATO UNBOUND, July 25, 2008, <http://www.cato-unbound.org/2008/07/25/erwin-chemerinsky/heller-decision-conservative-activism-its-aftermath>.

*Justice Stevens's Dissent*

Analogous concerns about text can crop up with Justice Stevens's position in *Heller*. As best one can tell,<sup>22</sup> Justice Stevens's position is close to the "sophisticated collective right" or "narrow militia right" interpretations launched by a famous 1989 article of Keith Ehrman and Dennis Henigan.<sup>23</sup> According to this view, the Second Amendment right of the people to keep and bear arms places no "limit[s] on] the authority of Congress to regulate the use or possession of firearms for purely civilian purposes."<sup>24</sup> It is simply a right of individuals to participate in a state government-organized military body, if their government decides to organize such a body and to require citizens to participate in it.<sup>25</sup> One of the naïve textualist's responses to this position is likely to be: "how is that a 'right of the people' if it depends on a government's say-so? That doesn't feel like a right. Other 'rights of the people' in the Bill of Rights seem to refer to rights to remain free of government interference. Why not this one?"<sup>26</sup> Indeed, the Stevens approach has been criticized for presenting as a "right" what, from the evidence of its proponents, appears to be something more aptly described as a (mere) duty.<sup>27</sup>

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22. It is not easy to pin down the positive content of Justice Stevens's interpretation, though it is clear that it excludes the possibility of individual citizens successfully bringing constitutional challenges to most possible forms of gun control. See David T. Hardy, *Ducking the Bullet: District of Columbia v. Heller and the Stevens Dissent*, 2010 CARDOZO L. REV. DE NOVO 61, 65–68.

23. Keith A. Ehrman and Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); see *id.* at 47–48 ("[T]he interest protected by the second amendment is the collective and public interest in a viable state militia, not the private interest of individuals in owning firearms for reasons unrelated to the militia . . . . [I]t is a narrow right indeed, for it is violated only by laws that, by regulating the individual's access to firearms, adversely affect the state's interest in a strong militia.").

24. *Heller*, 554 U.S. at 640 (Stevens, J., dissenting).

25. *Id.* at 646 (Stevens, J., dissenting) ("The 'right to keep and bear Arms' protects only a right to possess and use firearms in connection with service in a state-organized militia.").

26. See, e.g., Ehrman and Henigan, *supra* note 23 at 47 (acknowledging this criticism).

27. Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1598 (2014) (contrasting a duty to perform militia obligations when called up with a right to possess or use weapons; "Proponents of the collective rights view have the burden to articulate what the *right* to bear arms is, as opposed to a militiaman's *duty* to bear arms."); Nicholas J. Johnson, *Rights Versus Duties*, *History Department*



And there are other textual issues. A nonspecialist interlocutor is likely to feel some hesitation before the phrase “bear arms”; that might mean carrying weapons generally, but also has a ring of military participation, which is consistent with the Stevens approach. But there is another textual component of the right—the Second Amendment declares that “the people” have a right “to keep . . . arms.”<sup>28</sup> Why, he or she may ask, doesn’t that mean “own guns”?<sup>29</sup>

The dissenters respond to these textual qualms by resorting to context. What the text describes with two different words is really a “unitary” right, they argue: “keep and bear” is historically just one idea, not two.<sup>30</sup> Thus, it is claimed, the addition of “keep arms” doesn’t imply any protection for possession or use of guns unless it is “in conjunction with military activities.”<sup>31</sup>

In short, both of the main positions argued for in *Heller* at least arguably require the text to be supplemented with *context* in order to be plausible. To support a self-defense centered right to arms, the majority used English and (especially) nineteenth century American history to contextualize the prefatory clause’s reference to civic anti-tyranny purposes. And the Stevens dissent resorted to contextual arguments about militia laws in an effort to contextualize the

*Lawyering, and the Incoherence of Justice Stevens's Heller Dissent*, 39 FORDHAM URB. L.J. 1503, 1511 (2012).

28. U.S. CONST. amend. II.

29. As the U.S. Court of Appeals for the D.C. Circuit opined in the litigation that became *Heller*:

In contrast to the collective right theorists’ extensive efforts to tease out the meaning of “bear,” the conjoined, *preceding* verb “keep” has been almost entirely neglected . . . . [T]he plain meaning of “keep” strikes a mortal blow to the collective right theory . . . . We think “keep” is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use.

*Parker v. District of Columbia*, 478 F.3d 370, 385–86 (D.C. Cir. 2007), *aff’d sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008); *cf. id.* at 386 (acknowledging that “[t]he term ‘bear arms,’ when viewed in isolation, might be thought ambiguous; it could have a military cast,” but concluding that “since ‘the people’ and ‘keep’ have obvious individual and private meanings, . . . those words resolve any supposed ambiguity in the term ‘bear arms.’”).

Many of the early authorities discussed in this article concurred with *Parker*’s individual analysis of “keep arms,” but maintained that “bear arms” could simultaneously receive a predominantly civic or military interpretation.

30. *Heller*, 554 U.S. at 646 (Stevens, J., dissenting).

31. *Id.* at 646–48.

operative clause's affirmation of the American "people's" right, not only to "bear" arms but also to "keep" them.

That a constitutional interpretation depends on supplementing or qualifying the plain text is not necessarily disqualifying, or even especially unusual; other constitutional provisions also have long-settled doctrinal features not apparent on the surface of their text.<sup>32</sup>

But although I have referred to the textualist orientation of the interlocutor above as "naïve" textualism, in fact I think it deserves to be taken seriously. It has force, especially in a legal and political culture where the Constitution is a public document, whose keeping is said to be in the trust of the people. Think of the rhetorical and moral force of Justice Black's "plain text" approach to the First Amendment's Free Speech Clause.<sup>33</sup>

So in judging the merits of *Heller* and its leading skeptics, we should also care about whether there are *other* available interpretations of the Second Amendment, especially if there are adequately grounded interpretations that can hope to satisfy the naïve textualist out of hand by giving readily understood legal significance to both halves of the Second Amendment's text.

There is indeed such an interpretation, and it is the principal subject of this article. It has deep historical roots. As I'll show, it was actually the most accepted understanding of the American right to keep and bear arms, by both courts and commentators, for more than half a century in the late nineteenth and early twentieth centuries. It has a further feature that makes it especially relevant to this Symposium and this law review: a "Made In Tennessee" label. The most penetrating and intellectually considerable judicial expositions of this view came not from the U.S. Supreme Court but

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32. For example, the text of the Sixth Amendment recognizes a right of a criminal defendant to have "the assistance of counsel" at trial, U.S. CONST. amend. VI, but it has also been interpreted, on the basis of historical context and pragmatic considerations, to protect the right of a mentally competent defendant to *refuse* the assistance of counsel and to represent himself at trial. See *Faretta v. California*, 422 U.S. 806, 814 (1975). The Fourth Amendment's text states limits on the use of search warrants, stating that they "shall [not] issue, but upon probable cause," U.S. CONST. amend. IV, but it has been interpreted to presumptively *require* a warrant for all searches unless an exception applies. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

33. Black took literally the First Amendment's textual command that "Congress shall make no law abridging the freedom of speech," U.S. CONST. amend. I, but also drew categorical distinctions between "speech" and "conduct," again grounding this in the constitutional text. See generally Note, *Reflections on Justice Black and Freedom of Speech*, 6 VAL. U. L. REV. 316 (1972).

from the judges of the nineteenth-century Tennessee Supreme Court.

My purpose in this essay is to describe the *hybrid* interpretation of the right to keep and bear arms, to say something about its history, and to show the ways in which it remains relevant to the law and scholarship of the Second Amendment today.

Briefly, under the hybrid interpretation, the right to arms protects a personal right of individual citizens to “keep arms”—that is, to acquire, possess, practice with, and engage in other types of legitimate activity with those types of common firearms that are useful for militia purposes. But the right to bear arms is structured mainly by the civic purposes mentioned in the Second Amendment’s preface—military readiness and protecting the public liberty by deterring government tyranny—not by the purpose of individual self-defense.

The hybrid interpretation has been well discussed as part of broader studies of the Second Amendment.<sup>34</sup> In its Tennessee aspect, it was treated a generation ago in the pages of this law review.<sup>35</sup> My goal is to focus more sharply on its relevance to current questions about *Heller* and its application.

I conclude this introduction with a note on terminology. In many ways it would be preferable to call this interpretation something other than the “hybrid” right. There is much to be said for simply calling it the “civic republican”<sup>36</sup> vision of the right to arms, as

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34. See, e.g., David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL’Y 559, 561 (1986) (observing that “there appears to be a hybrid interpretation [of the Second Amendment], which argues that the right protected is indeed one of individual citizens, but applies only to the ownership and use of firearms suitable for militia or military purposes.”). I offered my own survey of the hybrid right’s rise to prominence in post-Civil War state courts in O’Shea, *supra* note 13 at 642–53.

35. Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994).

36. Jack Balkin, *The Republican Theory of The Second Amendment and Its Ironies*, BALKINIZATION (April 16, 2004) [http://balkin.blogspot.com/2004\\_04\\_11\\_archive.html](http://balkin.blogspot.com/2004_04_11_archive.html) (“The civic republican theory of the Second Amendment holds that the citizenry’s right to bear arms is necessary to prevent tyrannical governments from abridging liberty. The Second Amendment is a fail-safe; if the central government becomes oppressive, or if a conquering or colonizing force takes power, the citizens can band together in militias to overthrow the government. In the alternative, they can provoke the oppressive government to expend resources in putting down the rebellion, in the process weakening or delegitimizing it.”) (internal parentheses omitted).

Robert Leider does in an important recent article.<sup>37</sup> Calling it *hybrid* risks needlessly loading the dice against it, as if it were a derivative development, created by combining aspects of two more fundamental positions: the self defense-based right and the narrow individual/collective right. But as I'll show, the so-called "hybrid" right has older and deeper roots than the twentieth-century interpretation championed by Justice Stevens and some of *Heller's* historian critics.<sup>38</sup> Moreover, it has a solid intellectual coherence. Many American jurists of earlier periods simply called it "the constitutional right to keep and bear arms."<sup>39</sup> There is no reason for treating it as anything less than a basic position in the interpretive debate.

Despite these reservations, I have reluctantly used the terms "hybrid right" and "hybrid interpretation" in most of this article for the sake of clarity. They are well established in the relevant literature. Furthermore, plausible alternative names for the right, like "civic individual right," are too likely to lead to confusion with the variants of the twentieth-century collective right, such as the "narrow individual right" or "militia individual right" of the *Heller* skeptics.

Part I of this article sets forth the contours of the hybrid right to arms using its most two prominent expositions by the nineteenth century Tennessee Supreme Court.<sup>40</sup> It briefly surveys the rise and dominance of this view in an era that stretches from Reconstruction to the Supreme Court's 1939 decision in *United States v. Miller*.<sup>41</sup>

Part II discusses how the hybrid right acted as a discomfiting foil in *District of Columbia v. Heller*,<sup>42</sup> and how it surprisingly persists as an influence on post-*Heller* litigation in the lower federal courts.

Part III considers how the hybrid right might apply to gun control controversies today. It argues that skeptics of *Heller* have underrated the hybrid right's relevance to their claims. If the skeptics' arguments against *Heller's* self-defense based approach to the Second Amendment were to prevail, by far the most strongly

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37. Leider, *supra* note 27 at 1612 (describing the cases in this tradition as "establishing the civic republican version of the right to bear arms").

38. *District of Columbia v. Heller*, 554 U.S. 570, 586 (2008).

39. See, e.g., THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 270–72 (1880) (analyzing "The Right to Keep and Bear Arms" in the Second Amendment in terms consistent with the hybrid/civic republican reading).

40. *Aymette v. State*, 21 Tenn. 154 (1840); *Andrews v. State*, 50 Tenn. 165 (1871).

41. 307 U.S. 174 (1939).

42. *Heller*, 554 U.S. 570.

grounded candidate to replace it would be the *hybrid* right, not the narrow construct promoted by Justice Stevens. This, in turn, would have negative consequences, which *Heller*'s skeptics should face, for the constitutionality of certain gun control measures, especially for bans on common semi-automatic firearms classified as "assault weapons."

# I. DEFINING THE "HYBRID" RIGHT TO ARMS: MILITIA-USABLE, COMMON ARMS IN PRIVATE HANDS FOR CIVIC PURPOSES

For a classic articulation of the scope of the hybrid right to arms, one can do no better than to turn to two widely cited decisions of the Tennessee Supreme Court, the 1840 opinion in *Aymette v. State*<sup>43</sup> and the 1871 opinion in *Andrews v. State*,<sup>44</sup> which developed and clarified *Aymette*.

The two decisions applied different versions of the Tennessee Constitution's right to arms. *Aymette* involved the state's 1834 constitution, which confined the right to "free white men," while the 1870 Tennessee Constitution interpreted in *Andrews* extended the right to arms to all "citizens."<sup>45</sup> However, the textual features that guided the Tennessee Supreme Court's interpretation in each case were the same: an individual right "to keep and to bear arms for th[e] common defense."<sup>46</sup> Both cases are important Second Amendment cases, not just state constitutional cases. In each, the Tennessee Supreme Court treated the Tennessee right to keep and bear arms as having the same scope and purposes as the federal Second Amendment.<sup>47</sup>

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43. *Aymette*, 21 Tenn. at 154.

44. *Andrews*, 50 Tenn. at 165.

45. Compare TENN. CONST. of 1834, art. I, § 26 ("That the free white men of this State have a right to keep and to bear arms for their common defence."), with TENN. CONST. of 1870, art. I, § 26 ("That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.").

46. *Id.*

47. See *Aymette*, 21 Tenn. at 157 ("[English] law, we have seen, only allowed persons of a certain rank to have arms . . . It was in reference to these facts, and to this state of the English law, that the second section of the amendments to the Constitution of the United States was incorporated into that instrument . . . In the same view, the section under consideration of our own bill of rights was adopted.") (emphases in original); *Andrews*, 50 Tenn. at 177 ("We find that, necessarily, the same rights, and for similar reasons, were being provided for and protected in both [the right to arms provisions of] the Federal and State Constitutions; in the one, as we have shown, against infringement by the Federal Legislature, and in the other, by the Legislature of the State.").

A. *Foundation: Aymette v. State (1840)*

*Aymette* was a constitutional challenge to Tennessee's earliest weapons control law,<sup>48</sup> an 1838 statute that prohibited the concealed carrying of "any bowie knife, or Arkansas tooth-pick"—two types of formidable, fixed blade knives.<sup>49</sup> The Tennessee Supreme Court upheld the statute, holding that the Tennessee right to arms—and by extension, the Second Amendment—protected only the possession and use of weapons that were "usually employed in civilized warfare, and . . . constitute the ordinary military equipment."<sup>50</sup> The court further reasoned that *concealed* carrying could be prohibited even with respect to arms that *did* meet the "civilized warfare" criterion, since this was a "manner of wearing [that] would never be resorted to by persons engaged in the common defence"—that is, because military arms are normally borne openly.<sup>51</sup>

Why were only these arms protected? Because the right to keep and bear arms, in the Tennessee Supreme Court's view, was specifically meant to serve the *civic* purposes of ensuring free government and deterring tyranny (the "common defense") and not for personal purposes such as self-defense against a thug's assault.<sup>52</sup> *Aymette* was—by twenty-first century standards—eye-openingly frank about what this entailed. The purpose of the right was to ensure a sufficient possibility of armed citizen resistance to deter public officials from usurping power, or, if this failed, to cause the oppressive measures to be rescinded:

Th[e English] declaration of right [wa]s made in reference to the fact . . . that the people had been disarmed, and soldiers had been quartered among them contrary to law. The complaint was against the *government*. The grievances to which they were thus forced to submit, were for the most part of a public character, and could have been redressed only by the people rising up for their *common defence* to vindicate their rights . . . . [In Tennessee] the free white men may keep arms to protect the public liberty, to keep in awe

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48. CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM 2–3 (1999).

49. See David B. Kopel, Clayton E. Cramer & Joseph E. Olson, *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167, 179–181, 185–87 (2013) (discussing the typical features of "Bowie knives," "Arkansas toothpicks," and the Tennessee law).

50. *Aymette*, 21 Tenn. at 158.

51. *Id.* at 160–61.

52. *Id.* at 157 ("No private defence was contemplated, or would have availed anything.").

those who are in power, and to maintain the supremacy of the laws and the constitution . . . . If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority.<sup>53</sup>

And the civic, anti-tyranny purpose of the right implied limitations on which weapons counted as protected "arms":

[The citizens] need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons . . . could not be employed advantageously in the common defence of the citizens. The right to keep and bear them, is not, therefore, secured by the constitution.<sup>54</sup>

This "*civilized warfare*" test for constitutionally protected arms is the calling card of the hybrid right to arms, the most characteristic doctrinal feature of the conception.

Under this test, citizens had "the *unqualified* right to keep the weapon, it being of the character before described."<sup>55</sup> This sort of strong protection for the right to own ("keep") arms was another calling card of the hybrid right to arms. The category of constitutionally protected "arms" included "swords, muskets, rifles, etc.," but not "a dirk or pistol concealed under [one's] clothes," a "spear in a cane,"<sup>56</sup> or Aymette's Bowie knife. Thus, his conviction for violating the statute was affirmed.<sup>57</sup>

On the other hand, the right to "bear arms" was not "unqualified" in character; arms were to be borne "for the common defense," that is, "to employ them in war, as arms are usually employed by civilized nations."<sup>58</sup> This distinction between the individual scope of the right to "keep" arms and the more collective right to "bear" them is a further characteristic of the hybrid right.

The organized, universal militia system of the past had already been in decline for at least a generation by the time *Aymette* was decided in 1840.<sup>59</sup> The opinion never employs the word "militia,"

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53. *Id.* at 157–58 (emphasis added).

54. *Id.* at 158.

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

56. *Id.* at 160–61.

57. *Id.* at 161–62.

58. *Id.* at 160.

59. Leider, *supra* note 27 at 1618 & n. 197; H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76

except once when reciting the words of the federal Second Amendment.<sup>60</sup> Yet, tellingly, this did not stop the state court from elaborating the content of the Tennessee—and Second Amendment—right to keep arms nor from connecting it closely to the civic purpose of protecting the public liberty.<sup>61</sup>

*Aymette* did not rest its holding, as *Heller* did, on a continuity between the English and American rights to arms.<sup>62</sup> Rather, *Aymette* explained that the American right went *further* than the English right to arms, which recognized only a right of Protestant subjects to “have arms for their defense” and conditioned the right to arms on the social “condition” of each subject.<sup>63</sup> The American right to arms extended to the whole citizenry. *Aymette* underscored the individual quality of the American right to arms by pointing to the harsh game laws of Stuart England as emblematic of the type of government action that the American right to arms was meant to prevent.<sup>64</sup> The 1671 Game Act prohibited all but a few wealthy landowners from “keep[ing] a gun,” which caused “a large proportion of the people [to be] . . . entirely disarmed.”<sup>65</sup>

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CHI.-KENT L. REV. 403, 522-529 (2000) (describing how, “despite the hortatory intentions embodied in the Militia Act of 1792, compulsory universal militia service disintegrated during the early years of the Republic.”). Tennessee’s militia did play an active role in military actions up to the Mexican War of 1846-48, but it had long since become a primarily volunteer organization. *See generally* Trevor Augustine Smith, “Pioneers, Patriots, and Politicians: The Tennessee Militia System, 1772-1857,” (Ph.D. diss., Univ. of Tennessee, 2003), chs. 5 & 6, *available at* [http://trace.tennessee.edu/utk\\_graddiss/2661](http://trace.tennessee.edu/utk_graddiss/2661); *see id.* at 171 (describing “the Tennessee militia system of the 1830s” as “[c]omposed almost entirely of volunteers,” with “a small number of well-trained and well-equipped companies and a large number of men who put forth a feeble effort or did not participate at all.”).

60. *Aymette*, 21 Tenn. at 157; *see* District of Columbia v. *Heller*, 554 U.S. 570, 613 (2008).

61. *See Aymette*, 21 Tenn. at 154.

62. *Heller*, 554 U.S. at 570.

63. *Aymette*, 21 Tenn. at 156-57.

64. *Id.*

65. *Id.* at 156. There is a dispute among historians as to whether the *English* right to arms expressed in the 1689 Declaration of Right was meant to abrogate the disarming effect of these game laws. *Compare* MALCOLM, *supra* note 12 at 118-19 (arguing the affirmative) *with* Charles, *supra* note 12 at 386-403 (noting that the 1689 Declaration only applied to the crown, not Parliament, and arguing that the Declaration was viewed as consistent with the restrictions in the 1671 Game Law).

*Aymette* is crucial because it concludes that the English right did not abrogate gun restrictions such as the ones imposed by the Stuart game laws, yet it found this no obstacle at all to holding that such broad gun bans *would* violate the *American* right to keep arms, which it recognized to be considerably broader than the English. *See Aymette*, 21 Tenn. at 154.



*B. Andrews v. State (1871)*

The Tennessee Supreme Court returned to the right to keep and bear arms in the aftermath of the Civil War and remained loyal to *Aymette's* civic republican model. *Andrews v. State*<sup>66</sup> was a constitutional challenge to three convictions for violating an 1870 Tennessee statute that banned most carrying of handguns.<sup>67</sup> The Tennessee Supreme Court drew upon its prewar precedent in *Aymette* and again concluded that the Tennessee Constitution protected the same rights as the federal Second Amendment.<sup>68</sup>

The court emphasized that the right to “keep arms” is an individual right guaranteed to each citizen qua citizen.<sup>69</sup> *Andrews* also introduced a subtle, but important refinement to the “civilized warfare” test that *Aymette* had used to define the arms each citizen had the right to keep.<sup>70</sup> While *Aymette* had simply referred to war arms (“the ordinary military equipment”<sup>71</sup>), *Andrews* envisioned a test that would ask *both* whether a weapon had militia utility *and* whether it was a common part of the citizenry’s gun culture (a question that resembles the later “common use” limitation in *Heller*):

What, then, is [the citizen] protected in the right to keep and thus use? Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State.<sup>72</sup>

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66. 50 Tenn. 165 (1871); *see also* O’Shea, *supra* note 13 at 642–47 (examining the case, including the partial concurrence of two justices, who argued for a broader reading of the right to bear arms that would privilege personal defense).

67. *Andrews*, 50 Tenn. at 166–67.

68. *Id.* at 177.

69. *Id.* at 183–84 (“[T]his right was intended . . . to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.”).

70. *Id.* at 184–86.

71. *Aymette v. State*, 21 Tenn. 154, 158 (1840).

72. *Id.* at 179; *compare* *District of Columbia v. Heller*, 554 U.S. at 570, 627 (2008) (holding that Second Amendment protects weapons “in common use at the time”); *id.* at 624 (observing that the traditional militia included citizens who came armed with the types of personal weapons “in common use at the time for lawful purposes like self-defense”) (internal quotation marks omitted).

Arms that met both criteria were constitutionally protected:

Under this head, *with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained*, we would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms; and that under the Constitution the right to *keep* such arms, can not be *infringed or forbidden* by the Legislature.<sup>73</sup>

The inclusion of the “repeater” in this list of protected arms is significant, for *Andrews* made clear that this referred to full sized military revolvers, although not smaller concealable handguns.<sup>74</sup> The inclusion of the “rifle of all descriptions” is also significant, because by the time the *Andrews* court wrote, this included repeating rifles with substantial ammunition capacities, such as the commercially available 15-shot Winchester Model 1866 rifle.<sup>75</sup>

Further fleshing out the right, *Andrews* concluded that the right to keep arms protected not just bare possession, but also various penumbral features or “necessary incidents” of the right.<sup>76</sup> These included purchasing arms, practicing with them in order to maintain efficiency in their use, transporting them, and keeping them in repair.<sup>77</sup> Finally, it protected at least some kinds of handgun carrying for self-defense, such as when an individual could establish that he was “in peril of life or limb or great bodily harm.”<sup>78</sup> Since the indictments against *Andrews* and the other defendants did not make clear whether they were carrying constitutionally protected “repeaters” or some other type of handgun, the indictments were quashed on constitutional grounds.<sup>79</sup>

On the other hand, while keeping arms was an individual civil right, *bearing* arms was a “political right” meant to be exercised collectively.<sup>80</sup> Thus, government had substantial, but not unlimited, authority to regulate carrying handguns and other arms for self-

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73. *Andrews*, 50 Tenn. at 179 (emphasis added to first italicized clause; other emphases in original).

74. *Id.* at 186–87.

75. See Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 381–82 (2009) (discussing the Civil War-era Henry lever-action rifle and its commercial introduction as the Winchester Model 1866).

76. *Id.* at 182.

77. *Id.* at 178.

78. *Id.* at 190.

79. *Id.* at 192.

80. *Id.* at 182.

defense. Glenn Reynolds has summarized the resultant legal landscape:

[T]he view . . . extracted from the Tennessee Constitution . . . [is] that government is the product of a delegation of power from the people, that the people retain the right (even the duty) of revolt whenever that government exceeds the scope of delegation, and that widespread private ownership of arms is an important means of making that right of revolt real—along, perhaps, with the implication that so long as the ability to exercise that right remains real it is unlikely to be needed.<sup>81</sup>

This interpretation, more than the government-centered view of Justice Stevens, has the historical warrant to be considered the civic republican understanding of the American right to arms.

### C. *The Spread of the "Hybrid" Right*

The *Aymette-Andrews* interpretation spread far beyond the borders of Tennessee. A typical expression came from the courts of Arkansas, whose state constitution resembled Tennessee's in recognizing the right of citizens "to keep and bear arms" for "their common defense."<sup>82</sup> In a series of postwar decisions spanning a decade, Arkansas adopted the "civilized warfare" test for protected arms—including rifles, shotguns, full-sized handguns, and swords.<sup>83</sup> Like Tennessee's courts, the Arkansas Supreme Court expressly equated the scope of its state constitutional right to arms with the protection of the Second Amendment.<sup>84</sup> It likewise upheld bans on the concealed carry of handguns<sup>85</sup> and held that small, concealable handguns could be prohibited outright,<sup>86</sup> but it upheld a constitutional right to possess full sized military revolvers<sup>87</sup> and indeed to carry those handguns under some circumstances.<sup>88</sup> By the

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81. Reynolds, *supra* note 35, at 657.

82. See ARK. CONST. of 1868, art. I, § 5; ARK. CONST. of 1874, art. I, § 5.

83. *Fife v. State*, 31 Ark. 455, 459, 461 (1876) (upholding conviction for carrying a small "pocket revolver," which, unlike the weapons listed, was not a constitutionally protected "arm").

84. *Id.* at 458.

85. *Carroll v. State*, 28 Ark. 99 (1872).

86. *Fife*, 31 Ark. at 461.

87. *Id.* at 460–61 (distinguishing "pistols" which were prohibited to be carried from full sized "repeaters" such as the Colt Army and Navy revolvers used in the Civil War).

88. *Wilson v. State*, 33 Ark. 557, 560 (1878) (reversing as unconstitutional a

time the Arkansas Supreme Court decided *Haile v. State*<sup>89</sup> in 1882, the state's organized militia had been inert for decades. Yet the court was crystal clear in its emphasis on the civic and indeed collective purposes that the right to arms was meant to serve.<sup>90</sup> No latter-day *Heller* skeptic could hope to exceed the decisiveness with which *Haile* emphasized the collective purpose and rejected personal defense as a central component of the right to bear arms.

The constitutional provision sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression. It is not intended to afford citizens the means of prosecuting, more successfully, their private broils in a free government. It would be a perversion of its object, to make it a protection to the citizen, in going . . . prepared at all times to inflict death upon his fellow-citizens, upon the occasion of any real or imaginary wrong. The "common defense" of the citizen does not require that . . .<sup>91</sup>

And yet, *Haile* simultaneously had no difficulty in recognizing the right to keep arms as a personal liberty to have guns, not a mere government prerogative or a duty masquerading as a right. Though oriented to civic purposes, the right serves those purposes by protecting the individual possession and use of arms, ensuring a residual military force in the people that cannot be fully subjected to government control.<sup>92</sup>

The constitutional right is a very valuable one. We would not disparage it . . . . Yet if every citizen may keep arms in readiness upon his place, may render himself skillful in their use by practice, and carry them upon a journey without let or hindrance, it seems to us, the essential objects of this particular clause of the bill of rights will be preserved.<sup>93</sup>

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conviction for carrying an "army pistol"; legislature could regulate the carrying of protected arms for self-defense but not forbid it).

89. *Haile v. State*, 38 Ark. 564 (1882).

90. *Id.* at 566.

91. *Id.*

92. See George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment As A Nonindividual Right*, 76 Fordham L. Rev. 2113, 2154–55, 2160–64 (2008) (mustering sources for the view that the citizens cannot fulfill the liberty-preserving purpose of the Second Amendment's preface if the right to arms were confined to an organized militia from which federal or state governments could simply exclude them).

93. *Haile*, 38 Ark. at 566–67. *Haile* upheld, against constitutional challenge, a

By the end of the nineteenth century, the courts in Texas,<sup>94</sup> Georgia,<sup>95</sup> and West Virginia<sup>96</sup> had adopted the same interpretation. In the first decades of the next century it migrated further to Oklahoma,<sup>97</sup> Florida,<sup>98</sup> and North Carolina.<sup>99</sup> Most gun control laws—and thus gun rights litigation—were then found in the Southern states<sup>100</sup> so this represented a large swath of the relevant jurisprudence of the era.

Finally, as I've written elsewhere,<sup>101</sup> the United States Supreme Court's main pre-*Heller* precedent on the Second Amendment, *United States v. Miller*,<sup>102</sup> can't be understood without a grasp of the hybrid right and its prominence in the decades leading up to that 1939 decision. *Miller* rejected an ex-felon's Second Amendment challenge to a charge of transporting an unregistered sawed-off shotgun across state lines, in violation of the National Firearms Act

statute that banned carrying handguns off of one's own land, with a narrow exception for military handguns carried "uncovered and in the hand," and another exception for carrying handguns "while upon a journey." *Id.*

94. See *English v. State*, 35 Tex. 473, 478 (1872). A few years later, the Texas Supreme Court retreated somewhat from *English's* adoption of the "civilized warfare" test for protected arms. See *State v. Duke*, 42 Tex. 455, 458 (1875). However, *Duke* still stuck close to *Andrews's* model of the hybrid right, since it upheld heavy restrictions on carrying handguns for self-defense, and expressed doubt whether small handguns "adapted to being carried concealed" were entitled to constitutional protection. *Id.*

95. *Hill v. State*, 53 Ga. 472, 482–83 (1874); accord *Strickland v. State*, 72 S.E. 260, 268 (Ga. 1911).

96. *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891).

97. *Ex parte Thomas*, 97 P. 260, 265 (Okla. 1908).

98. *Carlton v. State*, 58 So. 486, 488 (Fla. 1912) (describing the right to bear arms as "intended to give the people the means of protecting themselves against oppression and public outrage").

99. *State v. Kerner*, 107 S.E. 222, 223–25 (N.C. 1921) (opinion of Clark, C.J.). In a thoughtful opinion, the plurality struck down a prohibition on carrying handguns without a county permit. It held that the North Carolina Constitution's right "to keep and bear arms" was intended "to embrace the 'arms,' an acquaintance with whose use was necessary for th[e people's] protection against the usurpation of illegal powers—such as rifles, muskets, shotguns, swords, and pistols. These are now but little used in war; still they are such weapons that they or their like can still be considered as 'arms,' which they have a right to 'bear.'" *Id.* at 225.

100. See generally David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep & Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1124–1157 (2010); see *id.* at 1137 ("As in the antebellum period, postbellum gun control remained primarily a Southern practice.").

101. O'Shea, *supra* note 13 at 660–61.

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

of 1934.<sup>103</sup> While the Roosevelt Administration had argued that the Second Amendment should be interpreted as a purely collective right that did not protect individual gun ownership, the Supreme Court instead rested its holding on the government's backup argument—that Miller's sawed-off shotgun was not a constitutionally protected "arm" because it had not been shown to be "part of the ordinary military equipment."<sup>104</sup> This, of course, was a version of the "civilized warfare" test that is the calling card of the hybrid interpretation. In fact, the only right-to-arms case cited as authority in the body of the *Miller* opinion was the Tennessee Supreme Court's 1840 opinion in *Aymette v. State*—the first hybrid right case.<sup>105</sup>

Probably the most natural reading of *Miller* was that it adopted the hybrid interpretation of the Second Amendment, with its accordant protection for personal possession of militia arms.<sup>106</sup> But it was still *possible* to avoid that reading—and the lower federal courts studiously did avoid it in the years that followed,<sup>107</sup> even at the cost of refusing to treat *Miller* as establishing any rule of decision.<sup>108</sup>

## II. THE "HYBRID" RIGHT IN THE FEDERAL COURTS TODAY

### A. *How the Hybrid Right Haunted Heller*

To say that the hybrid interpretation haunted the Supreme Court in *District of Columbia v. Heller* is to say that it loomed over the litigation<sup>109</sup> and impinged on the arguments made in all three of the contending opinions produced in *Heller*, yet that none of the

103. *Id.* at 178.

104. *Id.* (citing *Aymette v. State*, 21 Tenn. 154, 158 (1840)).

105. *Id.*; see *supra* notes 48 to 65 and accompanying text.

106. *Cf. Leider, supra* note 27, at 1629 (arguing that *Miller* held that only arms with military utility were constitutionally protected (a feature of the hybrid right), and that *Miller* "was not . . . opaque or wrongly decided . . . . Indeed, it was more originalist than *Heller*").

107. See *id.* at 1636–1641; see, e.g., *United States v. Stevens*, 440 F.2d 144, 149 (6th Cir. 1971), *United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942).

108. See, e.g., *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (acknowledging that *Miller* employed the "ordinary military equipment" reasoning to reach its holding, but then declaring that the Supreme Court was not "attempting to formulate a general rule applicable to all cases," and refusing to formulate a rule of decision for the case before it as well).

109. The federal government, in particular, structured much of its *Heller* briefing to fend off a perceived risk that the Supreme Court would read *Miller* as establishing a strict version of the hybrid right, and would then affirm an individual right to own machine guns such as M16s, which are part of the ordinary military equipment today. See O'Shea, *supra* note 75 at 360–62.

Justices came to grips in an adequate way with the hybrid right tradition.

Justice Scalia's *Heller* majority opinion *downplayed* the hybrid right. The opinion disposed of *Aymette* in a paragraph, setting it aside as an "odd reading" of the right to bear arms that was "contrary to virtually all other authorities."<sup>110</sup> But that last assertion, to be accurate, must be confined to a circumscribed stretch of history. After the Civil War, numerous cases adopted *Aymette*'s basic posture.<sup>111</sup> The *Heller* majority made a selective use of Tennessee's other great hybrid right case, *Andrews*, citing it as evidence that some restrictions on handguns violate the Second Amendment.<sup>112</sup> This was fair use, as *Andrews* did hold that full sized handguns were protected arms, and it struck down a complete ban on carrying them.<sup>113</sup> In effect, *Heller* used *Andrews*'s acknowledgment of a *secondary*, penumbral aspect of self-defense to support its own, self-defense centered conception of the Second Amendment right. The majority can be read as correctly arguing that the challenged District of Columbia restrictions on defensive gun use were so prohibitive, that even courts that viewed self-defense as merely an *auxiliary*, penumbral aspect of the Second Amendment would still likely strike those restrictions down.<sup>114</sup> However, the *Heller* majority pointedly did not embrace *Andrews*'s focus on the centrality of the anti-tyranny purpose of the right to arms, nor *Andrews*'s conclusion that the right to "bear" arms was essentially a civic and political right, not an individual one.

Justice Stevens's dissent *ignored or suppressed* the hybrid right. Stevens simply evaded any discussion of the rich nineteenth century state court tradition, writing instead that the Second Amendment "made few appearances in the decisions of *this Court*" in the nineteenth century<sup>115</sup>—an unsurprising fact, because there were no federal gun control laws during that century, and the Supreme Court did not consider the Second Amendment right to be incorporated against the States.<sup>116</sup> But the Second Amendment

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110. *District of Columbia v. Heller*, 554 U.S. 570, 613–14 (2008).

111. *See supra* notes 82 to 99 and accompanying text.

112. *Heller*, 554 U.S. at 629.

113. *Andrews v. State*, 50 Tenn. 165, 190–92 (1871).

114. *Cf. Heller*, 554 U.S. at 629 ("Few laws in the history of our nation have come close to the severe restriction of the District [of Columbia]'s handgun ban. And some of those few have been struck down.") (citing, *inter alia*, *Andrews*, 50 Tenn. at 165).

115. *Id.* at 672 (Stevens, J., dissenting) (emphasis added).

116. *See Presser v. Illinois*, 116 U.S. 252, 264–65 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

made numerous appearances in the state courts, whether it was being applied directly to state legislation<sup>117</sup> or being analyzed by courts that interpreted their state constitutional right to arms as identical to the Second Amendment.<sup>118</sup> And virtually all of the nineteenth century jurisprudence is grievously damaging to Justice Stevens's position, because his view was that the Second Amendment does not protect personal ownership of arms at all.<sup>119</sup> Understanding the hybrid interpretation and its historical prominence immediately reveals the *non sequitur* that structured much of the dissent. Justice Stevens contends that "[t]he absence of any reference to civilian uses of weapons [in the Second Amendment] tailors the text of the Amendment to the purpose identified in its preamble"<sup>120</sup>—not an implausible claim, and one that many naïve textualists might find persuasive today. But from this, Justice Stevens infers that "[d]ifferent language surely would have been used to protect nonmilitary use and possession of weapons from regulation if such an intent had played any role in the drafting of the Amendment."<sup>121</sup> There is a certain studied ambiguity to the phrase "nonmilitary use and possession of weapons," but if it means what Stevens says elsewhere—no right to possess arms outside of service in a state-organized militia<sup>122</sup>—then we know that his inference was rejected by virtually every nineteenth century American judge who considered it.<sup>123</sup> Even when the early courts *agreed* with Stevens that the right to keep and bear arms is "tailored" to the civic purpose of preserving the basis for a popular militia, they had no difficulty

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117. See *Nunn v. State*, 1 Ga. 243, 251 (1846) (striking down state ban on handgun carrying as Second Amendment violation); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (opining that the Second Amendment protected the open carrying of weapons for personal defense).

118. See, e.g., *Andrews*, 50 Tenn. at 177 (interpreting both the Tennessee Constitution and the Second Amendment to protect an individual civil right to own common firearms appropriate for militia use).

119. *Heller*, 554 U.S. at 646 (Stevens, J., dissenting).

120. *Id.* at 647–48.

121. *Id.* at 651.

122. *Id.* at 646 ("[T]he 'right to keep and bear arms' protects only a right to possess and use firearms in connection with service in a state-organized militia.").

123. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev. 1359, 1422–24 (identifying the concurring opinion of a single justice in *State v. Buzzard*, 4 Ark. 18, 32–33 (1842) (Dickinson, C.J., concurring), as the sole judicial support for any form of the "collective right" model of the Second Amendment in nineteenth century case law). A Stevens-like interpretation first appeared in a majority holding of an American court in the early twentieth century, in *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905). See Kopel, *supra* note 123 at 1510–12.



concluding that it nevertheless protected personal ownership of arms. That is the "hybrid," civic republican interpretation. It is not Justice Stevens's interpretation.<sup>124</sup> The untenability of Stevens's historical claims is shown in the fact that it is contradicted by *both* of the two major competing strands of early American right to arms jurisprudence—the self-defense based interpretation that dominated the antebellum nineteenth century—and that *Heller* adopted—as well as the hybrid interpretation that dominated the latter part of the century.

Finally, Justice Breyer's separate dissent *watered the hybrid right down*. Breyer appeared to adopt, for the sake of argument, a view of the Second Amendment under which citizens would have a right to have arms for civic purposes such as militia preservation or a "military-training interest" (in Justice Breyer's phrasing), with also a secondary or tertiary—but not central—interest in personal defense.<sup>125</sup> So far, this is broadly recognizable as a version of the "hybrid" right. However, Justice Breyer's translation of these premises into doctrine was very different from the spirit of the hybrid right cases. Breyer urged a deferential, "interest-balancing" approach to evaluating bans on large classes of arms (such as the District of Columbia's handgun ban)<sup>126</sup> and would have held that the prevalence of handguns in crime was a sufficient basis to ban them outright.<sup>127</sup>

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124. The early cases also undermine the Stevens dissent's claim that the "right to keep and bear arms" was historically understood as a "unitary" right, not two rights. As soon as the opportunity arose, the Tennessee Supreme Court construed its state constitutional guarantee of the right "to keep and bear arms for the common defense" as protecting two distinct rights. See *Aymette v. State*, 21 Tenn. 154, 158, 161 (1840) (separately construing the citizens' rights to "keep arms" and "bear arms"); see also Leider, *supra* note 27, at 1614–15 & n.170. Strangely, Justice Stevens himself cites *Aymette* as support for his narrow view of "bear arms" with no recognition of the case's rejection of his attempt to conflate "bear" and "keep." See *Heller*, 554 U.S. at 648 n.10 (Stevens, J. dissenting).

125. *Heller*, 554 U.S. at 706, 708 (Breyer, J., dissenting). Justice Breyer also assumes *arguendo* that the right to keep and bear arms protects "the use of firearms for sporting purposes," and somewhat incongruously lists this interest before self-defense. *Id.* at 706.

126. *Id.* at 689 (Breyer, J., dissenting) ("I would . . . adopt such an interest-balancing inquiry explicitly"); see *id.* at 693 ("The ultimate question is whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate."); *id.* at 705 (describing the District of Columbia's decision to ban all handguns, on asserted public safety grounds, as "the kind of empirically based judgment that legislatures, not courts, are best suited to make" and urging "deference to legislative judgment" in Second Amendment cases).

127. *Id.* at 722 (Breyer, J., dissenting).

In contrast, the hybrid right/civic republican tradition mostly held that handguns, particularly full-sized, military handguns, were entitled to protection as a militia arm.<sup>128</sup> And while the hybrid right tradition did indeed tend to uphold substantial regulation of the *bearing* of arms due to concerns about public safety,<sup>129</sup> it took a much more categorical approach to the right to *keep* protected arms at home,<sup>130</sup> which was the issue in *Heller*. This distinction is importantly grounded in the civic republican theory that undergirds the hybrid interpretation. The right to arm is meant to ensure not just military *familiarization*, as Justice Breyer suggests, but a residual military *power* in the people to ensure that the government does not flagrantly abuse its delegated powers. The use of personally owned weapons can be regulated quite a bit—especially in public places—without impairing the anti-tyranny purpose of the right, but restrictions on the keeping of common, militia-suitable arms, which include at least some handguns, cut to the very core of the right under the civic republican interpretation and should be viewed quite skeptically,<sup>131</sup> not with the relaxed “interest balancing” sketched by Justice Breyer.<sup>132</sup>

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128. See, e.g., *Andrews v. State*, 50 Tenn. 165, 179 (1871) (noting that citizens have a constitutional right to keep revolvers that are military “repeaters” and carry them in some circumstances); *Wilson v. State*, 33 Ark. 557, 560 (1878) (same); *State v. Kerner*, 107 S.E. 222, 225 (1921) (opinion of Clark, C.J.) (same, as to full-sized handguns in general).

129. See O’Shea, *supra* note 13, at 655–56; cf. *Peruta v. County of San Diego*, 742 F.3d 1144, 1174 (9th Cir. 2014) (contrasting the substantial regulation of weapons-bearing held allowable in some hybrid right cases with the greater protection that courts in the self-defense based tradition give to the right to carry arms).

130. See, e.g., *Aymette v. State*, 21 Tenn. 154, 160 (1840) (identifying the citizens’ right to keep common militia arms as an “unqualified” right, in contrast to the right to bear them); Robert H. Churchill, *Gun Regulation, The Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 166 (2007) (“At the time of the framing of the Second Amendment, . . . Americans understood the right to keep arms not only as a civic right in the sense of its being connected to a civic obligation, but also as a basic right of citizenship.”); Leider, *supra* note 27 at 1626 (“Not a single court, post-Civil War through 1900, held that the right to keep arms in the home was contingent on active service in a well-regulated militia . . . .”); *id.* at 1629 (“By 1900, the right to keep and bear arms was the right to keep military-style weapons in the home, and, in very limited cases, to bear them openly in public.”); see also *Jennings v. State*, 5 Tex. App. 298 (1878) (holding that, while government could lawfully restrict the carrying of handguns in an effort to prevent crime, it could not “take a citizen’s arms away from him”; hence, a law requiring forfeiture of an illegally carried handgun was a violation of the citizen’s right to possess arms).

131. Similar criticism applies to the Rhode Island Supreme Court’s decision in

### B. *The Hybrid Right In the Lower Federal Courts Today*

Despite *Heller's* adoption of a self-defense based conception, the hybrid right tradition has continued to impinge on Second Amendment litigation in the lower courts, in both appropriate and inappropriate ways.

In *Ezell v. City of Chicago*, the United States Court of Appeals for the Seventh Circuit relied on the hybrid right-based

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*Mosby v. Devine*, 851 A.2d 1031 (R.I. 2004), which interpreted the right to arms in the Rhode Island Constitution as reflecting aspects of the hybrid model. See R.I. CONST. art. I, § 22 (1842) ("The right of the people to keep and bear arms shall not be infringed."). The *Mosby* court invoked Tennessee's 1840 *Aymette* decision to conclude that while the right to "keep" arms was individual in nature, "bear[ing] arms" under the state constitution meant only participation in a military organization. *Mosby*, 851 A.2d at 1041–42 (citing *Aymette v. State*, 21 Tenn. 154 (1840)). The court used this conclusion to bless various restrictions on handgun carrying. *Id.* at 1045–51.

However, *Mosby's* use of hybrid-right concepts was not entirely coherent. The court resorted to *Aymette* in order to justify the characteristic *limitations* of the hybrid right, such as wide authority to regulate defensive weapons bearing. *Id.* at 1041, 1051 (holding that a gun carrying permit law that left the Attorney General with wide discretion to deny permits to citizens did not even "impact" the constitutional right to bear arms). But its opinion showed less awareness of the characteristic *protections* that the hybrid right also implies, such as strong, often categorical protection for the right to keep arms. *Mosby* gave no criterion for deciding which weapons are constitutionally protected (conspicuously omitting to adopt *Aymette's* "civilized warfare" test), and it favorably cited opinions upholding bans on modern semi-automatic rifles, *id.* at 1044 (citing *Benjamin v. Bailey*, 662 A.2d 1226 (Conn. 1995)), while hinting that handguns, too, might be constitutionally banned. See *id.* (refusing to decide whether there is a fundamental liberty interest in possessing a handgun).

*Aymette* had characterized the right to keep protected arms as "unqualified," 21 Tenn. at 160, but *Mosby* took the relaxed attitude that a restriction on the possession of arms would be upheld as long as it was a "reasonable regulation" and "not a total ban." 851 A.2d at 1045. In the end, *Mosby* is best viewed as an incompletely reasoned opinion that makes use of some hybrid-right ideas to define a very limited, albeit still individual, right to arms.

132. See Reynolds, *supra* note 35, at 653.

In this view, the legislature may regulate firearms in ways that are consistent with its general police powers—regulations that are calculated to prevent violent crime—but, since the Declaration of Rights constitutes a carving-out from those general police powers, it may not regulate firearms in ways that frustrate the ability of the populace to maintain the ability to revolt.

*Id.*

interpretation in Justice Thomas Cooley's 1880 *Constitutional Principles* for the important proposition that "[t]he right to possess firearms . . . implies a corresponding right to acquire and maintain proficiency in their use."<sup>133</sup> Accordingly, it struck down a Chicago ordinance that simultaneously required live-fire gun range training for handgun owners, yet banned gun ranges from the city limits.<sup>134</sup> The court reasoned that "the core right" to possess guns "wouldn't mean much without the training and practice that make it effective,"<sup>135</sup> and approved of Cooley's conclusion that "[t]o bear arms implies . . . learning to handle and use them . . . ; it implies the right to meet for voluntary discipline in arms. . . ."<sup>136</sup>

*Ezell* is an example of an appropriate use of a hybrid-right source to explicate the right recognized in *Heller*. Under either the hybrid right or the self-defense based right, the right to possess arms is meant to serve particular purposes (whether tyranny control or personal defense). Neither purpose can be realized without preserving the possibility of effectively *using* those arms as weapons. Hence, a right to practice is equally essential to either conception of the right, justifying the analogy.<sup>137</sup>

On the other hand, it is not appropriate, in the wake of *Heller*, for courts to rely on hybrid right authorities to uphold restrictions on the use of firearms for self-defense, since those authorities hold a different view of the Second Amendment's central purposes than the one adopted by the Supreme Court. This error undermines the opinion of the U.S. Court of Appeals for the Second Circuit in *Kachalsky v. Westchester County*,<sup>138</sup> which upheld New York's very restrictive handgun carrying permit statute against a Second

133. *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011).

134. *Id.* at 710–11 (ordering a preliminary injunction against the ordinance on the ground that it likely violated the Second Amendment).

135. *Id.* at 704.

136. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 616, 617–18). The court inadvertently attributed the quotation to Cooley's 1868 treatise on *Constitutional Limitations* rather than his later *Principles*. Thomas M. Cooley, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 298 (Andrew C. McLaughlin 3d ed. 1898).

137. Similarly, the hybrid cases recognized that the right to possess arms to safeguard the public liberty includes, as a necessary "incident," the right to "purchase" them. *See, e.g., Andrews v. State*, 50 Tenn. 165, 178, 182. This argument is equally sound when applied to the right to possess arms for self-defense, which "must also include the right to *acquire* a firearm," on pain of not being able to exercise the right. *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928 (N.D. Ill. 2014) (emphasis in original) (striking down municipal ban on sales of firearms as a Second Amendment violation).

138. *Kachalsky v. County of Winchester*, 701 F.3d 81 (2d Cir. 2012).

Amendment challenge.<sup>139</sup> The judicial record of nineteenth century American state courts, particularly in the antebellum era, casts doubt on this holding: Numerous courts concluded that state or federal constitutional right to arms provisions protected a right to carry handguns or other common weapons outside the home for self-defense.<sup>140</sup> Seeking to blunt this argument, *Kachalsky* cited a handful of nineteenth century cases upholding restrictions on carrying in support of the claim that the historical record was not uniform on this point.<sup>141</sup> However, all of the cited cases were hybrid-right cases.<sup>142</sup> They took a deferential view of governmental power to restrict carrying arms for personal defense for the straightforward reason that they did not think personal defense was a central purpose of the right to bear arms.<sup>143</sup> But that is not the conception that the Supreme Court adopted in *Heller* and that the Second Circuit was tasked with applying.<sup>144</sup>

The recent decision of the U.S. Court of Appeals for the Ninth Circuit in *Peruta v. County of San Diego* reflects a clearer-headed approach. *Peruta* recognizes the existence of the two main traditions in American right-to-arms jurisprudence, and emphasizes that authorities from the civic-focused, hybrid-right tradition are of little persuasive value in determining the scope of the right to bear arms for individual self-defense.<sup>145</sup> Accordingly, it criticizes *Kachalsky* for using hybrid-right sources to argue that sweeping restrictions on

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139. *Id.* at 101. Unlike most states, New York's law prohibits law-abiding citizens from obtaining a permit to carry a handgun in public for self-defense unless they can demonstrate "proper cause" to the satisfaction of a state licensing official. *Id.* at 86; N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2008). "Proper cause," in turn, is judicially defined as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Kachalsky*, 701 F.3d at 86 (quoting *Klenosky v. N.Y.C. Police Dep't*, 428 N.Y.S.2d 256 (1st Dep't 1980), *aff'd on op. below*, 421 N.E.2d 503 (N.Y. 1981)).

140. See *Leider*, *supra* note 27 at 1601–11; O'Shea, *supra* note 13 at 623–37; *Kopel & Cramer*, *supra* note 100 at 1124–37 (all canvassing the antebellum case law and reaching essentially the same conclusions).

141. *Kachalsky*, 701 F.3d at 90–91, (citing *Fife v. State*, 31 Ark. 455 (1876); *English v. State*, 35 Tex. 473 (1871); and *Andrews v. State*, 50 Tenn. 165 (1871)).

142. *Fife*, 31 Ark. at 459; *Andrews*, 50 Tenn. at 181–82; *English*, 35 Tex. at 477.

143. *Id.*

144. See *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1174 (9th Cir. 2014) (criticizing *Kachalsky* on this score, reasoning that "the cases [*Kachalsky*] cites in favor of broad public carry restrictions adhere to a view of the Second Amendment that is and always has been incorrect," in light of *Heller*'s official adoption of the self-defense based conception of the right).

145. *Id.*

defensive gun carrying are permissible.<sup>146</sup> To the contrary, argues *Peruta*, once one distinguishes the right sources—those recognizing a right to bear arms with a central component of self-defense—the nineteenth century sources speak with clarity on the existence of a right of most persons to carry handguns in most places.<sup>147</sup> Courts applying the hybrid right model typically would not be willing to go as far as *Peruta* in recognizing defensive carry rights, but *Heller* rejected that model.

On the other hand, while some post-*Heller* courts have treated hybrid right sources as relevant and probative when it is a matter of casting doubt on the scope of the right to carry handguns, such sources have *not* appeared in judicial opinions in another area where one might think them relevant: Second Amendment challenges to prohibitions on popular semi-automatic rifles such as the AR-15, and their magazines. Such laws are often termed “assault weapons bans.”<sup>148</sup>

Under contemporary application of the hybrid right, no firearm would be entitled to as categorical protection as the AR-15. Not only did the hybrid right consistently extend strong constitutional protection to “the rifle of all descriptions,”<sup>149</sup> but a court that followed the hybrid tradition’s admonition to draw upon “a knowledge of the habits of our people” as well as “of the arms in the use of which a soldier should be trained,”<sup>150</sup> would have little trouble concluding that such rifles deserve to be at the core of constitutional protection.<sup>151</sup>

The AR-15 pattern rifle is frequently referred to in media as the best selling rifle in America,<sup>152</sup> and statistics bear this out.<sup>153</sup> Private

146. *Id.*

147. *Id.*

148. *See, e.g., Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (upholding, against Second Amendment challenge, District of Columbia’s prohibition on many models of popular semiautomatic rifles and magazines holding over 10 rounds of ammunition, despite acknowledging that both are in “common use” in the United States); *Shew v. Malloy*, No. 3:13CV739, 2014 WL 346859, at \*5, \*9 (D. Conn. Jan. 30, 2014) (same).

149. *Andrews v. State*, 50 Tenn. 165, 179 (1871).

150. *Id.*

151. *See id.* (arguing that courts should identify, and protect the right to keep, “the usual arms of the citizen of the country, . . . the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State”).

152. Natasha Singer, *The Most Wanted Gun in America*, N.Y. TIMES, Feb. 3, 2013, <http://www.nytimes.com/2013/02/03/business/the-ar-15-the-most-wanted-gun-in-america.html>.

153. *See* NAT’L RIFLE ASS’N, INSTITUTE FOR LEGISLATIVE ACTION, U.S. FIREARM PRODUCTION SETS RECORD IN 2012: AR-15 PRODUCTION UP OVER 15% (Feb. 21,

ownership of AR-15s is now well into the millions.<sup>154</sup> As I've argued elsewhere, the semi-automatic AR-15 is "a commonly owned, less destructive version[ ] of the standard American military rifle used today; [its] utility for a popular militia is clearer than that of any other firearm."<sup>155</sup>

Scholars tend to agree that the hybrid right fell from acceptance in the twentieth century because of perceived pragmatic concerns that it would have blocked government from restricting access to M16 machine guns and other modern military small arms that were viewed as inappropriate for common ownership by the citizenry at large.<sup>156</sup> I have published a similar view about the motivation for the change.<sup>157</sup> Nevertheless, I am not so convinced that the hybrid/civic republican right is really unimaginable today.

The key is to notice the refinement that *Andrews* added to the "civilized warfare" test, replacing *Aymette's* pure criterion of "ordinary military equipment" with a joint criterion of militia utility *plus* common use by private citizens.<sup>158</sup> Bluntly, this refinement would imply today that widely owned, self-loading AR-15s are "in" (that is, are constitutionally protected "arms") but machineguns like the M-16, which have traditionally been vastly less common in private hands, are "out." This, in turn, greatly weakens the force of the supposed *reductio ad absurdum* that concerned the *Heller* majority and the twentieth century courts. After all, a legal regime in which modern semi-automatic rifles and their magazines are widely available and commonly kept by individual private citizens for legitimate purposes does not name a hypothetical future: it describes the American status quo today.<sup>159</sup> And as I've noted, a shift

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2014), <http://www.nraila.org/news-issues/articles/2014/2/us-firearm-production-sets-record-in-2012-ar-15-production-up-over-100-percent.aspx>.

154. See *id.*

155. O'Shea, *supra* note 13, at 659.

156. See, e.g., Leider, *supra* note 27 at 1638-39 (arguing that by the mid-twentieth century, *Aymette's* criterion of protecting private ownership of "ordinary military equipment" would have included weapons such as the M-16 assault rifle, deemed a machine gun under federal law). In Leider's view, twentieth century federal courts retreated to the "collective rights view of the Second Amendment," in which individual gun possession was not protected, in order to "remov[e] the federal courts from this quagmire." *Id.* at 1639.

157. O'Shea, *supra* note 13 at 658-59.

158. See *supra* notes 70 to 76 and accompanying text.

159. See JOHNSON ET AL., *supra* note \* at 12-13 (surveying federal and state laws on ownership of AR-15s and similar rifles sometimes termed "assault weapons"; noting that while a minority of states restrict these arms, in most states they are entirely legal to own and acquire and are not treated differently from other types of guns).

to the hybrid right would actually impose less constitutional constraint on gun regulation in some important areas than *Heller* does: particularly as applied to laws limiting handgun carrying than *Heller* does. The personal defense-based right adopted in *Heller* no doubt corresponds more closely with what most Americans find valuable today about firearms ownership and use. But the hybrid right is plausible and practicable enough to take seriously.

#### CONCLUSION: IF NOT *HELLER*, THEN THE HYBRID RIGHT

The history of (what we should henceforth call simply) the civic republican interpretation of the right to arms complicates the effort of some of *Heller*'s historical critics to support Justice Stevens's narrow approach to the Second Amendment. A common approach is to argue as follows: English and/or founding-era sources on the right to arms (it is contended) stressed civic purposes, not personal defense; therefore, the right to arms was not intended to protect personal gun possession. The argument is invalid,<sup>160</sup> because it fails to exclude the possibility that the right to arms was primarily oriented toward civic purposes, yet protected personal gun possession. The hybrid right tradition shows that the excluded

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Of course, the regulatory status quo is itself controversial. The wide commercial availability (in most states) of the modern guns dubbed "assault weapons" is one of the leading gun control controversies today, particularly in light of several atrocious mass murders in recent years, some of which were committed with these types of weapons. But the point remains that in most parts of the country, recognition of a hybrid right to arms would not require any large deregulatory shift in current gun laws, and this casts doubt on the *reductio ad absurdum* argument scouted in the text.

It is relevant that rifles in general—only a portion of which are typically classed as "assault weapons," such as the AR-15—appear to be employed in far fewer murders than handguns, the category of firearms which *Heller* has deemed entitled to the strongest constitutional protection. For example, in 2012 (the most recent year for which full data are published in the federal Uniform Crime Reports) handguns were used to commit at least 6,371 murders in America, while rifles were known to be used in only 322 (303 involved shotguns). Another 1,859 murders involved "other" firearms or were incidents in which the type of firearm was undisclosed. See U.S. Dep't of Justice, Fed. Bur. of Investigation, *Crime in the United States 2012*, tbl.11, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_11\\_murder\\_circumstances\\_by\\_weapon\\_2012.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_11_murder_circumstances_by_weapon_2012.xls) (last visited July 7, 2014).

160. Formally, it is an example of denying the antecedent.



possibility is not theoretical; it was directly embodied in many legal authorities during a large swath of American history.<sup>161</sup>

Let us put the point another way. Many founding-era clues show that early Americans thought a personal right to arms, independent of government's say-so, was entirely consistent with an emphasis on the civic, liberty-preserving function of arms ownership.<sup>162</sup> Think of the textual evidence of Madison's early proposal to interlineate the Second Amendment, *not* among the structural guarantees of federal and state control in the Militia Clauses of Article I, Section 8, but rather to group it with the individual liberty protections of Article I, Section 9, such as the prohibitions against bills of attainder, suspending the writ of habeas corpus, and ex post facto laws.<sup>163</sup> Historian Robert Churchill has also pointed to the importance of Revolutionary-era laws exempting personally owned firearms from impressment and ensuring that the individual members of the body politic could keep arms.<sup>164</sup> And we should observe Federalist official Tench Coxe's 1789 commentary on the provision of the proposed Bill of Rights that would become the Second Amendment:

As 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*.<sup>165</sup>

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161. See *id.* at 642–650 (discussing hybrid right cases).

162. *Id.*

163. Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 223 (1983).

164. Churchill, *supra* note 130. Churchill identifies a Founding-era consciousness of an individual right to keep arms that was intimately intertwined with civic purposes yet remained outside the government's regulatory "police power." This consciousness maps naturally onto the judicial conception set out in the hybrid right cases:

The right to keep arms commanded legislative respect in early America because it facilitated the public purpose of collective self-defense . . . . But the right to keep arms, as distinct from bearing them, did not require collective action. Nor was the right carried out within a public organization . . . .

*Id.* at 166–67.

165. A *Pennsylvanian* (Tench Coxe), *Remarks on the First Part of the Amendments to the Federal Constitution*, PHILA. FED. GAZETTE, June 18, 1789, at 2

This is the conception later adopted by many American courts in *Aymette* and its progeny, and it is a conception of a bona fide personal right, a legal impediment to prohibitory gun legislation.<sup>166</sup> Soon after some American jurisdictions began to adopt serious gun control laws in the 1820s and 1830s, their courts began articulating the constitutional right to arms.<sup>167</sup> Both then and later, courts did not uniformly agree about whether personal defense was a central component of that right (although the clear majority of antebellum courts concluded it was), but they *did* achieve something very close to unanimity on the proposition that it protected individual keeping of at least some weapons.<sup>168</sup> It is telling that an early American court like the *Aymette* court could echo every point made by *Heller*'s historical critics in rejecting the centrality of personal defense, while adopting their reading of English history instead of *Heller*'s—and yet concluded that the Second Amendment (in parallel with the Tennessee Constitution) still protected an individual right of the citizen to “keep arms”—indeed, an “unqualified right” to keep those arms appropriate for a popular militia.<sup>169</sup> As *Andrews* and its progeny show, in the generations that followed, American jurists continued to find this a natural reading of the Second Amendment.<sup>170</sup>

So even if one believed that the critics have carried their point in criticizing *Heller*'s stress on personal defense, why would one think—in the teeth of what early American courts actually *did* in such a situation—that something like Justice Stevens' near-nugatory conception of the right to arms would follow in its place? Surely if *Heller* erred in this way, the more natural conclusion is that the Second Amendment protects the civic republican, hybrid right, which gives an obvious, facially understandable significance to both clauses of the amendment. That, as I've argued, would put some types of controversial gun control laws—such as “assault weapons” laws—in more danger than they are now under *Heller*, while it would tend to reduce the legal threat to others—such as restrictive laws on handgun carrying. People of good will may disagree about whether this would be a normatively preferable prospect, but it is not absurd.

It is time for an end to word games like Justice Stevens's denial that the Second Amendment “protect[s] nonmilitary use and

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(emphasis added), quoted in *Kates*, *supra* note 163, at 224 n.81.

166. *Aymette v. State*, 21 Tenn. 154, 159 (1840).

167. *See, e.g., id.*

168. *See supra* Part I.

169. *Aymette*, 21 Tenn. at 158, 160.

170. *Andrews v. State*, 50 Tenn. 165, 178–79 (1871); *see infra* Part I.

possession of weapons" or imposes any limits on "elected officials wishing to regulate civilian uses of weapons."<sup>171</sup> Let us be fully specific about the alternate interpretation being advanced. If critics of the *Heller* majority wish to argue that the evidence better supports the civic republican interpretation of the Second Amendment, which this article has called the "hybrid" right, then I concede that there is an intellectually respectable and interesting ground for debate on that score. But the civic republican interpretation still implies judicially enforceable constitutional limits on gun control laws; it is just that the contours of those limits differ from the ones implied by the model of the right adopted in *Heller*.

If, on the other hand, *Heller's* critics wish to reject the civic republican/hybrid interpretation as well, then they have a further burden of persuasion to carry. This burden cannot be met by simply pointing to the civic-focused prefatory clause of the Second Amendment, nor by early sources emphasizing the civic, anti-tyranny purposes of the right to keep and bear arms. For that is common ground between the civic republican/hybrid right and the narrow interpretation promoted by Justice Stevens. To carry this burden, it will be particularly necessary to explain why the nineteenth century judicial record contains plentiful sources in support of both *Heller's* defense-based tradition and the rival, civic republican tradition, while any clear evidence that early American courts embraced Justice Stevens's government-centered view is exceptionally scarce prior to the twentieth century.

To make the point concrete: As things stand, there is a plausibly grounded interpretation of the Second Amendment that enables one to argue for upholding "may issue" handgun carrying laws as constitutional. And there is also a grounded approach from which one can plausibly argue for upholding some semi-automatic "assault weapons" bans as constitutional. But not for upholding both.<sup>172</sup>

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171. *District of Columbia v. Heller*, 554 U.S. 570, 651, 680 (2008) (Stevens, J., dissenting).

172. Of course, one can also argue that both types of laws should be struck down as unconstitutional. Considerations of space have prevented me from examining this possibility further here. Such a view could draw support from the Georgia Supreme Court's famous opinion in *Nunn v. State*:

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

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vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta!*

...

We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . . .

