AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 5: The Jacksonian Era—Individual Rights/Guns/General Principles

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State v. Buzzard, 4 Ark. 18 (1842) (expanded)

Buzzard was indicted for carrying a concealed weapon. At trial, he successfully moved to have the indictment quashed on the ground that the Arkansas law banning concealed weapons violated the right to bear arms protected by the state and federal constitutions. The state appealed this decision to the Supreme Court of Arkansas.

The Supreme Court of Arkansas ruled that the state concealed weapons law did not abridge the right to bear arms. The judicial opinions in Buzzard *are the most extensive discussion in antebellum America on the relationship between the right to bear arms, militia service, and self-defence. How would you describe the differences between the majority opinions and the dissent? Do the judges dispute basic constitutional principles, methods of constitutional interpretation, or applications of shared principles? Do the justices simply have different values? Are the judges engaged in a good faith dispute over the meaning of constitutional principles or do some opinions smuggle illegitimate non-legal principles into constitutional interpretation?*

Contemporary constitutional commentators dispute whether the result in State v. Buzzard *reflected a general sentiment that the right to bear arms was limited to militia service.* State v. Buzzard *is the precedent of choice for contemporary Americans who champion a narrow reading of Second Amendment. Nevertheless, other cases decided in Jacksonian America connect the right to bear arms to self-defense. The Supreme Court of Louisiana in* State v. Chandler *(1850) spoke of "a manly and noble defence of themselves" when construing the constitutional right to bear arms. Contemporary champions of broad gun rights insist such cases as* Chandler *are more reflective of constitutional opinion before the Civil War.*

CHIEF JUSTICE RINGO

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. . . [I]t may not be without utility to inquire for what object the right to keep and bear arms is retained exempt from all legal regulation or control, if in fact it has been so retained, as urged in the argument for the appellee. Is it to enable each member of the community to protect and defend by individual force his private rights against every illegal invasion, or to obtain redress in like manner for injuries thereto committed by persons acting contrary to law? Certainly not; because, according to the fundamental principles of government, such rights are created, limited, and defined by law, or retained subject to be regulated and controlled thereby; and the laws alone are and must be regarded as securing to every individual the quiet enjoyment of every right with which he is invested; thus affording to all persons, through the agency of the public authorities to whom their administration and execution are confided, ample redress for every violation thereof. And to these authorities every person is, in most cases, bound to resort, for the security of his private rights, as well as the redress of all injuries thereto. . . .

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. . . [T]he government possesses, in my opinion, ample power to inhibit, by law, all such acts and practices of individuals, as affect, injuriously, the private rights of others, tend to disturb domestic tranquility, or the peace and good order of society, militate against the common interests, impair the means of common defence, or sap the free institutions of the country; and to enforce the observance of such laws by adequate penalties, the character and quantum of which, in most respects, depend exclusively upon the will and judgment of the Legislature.

If these general powers of the government are restricted in regard to the right to keep and bear arms, the limitation, to whatever extent it may exist, will be better understood, and more clearly seen, when the object for which the right is supposed to have been retained, is stated. That object could not have been to protect or redress by individual force, such rights as are merely private and individual, as has been already, it is believed, sufficiently shown: consequently, the object must have been to provide an additional security for the public liberty and the free institutions of the state, as no other important object is perceived, which the reservation of such right could have been designed to effect. Besides which, the language used appears to indicate distinctly that this, and this alone, was the object for which the article under consideration was adopted. And it is equally apparent, that a well regulated militia was considered by the people as the best security a free state could have, or at least, the best within their power to provide. But it was also well understood that the militia, without arms, however well disposed, might be unable to resist, successfully, the effort of those who should conspire to overthrow the established institutions of the country, or subjugate their common liberties; and therefore, to guard most effectually against such consequences, and enable the militia to discharge this most important trust, so reposed in them, and for this purpose only, it is conceived the right to keep and bear arms was retained, and the power which, without such reservation, would have been vested in the government, to prohibit, by law, their keeping and bearing arms for any purpose whatever was so far limited or withdrawn; which conclusion derives additional support from the well-known fact that the practice of maintaining a large standing army in times of peace had been denounced and repudiated by the people of the United States as an institution dangerous to civil liberty and a free State, which produced at once the necessity of providing some adequate means for the security and defense of the state, more congenial to civil liberty and republican government. And it is confidently believed that the people designed and expected to accomplish this object by the adoption of the article under consideration, which would forever invest them with a legal right to keep and bear arms for that purpose; but it surely was not designed to operate as an immunity to those who should so keep or bear their arms as to injure or endanger the private rights of others, or in any manner prejudice the common interests of society.

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Suppose a portion of the community consider their private rights invaded by some act or exercise of authority on the part of the government, which they consider as unauthorized, can they, by virtue of any legal right with which they are invested, either prevent or redress such injury by private force? In my opinion they cannot; their private rights being in this, as in most other cases, committed, as it were, to the care and custody of the law, and to it, so long as our civil liberties and republican institutions remain unimpaired, they are bound to look for protection as well as redress; both of which the government is under a positive obligation to provide.

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JUSTICE DICKINSON concurring

. . . The class of cases to which the constitutional provision applies is widely different from the right of a private citizen to bear, concealed about his person, deadly weapons or arms. In the one, they are kept and carried in conformity with the Constitution and laws of the United States, with a certain specific object in view; in the other, they are kept and carried for private purposes, wholly independent of any constitutional regulation, and to answer private ends, which have no bearing upon the security of the State. If this idea be correct, then it follows that when arms are not kept or used for the defense of the State or Federal government, the manner of carrying and mode of using them are subject to the control and authority of the State Legislature. . . .

. . . The enactment in question is a mere police regulation of the state for the better security and safety of its citizens, having reference to weapons and arms of a wholly different character from such as are ordinarily used for warlike purposes. The principle contained in the provision of our Constitution, which declares that "the freemen of this State shall keep and bear arms for their common defense," is precisely similar to that of the United States; it stands upon the same ground and is declaratory of the same right. The terms "common defense," in ordinary language, means national defense. The reason for keeping and bearing arms given in the instrument itself is clearly explanatory and furnishes the true

interpretation of the claim in question. The militia constitutes the shield and defense for the security of a free State; and to maintain that freedom unimpaired, arms and the right to use them for that purpose are solely guaranteed. The personal rights of the citizens are secured to him through the instrumentality and agency of the constitution and laws of the country; and to them he must appeal for the protection of his private rights and the redress of his private injuries. To deprive the General Assembly of the power to regulate and control those rights when not inconsistent with the grant to the General Government, would be to take away from the state the terrors of the law and the restraint of its moral influence, upon which its prosperity mainly depends. . . .

JUSTICE LACY

. . . I take the expressions "a well regulated militia being necessary for the security of a free State," and the terms "common defense," to be the reasons assigned for the granting of the right, and not a restriction or limitation upon the right itself, or the perfect freedom of its exercise. The security of the state is the constitutional reason for the guaranty. But when was it contended before that the reason given for the establishment of a right or its uninterrupted enjoyment not only limited the right itself, but restrained it to a single specific object? . . . According to the rule laid down in [the majority's] interpretation of this clause, I deem the right to be valueless and not worth preserving; for the State unquestionably possesses the power, without the grant, to arm the militia and direct how they shall be employed in cases of invasion or domestic insurrection. If this be the meaning of the Constitution, why give that which is no right in itself and guarantees a privilege that is useless? This construction, according to the views I entertain, takes the arms out of the hands of the people, and places them in the hands of the Legislature, with no restraint or limitation whatever upon their power, except their own free will and sovereign pleasure. Are great affirmative grants of political powers to be determined by this technical rule of verbal criticism? If so, its rigid application to other portions of the Constitution would erase from its pages many of its most important and salutary provisions. Such a principle, I apprehend, should never be recognized or adopted by any judicial tribunal in determining the inherent and original rights of the citizen. It goes to abridge instead of enlarging the constitutional guarantees of personal liberty.

. . . I deny that any just or free government upon earth has the power to disarm its citizens and to take from them the only security and ultimate hope that they have for the defense of their liberties and their rights. I deny this, not only upon constitutional grounds, but upon the immutable principles of natural and equal justice that all men have a right to, and which to deprive them of amounts to tyranny and oppression. Can it be doubted, that if the Legislature, in moments of high political excitement or of revolution, were to pass an act disarming the whole population of the State, that such an act would be utterly void, not only because it violated the spirit and tenor of the Constitution, but because it invaded the original rights of natural justice? Now, if they are private and not public arms, the Constitution guarantees the right of keeping and bearing them.

. . . A man's arms are his private property: how, then, can he be legally deprived of them? If they can forbid him, under the penalty of fine and imprisonment, to keep them concealed or exposed about his person, or on his own premises, although their unrestrained use may be necessary for all the purposes of his ordinary business and of personal defense, then certainly the right of keeping and bearing arms according to his own discretion, is infringed and violated, and his own free will in the management of this property abridged and destroyed.

. . . I maintain that the simple fact of a man's keeping and bearing private arms, whether concealed or exposed, is an act innocent of itself, and its freedom secured from all legislative interference. The act being innocent and allowed, can not be made penal, or prohibited by law. The existence and freedom of a right is one thing, and the culpable and criminal use of it another and a wholly different thing. A right, in itself innocent and guaranteed by law, can not be made illegal or punished as a crime; and the error into which the court has fallen in the present instance, seems to me to result from confounding these two things, which are wholly separate and independent of each other.

. . . I maintain that the act is not only lawful, but expressly secured by the Constitution, and of course cannot be controlled by ordinary legislation I admit that, if a man uses his arms improperly, or in an unlawful manner, then it is competent for the Legislature to punish him for the improper and illegal

use of them; and it is right to do so; for every one is bound so to exercise his own rights, as not to prejudice those of others. The Legislature, in doing this, does not punish an innocent act, but an unwarrantable one; it does not abridge a natural and constitutional right, or in any manner interfere with its freedom. It merely punishes an unlawful use of a right; and it can do that only when the party has committed, with his own arms, unauthorized aggression upon the person or property of another. . . .

Sic utere tuo, non lædas alienum, is a maxim that runs through the whole body of the English common law, and pervades every part of our entire system of jurisprudence. . . . The application of this governing rule in the construction of laws, demonstrates and explains the reasons why it would be unlawful so to keep arms and ammunition of any kind, as to endanger the lives or property of others; and it solves the supposed difficulty, that if there is no limitation or restriction of the power of keeping and bearing arms, then the State has no authority to disarm a criminal for any offense whatever. When a citizen breaks his covenant with his government, he forfeits the protection of her laws; and of course this supercedes or destroys many of his municipal rights and political franchises, which he otherwise would be entitled to receive at her hands.

. . . By far the most important and largest of the rights of the Constitution appertain exclusively to the person of the citizen, and concern the inherent rights of life, liberty and property. Many of these rights lie behind the Constitution, and existed antecedent to its formation and its adoption. They are embodied in its will, and organized by its power, to give them greater sanctity and effect. They are written that they may be understood and remembered; and then declared inviolate and supreme, because they cannot be weakened or invaded without doing the government and citizen manifest injustice and wrong. Among these rights, I hold, is the privilege of the people to keep and to bear their private arms for the necessary defense of their person, habitation and property, or for any useful or innocent purpose whatever. We derive this right from our Anglo-Saxon ancestors, and under the form of that government it has ever been regarded as sacred and inviolable. It is of great antiquity and of invaluable price. Its necessary operation, in times of convulsion and of revolution, has been the only means by which public liberty or the security of free States has been vindicated and maintained. Here, the principles of equal and natural justice, as well as the obvious meaning and spirit of the Constitution, have placed it above legislative interference. To forbid a citizen, under the penalty of fine and imprisonment, to carry his own private arms about his person, in any manner that he may think proper for his security or safety, is, in my opinion, an unauthorized attempt to abridge a constitutional privilege, and therefore I hold the law in question to be of no effect.