AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 6: The Civil War and Reconstruction—Individual Rights/Guns

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English v. State, 30 Tex. 473 (1871)

William English wore an unloaded pistol while publicly intoxicated in Marion County, Texas. He was arrested and convicted for violating a Texas law prohibiting persons from carrying deadly weapons. Pistols were among the weapons forbidden by the Texas law. English appealed his conviction to the Supreme Court of Texas. He claimed the Texas law violated the Second Amendment and the Constitution of Texas.

The Supreme Court of Texas rejected his appeal. Judge Walker's unanimous opinion declared that the Second Amendment protected only those weapons that had military uses and that a pistol was not a military weapon. Courts in Tennessee and Arkansas reached similar conclusions. What might explain this tendency during Reconstruction to connect the right to bear arms with the militia? Consider two hypotheses. First, English *and related cases are connected to mid-nineteenth century efforts by police and municipal authorities to fight crime. Second, the tendency of southern courts to connect the right to bear arms with militia service was part of an effort after the Civil War to keep weapons from persons of color, who did not serve in the militia.*

JUDGE WALKER

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. . . [The Second Amendment] protects only the right to 'keep' such 'arms' as are used for purposes of war, in distinction from those which are employed in quarrels and broils, and fights between maddened individuals, since such only are properly known by the name of 'arms,' and such only are adapted to promote "the security of a free state." In like manner the right to 'bear' arms refers merely to the military way of using them, not to their use in bravado and affray. . . .

To refer the deadly devices and instruments called in the statute "deadly weapons," to the proper or necessary arms of a "well-regulated militia," is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit. The word "arms" in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms.

The terms dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives, belong to no military vocabulary. Were a soldier on duty found with any of these things about his person, he would be punished for an offense against discipline.

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It will doubtless work a great improvement in the moral and social condition of men, when every man shall come fully to understand that, in the great social compact under and by which states and communities are bound and held together, each individual has compromised the right to avenge his own wrongs, and must look to the state for redress. We must not go back to that state of barbarism in which each claims the right to administer the law in his own case; that law being simply the domination of the strong and the violent over the weak and submissive.

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It is furthermore claimed that this is a law in violation of the thirteenth section, first article, of our own constitution, which reads thus: "Every person shall have the right to keep and bear arms in the lawful defense of himself or the state, under such regulations as the legislature may prescribe." We understand the word "arms," when used in this connection, as having the same import and meaning which it has when used in the amendment of the federal constitution.

Our constitution, however, confers upon the legislature the power to regulate the privilege. The legislature may regulate it without taking it away—this has been done in the act under consideration. But we do not intend to be understood as admitting for one moment, that the abuses prohibited are in any way protected either under the state or federal constitution. We confess it appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together.

It is not our purpose to make an argument in justification of the law. The history of our whole country but too well justifies the enactment of such laws. This law is not peculiar to our own state, nor is the necessity which justified the enactment (whatever may be said of us to the contrary) peculiar to Texas. It is safe to say that almost, if not every one of the states of this Union have a similar law upon their statute books, and, indeed, so far as we have been able to examine them, they are more rigorous than the act under consideration. Other older states have been better able to carry out these laws than we have yet been, and the laws perhaps themselves have been less repugnant to the people of those states, than our law has been to a class of our own people. But a law is not to be set aside because it may be repugnant to the wishes, or distasteful to a class of the community, for it is generally to that class that the law is more especially addressed. Were such a rule to obtain in civilized states, it would operate a revocation of all legislative functions; the mob would assume to declare what should be law, and what should not. There could be no reformation of evils in society. Communities and states would degenerate just in proportion as their laws were wise and wholesome, or foolish and immoral.

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