



The legal history of bans on firearms and Bowie knives before 1900

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Bowie knives are back in constitutional law news these days, after a very long absence. The U.S. Supreme Court's *Bruen* decision instructs lower courts to look to U.S. legal history to see what sorts of restrictions on Second Amendment rights are consistent with the mainstream American legal tradition. According to the Court, the legal history of the Founding Era is the most important, the late nineteenth century much less so, and the twentieth century too late to create a tradition that contradicts the text of the Second Amendment.

Post-*Bruen*, some gun control advocates have been looking to Bowie knife laws as analogical justifications for bans on common modern rifles and magazines. In a separate post, *Bowie knife statutes 1837-1899*, I provide a state-by-state survey of all state Bowie knife laws through 1899. This post examines constitutional case law on Bowie knives, the history of such knives, and the history of pre-1900 bans on types of firearms.

As described below, valid pre-1900 precedents on firearms prohibitions are non-existent. *Bruen* suggests that "dramatic technological changes may require a more nuanced approach" in drawing historical analogies to justify modern arms controls. Accordingly, there has been renewed interest in Bowie knives, which are said to be a new technology that appeared in the early 19th century. In the Fourth Circuit, Maryland Attorney General Frosh is defending a Maryland ban on many common rifles. In his recently-filed supplemental brief in *Bianchi v. Frosh*, Bowie knife laws are an important part of his argument, including with a citation to my article *Knives and the Second Amendment*, 47 U. Michigan J. of Law Reform 175 (2013) (with Clayton Cramer and Joseph Olson).

At a previous stage in the case, I coauthored an amicus brief in support of the plaintiffs' cert. petition, *Bianchi v. Frosh*. No. 21-902. The brief was on behalf of Professors of Second Amendment Law (including VC's Randy Barnett), Cato Institute, John Locke Foundation, Center to Keep and Bear Arms (Mountain States Legal Foundation), and Independence Institute. The week after *Bruen*, the Supreme Court granted cert., vacated the decision below (the Fourth Circuit upholding the ban), and remanded for consideration in light of *Bruen*.

This post proceeds as follows:

- Part I summarizes *Bruen*'s rules for reasoning from historical analogies.

- Part II summarizes the pre-1900 American history of firearms bans. Four states enacted some sort of prohibitory law on particular types of firearms.
- Part III explains Bowie knives, and the infamous 1837 murder on the floor of the Arkansas legislature that may have spurred legislative action in several states.
- Part IV examines the three major state supreme court cases involving Bowie knives:
 - In Georgia, *Nunn v. State* (1844) held that a statute banning Bowie knives and handguns violated the Second Amendment.
 - In Tennessee, *Aymette v. State* (1840) upheld a ban on concealed carry of Bowie knives as not violating the state constitution. The court stated that the right to keep arms was individual, but the right to bear arms was only for military service, such as the militia. Mistakenly, the court said that a Bowie knife would be of no use to a militia. To the contrary, many militias used Bowie knives, before and after 1840.
 - *Cockrum v. State* (1859) applied the Texas Constitution and the Second Amendment and stated, "The right to carry a bowie-knife for lawful defense is secured, and must be admitted." However, enhanced sentencing for use of a Bowie knife in murder was constitutional.

The other post, *Bowie knife statutes 1837-1899*, excerpts and analyzes state 19th-century Bowie knife statutes. With very rare exceptions, states that chose to regulate Bowie knives treated them the same as other, older, types of fighting knives, namely dirks and/or daggers. As described in this post, "Bowie knives" were briefly considered to be a new type of arm, but they were not. Bowie knife laws turned into general laws about large knives, and so in statutes, "Bowie knife" was joined by other well-known fighting knives.

The knife category of Bowie knives plus dirks and/or daggers was frequently regulated at the same level as handguns. That is, prohibitions were rarities. The mainstream approach for handguns and knives was non-prohibitory for peaceable adults, such as laws forbidding concealed carry (while allowing open carry), prohibiting sales to minors, or specially punishing misuse.

Whatever 19th century handgun laws teach about permissible limits on the right to arms, the Bowie knife laws go no further. Because Bowie knives are so often *in pari materia* with 19th-century handgun regulations that they add little if anything to the very thin base of historical precedents for prohibitions on common arms.

The legal history of Bowie knives reinforces the U.S. Supreme Court's history-based holdings about permissible handgun regulation. Bowie knives were not some extraordinary category for which regulation more severe than handgun control was typical.

I. Rules from *Bruen*

Further analysis of the material in this Part is in my article *Restoring the right to bear arms: New York State Rifle and Pistol Association v. Bruen*, 2021-22 Cato Supreme Court Review (Trevor Burrus ed., 2022).

Bruen affirmed that text, history, and tradition is the correct methodology in Second Amendment cases, not interest balancing:

... *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

142 S. Ct. 2111, 2126-27 (2022). Courts may not engage in interest balancing, nor may they defer to legislative interest balancing:

The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.

Id. at 2131 (quoting *Heller*).

Thus, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30.

Judges do not bear the burden of becoming legal history researchers. As with anything else that the government must prove, the government must present persuasive legal history to the court. "Courts are thus entitled to decide a case based on the historical record compiled by the parties." *Id.* at 2130 n.5.

Sometimes, the government and its allies will win because there are many historic laws that are twins of modern ones—such as prohibiting reckless discharge of a firearm in populated areas. Additionally, the government can prove its case by "analogical reasoning." This means "a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* at 2133.

"[A]nalogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." *Id.* "[C]ourts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.'" *Id.* (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021)).

If a historical arms control law is both "established" and "representative," the next step is to determine whether the modern gun control and the alleged historical analogue are "relevantly similar." *Bruen* does not purport to "exhaustively" define how judges may consider similarity.

Instead, *Bruen* suggests that *Heller* and *McDonald* point to "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."

"How" means: "whether modern and historical regulations impose a comparable burden on the right of armed self-defense."

"Why" means: "whether that burden is comparably justified." The second metric prevents historic, burdensome laws that were enacted for one purpose from being used as a pretext to impose burdens for other purposes. *Id.* at 2132-33.

How to deal with technological or societal changes? Per Justice Thomas:

While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—"intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.

Id. at 2132 (quoting *McCulloch v. Maryland*). Some social problems have been around for a long time. Whether previous generations addressed a problem with restrictions on Second Amendment rights is an important question:

[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Id. at 2131.

Legal tradition is based on many places over many years. A few harsh laws in a few places do not negate the mainstream. For example, in *Bruen* the following were, cumulatively, insufficient to negate the general American tradition of a right to carry arms:

- A statute in the short-lived colony of East Jersey (half of present New Jersey) against frontiersmen ("planters") carrying handguns. The statute was in effect for "[a]t most eight years."
- An 1871 Texas ban against carrying handguns under most circumstances.

- In the latter nineteenth century, five western territories with statutes against handgun carrying in cities, or more broadly.
- Four colonial or Early Republic statutes that supposedly prohibited arms carrying. They actually did not, but the Court assumed *arguendo* that the description of the statutes in the amicus briefs of the anti-gun lobbies was accurate.

In general, "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 2154.

Broad state restrictions on peaceable carry did become more common in the 20th century, most famously with the 1911 New York "Sullivan Act" at issue in *Bruen*. But, "[a]s with . . . late-19th-century evidence, the 20th-century evidence presented by respondents and their amici does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 2154 n.28.

According to *Bruen*, states may require licenses for bearing arms in public. Issuance must be based on narrow and objective criteria. The licensing systems may not have "lengthy wait times . . . or exorbitant fees." *Id.* at 2138 n.9.

II. Firearms bans in the U.S. before 1900

Attorneys General who must defend recent state bans on various types of common firearms have a challenging task. There were very few bans of particular types of firearms during the nineteenth century, and all of them are plainly unconstitutional under modern doctrine.

A. Georgia ban on handguns, Bowie knives, and other arms

The only firearms ban statute before the Civil War was enacted by Georgia. It outlawed possession, sale, open carry, and concealed carry of the vast majority of handguns. The statute also banned Bowie knives and certain other arms. In *Nunn v. State*, the Georgia Supreme Court held the statute entirely unconstitutional because of the Second Amendment, except as to concealed carry. *Nunn* is the historic case that is most extolled by the U.S. Supreme Court's *Heller* opinion. The case is discussed further in Part IV.

B. Tennessee ban on many handguns

After the end of Reconstruction, the white supremacist legislature of Tennessee in 1879 banned the sale "of belt or pocket pistols, or revolvers, or any other kind of pistol, except army or navy pistols"—that is, large handguns of the sort carried by military officers, artillerymen, etc. These big and well-made guns were already possessed in quantity by former Confederate soldiers. The army & navy handguns were more expensive than smaller pistols. The ban was upheld because it would help reduce the concealed carrying of handguns. *State v. Burgoyne*, 75 Tenn. (7 Lea) 173 (1881).

C. Arkansas ban on many handguns, and Bowie knives

Arkansas followed suit with a similar law in 1881. That law also forbade the sale of Bowie knives, dirks (another type of knife), sword-canes (a sword concealed in a walking stick), or

metal knuckles. In a prosecution for the sale of a pocket pistol, the Arkansas Supreme Court rejected a constitutional defense. The statute was "leveled at the pernicious habit of wearing such dangerous or deadly weapons as are easily concealed about the person. It does not abridge the constitutional right of citizens to keep and bear arms for the common defense; for it in no wise restrains the use or sale of such arms as are useful in warfare." *Dabbs v. State*, 39 Ark. 353, 357 (1885).

The right to arms provision of the Tennessee Constitution, as adopted in 1870 and still in effect, states, "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." The 1868 Arkansas Constitution right to arms, also still in effect, states, "The citizens of this State shall have the right to keep and bear arms for their common defence."

In both states, the "common defense" language was interpreted by the courts as protecting an individual right of everyone, but only for militia-type arms. Such arms included the general types of handguns used in the U.S. military. When Congress was drafting the future Second Amendment, there was a proposal in the Senate to add similar "common defence" language. The Senate rejected the proposal. Senate Journal, 1st Cong., 1st Sess. 77 (Sept. 9, 1789).

Whatever the merits of the state courts' interpretations of the state constitutions, the Tennessee and Arkansas statutes are unconstitutional under the Second Amendment. The U.S. Supreme Court in *Heller* repudiated the notion that the Second Amendment is only for military-type arms. Dick Heller's 9-shot .22 caliber revolver was certainly not a military-type handgun.

D. Florida licensing law for repeating rifles and handguns

The closest historic analogue to present bans on semiautomatic rifles is an 1893 Florida statute that required owners of Winchesters and other repeating rifles to apply for a license from the board of county commissioners. In 1901 the law was extended to also include handguns. As amended, "Whoever shall carry around with, or have in his manual possession, in any county in this State, any pistol, Winchester rifle, or other repeating rifle, without having a license from the county commissioners of the respective counties of this State," should be fined up to \$100 or imprisoned up to 30 days.

The county commissioners could issue a two-year license only if the applicant posted a bond of \$100. The commissioners were required to record "the maker of the firearm so licensed to be carried, and the caliber and number of the same." *Revised General Laws of Florida*, § 7202-03 (1927); 1893 Fla. Laws ch. 4147; 1901 Fla. Laws ch. 4928.

The bond of \$100 was exorbitant. It was equivalent to over \$3,400 today. (Fed. Reserve Bank of Minneapolis, Consumer Price Index 1800-. 2022=884.6. 1893=27. 1901= 25. Avg. = 26.)

A 1909 case involved Giacomo Russo's petition for a writ of mandamus against county commissioners who had refused his application for a handgun carry license. Based on his name, Russo may have been an Italian immigrant. At the time, Italians were sometimes considered to be in a separate racial category. When Russo applied, the county commissioners said that they only issued licenses to applicants whom they knew personally, and they did not think the

applicant needed to carry a handgun. Russo argued that the licensing statute was unconstitutional.

The Florida Supreme Court denied Russo's petition for a writ of mandamus. According to the Court, there were two possibilities: 1. If the statute is constitutional, then mandamus to the county commissioners would be incorrect, because they acted within their legal discretion. 2. If the statute is unconstitutional, then mandamus would be improper, because a writ of mandamus cannot order an official to carry out an unconstitutional statute. Either way, Russo was not entitled to a writ of mandamus. Pursuant to the doctrine of constitutional avoidance, the Court declined to opine on the statute's constitutionality. *State v. Parker*, 57 Fla. 170, 49 So. 124 (1909).

Decades later, a case arose as to whether a handgun in an automobile glove-box fit within the statutory language, "on his person or in his manual possession." By 5-2, the Florida Supreme Court held that it did not; no license was necessary to carry a handgun or repeating rifle in an automobile. *Watson v. Stone*, 148 Fla. 516, 4 So. 2d 700 (1941). A four Justice majority granted the defendant's petition for habeas corpus because of the rule of lenity: in case of ambiguity criminal statutes should be construed narrowly.

Justice Rivers H. Buford concurred in with the 4-Justice majority opinion. His opinion went straight to the core problem with the statute.

Born in 1878, Buford had worked from ages 10 to 21 in Florida logging and lumber camps. In 1899, at the suggestion of a federal judge who owned a logging camp, Buford began the study of law. He was admitted to the Florida bar the next year. In 1901, he was elected to the Florida House of Representatives. Later, he was appointed county prosecuting attorney, elected state's attorney for the 9th district, and elected state attorney general. He was appointed to the Florida Supreme Court in 1925. 3 *History of Florida: Past and Present* 156 (1923); Florida Supreme Court, Justice Rivers Henderson Buford. As of 1923, "His principal diversion is hunting." *History of Florida* at 156.

The Florida Constitution of 1885 had provided: "The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne."

Concurring, Justice Buford wrote that the statute should be held to violate the Florida Constitution and the Second Amendment:

I concur in the judgment discharging the relator because I think that Section 5100, R.G.S., § 7202, C.G.L., is unconstitutional because it offends against the Second Amendment to the Constitution of the United States and Section 20 of the Declaration of Rights of the Constitution of Florida.

Proceedings in habeas corpus will lie for the discharge of one who is held in custody under a charge based on an unconstitutional statute. [citations omitted]

The statute, *supra*, does not attempt to prescribe the manner in which arms may be borne but definitely infringes on the right of the citizen to bear arms as guaranteed to him under Section 20 of the Declaration of Rights of the Florida Constitution.

He explained the history of the exorbitant licensing laws of 1893 and 1901:

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and there had never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.

Watson, 4 So.2d at 703.

Justice Buford had described some of the changed societal conditions underlying the 1893 and 1901 enactments. There may have been additional factors involved. Repeating rifles had been around for decades and had been widely available and affordable for many consumers since the 1860s. By the 1880s, manufacturing improvements had made such rifles affordable to many black people. They were using such rifles to drive off lynch mobs, such as in famous 1892 incidents in Paducah, Kentucky, and Jacksonville Florida. In Jacksonville,

[W]hen a white man, having been killed by a negro, and threats of lynching the prisoner from the Duval County Jail being made, a large concourse, or mob of negroes, assembled around the jail and defied and denied the sheriff of the county ingress to the building. This mob, refusing to disburse upon the reading of the riot act by the sheriff, he called for assistance from the militia to aid him in enforcing the laws.

Report of the Adjutant-General for the Biennial Period Ending December 31, 1892, at 18, in [Florida] *Journal of the Senate* (1893); Nicholas J. Johnson, *Negroes and Gun: The Black Tradition of Arms* 110-12 (2014).

In sum, the 19th century history of firearms bans is not helpful for modern litigants seeking to justify prohibitions on semiautomatic rifles. The only pre-1900 statutory precedent for such a law is Florida in 1893, and it is a dubious precedent. Before that, there were three prior sales prohibitions that covered many or most handguns. One of these was held to violate the Second Amendment, and the other two are plainly unconstitutional under *Heller*.

Accordingly, renewed attention is being given to precedents involving Bowie knives, which we will examine next.

III. Bowie knives and Arkansas toothpicks

A. What is a Bowie knife?

Cites for some of the material in Part III.A & B are available in my Michigan *Knives and the Second Amendment* article. This part is supplemented by information from emails with Mark Zalesky, publisher of *Knife Magazine*.

Starting in 1837, several southern states enacted laws about Bowie knives. Some of these statutes also applied to the "Arkansas toothpick." Later, many other states adopted Bowie knife laws.

The term "Bowie knife" originated after frontiersman Col. Jim Bowie used one at a famous "Sandbar Fight" on the lower Mississippi River near Natchez, Mississippi, on September 19, 1827.

The knife had been made by Rezin Bowie, Jim's brother. According to Rezin, the knife was intended for bear hunting. He stated, "The length of the knife was nine and a quarter inches, its width one and a half inches, single-edged, and blade not curved." Nothing about the knife was novel.

The initial and subsequent media coverage of the Sandbar Fight was often highly inaccurate. As "Bowie knife" entered the American vocabulary and then the British, manufacturers began labeling all sorts of large knives as "Bowie knives." Some of these were straight (like Rezin's) and other had curved blades. Rezin's knife was single-edged, but some "Bowie knives" were double-edged. Rezin's knife did not have a clip point, but some so-called "Bowie knives" did. Likewise, some had crossguards (to protect the user's hand), and others did not. "Bowie knife" more a sloppy marketing term than a description of a particular type of knife—just as some people today say "Coke" to mean many kinds of carbonated beverages. (The difference is that true "Coke" products, manufactured by the Coca-Cola Company, do exist; there never was a true Bowie knife.) Manufacturers slapped the "Bowie knife" label on a wide variety of large knives that were highly suitable for hunting and self-defense. In words of knife historian Norm Flayderman, "there is no one specific knife that can be exactly described as a Bowie knife." Norm Flayderman, *The Bowie Knife: Unsheathing an American Legend* 490 (2004).

The knife photo in this post is an 1850s knife manufactured in England and marketed as a "Bowie knife." It's a good match for what 20th century movies and television called as a "Bowie knife." There are many modern imitations, none of which are like the knife at the Sandbar Fight; nor are they the type that Rezin and Jim Bowie later ordered from custom cutlers. Visit today's websites of knife sellers, search for "Bowie knife," and you will find a quite a disparate variety.

From the beginning, laws about "Bowie knives" have been plagued by vagueness. For example, a Tennessee statute against concealed carry applied to "any Bowie knife or knives, or Arkansas tooth picks, or any knife or weapon that shall in form, shape or size resemble a Bowie knife or any Arkansas tooth pick . . ." 22 Tenn. Gen. Assemb. Acts 200, ch. 137.

When Stephen Haynes was prosecuted for concealed carry, the witnesses disagreed about whether his knife was a Bowie knife. Some said that it was too small and slim to be a Bowie knife, and would properly be called a "Mexican pirate-knife." The jury found Haynes innocent of wearing a Bowie knife but guilty on a second charge "of wearing a knife in shape or size resembling a bowie-knife." Note the disjunctive "form, shape *or* size." On appeal, the Tennessee Supreme Court agreed that the legislature could not declare "war against the name of the knife" alone. A strict application of the letter of the law could result in injustices: "for a small pocket-knife, which is innocuous, may be made to resemble in form and shape a bowie-knife or Arkansas tooth-pick" and would thus be illegal. The Tennessee Supreme Court held that the statute must be construed "within the spirit and meaning of the law" and relied on the judge and jury to make this decision as a matter of fact. *Haynes v. State*, 24 Tenn. (5 Hum.) 120 (1844).

B. What is an Arkansas toothpick?

As for "Arkansas Toothpick," Flayderman says that it was mainly another marketing term for "Bowie knife." Flayderman at 265-74. However, he notes that some Mississippi tax receipts, and some other writings, expressly distinguish an "Arkansas Toothpick" from a "Bowie knife."

Mark Zalesky, publisher of *Knife Magazine*, explained in Nov. 10 and 19 emails to me: "The idea of the 'Arkansas toothpick' being a large dagger seems to stem from Raymond Thorp's 1948 book *Bowie Knife* (Thorp actually did some good research, but much of the book is complete nonsense); *The Iron Mistress* novel and movie in 1951/52; and the subsequent interest in Bowie, Crockett, the Alamo etc. during the 1950s and early 1960s. You are dealing with a definition that has changed over the years." But as of 1840, "Most evidence supports the idea that 'Arkansas toothpick' was originally a 'frontier brag' of sorts, a casual nickname for any variety of bowie knife but particularly types that were popular in Arkansas."

The late 20th century idea of an Arkansas toothpick. By Rhonda Thorne Cramer. Rhonda L. Thorne Cramer

Here is a drawing of what late 20th century Americans, based on contemporary movies and television, thought to be an Arkansas toothpick. It is sharpened on both edges (unlike the sandbar fight knife), with a triangular blade up to eighteen inches long.

C. The crime in the Arkansas legislature

The sandbar fight had taken place in 1827. Jim Bowie died on March 6, 1836, as one of the defenders of the Alamo. In 1840, he would become the namesake of Bowie County, the northeasternmost county in Texas. According to Zalesky, "we first see the term 'Bowie knife' beginning to come into use in 1835 and by mid-1836 it was everywhere. It is clear that such knives existed before the term for them became popular."

Perhaps the first legislation about Bowie knives, from Mississippi and Alabama in mid-1837, was about a continuing problem of criminal misuse. Legislative attention to the topic was surely intensified by an infamous crime in late 1837, which may have helped lead to the enactment of several laws in succeeding weeks. My frequent coauthor, historian Clayton Cramer, explains:

Two members of the Arkansas House of Representatives turned from insults to Bowie knives during debate as to which state official should authorize payment of bounties on wolves. Speaker of the House John Wilson was president of the Real Estate Bank. Representative J. J. Anthony sarcastically suggested that instead of having judges sign the wolf bounty warrants, some *really* important official should do so, such as the president of the Real Estate Bank.

Speaker Wilson took offense and immediately confronted Anthony, at which point both men drew concealed Bowie knives. Anthony struck the first blows, and nearly severed Wilson's arm. Anthony then threw down his knife (or threw it at Wilson), then threw a chair at Wilson. In response, Wilson buried his Bowie knife to the hilt in Anthony's chest (or abdomen, depending on the account), killing him. "Anthony fell, exclaiming, 'I'm a dead man,' and immediately expired." Judge William F. Pope, *Early Days in Arkansas* 225 (Dunbar H. Pope ed., 1895); "The Murder in Arkansas," *54 Niles' National Register* 258 (June 23, 1838). "The Speaker himself fell to the floor, weak from loss of blood. But on hands and knees he crawled to his dead opponent, withdrew his Bowie, wiped it clean on Anthony's coat, replaced it in its sheath, and fainted." Raymond W. Thorp, *Bowie Knife* 4 (1991). While Wilson was expelled from the House, he was acquitted at trial, causing "the most intense indignation through the entire State." Pope, at 225-26; Thorp at 1-5; "General Assembly," *Arkansas State Gazette*, Dec. 12, 1837, at 2 (expulsion two days later); "The trial of John Wilson . . .," (Milledgeville, Ga.) *Southern Recorder*, March 6, 1838; "The Murder in Arkansas," *Niles' National Register*, *supra*..

IV. Cases on Bowie knives

In the nineteenth century, there were three major state supreme court constitutional cases on Bowie knives. The results of all three are consistent:

- Georgia: Prohibiting the sale of Bowie knives violates the Second Amendment. Prohibiting concealed carry does not.
- Tennessee: Prohibiting concealed carry of Bowie knives does not violate the state constitution.
- Texas: The state constitution and the Second Amendment guarantee the right to own and carry Bowie knives, but extra punishment for a crime committed with a Bowie knife is constitutional.

A. *Nunn v. State*

Between 1800 and the beginning of the Civil War in 1861, there was one law enacted against particular types of firearms. The Georgia Supreme Court held it unconstitutional as a violation of the Second Amendment. *Nunn v. State*, 1 Ga. 243 (1846). The U.S. Supreme Court's 2008 *Heller* case extols *Nunn* because the "opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause." *District of Columbia v. Heller*, 554 U.S. 570, 612 (2008).

Shortly after the infamous crime in the Arkansas legislature, an 1837 Georgia statute declared:

that it shall not be lawful for any merchant or vender of wares or merchandize in this State, or any other person or persons whatever, to sell, or to offer to sell, or to keep or to have about their persons, or elsewhere any . . . Bowie or any other kinds of knives, manufactured and sold for the purpose of wearing or carrying the same as arms of offence or defence; pistols, dirks, sword-canes, spears, &c., shall also be contemplated in this act, save such pistols as are known and used as horseman's pistols.

Acts of the General Assembly of the State of Georgia Passed in Milledgeville at an Annual Session in November and December, 1837, pp. 90-91 (Milledgeville: P. L. Robinson, 1838) (Dec. 25, 1837).

Glossary:

"Dirk": Originally, a Scottish fighting knife with one cutting edge. Harold L. Peterson, *Daggers & Fighting Knives of the Western World* 60 (1968). According to Zalesky, "Dirks in America were small stabbing weapons, usually small daggers but sometimes single edged." Many 19th century laws forbade concealed carry of "dirks" and/or "daggers."

"Sword-cane": a sword concealed in a walking stick.

"Horse pistols": the only type of handgun not banned in Georgia. These were large handguns, usually sold in a pair, along with a double holster that was meant to be draped over a saddle. They were too large for practical carry by a person who was walking.

Although section 1 of the act was prohibitory, Section 4 contained an exception allowing open carry of some of the aforesaid arms, not including handguns: "*Provided, also*, that no person or persons, shall be found guilty of violating the before recited act, who shall openly wear, externally, Bowie Knives, Dirks, Tooth Picks, Spears, and which shall be exposed plainly to view..." The same section also allowed vendors to sell inventory they already owned, through the next year.

At the time, there was no right to arms in the Georgia Constitution. In 1846, the Georgia Supreme Court held the statute unconstitutional for *all* the enumerated arms, not just for handguns. The Court explained that the Second Amendment protected an inherent right, and nothing in the Georgia Constitution had ever authorized the state government to violate the right. For all the weapons, including handguns, the ban on concealed carry was upheld. The ban on handgun open carry was unconstitutional.

Nunn was among the many antebellum state court decisions holding that a right enumerated in the U.S. Bill of Rights was protected against state infringement. See Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 Minn. L. Rev. 1 (2007); Akhil Reed Amar, *The Bill of Rights* 145-56 (1998) (discussing "the Barron contrarians").

B. *Aymette v. State*

In 1837, Tennessee prohibited concealed carry of Bowie knives and Arkansas toothpicks. 22 Tenn. Gen. Assemb. Acts 200, ch. 137 (1838). An 1838 bill to add pistols to the concealed carry ban was rejected. Tennessee Legislature, *Daily Republican Banner* (Nashville), Jan. 13, 1838, at 2. The Tennessee Supreme Court upheld the concealed carry ban in a famous 1840 case. *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

The Tennessee Constitution's right to arms at the time was "the free white men of this State have a right to keep and to bear arms for their common defence." The racial exclusion to the original 1796 Constitution had been added in 1834. As noted above, the U.S. Senate had rejected inserting a "common defence" clause into the proposed Second Amendment.

According to the Tennessee Court, the right to *keep* arms was an individual right. But the right to *bear* arms was only for service in a militia. The right to bear arms "does not mean for *private defence*, but being armed, they may as a body, rise up to defend their just rights, and compel their rulers to respect the laws." The legislature could forbid arms that are "not usual in civilized warfare, or would not contribute to the common defence." *Aymette* at 157-59. According to the Court, Bowie knives "are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They 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." *Id.* at 158.

The *Aymette* court was very wrong on the facts. In 1836, the people of Texas had used Bowie knives to "rise up to defend their just rights," in their War of Independence from Mexico. The Texans won the war at the Battle of San Jacinto on April 21, 1836, when they stormed the Mexican breastworks, and used their Bowie knives to rout and put to flight the army of Mexican dictator Santa Ana. Kopel et al., *Knives*, at 189-90.

During the Civil War, Tennessee, Mississippi, and Alabama had to enact legislation to ameliorate the Bowie knife shortage that their laws had caused. The Tennessee legislature suspended the Bowie knife law for the duration. See Kopel, *Bowie knife statutes 1837-1899*. The militia of neighboring Mississippi often carried Bowie knives. Benson J. Lossing, 1 *Pictorial History of the Civil War in the United States of America* 479 n.2, 541 n.2 (1866) So did other soldiers, from every part of the nation. Flayderman at 125–68.

According to the U.S. Supreme Court in *Heller*, *Aymette* "erroneously, and contrary to virtually all other authorities," read the right to keep and bear arms as limited to the overthrow of a tyrannical government. *Heller*, 554 U.S. at 613. *Heller* held that the Second Amendment right to arms is not limited to the types of arms used by militia.

C. Cockrum v. State

After winning independence in 1836, the Republic of Texas joined the United States in 1845. A Texas state statute provided that a person convicted of manslaughter with a Bowie knife or dagger would be considered guilty of murder. For murder convictions in general, Texas law gave the jury discretion to impose a sentence of solitary confinement for life. In *Cockrum*, the judge

had erroneously taken away the jury's discretion, and instructed them to impose solitary for life. Accordingly, a new trial was necessary. *Cockrum v. State*, 24 Tex. 394 (1859).

The *Cockrum* court rejected the defense attorney's argument that enhanced punishment for a crime with a Bowie knife violated the Texas Constitution right to arms and the Second Amendment. "The right to carry a bowie-knife for lawful defense is secured, and must be admitted," wrote the court. *Id.* at 402. But the right to own and carry a Bowie knife for lawful self-defense did not preclude enhanced punishment for using the weapon in a crime. *Id.* at 403.

The court explained why Bowie knife crime was appropriate for enhanced sentencing:

It is an exceeding destructive weapon. It is difficult to defend against it, by any degree of bravery, or any amount of skill. The gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least. The sword may be parried. With these weapons men fight for the sake of the combat, to satisfy the laws of honor, not necessarily with the intention to kill, or with a certainty of killing, when the intention exists. The bowie-knife differs from these in its device and design; it is the instrument of almost certain death.

Id. at 402–03 (emphasis added).

The Texas legislature had not infringed an iota on the right to possess and carry Bowie knives; but as be described in the companion article, *Bowie knife statutes 1837-1899*, a few other Southern legislatures enacted taxes discouraging Bowie knife possession by the poor. In the antebellum era, not everyone could afford a firearm, but almost anyone could afford a large knife. As defense counsel in *Cockrum* had pointed out:

A bowie-knife or dagger, as defined in the code, is an ordinary weapon, one of the cheapest character, accessible even to the poorest citizen. A common butcher-knife, which costs not more than half a dollar, comes within the description given of a bowie-knife or dagger, being very frequently worn on the person. To prohibit such a weapon, is substantially to take away the right of bearing arms, from him who has not money enough to buy a gun or a pistol.

24 Tex. at 395-96. The Texas Supreme Court did not disagree with defense counsel's argument here. The court simply thought that extra punishment for violent criminals did not infringe the rights of peaceable poor people, or of anyone else.

In sum, two of the three antebellum right to arms cases involving Bowie knives stated that keeping and bearing such arms is a constitutional right. The *Aymette* decision was to the contrary, but it was based on the double error that the right to arms is for militia-type arms only, and that a Bowie knife is not such an arm.

As *Cockrum* illustrates, Bowie knife laws were not really about Bowie knives per se. Such laws amounted to generic laws about large knives, including very old-fashioned types such as butcher knives.

The discussion of Bowie knife statutes continues in *Bowie knife statutes 1837-1899*. In short, Bowie knives were quickly assimilated to lawmaking about old-fashioned knives, such as dirks and daggers. Often, these knives were regulated the same as handguns. Sales bans were rare,

with Tennessee joined only by Arkansas, in 1881. The norm in other states was limits on concealed carry and sales to minors, and penalties for misuse.