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Editors' Introduction

The Northeastern University Law Journal is dedicated to exploring emerging legal topics by highlighting differing viewpoints of practitioners and academics within the relevant field. Each year, the Journal hosts a symposium that provides a forum for discussion and exchange of ideas among experts on a topic selected by the Editors.

On June 26, 2008, the Supreme Court, in *District of Columbia v. Heller*, clarified the Second Amendment’s application to individuals who are not affiliated with any state-regulated militia but who wish to keep handguns and other firearms for private use in their homes. The Court ruled that individuals have a fundamental right to keep firearms in their homes for self-defense and other lawful purposes. An individual’s Second Amendment right is not unlimited, but the District of Columbia’s handgun ban and trigger-lock requirement were unconstitutional under any level of scrutiny that might apply. On June 28, 2010, in *McDonald v. City of Chicago*, the Supreme Court incorporated through the Due Process Clause of the Fourteenth Amendment this individual right to bear arms.

Anticipating the voluminous litigation challenging gun regulations in response to *Heller* and *McDonald*, we decided to focus on the recent changes in Second Amendment interpretation as the topic of our 2010 Symposium. On Friday, March 19, 2010, just one day after oral arguments in *McDonald*, the Journal hosted its 2010 symposium entitled “Chamber to Chambers: The Second Amendment in the New Century.” We brought together legal practitioners and historical experts to discuss the impact of *Heller* and the potential outcome and impact of *McDonald*. This edition features the work of speakers at the 2010 symposium, other scholars, and law students.

Patrick Charles, the keynote speaker at our 2010 Symposium, analyzes the history of the “well-regulated militia” language of the Second Amendment’s prefatory clause. He relates the great importance a militia had in England and Eighteenth century America, not only to the common defense, but also to the development of discipline and virtue in individuals.

In his article, Stephen Halbrook examines the legislative history

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1 554 U.S. 570, 128 S. Ct. 2783 (2008). The vast majority of our work on this volume was complete prior to *Heller*’s publication in the U.S. Reports. As a result, we cite to the Supreme Court Reporter for this case throughout.

2 130 S. Ct. 3020 (2010).
of the Fourteenth Amendment, rather than focusing only on that of the Second Amendment. He finds a clear intent to incorporate the Second Amendment against the states during Reconstruction, when southern states used Black Codes to disarm and terrorize newly freed slaves.

Allen Rostron surveys the role the Second Amendment has played in the confirmation hearings of Supreme Court nominees. He outlines the way in which some justices have foreshadowed their judicial opinions in confirmation testimony before Congress. Rostron also shows that as the debate over guns in the United States has become more politicized, Supreme Court confirmation hearings have, at times, provided a much-needed venue for reasoned and thoughtful discussion.

David Thomas Konig’s article explores the “invented tradition” of legally sanctioned gun use in the United States. He argues that by basing decisions on faulty history, the judiciary endorses the faulty history as fact. According to Konig, this historical invention has created the premise for the modern right to arms. It has masked the true history of gun use in America, he claims, and has misinformed popular and judicial understanding of that history.

David Hardy accounts first-hand the past three decades of legal scholarship on the Second Amendment and its legal interpretation. Since he started writing on the topic in 1974, legal academia’s understanding of the right to bear arms has shifted drastically, culminating in the Supreme Court rulings in *Heller* and *McDonald*. Hardy sets forth a practical application of the rulings, which call into question many statutes passed before the fundamental right to arms was recognized and incorporated.

Sean Kealy argues that the Framers addressed a perceived defect in the Constitution by giving individuals the right to arms as a check on state and federal government powers. In his historical interpretation, the prefatory language relates to the government’s responsibility to provide for a well-regulated militia and organize a common defense. An individual’s responsibility to obey reasonable state regulation and assist in the common defense in exchange for his right to arms was also well understood historically. Since the Second Amendment was originally meant to protect public safety, the article questions the wisdom of the federal government restricting states’ ability to regulate firearms at a point in history when public safety in some communities may be better served by restricting individual possession.
In addition to practitioners, two Northeastern School of Law students contributed articles to this edition. Ryan Menard picks up where Scalia’s *Heller* opinion left off, by evaluating the levels of review available to courts that are now tasked with determining the legality of gun regulations. Menard proposes a simple doctrine these courts should adopt. Elizabeth McEvoy’s article focuses on the status of the law regulating the right to bear arms in school zones in the wake of *Heller* and *McDonald*.

We are extremely proud of the hard work and long hours our staff dedicated to publishing this edition. We are grateful to our faculty advisors, Professors Michael Meltsner, David Phillips, and Sonia Rolland, as well as the Northeastern University School of Law administration, faculty, and staff, for their support and guidance as the Journal continues to grow. We would especially like to extend thanks to our authors for contributing their commentaries and perspectives on this timely and important issue.

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THE CONSTITUTIONAL SIGNIFICANCE OF A “WELL-REGULATED MILITIA” ASSERTED AND PROVEN WITH COMMENTARY ON THE FUTURE OF SECOND AMENDMENT JURISPRUDENCE

Patrick J. Charles*

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Introduction

In *McDonald v. City of Chicago*, a narrow 5-4 decision held that the “Second Amendment right recognized in *Heller*”\(^1\) is incorporated to the States as applied to American citizens.\(^2\) The plurality consisted of the

*I conclude that the right to keep and bear arms applies to the States through the Privileges or Immunities Clause, which recognizes the rights of United States “citizens.” The plurality concludes that the right applies to the States through the Due Process Clause, which covers all “persons[s].” Because this case does not involve a claim brought by a noncitizen, I express no view on the difference, if any, between my conclusion and the plurality’s with respect to the extent to which the States may regulate firearm possession by noncitizens.*

\(^{1}\) *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

\(^{2}\) *Id.* The Supreme Court only recognized the *Heller* right as incorporated to citizens due to Justice Thomas’s concurrence, which reads, in part:

\(^{1}\) *Id.* at 3083 n.19; *Marks v. United States*, 430 U.S. 188, 193 (1977) (“But we think the basic premise for this line of reasoning is faulty. When a fragmented Court decides a case and no single rationale explaining the result enjoys the
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same five justices that decided the majority opinion in District of Columbia v. Heller.\(^3\) However, unlike the Heller majority, the McDonald plurality did not once address the “well-regulated militia” language of the Second Amendment. It was not even restated as dicta. Whether this textual omission was intentional is unclear. What is clear is the abnormality of excluding the Second Amendment’s prefatory language from a plurality opinion exceeding one hundred pages in length.

The omission of the “well-regulated militia” language from the McDonald plurality is particularly odd, considering that a “well-regulated militia” was the constitutional impetus for including the Second Amendment within the Constitution. This fact was consistently reflected by the popular print culture of the Founding Era. For instance, prior to the adoption of the Bill of Rights, the Pennsylvania County of Franklin felt that the Constitution granted the federal government powers that are “too great.”\(^4\) The county proposed provisions respecting the freedom of press, the right to trial by jury, and freedom of religion. However, the county did not propose a right to “keep and bear arms.” Instead, it offered that a provision be included to check standing armies and suggested that a “well organized militia” would be the “proper security” for this end.\(^5\)

In a 1787 editorial, John De Witt conveyed similar concerns. He hoped for a provision in the “Bill of Rights” that would check congressional power over “raising armies.”\(^6\) Relying on the “most respectable writers upon Government,” which included David Hume, John Locke, and Algernon Sidney, Dewitt thought “that a well regulated militia, composed of the yeomanry of the country” was the “bulwark of a free people,” for “without it, it is folly to think that any free government will have stability or security.”\(^7\)

On October 25, 1790, militia Lieutenant Bernard Hubley hoped that a national “well Regulated militia corresponding with the

\(^3\) 128 S. Ct. 2783 (2008) (the majority consisted of Chief Justice Roberts and Associate Justices Scalia, Kennedy, Thomas, and Alito).

\(^4\) The Carlisle Gazette (Carlisle, PA), January 30, 1788, pg. 3, col. 3.

\(^5\) Id.

\(^6\) American Herald (Boston, MA), December 3, 1787, pg. 2, col. 4.

\(^7\) Id. at col. 2.
Constitution” would be “adopted . . . to answer the best end.” Meanwhile, a letter from Fayetteville, North Carolina recognized the importance of the right to “keep and bear arms,” but qualified that right, stating:

[T]he best security of that right after all is, that military spirit, that taste for martial exercises, which has always distinguished the free citizens of these States . . . . Such men form the best barrier to the Liberties of America. And when called to defend their country they fight for all that gives worth to existence.¹⁹

These letters and editorials emphasize the historical fact that when the Founding Fathers drafted the Second Amendment they purposefully included the phrase “A well-regulated militia” – a fact that constitutional commentator William Rawle took notice of when he wrote that the phrase was “judiciously added” because “a disorderly militia is disgraceful to itself, and dangerous not to the enemy, but to its own country.”¹⁰ Justice Joseph Story took similar notice, writing that it was impracticable “to keep the people duly armed without some organization” because it would “gradually undermine all the protection intended by this clause of our National Bill of Rights.”¹¹ It is often asserted that a “well-regulated militia” means nothing more than that the entire body of the people, as a militia, should be armed as a means to check tyrannical government.¹²

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⁹ Extract of a Letter from Fayette-Ville, North-Carolina, Dated September 12, 53 Gazette of the United States 211 (1789).
¹² See Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right 85 (2d ed. 1994) [hereinafter Halbrook, That Every Man Be Armed] (arguing that the Second Amendment should be interpreted to read that because a “well-organized militia is necessary to security of a free State” the people should be armed); id. at 144 (“Recognition of the right of the people to have arms promoted a well-regulated militia.”); Stephen P. Halbrook, St. George Tucker’s Second Amendment: Deconstructing “The True Palladium of Liberty,” 3 Tenn. J.L. & Pol’y 120, 130 (2007) [hereinafter
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Such an interpretation arguably ignores the most significant phrase in understanding the Second Amendment’s constitutional purpose and protective scope. Not to mention, such an interpretation utterly negates what could be the future of Second Amendment jurisprudence.

In *District of Columbia v. Heller*, the Supreme Court majority did just this when it determined that a “well-regulated militia” implied nothing more “than the imposition of proper discipline and training.”\(^{13}\) The *Heller* majority went on to state that the Second Amendment’s use of the phrase “well-regulated militia” was not “the only reason Americans valued the ancient right” because the Founding Fathers “undoubtedly thought it even more important for self-defense and hunting.”\(^{14}\) In making this determination, the *Heller* majority dismissed the argument that an “organized militia is the sole institutional beneficiary of the Second Amendment’s guarantee.”\(^{15}\) They felt that this argument was futile given that “Congress retains plenary authority to organize the militia,” and therefore could undermine the very protection that the Second Amendment affords.\(^{16}\)

First, it is important to note that the *Heller* majority’s assertion that Congress could pass legislation that would override the states’ ability to regulate or call upon their respective militias is both historically and legally unsupported.\(^{17}\) The Constitution only grants Congress the plenary

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Halbrook, *St. George Tucker’s Second Amendment* (“[T]he Second Amendment was prompted by the perceived need to protect the right of individuals to keep and bear arms, which would encourage a well-regulated militia”); David T. Hardy, *Ducking the Bullet*: District of Columbia v. Heller and the Stevens Dissent, 2010 Cardozo L. Rev. de novo 61, 67 n.32 (2010) [hereinafter *Ducking the Bullet*] (stating that the Founding Fathers never defined a well-regulated militia and understood it to require that the people at large be “properly armed and equipped”); Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 Geo. Mason U. Civ. Rts. L.J. 229, 246-47 (2008) (arguing that the purpose of the Second Amendment was not “exclusively, or even primarily” connected with a well-regulated militia, but was a means to check tyranny by the people being armed).

14 *Id.* at 2801.
15 *Id.* at 2802.
16 *Id.*
17 See Selective Draft Law Cases, 245 U.S. 366, 383 (1918) (“There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of
authority to organize the federal militia. Certainly, during the Early Republic, the states amended their militia laws to comport with the 1792 National Militia Act. However, congressional legislation concerning the federal militia did not preclude the states from adopting whatever militia laws deemed necessary to preserve and regulate their respective militias.

its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) although leaving the carrying out of such command to the States.


18 U.S. Const. art. I, § 8, cl. 16. See also Op-Ed., Centinel, Revived. No. XXIX, The Independent Gazetteer (Philadelphia), September 9, 1789, at 2 (stating that the Second Amendment “does not ordain, or constitutionally provide for, the establishment of such a one. The absolute command vested by other sections in Congress over the militia, are not in the least abridged by this amendment.”).

19 Second Militia Act of 1792, 1 Stat. 271 (1792) repealed by The Militia Act of 1903, 32 Stat. 775; CHARLES, The Second Amendment, supra note 17, at 73-79.

20 See Report of a Committee on the Militia Laws of the United States (1803), in 1 American State Papers: Military Affairs 163 (Washington, Gales and Seaton 1832) (“[T]hat the deficiency in organization, arming, and discipline of the militia, which is too apparent in some of the States, does not arise from any defect in that part of the system which is under the control of Congress, but
Such concurrent authority, including the arming of the militia, was essential for each state to protect itself from whatever internal dangers may arise and, more importantly, provided the means to exercise the sovereign right of self-preservation.\(^{21}\)}
Second, the *Heller* majority’s characterization of a “well-regulated militia” seemingly guts the most significant phrase in the Second Amendment and the future of Second Amendment jurisprudence. The maintenance and advancement of a “well-regulated militia” was not only intended to defend the New Republic, but provided an affirmative check on the federal government. This constitutional check was the entire driving force for including the right to arms in the Bill of Rights.22 Early constitutional commentators were in concurrence with this historical fact. For instance, St. George Tucker noted that “all room for doubt, or uneasiness on the subject [of federal power over a national militia], seems to be completely removed” by the adoption of the Second Amendment.23 Justice Joseph Story wrote that “the importance of a well regulated militia would seem so undeniable, it cannot be disguised.”24 He thought it “is difficult to see . . . how it is practicable to keep the people duly armed without some organization.”25 Meanwhile, Benjamin Oliver came to a similar conclusion when he wrote that a well-regulated militia was the “reason assigned to the amendment for this restriction on the power of

only defence and protection which the State can have for the security of their rights and arbitrary encroachments of the general government”); John Taylor, An Inquiry into the Principles and Policy of Government 450-53 (Fredericksburg, Green & Caddy, 1814) (“As no governments can exist without military protection, and as a militia constitutes that, to which alone the state governments can resort, they must make it adequate to the end or perish.”); Bartgis’s Republican Gazette (Fredericktown, MD), November 26, 1802, pg. 2, col. 2 (“the militia being subject to the joint direction of congress and the state Laws on this subject”).


25 Id. at 747.
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Congress, which is sufficient to show its true construction.”26

Given the fact that every early constitutional commentator viewed a “well-regulated militia” as the essential piece of the right to “keep and bear arms,” it begets the question, “What is a ‘well-regulated militia’ as the Founders would have understood it, and what, if any, impact does a ‘well-regulated militia’ have on the future jurisprudence of the Second Amendment?” Answering this question is not as simple as characterizing a “well-regulated militia” as being synonymous with a well-regulated appetite or family.27 One can find what constitutes a “well-regulated militia” in the political works of Machiavelli, the political tracts and military treatises of late seventeenth century England, the militia laws of the respective states, both prior to and after the American Revolution, and the early American political tracts of the late eighteenth and early nineteenth centuries.

As I intend to show below, these sources indicate that a “well-regulated militia” does not mean just “regulated.” It does not just mean that individuals must have arms and individually train to accomplish the Second Amendment’s purpose. A “well-regulated militia” means much more. It defines an *espirit de corps* and a civic duty to be properly disciplined and trained in the art of war.

The Second Amendment does not mention an “ill-regulated militia” or “unregulated militia.” This is particularly significant because it shows that the Founding Fathers understood the difference between “regulated” and “well-regulated.” More importantly, the constitutional history of this distinguishing factor will aid future courts in determining the limits of the “right of the people to keep and bear arms,” for the *McDonald* plurality did not address this issue, leaving every jurisdiction to wrestle with the constitutional significance of a “well-regulated militia” in furtherance of Second Amendment jurisprudence.

I. The Early Anglo Origins of a “Well-Regulated Militia”

In an October 1682 edition of *The Observator*, Robert L’Estrange28

27 Hardy, *Ducking the Bullet*, *supra* note 12, at 67.
28 To learn more on the political writings of Robert L’Estrange, see generally, Lois
wrote that the militia is “a Sacred Piece of Business” that ensures the “Law of Nature; or Self-preservation” and “Whoever strikes at That, takes his Aim at the Government it self.” L’Estrange was emphasizing that, in late seventeenth century England, the militia was seen as the very means that protected the lives, liberties, property, and religion of a nation. A 1740 training manual entitled The Militia Man also addressed this principle. The manual stressed that the people, as a militia, with proper training and discipline not only “defend themselves,” but “their country, as any regiments of the standing army.” The militia preserved “their wives and children, their parents, their liberties, and all they possess, and every thing they can hold dear.” To be precise, the militia, and the laws and rights concerning it, were intended for the “preparation of self-defence” of an entire nation and people.

The militia was viewed in this fashion because not only did advocates believe that the militia should protect the nation from external threats, but it would also provide a sufficient constitutional check against a tyrannical sovereign. In fact, the politics concerning the control, maintenance, regulation, and need for reform of the militia were all significant factors that brought about the events of the Glorious

G. Schwoerer, The Ingenious Mr. Henry Care: London’s First Spin Doctor (2004).
29 The Observer (London), October 16, 1682.
32 Id. at 5.
33 Id.
34 Id. See also The Militia Law, Being All the Acts of Parliament Thereof, Methodically Digested vii (London, F. Tensen & W. Taylor 1718) (“The Militia of England is the natural Strength, and in its Original Constitution the great standing Army, and Safeguard of the Nation in Case of Insurrection, or Rebellion at home, or Invasion from abroad . . . .”).
35 Id. See also John Trenchard, A Letter from the Author of the Argument Against a Standing Army to the Author of the Balancing Letter 14-15 (1697) (“All Title arises upon an equal distribution of Power; and he that gets an Overbalance of Power . . . takes away the Title from the rest, and leaves them a Possession without a Right, which is a Tenure at the Will of the Lord.”).
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Revolution.  

Following that Revolution, and through the power vested in the 1689 Declaration of Rights, Parliament secured concurrent authority over the militia. While the sovereign retained the authority to appoint the Lord-Lieutenants and call upon the militia during times of need, Parliament ensured that qualified Protestants were permitted to “have arms for their defence suitable to their conditions and as allowed by law.” Despite fighting a nearly bloodless revolution to secure concurrent authority over the militia as a means to exercise the right of self-preservation and resistance, Parliament did not seriously consider militia reform until 1697.

This push for reform is of particular significance because the popular print culture of the era illuminates what would become the Founding Fathers’ understanding of a constitutional “well-regulated militia.” The political discourse of late seventeenth century writers such as Andrew Fletcher, Daniel Defoe, John Trenchard, and John Toland discussed the importance of a “well-regulated militia” in English society.

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37 Charles, The Right of Self-Preservation, supra note 30, at 45-47.

38 1 W. & M. 2d Sess., c. 2 (1688) (Eng.) (commonly known as the 1689 Declaration of Rights); see 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. City of Chicago, 57 Clev. St. L. Rev. 351, 363-83 (2009) [hereinafter Charles, Arms for Their Defense].

39 Schwoerer, “No Standing Armies,” supra note 36, at 155-88; Western, supra note 36, at 89-103.

40 For discussion on these political writers impact on the American militia system, see Bernard Bailyn, The Ideological Origins of the American Revolution 62-64, 84 (1967); Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789-1815, at 93 (2009); Lawrence Delbert Cress, Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia, 40 J. Hist. Ideas 43, 47-49 (1979); Konig, The
Of course, in advocating for this reform, their political discourse extolled the political ideology of Niccoli Machiavelli and James Harrington. As acclaimed historian J.G.A. Pocock writes:

[It was at this time] in which the myth of the English militia became potent, and did so in a recognizably Harringtonian form. The pamphleteer who declared that the militia could never act against liberty unless willing to destroy itself meant that it was the property and independence of the people in arms. To Harrington this had been the precondition which rendered a republic inescapable; to men of 1675 it was the guarantee of freedom, virtue, and stability in a restored and mixed government . . . New modes of corruption had become threatening, but the militia, like the frequent elections of parliament . . . could be seen as a means to the reactivation of virtue.42

The militia, as an actual, functioning, military defense system, had been inadequate since the time of Queen Elizabeth.43 This fact, however, did not deter politicians from using the militia as a propagandist vehicle to promote self-serving interests when attacking the crown and the political opposition.44 For example, throughout the English Civil War and up to the Glorious Revolution, politicians consistently used the ideology of the militia to attack the maintenance of a standing army.45 Militia advocates romanticized about the past, especially of Roman and Florentine times

42 Pocock, The Machiavellian Moment, supra note 41, at 414.
43 See generally Lindsay Boynton, The Elizabethan Militia, 1558-1638 (1967).
when arms bearing was considered a badge of citizenship. Participation in the militia not only showed that an individual was a man of property who had a vested interest in society, but that the individual was educated with civil and military virtue.

Machiavelli, of course, understood and conveyed this principle better than anyone. He saw the “strength of Rome was that it could mobilize the maximum of virtù for purposes both military and civic, and continue doing it for centuries.” What is virtù? The answer is complicated because it references an ancient principle that was engrossed in both civil and military form. However, its overarching definition was that it was the ideological and principled means by which “the autonomy of personalities mobilized for the public good.” How did this ancient principle of virtù coincide with a “well-regulated militia”? Indeed, virtù was the entire rationale and purpose of the militia. As will be shown, it was believed that without a civil and military balance of virtù a society could not form a “well-regulated militia.”

When the push for England’s militia reform finally came about in 1697 it was due to William maintaining an armed force of nearly 100,000 men. Many viewed this force as a violation of the Declaration of

46 See, e.g., Algernon Sidney, Discourses Concerning Government 134 (1698) (“Rome that was constituted for War, and sought its Grandeur by that means, could never have arriv’d to any considerable height, if the People had not bin exercised in Arms, and their Spirits raised to delight in Conquests, and willing to expose themselves to the greatest fatigues and dangers to accomplish them.”).


48 Pocock, The Machiavellian Moment, supra note 41, at 212.


51 Schwoerer, “No Standing Armies!,” supra note 36, at 155-88; Western, supra note 36, at 89-103.

Rights guarantee that “the raising or keeping [of] a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.”

Militia proponents, both in and out of Parliament, viewed this state of affairs as the opportune time to present a new militia – one that was modeled on the political ideologies of Machiavelli, James Harrington, and Algernon Sidney. How important was the need for a “well-regulated militia” viewed by the proponents of this period? In 1675, the Earl of Shaftesbury answered this question, writing:

[T]he only Antient and true Strength of the Nation, [is] the Legal Militia . . . . The Militia must, and can never be otherwise than for English Liberty, ‘cause else it doth destroy it self; but a standing Force can be for nothing but Prerogative, by whom it hath its idle Living and Subsistence.

Contemporary political arguments to this effect, see Andrew Fletcher, A Discourse of Government with Relation to Militia’s (Edinburgh, 1698) [hereinafter Discourse of Government]; Andrew Fletcher, A Discourse Concerning Militias and Standing Armies, with Relation to the Past and Present Governments of Europe, and of England in Particular (1697) [hereinafter Militias]; Thomas Orme, The Late Prints for a Standing Army, and in Vindication of the Militia Consider’d, are in some parts reconcil’d (London, 1698); John Somers, A Letter Ballancing the Necessity of Keeping a Land Force in Times of Peace: With the Dangers that May Follow on it (1697); John Toland, The Militia Reform’d, or, An Easy Scheme of Furnishing England with a Constant Land-Force Capable to Prevent or to Subdue any Foreign Power, and to Maintain Perpetual Quiet at Home Without Endangering the Public Liberty (London, John Darby, 1698); Thomas Trenchard, A Short History of Standing Armies in England (London, A. Baldwin 1698) [hereinafter A Short history]; John Trenchard, The Argument Against a Standing Army, Discuss’d (1698) [hereinafter Argument]; John Trenchard, An Argument, Shewing that a Standing Army is Inconsistent with a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy (London, 1697) [hereinafter Standing Army]; A Letter to A, B, C, D, E, F, &c. Concerning Their Argument About a Standing Army (London, 1698); The Case of a Standing Army Fairly and Impartially Stated (London, 1698) [hereinafter The Case of a Standing Army].

53 The Bill of Rights, 1 W. & M. 2, c. 2 (1689) (Eng.).
54 Anthony Ashley Cooper, A Letter from a Parliament man to his Friend,
However, despite the numerous pleas and schemes for 1697 militia reform, the majority of Parliament did not believe that such reform was needed. As early as 1691, the militia laws, as constructed, received the support of many. An anonymous pamphlet entitled, *A Necessary Abstract of the Laws Relating to the Militia* asserted that the problem was not the militia laws, but the fact that the laws were not made readily available to the people. The tract argued that so long as “none will be Offended at the Annexing an Exercise of Arms . . . [to] be practiced by the Trained Bands” the “Militia may not seem so useless.” John Darker made a similar observation in his 1692 tract, arguing that the current militia only needed to be properly taught the “Art of War” and “warlike Discipline” as that of the Roman Empire. Meanwhile, fellow pamphleteer Samuel Johnson agreed with the militia reformers that the “nation is not so well exercised in Arms.” Conversely, and comparable to Darker’s argument, Johnson argued that a “well-regulated militia” could be accomplished by enforcing Henry VIII’s ancient long bow statute. The only requirement would be that the law replace bows with “the use of Firearms.”

The fact that militia reform did not actually take place during this period does not disparage what proponents considered a “well-regulated

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Concerning the Proceedings of the House of Commons this Last Sessions, Begun the 13th of October, 1675, at 4 (1675).


56 For examples, see generally *A Necessary Abstract of the Laws Relating to the Militia, Reduced into a Practical Method* (1691); John Darker, *A Breviary of Military Discipline, Compos’d and Published for the Use of the Militia* (1692).

57 *A Necessary Abstract of the Laws Relating to the Militia*, supra note 56, at “The Dedication.”

58 *Id.*


60 *See An Acte for Maynten’nce of Artyllarie and debarringe of unlawfull Games, 1541, 33 Hen. 8, c.9 (Eng.).* For John Trenchard’s similar thoughts, see Trenchard, *Argument, supra* note 52, at 23 (“Why may not the Laws for shooting in Crossbows be changed into Firelocks.”).

61 Johnson, supra note 60, at 20.
militia” in the late seventeenth century. For example, in the 1699 tract entitled *A Letter to a Member of Parliament*, the author presented a “Project for a well Regulated Militia.” The safety and “Preservation” of the nation should not be trusted to the “Country Rabble, or a Giddy Multitude,” stated the anonymous author. Effectuating a “well-regulated militia,” (which was deemed the “happiest Policy, that any State can practice”) required the forming of the militia by the “whole united Power of both” the landed gentry and all “capable of bearing Arms.” Still, as the author states, this cannot be accomplished until all our “Countrymen are but well Arm’d and Disciplin’d at Home . . . under good Discipline, and skil[l]ful Officers.”

This last portion is significant because it illuminates the overwhelming consensus of what was required to effectuate a “well-regulated militia” – professional training and discipline. Men could not just be armed *per se*. A “well-regulated militia” required training, both individually and collectively. A general glance at John Darker’s *A Breviary of Military Discipline Compos’d and Published for the Use of the Militia* proves this very point, because every military movement required an economy of force. In other words, the effectiveness and power of each volley or charge was useless unless the militia acted in unison. Not to mention, a company or battalion could not defend itself from an assault, by either infantry or cavalry, if the entire militia did not work as one to do so.

Even the freethinking works of Andrew Fletcher and John Toland, the loudest proponents of militia reform during this period, understood this important military principle. For instance, Fletcher differentiated between a militia that was “under no other Discipline than that of an


65 Id. at 5.

66 Id. This approach differed significantly from the traditional English militia, for it had always been structured according to socio-economic status or the chain-of-being. See Charles, *Arms for Their Defence?*, supra note 38, at 378-79, 386-87.

67 H.H., supra note 64 at 6-7.

68 Darker, supra note 56.
The Constitutional Significance of a “Well-Regulated” Militia Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence

ordinary and ill-regulated Militia”\textsuperscript{69} and that of a “well-regulated militia.”\textsuperscript{70} A “well-regulated Militia,” wrote Fletcher, was able to “defend our selves . . . against any Foreign Force . . . [so that] the Nation may be free from the Fears of Invasion from abroad, as well as from the Danger from Slavery at home.”\textsuperscript{71} Meanwhile, an “ill-regulated Militia” could not accomplish this objective. Fletcher believed that “ill-regulated” militias had, in fact, become more prominent than “well-regulated” militias; his reason being that “the greatest part of the World has been fool’d into an opinion, That a Militia cannot be made serviceable.”\textsuperscript{72} Regarding the problems with England’s militia, Fletcher blamed “the discontinuing [of the] exercise [of] the whole People” and “taking Men without distinction . . . the Scum of the People.”\textsuperscript{73}

Fletcher preferred a militia that included “all that are able to bear Arms.”\textsuperscript{74} Men of “Quality and Riches ought [not] to be excused.”\textsuperscript{75} If anything, Fletcher thought such men should be the center and strength of a reformed militia, for only the landed gentry had the power to ensure that “this Constitution of Government put the Sword into the hands of the Subject.”\textsuperscript{76} It should be emphasized that a constitutional militia was seen as a delicate system where men of all classes served a significant purpose.\textsuperscript{77} For society to do nothing but arm the people served no

\textsuperscript{69} Fletcher, Militias, supra note 52, at 23-24.
\textsuperscript{70} Id. at 22
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 23.
\textsuperscript{73} Id. at 25.
\textsuperscript{74} Id. at 26.
\textsuperscript{75} Id. at 25. See also Fletcher, A Discourse of Government, supra note 52, at 47 (“Men of Quality and Estate, are allowed to send any wretched Servant in their place: so that they themselves are become mean, by being disused to handle Arms; and will not learn the use of them.”).
\textsuperscript{76} Fletcher, Militias, supra note 52, at 6. See also Fletcher, A Discourse of Government, supra note 52, at 7-8 (“For the Barons could not make use of their Power to destroy those limited Monarchies, without destroying their own Grandeur; nor could the King invade their Privileges, having no other Forces than the Vassals of his own Demeasnes to rely upon for support in such Attempt.”).
\textsuperscript{77} Fletcher, A Discourse of Government, supra note 52, at 48 (“No Bodies of Military Men can be of any force or value, unless many Persons of Quality or Education be among them; and such men should blush to think of excusing themselves from serving their Country.”).
other purpose than that of a mob, because arms alone did not provide
the required training and discipline necessary to defeat a professional
army. As Fletcher’s political tracts make clear, a well-regulated, effective,
and constitutional militia relied on the participation of all classes acting
together as one.78 Collective participation was necessary because the
wealth, power, and prestige of the landed gentry were crucial to checking
the power and wealth of the crown. More importantly, it brought social
and civic balance to the “minds of men, as well as forming their bodies,
for military and v[irtuous] Actions.”79 To be precise, what was significant
to the balance of the English Constitution80 was not that the people
were armed, but that they were well-regulated and “exercised to Arms.”81
Fletcher elaborated on this point when he wrote:

A good Militia is of such Importance to a Nation, that it is
the chief part of the Constitution of any free Government.
For tho[ugh] as to other things, the Constitution be never
so slight, a good Militia will always preserve the publick
Liberty. But in the best Constitution that ever was, as to
to all other parts of Government; if the Militia be not upon
a right foot, the Liberty of that people must perish.82

Andrew Fletcher was not the only pamphleteer to comment on the
significance of a constitutional and “well-regulated militia.” John Toland

78 Fletcher was borrowing from James Harrington. See JAMES HARRINGTON, THE
OCEANA OF JAMES HARRINGTON AND HIS OTHER WORKS 38-41, 53, 184-85
(John Toland ed., London 1700) [hereinafter HARRINGTON, THE OCEANA].
79 Fletcher, A Discourse of Government, supra note 52, at 50.
80 Robert Henley-Ongley, An Essay on the Nature and Use of the
Military v (London, 1757); Maurice Morgan, An Enquiry Concerning
[hereinafter Morgan, An Enquiry]; Orme, supra note 52, at 12; Trenchard,
Standing Army, supra note 52, at 7-8 (“[O]ur Constitution depending upon
due balance between King, Lords and Commons, and that Balance depending
upon the mutual Occasions and Necessities they have of one another . . . this
Balance can never be preserved but by a Union of the natural and artificial
Strength of the Kingdom, that is, by making the Militia.”). For a late seventeenth
century dissenting opinion on this view, see A LETTER TO A, B, C, D, E, F, &c.,
supra note 52, at 11-13.
81 Fletcher, A Discourse of Government, supra note 52, at 46.
82 Id. at 44-45.
also advocated for “modeling and disciplining” the militia to “preserve our Freedom and Peace at home.”\(^\text{83}\) Similar to how Machiavelli stressed the importance of \textit{virtù}, Toland wrote that “Government or Education makes all the Difference . . . as to Military and Civil Discipline.”\(^\text{84}\) Toland felt that such a “sufficiently train’d” militia was essential “for the King’s and our common Preservation.”\(^\text{85}\) It cannot be stressed enough that training and balanced virtue were intimately connected with a “well-regulated militia.” Toland wrote:

\[\text{[I]n a well-regulated Militia Gentlemen make their Discipline to be properly an Exercise or Diversion in time of Peace; and in War they fight not only to preserve their own Liberty and Fortunes, but also to become the best Men in their Country . . . After all, if Gentlemen will be at the pains of fighting for their own . . . tis’ surely worth their while to learn the Art of doing it . . . }\(^\text{86}\)

Of course, what constituted the characteristics of the ideal seventeenth century “well-regulated militia” was a matter of contentious debate. Like Fletcher, Toland felt the “Honour and Safety of the Nation is the commendable Design of all sides.”\(^\text{87}\) Where Toland broke away from Fletcher’s ideal militia was his perspective on the participation of the lower classes. Fletcher did not see a problem with including “Servants” in the militia so long as “many Persons of Quality or Education be among them.”\(^\text{88}\) Meanwhile, Toland took the ancient and conservative approach by limiting militia participation to “Freemen . . . [i.e.,] Men of Property, or Persons that are able to live of themselves.”\(^\text{89}\) According to Toland, freemen and servants were distinguishable by their respective interests in society. Freemen fight “for their Liberty and Property; whereas [servants] have nothing to lose but their Lives.”\(^\text{90}\) Freemen “will always appear

\(^{83}\) Toland, The Militia Reform’d, \textit{supra} note 52, at 6.
\(^{84}\) \textit{Id.} at 12.
\(^{85}\) \textit{Id.} at 91-92.
\(^{86}\) \textit{Id.} at 46-47.
\(^{87}\) \textit{Id.} at 16.
\(^{88}\) Fletcher, A Discourse of Government, \textit{supra} note 52, at 48.
\(^{89}\) Toland, The Militia Reform’d, \textit{supra} note 52, at 18.
\(^{90}\) \textit{Id.} at 19.
Most importantly, Toland distinguished between the classes because “Freemen . . . excel all other in Greatness of Soul and Courage” and employ themselves in the militia for “common Endeavors being to secure every Man’s private Property.”

Even Daniel Defoe, who was Toland and Fletcher’s literary opponent during this period in advocating for militia reform, knew the significance of a “well-regulated militia.” Defoe agreed that “a Militia well regulated . . . would be a good thing” to provide security to the nation. But Defoe disagreed with his contemporary opponents on whether the maintenance of a standing army was illegal and whether a militia should completely supplant it. The thrust of Defoe’s argument was that the regulation of the militia and army was a political question left to the “King, Lords and Commons.” “To them let it be left” whether England should be protected with “an Army, or without an Army; be it by a Militia regulated, or by an Army regulated.”

Defoe also disagreed with Toland and Fletcher that a “well-regulated militia,” by itself, would be sufficient in defending the nation or protecting the liberties of the people. He felt that, in an era of professional armies, a militia alone could not provide the necessary security against external threats because “War [has] become a Science, and Arms an Employment, [where] all our Neighbors keep standing Forces, Troops of

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91 Id. at 22.
92 Id. at 23. See also Trenchard, Standing Army, supra note 52, at 8 (“[B]y making the Militia to consist of the same Persons as have the Property; or otherwise the Government is violent and against nature, and cannot possibly continue, but the Constitution must either break the Army, or the Army will destroy the Constitution; for it is universally true, that where-ever the Militia is, there is or will be the Government in a short time.”). For a contemporaneous reply to Trenchard, see A True Account of Land Forces in England 8-9 (London, 1699) (posing the question of whether the King and House of Lords are part of the constitutional equation).
93 Daniel Defoe, A Brief Reply to the History of Standing Armies in England with Some Account of the Authors 10 (London, 1698).
94 Id. at 7.
95 Daniel Defoe, Some Reflections on a Pamphlet Lately Published Entituled An Argument Shewing that a Standing Army is Inconsistent with a Free Government and Absolutely Destructive to the Constitution of the English Monarchy 28 (London, 1697).
96 Id.
Veteran Experienced Soldiers." While Defoe agreed that the “Militia of England Regulated and Disciplined, join’d to [professional troops], might” provide some protection, he issued the disclaimer that the militia “but by themselves [could do] nothing.” Defoe also disagreed with Toland and Fletcher that a militia was better suited to protect the people’s liberties. Defoe wrote of the possibility that a militia “may enslave us as well as an Army.” Where the militia and army differed in this regard was that a tyrannical army would at least be sufficiently trained to defend the nation. Meanwhile, a tyrannical militia would not only enslave the nation, but the lack of proper regulation and discipline would also prevent the militia from “be[ing] able to defend us; [and] if they are unable to Defend us, they are insignificant.”

In the end, although Fletcher, Toland, and Defoe disagreed on the significance of a militia in the English Constitution, they all agreed that only a “well-regulated militia” could do any service to the nation. Even the militia proponent Andrew Fletcher knew that an “ill-regulated” or “ordinary” militia did not serve a constitutional purpose. A constitutional militia, wrote Toland, was “where all Persons are equally educated in Civil and Military Discipline,” and could “never [be] conquer’d by any Standing Armies, unless previously weaken’d by some intestine Divisions.” What Toland meant was that a constitutional militia was one that possessed Machiavelli’s virtù, and the only way such a militia

97 Id. at 16.
98 Id. at 20.
99 Id. at 18.
100 Id.
101 See 2 James Burgh, Political Disquisitions, bk. III, ch. I, at 352 (London, 1775) (discussing how only a “well-regulated militia” would accomplish the needs in defending the nation); An Essay for Regulating and Making More Useful the Militia of this Kingdom 1 (2d ed., London, 1701) (“[A] well regulated Militia, to us Islanders, would be far more useful as well as less chargeable than a Standing Army.”); Orme, supra note 52, at 10 (“Military Men must have Discipline and Exercise to make them useful.”); Reflections on the Short History of Standing Armies in England in Vindication of His Majesty and Government 23 (London, 1699) (discussing how a standing army cannot be disbanded until “the Militia be so regulated and disciplin’d, as they may be capable of defending their Country.”).
102 Fletcher, Discourse of Government, supra note 52, at 46.
103 Toland, The Militia Reform’d, supra note 52, at 23.
104 See Orme, supra note 52, at 16 (discussing the return of a constitutional militia
could ever be defeated was by the dissolution of a society’s soul.\textsuperscript{105}

II. A “Well-Regulated Militia” and England’s 1757 Militia Act

The next great push for militia reform came in 1756 in response to growing fears of a French invasion. While the king’s ministers sent for German auxiliaries to counter this threat,\textsuperscript{106} members of Parliament proposed bills to place the militia on better footing as a means to wean reliance on foreign auxiliaries.\textsuperscript{107} Similar to the militia reform of 1697, there was an attempt in the mid-eighteenth century to revive virtue through military discipline and training; particularly from the seventeenth century viewpoint that arms bearing was a form of liberty and citizen property.\textsuperscript{108} J.G.A. Pocock idealized this concept of liberty as follows:

\begin{quote}
If liberty, and with it the foundations of government, consisted in the exercise of property in the exercise of arms; the state of nature and the transition of the state government depended on this truth. This important, but by modern scholars neglected, proposition in juristic political theory was reinforced by the ancient proposition \ldots that it was the capacity to bear arms in a public cause requires it have “the same full Force, Strength, and Virtue that it ever had” in the past).
\end{quote}

\textsuperscript{105} The references to Machiavelli’s work are numerous in the militia reform pamphlets at this time. Pocock, The Machiavellian Moment, \textit{supra} note 41, at 426-46. For an example, see Trenchard, Standing Army, \textit{supra} note 52, at 25-26 (“Macchiavel spends several Chapters to prove, that no Prince or State ought to suffer any of their Subjects to make War their Profession, and that no Nation can be secure with any other Forces than a settled Militia.”).


\textsuperscript{107} Western, \textit{supra} note 36, at 128.

which made a man a citizen.  

There were multiple political tracts that discussed this “liberty” issue and the importance of a constitutional “well-regulated militia” altogether. These tracts not only give insight as to what constituted a “well-regulated militia” in mid-eighteenth century England, but they also had some influence on the militia bill, for both the militia tracts and the militia bill centered on establishing a “well regulated and well disciplined militia” as “the only proper military force of a free country.”

Naturally, the 1756 militia bill became the 1757 Militia Act, and it is often “omitted from the canon of eighteenth-century constitutional history.” What makes the 1757 Militia Act constitutionally significant is that it strengthened the crown’s prerogative over the militia – this included Parliament losing some of the concurrent authority that it had adamantly fought so hard to gain since the Restoration. For this discussion, it is significant that the 1757 Militia Act was the first substantial step toward integrating the concept of a “well-regulated militia” with the regular forces of the army. No longer were pamphleteers and

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109 Id.
111 15 The Parliamentary History of England, supra note 106, at 706. See also id. at 708 (“[W]e must have a well regulated and well disciplined militia, or some other sort of military force for our defence, is what, I am sure, no man will dispute.”); id. at 709 (“[T]he only sure method they have left to provide for their defence, is by establishing a well regulated and well disciplined militia.”); id. at 714 (“My lords, a well regulated and well disciplined militia is so necessary for the glory as well as safety of every nation.”); id. at 762 (“[T]he bad success of the militia laws now subsisting, we are not to conclude, that it is impossible to contrive any effectual law for establishing a well disciplined and serviceable militia.”).
112 30 Geo. 2, c. 25 (1757) (Eng.).
113 Gould, supra note 110, at 330.
114 Id.
proponents of militia reform advocating for a pure militia system. Since the Glorious Revolution the argument had been that standing armies, during times of peace, were dangerous to liberty, and that the only true defense of a nation was a “well-regulated militia.” This changed by the mid-eighteenth century. It became commonly accepted that a militia could not withstand the professional armies of Europe. As Horace Walpole wrote, “The difficulties of establishing a militia in an age of customs and manners so different [from those of the seventeenth century] were almost insuperable.”

117 Trenchard, A Short History, supra note 52, at 41 (“As to the Militia, I suppose every Man is now satisfied that we must never expect to see it made useful till we have disbanded the Army.”). See generally Fletcher, Discourse of Government, supra note 52; Fletcher, Militias, supra note 52; Harrington, The Oceana, supra note 78; Walter Moyle, The Second Part of an Argument, Shewing, that a Standing Army is Inconsistent with a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy (London, n. pub. 1697); Trenchard, Standing Army, supra note 52; Toland, supra note 52. See also Charles, Arms for Their Defence?, supra note 38, at 356-403; Charles, Right of Self-Preservation, supra note 30, at 26-36, 40-54; Gould, supra note 110, at 332-33.

118 This same argument held true during the late seventeenth century as well. See Some Queries Concerning the Disbanding of the Army: Humbly Offered to Publick Consideration 5 (n.p., n. pub. 1698) (Questioning “[w]hether the Militia . . . can ever be made Defensible against Regular, Veteran, Well-disciplined Troops, if they land upon us? Or whether any Person, that knows what Armies are or can do, be of this Opinion?”); The Case of a Standing Army, supra note 52, at 27 (“I desire to know what resistance our Militia cou’d make against 20 or 30 Thousand Regular Troops well Disciplin’d and inur’d th War.”).

119 2 Horace Walpole, Memoirs of King George II, March 1754-1757, at 91 (John Brooke ed., 1985). See also Gould, supra note 110, at 338 (“Instead of opposing standing armies outright, such men were beginning to advocate a less extreme defence policy, one that stressed the importance of relying on native recruits, limiting the duration of service for regulars and augmenting the standing forces with a national militia.”). For one of the earliest histories of the 1757 Militia Act, see 4 T. Smollett, The History of England: From the Revolution in 1688, to the Death of George II 364, 408, 499 (London, R. Scholey, and Vernor, Hood, & Sharpe, and B. Crosby & Co. 1810).
A. The Commentary of the Mid-Eighteenth Century Concerning Militia Reform

One of the first commentators to write on this new model of militia reform was William Thornton, a Whig member of York. In 1752, Thornton simultaneously wrote the tract *The Counterpoise, Being Thoughts on a Militia and a Standing Army* and proposed a militia bill in the House of Commons. Although Thornton’s bill did not survive the committee stage, his thesis that a constitutional militia should supplement England’s standing forces was the philosophical driving force and core of the 1757 Militia Act. Thus, *The Counterpoise* provides great insight as to the meaning and purpose of a “well-regulated militia” in mid-eighteenth century England.

In putting forth his vision of a constitutional militia, Thornton adamantly disagreed with the likes of Walter Moyle, John Trenchard, and others, who “indiscriminately attempt to prove that Standing Armies have been, and will be, the Ruin of the Constitution and Liberty of every Country that have or will entertain them.” Instead, Thornton believed a “well-regulated Militia” would serve as a counterpoise, or a constitutional check against standing armies. This new militia would not only make England as “[f]ormidable a Nation as any in the World” but would also “[s]ecure our Liberties to the latest Posterity” by placing a “check to the Army.”

Indeed, Thornton agreed with the late seventeenth century militia

120 *William Thornton, The Counterpoise, Being Thoughts on a Militia and Standing Army* (2nd ed. 1753), available at www.archive.org/details/counterpoisebein00thoruoft. *The Counterpoise* seems to have influenced John Millar’s 1803 *An Historical View of the English Government*, where he wrote: “But whatever patriotic measures have been taken, in some of those countries, for supporting a national militia, to serve as a counterpoise to the standing army, the difficulty of enforcing regulations of this nature, so as to derive much advantage from them, must afford sufficient evidence that they are adverse to the spirit of the times.” 4 John Millar, *An Historical View of the English Government* 189 (Mark Salber Phillips & Dale R. Smith eds., 2006) (1803).

121 Western, supra note 36, at 121.

122 Thornton, supra note 120, at 3.

123 *Id.* (“I admit Standing Armies have ruined the Liberties of all Countries that have had them, without a Counterpoise; but not those who have had them with one, which cannot be but by a well regulated MILITIA.”).

124 *Id.* at 4.
commentators on many points, for instance that a well-regulated and "[g]ood Militia" was "[a]bsolutely necessary for the Safety of the Nation."125 Meanwhile an ill-regulated, ordinary, or unexercised militia was nothing more than a mob.126 Thornton elaborated on this point, writing:

[A militia] properly trained, should be established as soon as possible; for what good can an unexercised Militia do, such as of late hath been raised on Emergencies, and marched out in such Haste, that they have suffered greatly by the Arts of undermining and self-interested persons, who took every Opportunity of misrepresenting their Behaviour; when, in Fact, they could not be called a Militia, but a Mob.127

Thornton agreed with his seventeenth century counterparts on another point: he viewed a militia as "expedient" and "[n]ecessary, to our continuing [as] a free People."128 Inspired by the work of Machiavelli,129 Thornton saw the militia as "strengthening . . . the Civil Power, by assisting the better Execution of the Laws."130 Naturally, this militia was subject to two constitutional limitations. First, the militia needed to be properly disciplined and trained. As shown above, Thornton thought an "ill regulated [militia], may have a bad Effect" because it would be "injudiciously and intemperately used."131

Second, members of the militia were required to be well-affected to the government and its laws.132 As Thornton wrote, the arming of the militia was "to place Arms in the Hands of those Friends of the

125 Id. at 5. See also Fletcher, Militias, supra note 52, at 23-26; Toland, supra note 52, at 46-47.
126 Thornton, supra note 120, at 6.
127 Id. See also id. at 52 ("I confess that a Militia ill regulated, may have a bad Effect; so may that Salutary Things in the World be converted into Poisons, injudiciously and intemperately used").
128 Id. at 6.
129 Id. at 7. See also id. at 17(discussing Machiavelli).
130 Id. at 13.
131 Id. at 52.
132 Id. at 28. This aspect of the right to arms is often overlooked by historians and legal commentators. See Charles, The Second Amendment, supra note 17, at 95.
Constitution,” not those “[d]eprived of avowing their Affection for it.”133 In fact, Thornton did not think it was even conceivable for individuals disaffected to government to serve in the militia, writing:

[I]ndeed I cannot be so chimerical as some are, to conceive that any one would be so rash as to take up Arms in the Militia, under an Appearance of supporting the States, when their Hearts are averse to our Government and Laws.134

In other words, affection for the government, constitution, and laws was an essential requirement to be a member of the English militia, and rightfully so. As the works of Machiavelli and Harrington extolled, the exercise of arms brought the community together physically, morally, and ethically. Individuals that did not agree with advancing the virtuous interests of society could not participate. Thornton clearly understood this Machiavellian principle of virtù, for he believed that “Virtue and Honour . . . ha[ve] always been inherent to the People of every Nation that had the Business of Arms in common.”135

It is also noteworthy that Thornton’s The Counterpoise illustrated the same limited right to “have arms” that the 1689 Declaration of Rights enshrined. Also known as the “have arms” provision, Article VII of the Declaration declared, “That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.”136 Often misinterpreted as a right to defend one’s person, home, or property,137 the “have arms” provision ensured that Parliament could exercise its sovereign right of self-preservation by arming qualified

133 Thornton, supra note 120, at 28.
134 Id.
135 Id. at 30. See also Proposals for Carrying on the War with Vigour, Raising the Supplies Within the Year, and Forming a National Militia 41 (London, 1757) (“[T]he Militia may be Persons of sound Principles, and known Loyalty to the King and the present Royal Family.”).
136 1 W. & M. 2, c. 2 (1688) (Eng.).
Protestants as a militia. A 1692 tract entitled *Some Short Considerations Concerning the State of the Nation* by John Hampden confirmed this:

[The militia], is, the way and manner of defending the Kingdom but ‘tis so unexperienc’d, undisiplin’d, and compos’d of such Persons, that it can never be any real Defence to the Kingdom in time of Danger. There is indeed no Militia settl’d, but what is burdensome and useless . . . . Our Ancestors were a Warlike People, and it was the Policy of those free and honest times, to keep all the People of England to the Exercise of their Arms; and for this purpose there were divers Laws made, which were duly and constantly executed, by which means all the Men in the Nation, who were able to bear Arms, were perfectly well-disciplin’d, and enabled to defend their Country in their own proper Persons, which is the only true Defence of a free Country . . . When our old Laws are reviv’d . . . and our old Discipline restor’d, our Militia will then be significant indeed for our Defence, and not till then. There is one Clause in the Bill of Rights which seems to look towards this, which is, That every English Subject has a Right of keeping Arms for his Defence. But this is not enough, the old Laws must be reviv’d, and our Militia . . . must be put into a real Condition of being useful, and a true Defence to the Nation.

Thornton’s take on the “have arms” provision was that he sincerely wished the people “more universally understood” this “right to keep such Arms” in service of the militia, for the “Law justifies them in doing it.” Thornton viewed the English right to “have arms” as akin to the structure of the Swiss militia, where each member kept their own arms. However, many politicians and commentators objected to the keeping of militia


139 John Hampden, *Some Short Considerations Concerning the State of the Nation* (1692), reprinted in 2 *A Collection of State Tracts, Publish’d During the Reign of King William III*, at 327 (1706).

140 THORNTON, supra note 120, at 62.
arms in mid-eighteenth century society, especially when the people lacked the proper training and discipline. Indeed, since the late seventeenth century it had been argued that arming the masses would increase crime and destroy game.\footnote{141} Thornton replied to such critics, stating that the current militia laws already required “Persons of fifty Pounds a Year,”\footnote{142} so long as they were charged by the Lord-Lieutenant,\footnote{143} to provide “Foot Souldier and Armes.” Regarding the concerns over the unlawful hunting...
of game, Thornton responded that militia “Musquets are not proper Instruments for destroying Game with; if they were, they formally have kept them with Inconvenience.”

Another prominent militia commentary at this time was Charles Sackville’s *A Treatise Concerning the Militia*. Sackville, as had every commentator before him, knew a militia could not “resist any Body of regular Forces . . . without Arms or Discipline.” A militia’s discipline and regulation were crucial, for without the proper exercising of arms a militia could not even serve the purpose of checking a tyrannical “Crown Army . . . unless every Man in the Kingdom agrees upon a revolt” — a scenario Sackville knew was “un-imaginable” because it would require the assistance of the entire “Nobility, and all the People of England.”

Only a well-regulated and properly disciplined militia could serve the legitimate and constitutional purpose for which it was intended. To accomplish this end, Sackville offered proposals that were analogous to those of earlier commentators. Two of these proposals are particularly important in understanding what a constitutional “well-regulated militia” was in mid-eighteenth century England. The first is that the militia should consist of “Men who have Property as well as Liberty to secure; and who are connected with the Government.” Sackville described such “proportioning of [militia] Service to Property” as “the most equitable Rule,” for only “Men of Property . . . will not disturb the Peace of their own Possessions; nor ever rise against Government, that shall protect their Liberties and Fortunes.”

144 Thornton, *supra* note 120, at 62.
146 *Id.* at 14. *See also* Burgh, *supra* note 101, c. IV at 401 (“But without the people’s having some knowledge of arms, I see not what is to secure them against slavery.”).
147 Sackville, *supra* note 141, at 15.
148 *Id.* at 33. *See also*, Fletcher, *Militias*, *supra* note 52, at 23-26; Thornton, *supra* note 120, at 28; Toland, *supra* note 52, at 18-23. The militia laws up to that point had also been based on socio-economic conditions. *See* 1 Jac. 2, c. 8 (1685) (Eng.); 13 & 14 Car. 2, c. 3 (1662) (Eng.); 4 & 5 Phil. & M., c. 2 (1557) (Eng.); 26 Hen. 8, c. 6, § 3 (1534) (Eng.); 20 Rich. 2, c. 1 (1396) (Eng.); 12 Rich. 2, c. 6 (1388) (Eng.); 7 Rich. 2, c. 13 (1383) (Eng.); 25 Edw. 3, c. 2 (1351) (Eng.); 2 Edw. 3, c. 3 (1328) (Eng.); 13 Edw., c. 6 (1285) (Eng.); 13 Edw., c. 2 (1285) (Eng.); 7 Edw. (1279) (Eng.).
Sidney,\textsuperscript{150} who wrote that:

\begin{quote}
[\textit{N}o State can be said to stand upon a steady Foundation, except those whose strength is in their own Soldiery, and the body of their own People. Such as serve for Wages, often betray their Masters in distress, and always want the courage and industry which is found in those who fight for their own Interests, and are to have a part in the Victory.\textsuperscript{151}
\end{quote}

Sackville’s second noteworthy proposal is that to effectively restore the virtue of the “ancient Militia,” the cities must return to its “natural Strength, and constitutional Enforcement of Obedience to the Laws” by “instructing a warlike Generation of Men (once more) in the Use of Arms; in defence of Themselves, their Liberty, Religion, Government, and Laws.”\textsuperscript{152} A return to Machiavelli’s \textit{virtù} was not only necessarily have a right to take up arms in the militia for they also had to be well-afllicted to government. Sackville accurately states that “All disaffected Persons, who refuse the legal Oaths of Supremacy and Abjuration” could not serve in the militia or have arms, but were still “obliged to pay” militia taxes. \textit{Id.} at 59-60. Affection to government had always been a stipulation to serving in the militia and having arms. See 13 & 14 Car. 2, c. 3 (1662) (Eng.). This is because arms of disaffected and dangerous persons were always subject to lawful seizure. \textit{Id.} at § 14; Charles, \textit{Arms for Their Defence, supra} note 38, at 358-403; Charles, \textit{The Right of Self-Preservation, supra} note 30, at 50-51.

\textsuperscript{150} Sackville, \textit{supra} note 141, at 54.
\textsuperscript{151} Sidney, \textit{supra} note 46, at 156.
\textsuperscript{152} Sackville, \textit{supra} note 141, at 42. \textit{See also id.} at 54 (Only a “well disciplined Militia” could protect England from “the Dangers we are exposed to . . . and protect us from Invasion.”). “Defence of themselves” was a phrase often used to describe defending the realm. \textit{See} Charles, \textit{Right of Self-Preservation, supra} note 30, at 28-29, 53. The use of “defence of themselves” in English literature probably influenced the drafting of early state constitution “bear arms” provisions. \textit{See} Ky. Const. of 1799, art. X, § 23, \textit{reprinted in} 3 \textit{The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America} 1290 (Francis Newton Thorpe ed., 1909); Ohio Const. of 1802, art. VIII, § 20, \textit{reprinted in} 5 \textit{The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America} 2911 (Francis Newton Thorpe ed., 1909); Pa.
essential to Sackville’s “well-regulated militia,” but to every serious militia commentator of the mid-eighteenth century. As shown above, William Thornton saw “Virtue and Honour” as being “inherent to the People of every Nation that had the Business of Arms in common.”

Scottish and Edinburgh literatus Adam Ferguson made a comparable observation, writing that the mere handling of arms does not inspire men “with a love of Arms.” The members of a militia must fill “their Minds with such Knowledge, and forming their Persons by such Exercises, as give the Accompishments, the Manners, and Air of Gentlemen.” Familiarity with arms was only the means to achieve the true objective of a militia — to “produce Courage and Discipline.” Additionally, Thomas Whiston


153 Thornton, supra note 120, at 30.

154 Ferguson, supra note 141, at 17. See also id. at 15 (“We must therefore think that the Name of a Militia, and a few Arms sent to the Country, will at once find Soldiers ready to receive them.”). Ferguson perhaps advocated the most extreme militia reform by advocating the “bold . . . first Step” of taking away “every Restraint . . . by which the People are hindered from having or amusing themselves with Arms.” Id. at 16. This included a repeal of all the game laws. Id. at 16-17. Ferguson also addressed concerns about gun control, in which opponents of his militia reform argued that an increase of quarrels and deaths by guns may occur. He knew a “few domestic Inconvenience[s]” would occur, but that this should not “deter us from the necessary Steps, in our own Defence, against a foreign Enemy.” Id. at 28. Soame Jenyns made a similar observation when he wrote: “If it be objected, that to balance this many lives will be lost by the institution of these forces, by the accidental discharge of their firelocks, or the too valiant use of their swords in drunken quarrels . . . .” Jenyns, supra note 141, at 414. Jenyns’s justified such deaths by arguing that “these accidents may sometimes happen; but, as on the most moderate computation, every man in these corps will probably beget three children before he kills one man.” Id.

155 Ferguson, supra note 141, at 20.

156 Id. For further reading on Ferguson and Machiavelli’s virtù, see Pocock, The
felt that in order to attain a constitutional militia the people must “be used to an honest and virtuous industry.” He stressed that “citizens” ought to be “highly careful” that their minds are not “diverted from the constant pursuit of virtue” when performing their “warlike exercises.”

It cannot be emphasized enough that virtue was the key to establishing and maintaining a constitutional militia. As one commentator conveyed it, the “Soul of the Constitution” was “Public Liberty,” and given that the core “public liberty” was that government pursue what was in the interest of the public’s “real good,” it was important that every individual and the nation itself “formerly famed for Arms and Virtue . . . retrieve [their] tarnished honor” by returning to a constitutional militia. The militia was more than men in arms. It was “the wisdom of our Gothick constitution” in that it invested “the Commons of this realm, whenever necessity” requires it “with the means and instruments of defence to protect themselves; and to repel every attempt foreign and domestic, to alter the religion and fundamental laws of this kingdom.”

Certainly, arms were the military instruments of a constitutional “well-regulated militia,” and the “collective body of the people” comprised it. However, the “very freedom and preservation of Liberty in this nation” was not that the people possessed arms per se, but that a constitutional militia provided the “collective body of the Commons” with the means to address the “manifold wrongs which have been committed against the honor and happiness of England, by servants of the C[rown.]”

To be brief, mid-eighteenth century militia commentators did not see a “well-regulated militia” all that differently than their late seventeenth century predecessors. A “well-regulated militia” was seen as the constitutional right of free Englishmen, which required a return

Machiavellian Moment, supra note 41, at 499-501.
157 Thomas Whiston, A Political Discourse Upon the Different Kinds of Militia Whether National, Mercenary, or Auxiliary 46 (London, 1757).
158 Id. at 47.
159 A Modest Address to the Commons of Great Britain . . . , and in Particular to the Free Citizens of London, Occasioned by the Ill Success of Our Present Naval War with France, and the Want of a Militia Bill 3 (1756).
160 Id. at 5-6.
161 Id. at 28.
162 Id. at 29.
163 Id. at 32.
to Machiavelli’s virtù. Such a militia was essential “to maintain a due Balance of Power between the Crown and People” and created “a Defence against foreign Enem[ies].” The central question at the time of the 1756 militia bill was whether the “good People of England [would] return again to such a Constitution?” A constitutional militia where “[I]t becomes the Duty of every Briton . . . to hazard his Person and to sacrifice his Fortune, in Defence of his Religion, Liberty, Property, Posterity, Relations, Friends, and whatever else is dear and valuable in society.”

It should be emphasized that the establishment of a “well-regulated militia” was a delicate operation. As Maurice Morgan observed, regulation must “not destroy the Ballance of our Constitution by throwing too much Weight either into the Regal or Popular Scale.” The difficulty in establishing this “balance,” however, was seen as a necessity to preserve the constitution. The right to take up arms was something that was viewed as an ancient and international right of all free governments, not merely an English one. This is why Morgan described a “well-regulated

164 In addition to the commentators already mentioned, see id. at 61, 114.
165 Henley-Ongley, An Essay, supra note 80, at v.
166 Further Objections to the Establishment of a Constitutional Militia 39 (1757).
167 Proposals for Carrying on the War with Vigour, Raising the Supplies within the Year, and Forming a National Militia, supra note 135, at 1. See also William Williams, A Sermon Preached in the Parish-Church of Snaith on the 18th of September 1757 on the Present Disturbances on Account of the Militia Act 13 (York, Caesar Ward 1757) (“In such Cases every Subject, every Man, is a Soldier to defend his King and Country, his Wife, his Family, his Religion.”).
168 Morgan, An Enquiry, supra note 80, at 53.
169 Id.
170 This right of “self-preservation” was traced back to Roman times, through the political works of Machiavelli, and the philosophy of Hugo Grotius. Fletcher, Discourse of Government, supra note 52, at 44-45 (“A good Militia . . . is the chief part of the Constitution of any free government.”); Morgan, An Enquiry, supra note 80, at 47 (“A General Militia is the greatest Defence any Nation can be possessed of”); Whiston, supra note 157, at 46 (“[T]he exercise of arms . . . [is one of two things] to which every nation owes its preservation.”); 15 The Parliamentary History of England, supra note 106, at 706 (“[T]he only proper military force of a free country is a well regulated and well disciplined militia.”). See generally Sackville, supra note 141, at 17-32 (discussing the Roman militia); Thornton, supra note 120, at 17-23 (discussing
militia” as “so natural to our Constitution, that the Power and Strength which it communicates, cannot fail of being easily distributed through the separate Parts of our Government.”

B. *The 1757 Militia Act and the Significance of Well-Regulation and Discipline*

The constitutional significance of a well-regulated and disciplined militia is apparent upon reading the preamble of the 1757 Militia Act. It stated, “Whereas a well-ordered and well-disciplined Militia is essentially necessary to the Safety, Peace and Prosperity of this Kingdom . . . .” Such preambles were not empty rhetoric. They often reminded the reader of the constitutional purpose and significance of the bill.

The debates of what would become the 1757 Militia Act illuminated this very fact, for when the Earl of Stanhope delivered his support for the militia bill he repeatedly exclaimed the significance of a “well-regulated militia.” He also presented a history lesson on the militia of Machiavelli, the Swiss, and Rome); Whiston, *supra* note 157, at 46-73. *See also* H. Grotius, 1 Of the Rights of War and Peace 178-210 (photo. reprint 2001) (London, 1715); Emer de Vattel, The Law of Nations 82-84, 88 (Bela Kapossy & Richard Whatmore eds. & trans., Liberty Fund 2008) (1797).

171 Morgan, An Enquiry, *supra* note 80, at 53. In a 1778 letter to Lord Althorpe, Sir William Jones confirms that the English “constitution has a good defence in a well regulated militia, officered by men who love their country: and a militia so regulated may in due time be the means of thinning the formidable standing army.” John Shore Teignmouth, Memoirs of the Life, Writings, and Correspondence of Sir William Jones 202 (London, John Hatchard new ed. 1807).

172 30 Geo. 2, c. 25, § 1 (1757) (Eng.).

173 *15 The Parliamentary History of England, supra* note 106, at 727-28 (“What do the Commons do in every Mutiny Bill which they annually send up to your lordships? They constantly insert the same preamble, and repeat the recitals . . . . These points are as known established law, and declared by as express acts of parliament still in force, as the power of the crown over the militia; and yet are always repeated by way of continual claim, even in Bills . . . . And I hope the Commons will always continue to adhere to this practice. It is a right in such fundamental points.); Konig, *Why the Second Amendment Has a Preamble, supra* note 22, at 1330-34.

174 *15 The Parliamentary History of England, supra* note 106, at 706 (“[T]he only proper military force of a free country is a well regulated and well
constitutional militias of Switzerland, Rome, and Saxons to support his belief that “the only sure method . . . left to provide for [our] defence, is by establishing a well regulated and well disciplined militia.” Of course, no one disagreed with the importance of a “well-regulated militia” as a constitutional institution. Throughout the mid-eighteenth century, militia reform had become a polarizing political issue. General dissatisfaction with the employment of foreign auxiliaries, coupled with the numerous political tracts supporting militia reform, made the subject of the militia “too popular to be withstood.” Militia reform was so popular that even the crown viewed militia reform as a potential means to centralize authority within the army.

In fact, to argue against the constitutional significance of a “well-regulated militia” was political suicide and an expedient way to be ostracized by either party. Not one opponent to the 1756 militia bill ever asserted that a “well-regulated militia” was unconstitutional or insignificant. Instead, opponents argued that a well-regulated and disciplined militia could not be achieved in contemporary English society. Edward Gibbons conveyed this point in his Memoirs, writing that the “national spirit” had dwindled due to the people’s focus on “peaceful occupations of trade.”

Even if the Stuart Ages “obsolete forms of militia were preserved,” its method and forms of discipline “[were] less the object of confidence than of ridicule.” In particular, Gibbons had qualms with using the Swiss militia as evidence that England could ever again restore the militia as a constitutional fighting force.

Gibbons was not alone in this assessment. A 1757 tract entitled A Word in Time to Both Houses of Parliament stated to compare the Swiss militia with that of England was “as much Justice, [as to] compare”

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175 Id. at 709.
177 Id. at 339.
178 Id. at 338.
179 See Pocock, 1 Barbarism and Religion, supra note 108, at 96.
180 Id.
181 Id. at 96-98.
England’s political system “with the Chinese.” 182 The Swiss were unique in many regards, but in particular, the problem with drawing comparisons revolved around the fact that Switzerland was “not a trading Nation . . . and as their Manufacturers are by no means sufficient to employ their Natives . . . they find it necessary to keep up a martial Spirit among the People” to “embrace the Profession of Arms.” 183

The anonymous author of A Word in Time to Both Houses of Parliament agreed that there had been a time and place for a constitutional militia, but that time had past. The militia of yesteryears was nothing more than a popular theory of “constitutional Liberty!” 184 Indeed, it was “all very pretty, and very fine, but it is, at the same Time, all Theory, and all Chimera.” 185 It was also “very easy to foresee what king of Troops these Gentlemen Soldiers” would be when they are “subject to no military Law.” 186 However, an effective and constitutional militia required “nothing less than uninterrupted daily Exercise, penal Laws, severe Discipline, military Authority, and Subordination,” 187 for the “whole Strength” of a militia “consists of cohesion . . . of its Individuals; and their destructive Power, in their quick, yet cool Manner of Firing” as a “Body of Men” or one cohesive unit. 188 Without this cohesion or esprit de corps it was foreseen:

[S]hould you take your Fire-Arms along with you, that John in the Rear will be firing his Piece into the Back-side of his Friend Tom in the Front; or, which would be still worse, blow out the Brains of his noble Captain. To some of your intrepid Patriots and Heroes, who are resolved, dam-me! to fight, Blood to the Knees, in Defence of their Lives, Wives, and Properties, these may seem Considerations of no Importance . . . . But the

182 A Word in Time to Both Houses of Parliament; Recommended to the Perusal of Each Member, Before He Either Speaks, or Votes, for or Against a Militia-Bill 5 (1757).
183 Id. at 5-6.
184 Id. at 21.
185 Id.
186 Id. at 7.
187 Id. at 10.
188 Id. at 9.
Dangers to which you are about to expose yourselves are infinite . . . . Seriously, Gentlemen, I assure you, that a Firelock, with a Bayonet fixed on the End of it, is a very awkward Kind of Instrument; and that it requires more Dexterity than you may be aware of, to manage it, without wounding your Neighbors. Many and frequent are the Accidents . . . among regular Troops . . . . What therefore may be expected from half-disciplined Men, I need not inform you.  

Even the staunchest opponent to the bill, Lord Harwicke, knew that militia reform was consistent with the English constitution. Hardwicke agreed with militia supporters that the nobility “being educated and trained to arms, gives a habit, and a love of that kind of life” – the type of militia society of their English forefathers. However, Harwicke argued that the efficiency of commerce would suffer as a result of reform. Harwicke also attacked the bill on the grounds that it was insufficient in endowing men with the martial spirit necessary to effectuate a “well-regulated militia.” He felt that the purpose of a militia bill was to revive and propagate “a true martial spirit among the people in general, and unless [Parliament] can do this, no law . . . will ever render our militia useful . . . as to be depended on against an invading army of foreign veterans.”

Lord Sandys asserted a similar argument, stating that he would only support a militia bill if Parliament “be provided with such a well regulated, well disciplined militia as we might depend on for our defence, against invasions from abroad as well as insurrections at home.” He thought it was “impossible to discipline a militia so as to make them fit for service” because the “art of war is now carried to such a height, that even that part of it which belongs to a common soldier, is not be learned without frequent and long practice.”

Naturally, proponents of the militia bill turned these arguments

189 Id. at 11-13.
190 Id. at 735-36.
191 Id. at 742-43.
192 Id. at 734.
193 Id. at 755.
194 Id. at 756.
on their head. For instance, Earl Temple argued that the 1756 militia bill was better than no bill at all. Just because militia reform was difficult and failed in the past, Temple asserted that this should not prevent Parliament from adopting a bill because “if a proper law be passed for establishing a well disciplined militia, the crown will take all possible care for carrying it duly into execution.”195 The Duke of Bedford similarly supported the bill so long as due regulation and discipline of the militia could be achieved. He elaborated on this point, stating “it [is] the interest of every man in the kingdom to breed himself to arms, and to make himself master of military discipline.”196 In addition, Lord Talbot supported the bill because:

[W]hen a well regulated and well disciplined militia appears to be so necessary for our defence, when the establishing of such a militia is so universally called for by all ranks of men in the kingdom, I tremble to think of the consequences that may ensue from our rejecting the Bill now before us.197

Parliament originally rejected the 1756 militia bill.198 However, the political significance of militia reform would eventually win out, for King George II would assist in pushing forth the bill with the following address to Parliament:

An adequate and firm defence at home must have the chief place in my thoughts; and, in this great view, I have nothing so much at heart, as that no ground of dissatisfaction may remain in my people. To this end a national militia, planned and regulated with equal regard to the just rights of my crown and people, may, in time, become one good resource, in case of general danger; and I recommend the framing of such a militia to the care and diligence of my parliament. The unnatural union of councils abroad, the calamities which, in consequence of this unhappy conjunction, may, by irruptions of foreign

195 Id. at 761.
196 Id. at 721.
197 Id. at 750.
198 Id. at 769.
armies into the empire, shake its constitutions, overturn its system, and threaten oppression to the Protestant interest there, are events which must sensibly affect the minds of this nation, and have fixed the eyes of Europe on this new and dangerous crisis. 199

It is worth emphasizing the King’s reference to how the militia is to be “planned and regulated with equal regard” to the rights of the crown and the people. The comment demonstrates that even the crown acknowledged that the militia was a constitutional instrument of the entire government, as well as the people. Naturally, the individual people themselves did not control the militia. The representatives of the people (i.e., Parliament) exercised this concurrent power,200 which included determining who was qualified to bear arms.201 As John Sadler wrote in his tract entitled The Rights of the Kingdom, “Men ought indeed have Arms, and them to keep in Readiness for Defence of the King and Kingdom,”202 but Parliament defined which men were to “provide and bear arms, how, and when, and where.”203 Sadler further explained that “all matters of History, telleth us their general Custom was; Not to entrust any man with bearing Arms . . . till some Common Council, more or less, had approved him.”204

With the King’s help, Parliament eventually accepted the 1757 Militia Act.205 This, however, did not occur without some changes as to what constituted a “well-regulated militia.” Of particular note is that

199 Id. at 772.
201 See John Sadler, Rights of the Kingdom: or, Customs of Our Ancestors. Touching the Duty, Power, Election, or Succession of Our Kings and Parliaments, Our True Liberty, Due Allegiance, Three Estates, Their Legislative Power, Original, Judicial, and Executive, with the Militia. Freely Discussed Through the British, Saxon, Norman Laws and Histories, With an Occasional Discourse of Great Changes yet Expected in the World 147 (London, 1682) (Arms were to be assessed by the “common consent” of Parliament to the “Proportion of every[.] Man’s Estate, and Fee for the Defence of the King and Kingdom.”).
202 Id. at 143.
203 Id. at 146.
204 Id. at 159.
205 Militia Act of 1757, 30 Geo. 2, c. 25 (Eng.).
the militia arms were no longer scattered among the parishes. It was widely believed that concentrating arms in fewer and more fortified locations would prevent them from falling into the hands of disaffected and dangerous persons.\footnote{Western, supra note 36, at 135-36.} To further prevent this, the 1757 Militia Act even included a provision that permitted the Lord-Lieutenants to remove the arms to a safe place at any time.\footnote{Militia Act of 1757, 30 Geo. 2, c. 25, § 33 (Eng.).}

Regarding the taxation and distribution of the arms themselves, the law no longer charged individuals according to station,\footnote{Western, supra note 36, at 130.} nor were the arms kept by the individuals appointed to perform militia service.\footnote{Militia Act of 1757, 30 Geo. 2, c. 25, § 32 (Eng.).} Instead, the government purchased arms through general taxation, and they were to be distributed only during musters and times of training.\footnote{Id.} In this respect the 1757 Militia Act was quite different from its 1662 predecessor. No longer were “men of property” required to provide arms “suitable to their condition.”\footnote{The City of London Militia Act 1662, 14 Car. 2, c. 3 (1662) (Eng.); 15 The Parliamentary History of England, supra note 106, at 758.} In a way, the 1757 Militia Act more closely resembled James Harrington’s idea of a “well-regulated militia,” for men of all classes could be part of the militia as long as they were freemen and in support of just government.\footnote{Harrington believed that a militia comprised of English yeoman citizens would provide better protection than any of the professional armies of Europe. See Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America 156-57 (W.W. Norton & Company 1988). Harrington slightly altered the Roman militia system, giving the ability to bear arms to all citizens. James Harrington, Oceana (London, 1656), reprinted in Ideal Commonwealths 183, 361 (Henry Morley ed., Kennikat Press 1968).} However, as Edward Gibbons points out, at the same time the ancient “character of the militia was lost; and, under that specious name” it was nothing more than a “second army, more costly and less useful than the first.”\footnote{Pocock, 1 Barbarism and Religion, supra note 108, at 115-16.} The militia was no longer the constitutional instrument of parliamentary “self-preservation” but a transfer of loyalty to the crown. As Gibbon wrote, “They have changed the Idol, but they have preserved the Idolatry!”\footnote{Id. at 116.}
III. The American “Well-Regulated Militia” – Different or the Same?

The National Rifle Association, in its brief for *McDonald v. City of Chicago*, asserted that the American colonies’ understanding of what constituted the militia, a “well-regulated militia,” and the right to “keep and bear arms” was unique and distinct from their Anglo origins. As will be shown, the historical and legal evidence suggests otherwise. A “well-regulated militia” in the American colonies was synonymous with the ideals of England’s commentators and the English Constitution. A “well-regulated militia” protected each colony’s sovereign right of self-preservation, united society in common virtù, ensured that the sovereign authority could not usurp the people’s rights and liberties, and provided the necessary physical security – from both internal and external

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215 Reply Brief for Respondents National Rifle Ass’n of America, Inc., et al. in Support of Petitioners at 26-27, McDonald v. City of Chicago, No. 08-1521 (U.S. June 28, 2010) (“English law is particularly inappropriate because our respective views of the right to keep and bear arms have not only diverged since the Framing, but were different even prior.”). However, in its opening brief the National Rifle Association actually embraced the Anglo origins of the right to arms. See Brief for Respondents National Rifle Ass’n of America, Inc., et al. in Support of Petitioners at 31, McDonald v. City of Chicago, No. 08-1521 (U.S. June 28, 2010). Not to mention the Petitioners supported the Anglo origins of the right. See Brief of Petitioners at 68-69, McDonald v. City of Chicago, No. 08-1521 (U.S. June 28, 2010). The National Rifle Association might have slightly deviated its approach regarding the Anglo origins in light of the Amici Curiae Brief of Early English Historians. C.f. Brief for English/Early American Historians as Amici Curiae in Support of Respondents at 6-40, McDonald v. City of Chicago, No. 08-1521 (U.S. June 28, 2010).

216 See Josiah Quincy, Jr., Observations on the Act of Parliament 39 (Boston, Edes & Gill 1774) (“[A] well regulated militia . . . is the policy of a truly wise nation, and such was the wisdom of antient Britons.”). See also Josiah Quincy, Memoir of the Life of Josiah Quincy, Jun. of Massachusetts: by His Son, Josiah Quincy 413 (Boston, Cummings, Hilliard, & Co. 1825).


Pennsylvania’s 1757 Militia Act perfectly illustrated this premise of a “well-regulated militia” in American society. Governor William Denney had become frustrated over several failed attempts to prepare a new militia bill, and on October 17, 1757, he requested that the Pennsylvania Assembly prepare a “well framed constitutional Militia Law.”

“By a constitutional Militia law,” Denney meant, “one as is founded on the Principles of an English Constitution, and preserves equally the legal Prerogatives of the Crown, and the just Rights of the People.” Governor Denney felt that “Experience, and the Wisdom of all the States shew [sic], that a well regulated Militia is the best Security to every Country.” In response, the Pennsylvania Assembly drafted and approved the 1757 Militia Act. The Act’s preamble not only echoes the significance of the ancient right of “self-preservation” as Blackstone understood it, but also implicitly references the concept of Machiavelli’s virtù.

It reads as follows:

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219 Charles, The Second Amendment, supra note 17, at 89-94; see also Charles, Arms for Their Defence?, supra note 38, at 449-54.
220 This act also applied to Delaware. See 2 Laws of the Government of New-Castle, Kent, Sussex, Upon Delaware 11-20 (Wilmington, Adams 1763).
222 Id.
223 Id.
224 See 1 William Blackstone, Commentaries on the Laws of England 139 (Oxford, Clarendon Press 1765); see also Charles, Right of Self-Preservation, supra note 30, at 24-40; Heyman, supra note 22, passim. The public perception of Blackstone’s right of self-preservation can also be found in the Essex Gazette. See The Essex Gazette (Salem, MA), April 6, 1773, pg. 143, col. 2 (“The Law of Nature with respect to communities, is the same that it is with respect to individuals; it gives the collective body a right to preserve themselves; to employ undisturbed the means of life . . . and the power to defend themselves, the surest pledge of their safety. This affords us the strongest encouragement that our countrymen are by no means fallen into that state of pusillanimous indifference about their Rights and submission to the invasion of them, which Judge Blackstone holds so criminal and degradatory to an Englishman. – These invaluable and unalienable birthrights, this same great jurist tells us, are to be vindicated first by petition, and failure of this, by ARMS.”).
Whereas Self-preservation is the first principle and law of nature, and a duty that every man indispensibly owes not only to himself but the Supreme Director and Governor of the Universe, who gave him Being; And Whereas, in a state of political Society and Government, all men, by their original compact and agreement, are obliged to unite in defending themselves and those of the same community, against such as shall attempt unlawfully to deprive them of their just rights and liberties, and it is apparent to every rational creature, that without defence no government can possibly subsist.225

What the preamble makes apparent is that an ancient and constitutional militia was much more than men possessing arms. It required the uniting of men for the greater good, including placing their individual lives at stake to defend government and secure the liberties of their fellow citizens. A “well-regulated militia” had little, if anything, to do with individual self-defense. Instead, as the Pennsylvania Assembly stated, a “well-regulated Militia is the most effectual guard and security to every country” and was essential “for the safety and security of our constituents.”226 In order to accomplish this safety, the people must be “armed, trained, and disciplined, in the art of war.”227 Only then could the people effectively “assert the just rights of his majesty’s crown” and “defend themselves, their lives and properties, and preserve the many invaluable privileges they enjoy, under their present happy constitution.”228

Of course, the American colonies understood and recognized the constitutional principle of a “well-regulated militia” well before 1757. One can readily find examples within the colonies’ militia laws. As early as 1660, the Massachusetts law books recognized that “the well Ordering of the Militia is a matter of great concernment to the safety & welfare of this Commonwealth.”229 In 1724, the New York Assembly established

226 Id.
227 Id.
228 Id.
229 The Book of the General Lawes and Libertyes Concerning the
The Constitutional Significance of a “Well-Regulated” Militia Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence

a militia act that proclaimed, “Whereas an orderly and well disciplin'd Militia is justly esteemed to be a great Defence and Security to the Welfare of this Province . . . ." Moreover, on January 23, 1740, Governor George Thomas wrote that “if a well regulated Militia can be proved, any other Way than by [the Pennsylvania Assembly’s] own Assertion” he was for it. Such a militia law required the Assembly to ensure each inhabitant was “principled for bearing Arms, . . . well armed,” and “well disciplined, and understand[s] the Art of War.”

Early American political tracts reveal more of the same. In The Necessity of a Well Experienced Souldiery, John Richardson examined the lawfulness of war and the importance of military discipline. Richardson advocated that every Christian be “carefully and diligently instructed in” the “Art . . . and Exact Using or handling of Martial Weapons,” for he knew that “a Countries [sic] safety depends much upon an experienced Militia.” In other words, an “Experienced Militia” was the entire means by which “the safety and preservation of our lives, Libertys &c” were protected. In 1739, Samuel Mather published a similar piece entitled War is Lawful, And Arms Are To Be Proved. While stressing

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Inhabitants of the Massachusetts 55 (Cambridge, 1660). See also The General Laws and Liberties of the Massachusetts Colony 107, 115 (Cambridge, Green 1672).

230 An Act for Settling and Regulating the Militia 269 (New York, Bradford 1724).


232 Id. at 370.


234 Id. at 4.

235 Id. at 10.

236 Id. at 14. See also id. at 9 (“From the great dependence that the safety and preservation of mens lives and libertys hath therupon, and upon their so being, viz. Experienced Soldiers . . . The Art Military . . . being the highest profession as to the preservation of our Countrys . . . wherein our Lives, Liberties, and Estates are included, we ought to be more studious thereof, and exercised therein.”).

237 Samuel Mather, War is Lawful, and Arms Are to be Proved: A Sermon Preached to the Ancient and Honorable Artillery Company, on June 4, 1739 (Boston, Fleet 1739).
the importance of uniform and proper arms, Mather stated that such arms were useless unless “their designed End is not attain’d.” This “end” required that men have knowledge of the “Use and Exercise” of arms, as well as “prove[] them.” Regarding those who were not properly instructed in the art of war, Mather wrote:

And, if any pretend to appear in Arms, which They know not how to use, because They never exercised and proved Them, They deserve to be condemned for their Folly and Rashness . . . when and where Men have not known the use of warlike Instruments, and have bin [sic] unacquainted with Military Order; the strongest Party has generally, if not always, prov’d victorious and triumphant.

Another historical example as to the significance of a “well-regulated militia” can be observed in a 1757 Massachusetts editorial published by The Boston Evening Post. The author emphasized that the militia should consist of “all Persons capable of bearing Arms” because “every Person that receives protection from a Community owes it to Defence.” Similar to the proposed Pennsylvania 1757 Militia Act, the author grounded his observation on the “Principle of Self-Preservation.” Using circular reasoning, the author defined the constitutional principle as follows:

Self-Preservation is to every Individual the first Law of Nature, and as every Community is only a Collection of Individuals, the first Law of Nature must oblige every one of them collectively, that is, every Individual is obliged to do his utmost for the Preservation of the Whole, because

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238 See id. at 15-19.
239 Id. at 20.
240 See id. (“As Use and Exercise is the End of other Instruments; so the same is the End of all warlike Instruments in particular: And, without the Use and Exercise and Proof of Them, their designed End is not attain’d.”).
241 Id. at 19 (“[W]e cannot nor should go with These or Those Arms, unless we have proved them.”).
242 Id. at 20.
243 The Boston Evening Post, Dec. 12, 1757, at 1.
244 Id.
his own Preservation is concerned in it.245

Similar to Hugo Grotius, Machiavelli, Algernon Sidney,246 and many others, the author defined the right to take part in defending one’s liberties as an international right of democratic republics. “It would be endless to go through the antient History of Nations” concerning the origins of the right, wrote the author.247 However, the author stated that “it hath always been the standing Law amongst them, that every Man capable of bearing Arms, should be obliged to serve in Defence of his Country.”248 It was a right defined by “the first Law of Nature,” exercised “by all wise Governments,” and controlled by the Legislature to ensure “its Members be thus qualified.”249

Lastly, the constitutional significance of a “well-regulated militia” can be found in New Jersey politics from 1744-46. Comparable to the political differences of Governor Denney and the Pennsylvania Assembly in 1757, Governor Lewis Morris and the New Jersey Assembly disputed the establishment of a “well-regulated militia” for nearly two years. It began in June of 1744 when Governor Morris requested a new militia bill.250 The New Jersey Assembly replied that such reform was unnecessary because the current militia law “sufficiently provides for the settling of a Militia and Watches in this Colony.”251

Governor Morris disagreed with the Assembly. He wrote back that the current militia law was insufficient, and the people “should be trained and taught the Use of Arms” because “it is chiefly for this that the Militia Act is intended.”252 Only then did the New Jersey Assembly quickly respond by pushing through a bill for the Governor’s approval.

245 Id.
246 See e.g., supra pp. 13-14 and notes 46 and 170.
247 The Boston Evening Post, Dec. 12, 1757, at 1.
248 Id.
249 Id.
250 The Votes and Proceedings of the General Assembly of the Province of New-Jersey, Held at Burlington on Friday the Twenty-Second of June 1744 4 (Philadelphia, Bradford 1744) [hereinafter The Proceedings of New-Jersey Held at Burlington] (“I have more than once recommended the passing a Law for the better regulating of our Militia.”).
251 Id. at 9.
252 The Speeches of His Excellency Lewis Morris, Esq; Governor of New Jersey 14 (Philadelphia, Franklin 1744).
However, Morris thought the bill was ineffective for many reasons. One reason was that it did not “sufficiently provide for” protection against “Cases of Insurrection, Rebellion, or Invasion,” which was “absolutely necessary for the Security, Preservation, and Defence” of the province. He thereby dissolved the Assembly.

New Jersey did not seriously consider militia reform again until October when the New Jersey House of Representatives resolved itself into a committee. By November 28, 1744 the Assembly finished a draft of the militia bill, but could not settle its exact terms. Governor Morris dissolved the Assembly again. His Majesty’s Council, in the General Assembly, delivered the following address:

The People of this Colony . . . have no other way of defending themselves than by a well regulated Militia; yet such has been the Conduct of the House of Assembly at this Time, that they have denied the People the only

253 Id. at 20. In asserting this argument, Governor Morris was turning the militia bill’s preamble on its head. The bill read, “Whereas a due Regulation of the Militia and making Provision in Cases of Insurrection, Rebellion or Invasion, is absolutely necessary for the Security, Preservation and Defence of this Province at this time when His Majesty is engaged in a most just War with France and Spain.” The Votes and Proceedings of New-Jersey Held at Burlington, supra note 250, at 16.

254 The Votes and Proceedings of New-Jersey Held at Burlington, supra note 250, at 28.

255 Upon the Assembly reconvening on August 18th, Governor Morris had pushed forth the need for militia reform. However, the Assembly requested a recess and did not reconvene until October. The Votes and Proceedings of the General Assembly of the Province of New-Jersey, Held at Amboy on Saturday the Eighteenth of August 1744, at 4-5, 10 (Philadelphia, Bradford 1744) [hereinafter The Proceedings of New Jersey Held at Amboy]; The Votes and Proceedings of the General Assembly of the Province of New-Jersey, Held at Burlington on Thursday the Fourth of October 1744 17 (Philadelphia, Bradford 1744).


257 Id. at 110. For a contemporaneous debate on this issue in political pamphlets, see A Modest Vindication of the Late New-Jersey Assembly 27-31 (Philadelphia, Bradford 1745) (defending the Assembly’s militia bill as “sufficient to effectually discipline and answer all the Purposes of a well regulated Militia”); see generally A Dialogue Between Two Gentlemen in New-York (Philadelphia, Bradford 1744).
Means in their Power of preserving themselves, their Wives, their Children, and their Fortunes from becoming an easy Prey to the first Invader. That the Law for the better Regulation of the Militia of this Province as this Time is absolutely necessary, stands confessed by the Title and Preamble to their own Bill\textsuperscript{238} . . . . Some People, perhaps, may imagine, that by the Method proposed by the Council, the Militia would be put under a stricter Discipline that is necessary . . . but if such People would consider, that unless a Militia be well disciplined, and under good Regulation, they never will be able to make any tolerable Defence . . . since it is for the Peoples own sakes that such are proposed; since such Discipline can only be designed for the Preservation of the People, their Liberties and Estates . . . such a Discipline, must be looked upon as absolutely necessary at this Time.\textsuperscript{259}

In many respects, the Council’s address is significant in understanding a “well-regulated militia.” First, it reiterates the premise that only a well-regulated and disciplined militia could protect the interests of society. More importantly, though, the address communicates that militia law preambles were not empty rhetoric. They served the purpose of reminding the branches of government and the people of the importance of a well-regulated and disciplined militia. The Council’s address made this very point with its reference to the “Title and Preamble” of the bill.\textsuperscript{260} Not to mention, on multiple occasions, Governor Morris referenced that it was the duty of the legislature to ensure the substance of the bill lived up to the text in the preamble.\textsuperscript{261}

Thirteen years later, in writing about his disfavor of England’s 1757

\begin{footnotes}
\item[238] 13 Documents relating to the colonial, Revolutionary and post-Revolutionary history of the State of New Jersey 1398 (New Jersey Historical Soc’y 1890).
\item[259] Id. at 390-91.
\item[260] Id. at 391.
\item[261] The Speeches of His Excellency Lewis Morris, supra note 252, at 20; The Votes and Proceedings of the General Assembly of the Province of New-Jersey, Held at Amboy on Thursday the Fourth of April 1745 7 (Philadelphia, Bradford 1745).
\end{footnotes}
Militia Act, Lord Harwicke wrote that such preambles were constitutionally significant because they referenced “known established law, and declared . . . express acts of parliament still in force.”

Hardwicke hoped that preambles would be “always repeated by way of continual claim,” for “It is a right in such fundamental points.” Indeed, the American colonies adhered to this practice in their respective militia laws, both prior to and during the American Revolution. Concerning the latter, in 1777, Maryland’s militia law included the clause, “Whereas a well regulated militia is the proper and natural defence of a free government . . . .” In 1777, New York’s militia law included, “Whereas the Wisdom and Experience of Ages, point out a well regulated Militia, as the only secure Means for defending a State, against external Invasions, and internal Commotions and Insurrections . . . .” In 1779, Rhode Island’s militia law read: “Whereas the Security and Defence of all free States essentially depend, under God, upon the Exertions of a well regulated Militia . . . .” Meanwhile, North Carolina’s 1777 militia law reads eerily similar to the prefatory clause of the Second Amendment, stating, “Whereas a well regulated Militia is absolutely necessary for the defending and securing the Liberties of a free State . . . .”

262 15 The Parliamentary History of England, supra note 106, at 727. See also Burgh, supra note 101, at 419-20 (“Let us no longer acknowledge the importance of a militia in the preamble in many of our statutes, yet render this very militia ineffectual by suffering such destructive clauses to remain, as will reduce the statute itself to a mere form of words . . . .”).


264 See, e.g., supra p. 44-45.

265 Laws of Maryland, Made and Passed at a Session of Assembly, Begun and Held at the City of Annapolis, on Monday the Sixteenth of June, in the Year of Our Lord One Thousand Seven Hundred and Seventy-Seven ch. 27 (Annapolis, Green 1777).

266 The Laws of the State of New-York, Commencing with the First Session of the Senate and Assembly, After the Declaration of Independency, and the Organization of the New Government of the State 30 (Poughkeepsie, Holt 1782).

267 At the General Assembly of the Governor and Company of the State of Rhode-Island and Providence Plantations, Begun and Holden, at South-Kingstown, Within and for the said State Aforesaid, on the Last Monday in October, in the Year of our Lord 29 (Providence, Ward 1779).

268 The Acts of Assembly of the State of North Carolina: At a General Assembly Begun and Held at Newbern on the Eighth Day of April, in
These examples, among others, confidently establish that the phrase a “well-regulated militia” is the very heart of the Second Amendment. Not only does the phrase identify the purpose of the right to “keep and bear arms,” but it is the key to the future of Second Amendment jurisprudence. But before I can adequately address the future, I will further examine the significance of the phrase during the American Revolution and in American constitutions – both federal and state.

IV. Revolution, Constitutions, and “A Well-Regulated Militia”

The belief in a “well-regulated militia” as the people’s birthright
and security permeated throughout the American Revolution. As Thomas Paine wrote in the infamous *Common Sense*, “a well regulated militia will answer all the purposes of self-defence, and of a wise and just government.”\(^{270}\) Joseph Reed delivered similar sentiments to the Pennsylvania militia, setting before them the “inestimable advantages of a well regulated militia.”\(^{271}\)

Within just months of Lexington and Concord, a danger to this constitutional establishment developed the creation of the Continental Army. While George Washington and members of Congress saw the need for the establishment of a professional fighting force,\(^{272}\) selling the idea to the provincial assemblies was a difficult task. The central question was, “How could they justify creating an institution, yet argue that Parliament had violated their right against standing armies during times of peace?”

What developed was a compromise in which Congress would only have authority to regulate the Continental Army, and the provincial assemblies would remain in control of their respective militias. However, this compromise came to a halt when Washington requested that the militias in camp be placed under his control.\(^{273}\) Samuel Adams responded:

> It is certainly of the last Consequence to a free Country that the Militia, which is its natural Strength, should be kept on the most advantageous Footing. A standing Army, however necessary it may be at some times, is always dangerous to the Liberties of the People. [While] Soldiers are apt to consider themselves as a body distinct from the rest of the Citizens . . . The Militia is composed of free Citizens. There is therefore no Danger of their making use of their Power to the destruction of their own


\(^{271}\) Joseph Reed, *New Jersey Gazette* (Trenton, N.J.), Sept. 1, 1779, at 3. John Harvie would write to Thomas Jefferson in the middle of the American Revolution that a “well Regulated Militia may be our Salvation” for the war. 2 *The Papers of Thomas Jefferson* 35 (Julian P. Boyd ed. 1950).

\(^{272}\) 3 *American Archives*, *supra* note 269, at 1653-54 (John Adams writing to James Otis for the need of a united professional army).

Rights, or suffering others to invade them. I earnestly wish that young Gentlemen of military Genius . . . might be instructed in the Art of War, and at the same time taught the Principles of a free government, and deeply impressed with a Sense of the indispensable Obligation which every member is under the whole Society.\footnote{3}{The Writings of Samuel Adams 250-51 (Harry Alonzo Cushing ed., Octagon Books 1968) (1907).}

Adams also divulged his feelings on the matter in an editorial signed Caractacus. He defended the significance of a federally independent militia, writing that only “people of the smallest property, and perhaps of the least virtue among us” would join continently paid minutemen.\footnote{3}{American Archives, \textit{supra} note 269, at 219.} Adams further wrote, “It is needless to declaim long upon the advantages of a well regulated militia. A knowledge of the use of arms is the only condition of freedom.”\footnote{Id. at 220.} He went on to write that military knowledge “often precludes the use of arms,” suggesting that virtue and training were seen as justifiable prerequisites for arms bearing.\footnote{Id. Elbridge Gerry agreed with Adams on one important point – that the colonies controlled their respective militias, not Congress. While Gerry was willing to hand over temporary control of a colony’s militia, he feared whichever General was in control might “forget his station, and conceive himself [the militia’s] master.” \textit{Letter from Elbridge Gerry to Samuel Adams, 4} American Archives: Documents of the American Revolution, 1774-1776 ser. 4, at 255-56, \textit{available at} http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.10088#. Thus, he suggested that Washington and Congress should gain the approval of each colony’s legislature. \textit{Id.}}

It is worth noting that the militia that marched to Lexington and Concord, and worked its way to Boston, had been training, drilling, and preparing for almost a year.\footnote{John Ferling, \textit{Almost a Miracle} 27 (Oxford Univ. Press 2007); Ray Raphael, \textit{The First American Revolution} 157, 162 (The New Press 2002). \textit{See also} Bartgis’s \textit{Republican Gazette} (Fredericktown, Md.), Nov. 26, 1802, at 2 (“Many appeal to the history of our revolution to prove discipline unnecessary; but those who waded through it, will recollect the enthusiasm which embodied and disciplined our active citizens near twelve months before the sword was drawn.”).} English militia training pamphlets were
reprinted and distributed to organize and array the militia accordingly. As early as September 1774, the Massachusetts Provincial Congress ordered the drilling of the militia to secure “the lives, liberties, and properties of the inhabitants of this Province.” The resolve not only required the town to arm its militia but stressed that militiamen develop “knowledge and skill in the Art Military.” The Fairfax County, Virginia Militia Association’s 1774 resolve similarly assembled “for the Purpose of learning & practising the military Exercise & Discipline.” Led by Colonel George Mason, the Fairfax County resolve listed the need for uniforms, arms, gunpowder, and other accoutrements. However, the emphasis of the militia association was not the assembling of “arms.” Instead, it was:

That we will use our utmost Endeavors, as well at the Musters of the said Company, as by all other Means in our Power, to make ourselves Masters of the Military Exercise. And that we will always hold ourselves in Readiness, in Case of Necessity, hostile Invasion, or read Danger of the Community of which we are Members, to defend the utmost of our Power . . . the just Rights & Privileges of our Country, our Prosperity & ourselves upon the Principles of the British Constitution.

The importance of a “well-regulated militia” in the Fairfax County Association can also be seen in the resolutions of the Fairfax County Committee. Chaired by George Washington, the committee resolved “that a well regulated militia composed of gentlemen, freeholders, and other freemen, is the natural strength and only staple security of a free government.” As Washington and the committee understood it, a “well-

279 One of these pamphlets was The Manual Exercise, which was originally published in 1764 and adapted for the colonies in 1774. For a copy of this publication, see The Manual Exercise, as Ordered by His Majesty in MDCCLXIV (Norwich, Conn., Robertson & Trumbull 1774). For advertisements of these reprints, see The Norwich Packet (Norwich, Conn.), May 4, 1775, at 4, and The Norwich Packet (Hartford, Conn.), Feb. 23, 1775, at 3.
280 1 American Archives, supra note 269, at 852.
282 10 The Papers of George Washington: Colonial Series 237 (W.W. Abbot
regulated militia” was a constitutional body that limited the expenses in rendering “our protection and defence,” and made it “unnecessary to keep standing armies among us.”\(^{283}\) To support this constitutional body, it was not only proposed that men “provide themselves with good firelocks,” but that they also “use their utmost endeavors to make themselves masters of the military exercise” as stipulated in the pamphlet entitled *The Manual Exercise*.\(^{284}\)

Some individual right scholars have romanticized that the Battle of Lexington and Concord was a random assembling of armed farmers and countrymen,\(^{285}\) and that this constituted a “well-regulated militia.”\(^{286}\) Those scholars further assert that the “shot heard around the world” was instigated by Major John Pitcairn for trying to violate the colonists’ right to keep arms.\(^{287}\) Both assertions are misleading and must be qualified.

It is true that the Massachusetts colonists assembled in arms to repel the British troops, but the political climate of the time would have led to an assault on British troops regardless of their destination.\(^{288}\) Regarding the contention that England sparked the American Revolution by disarming the colonists,\(^{289}\) individual right scholars fail to mention that the British troops were sent to Lexington and Concord in order to retrieve munitions that were stolen and seized from them months earlier. This seizure occurred in December 1774 when a small militia force led

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\(^{284}\) *Id.* For more on the pamphlet entitled *The Manual Exercise*, see supra note 279.


\(^{286}\) See supra note 12.


\(^{288}\) See generally Raphael, supra note 278 (discussing the political climate and that Gage could not send his troops to any part of the countryside without fear of provoking armed resistance by the colonists).

\(^{289}\) Halbrook, *The Founders’ Second Amendment*, supra note 287; Young, supra note 285, at 51-53.
by Major John Sullivan assaulted the British garrison Fort William & Mary, taking as many munitions as possible. Thus, the argument that the American Revolution stemmed from the attempted seizure of the colonists’ arms is historically and factually incorrect. If anything, one would argue that the American seizure of the British arms was the start of hostilities in New England.

Indeed, it is a historical fact that the majority of late eighteenth century militias consisted of all white male freeholders between the ages of sixteen and forty-five years of age. But it is misleading to define the American force at Lexington and Concord as merely farmers. The militia had been drilling and training for nearly a year, showing the emphasis that

290 Charles, Irreconcilable Grievances, supra note 273, at 173-74; Raphael, supra note 278, at 181-83.

291 The fact that Major Pitcairn ordered an approaching hostile militia force to disarm and disperse has no bearing in understanding the Second Amendment. See Halbrook, The Founders’ Second Amendment, supra note 287, at 75-76. Pitcairn orders were no different than any other commander would order, either today or in 1775.

292 Charles, Irreconcilable Grievances, supra note 273, at 173. Not to mention, there exists no contemporaneous account showing that the colonists viewed Lexington and Concord as an attempt to violate the colonists’ right to have or keep arms. See Charles, Arms for Their Defence?, supra note 38, at 435-50. For other accounts showing the grievance of Gage’s seizure of arms being concerned with the violation of an agreement, and not a violation of a right to have or keep arms, see New York Journal, or Daily Advertiser (New York, NY), May 18, 1775, pg. 3, col. 3; Dunlap’s Pennsylvania Packet or, the General Advertiser (Philadelphia, PA), May 8, 1775, pg. 3, col. 1; The Connecticut Courant (Hartford, CT), May 8, 1775, pg. 2, col. 1; The Norwich Packet (Hartford, CT), May 4, 1775, pg. 3, col. 2.

293 Patrick J. Charles, Washington’s Decision: The Story of George Washington’s Decision to Reaccept Black Enlistments in the Continental Army, December 31, 1775 3-11 (2006) (discussing how black men, free or slave, were usually only enlisted during times of necessity or when white enlistments could not be obtained). Vagabonds and aliens, and others that do not have a vested interest in the civil government, were generally excluded from arms bearing. See Instructions for the Officers of Several Regiments of the Massachusetts Bay Forces . . . 10th Day of July 1775 (1775) (“You are not to Enlist any Person who is not an American-born, unless such Person has a Wife and Family, and is a settled Resident in this Country.”); The Independent Gazetteer (Philadelphia, PA), September 23, 1786, pg. 3, col. 2 (“To instruct vagabonds, servants, or slaves, in the military art, and even arm them at the expense of the state, will be the worst policy.”).
the Massachusetts Provincial Congress placed on formal military training and discipline to protect its rights. In fact, two months before the battle, on February 17, 1775, the Massachusetts Provincial Congress resolved to array the militia as an exercise of “the great law of self-preservation . . . to prepare against every attempt that may be made to attack [us] by surprize.” They hoped men would “spare neither time, pains, nor expence, as so critical a juncture, in perfecting themselves forthwith in military discipline; and that skillful instructors be provided for those companies which are not already provided therewith.” The bottom line is that the Founders viewed a “well-regulated militia” as something more than just an armed citizenry.

When John Hancock delivered a speech on March 5, 1774, he stressed that from a “well regulated militia we have nothing to fear; their interest is the same with that of the state.” Hancock elaborated on the common “interest” as akin to Machiavelli’s virtù, writing that they “march into the field with that fortitude which a consciousness of the justice of their cause inspires . . . they fight for their houses, their lands, for their wives, their children . . . they fight for their liberty, and for themselves, and for their God.”

Other commentators of the time supported Hancock’s understanding of what constituted a “well-regulated militia.” For instance Josiah Quincy’s Observations on the Act of Parliament addressed the constitutional significance of a “well-regulated militia.” To maintain a “free government,” wrote Quincy, arms should only be in the hands of “those who have an interest in the safety of the community, who fight for

294 The Norwich Packet (Hartford, CT), February 23, 1775, pg. 3, col. 1.
295 Id.
296 John Hancock, An Oration Delivered March Fifth, 1774, at 14 (Boston, Edes & Gill 1774). Many militia commentators of the eighteenth and seventeenth centuries often referred back to Rome. It was commonly believed that the end of Roman liberty began when Julius Caesar eliminated the “citizen soldier” and replaced the militia with a standing army. See Burgh, supra note 101, at 391-94; id. at 418 (“I do not think our constitution and liberties will ever be absolutely safe, until we return to our ancient method of making military exercises . . . to breed themselves up to arms and military discipline.”); Sidney, supra note 46, at 134.
297 Hancock, supra note 296, at 14-15.
298 Quincy, Observations, supra note 216, at 39.
their religion and their children.” 299 “Such are a well regulated militia” because it was “composed of the freeholders, citizen and husbandman, who take up arms to preserve their property as individuals, and their rights as freemen.” 300 In addition, when Anne-Arundel County, Maryland saw fit to make military preparations, it concluded that “a well regulated militia is the natural Strength and only state security of a free government, and unanimously recommended to the freemen . . . [to] form themselves into companies . . . [and] learn the military exercise.” 301 The county reminded its inhabitants that “every man by his duty to God, his country, and his posterity” should feel compelled to “unite[] in defence of our common rights and liberties.” 302 Meanwhile, Simeon Howard’s *A Sermon Preached*
to the Ancient and Honorable Artillery Company in Boston stressed that “Caution . . . ought to be used in constituting a militia . . . .” It should “be subject to discipline and order,” but not “be made an instrument of tyranny and oppression.” Most importantly, Howard emphasized that a “well-regulated militia” required its participants to “maintain the general practice of religion and virtue,” for “the wicked flee, when no man pursueth, but the righteous are bold as a lion.”

Other revolutionary documents clarify the constitutional significance and scope of a “well-regulated militia.” For example, a 1776 New Jersey militia ordinance affirms that participation in a “well-regulated militia” required one’s allegiance to government. Otherwise, a government was legally justified in disarming or failing to arm a citizen. First, the ordinance’s preamble announced its constitutional purpose, stating, “And whereas, our defence, under God, chiefly depends upon a well regulated Militia . . . .” More importantly, the ordinance permitted the taxing of disaffected citizens and the taking of militia arms. It reads:

That each and every person in this Colony, disarmed for refusing to sign the said Association, shall be subject to the same Fines and Forfeitures for not attending and doing duty in the Militia, or paying an equivalent thereof, as directed by the said Ordinance, in the same manner as though he had not been disarmed.

The connection between arms bearing and being in support of just government was not a novel concept circa 1776. Similar to their English forefathers, the American patriots thought it to be a normal occurrence to disarm those whom did not support just government. As the Americans surrounded the British at Boston, the orderly book of Edmund Bancroft catalogued the event. At a court martial on September 16, 1775, Bancroft wrote that Sergeant James Finley was “Deprived of his arms and accoutrements and to be Put into a horse Cart, with a Rope skill of arms.”

303 Id. at 200.
304 Id.
305 4 American Archives, supra note 269, at 1622-23.
306 Id. at 1623.
around his Neck . . . forever Incapable of Serving in the Continental Army” for “Expressing himself Disrespectfully of the Continental Association and Drinking [to] General Gage’s health.”

This disarming of disaffected persons and loyalists was common practice throughout the colonies. In fact, Congress authorized disarmament, resolving that “all persons [are] to be disarmed . . . who are notoriously disaffected to the cause of America, or have refused to associate, to defend, by arms these United Colonies.”


309 Charles, The Second Amendment, supra note 17, at 41–42; see also Proceedings of the Committee of Correspondence at Newbern at 2 (N.C. 1775) (ordering the disarming of all “negroes” and suspected persons). For newspapers accounts, see The Connecticut Courant (Hartford, CT), August 5, 1776, at 3; The Boston Gazette, and Country Journal (Boston, MA), February 5, 1776, pg. 3 col. 3; The Connecticut Journal (New Haven, CT), October 4, 1775, at 4 (Under the authority of Portsmouth, orders were sent that “disarmed all those People . . . called tories . . . who would not declare their readiness to use their arms . . . in favour of the united colonies.”); The Massachusetts Spy or, American Oracle of Liberty (Worcester, MA), May 24, 1775, at 3 (“[E]very person among us, who is known to be an enemy to the rights and privileges of this country, and has been aiding and abetting to the cursed plans of a tyrannical ruler and an abandoned military, should be disarmed and rendered, as incapable as possible of doing further material mischief . . . The Tories in this town were notified to appear with their arms and ammunition” to be surrendered.); The Pennsylvania Ledger (Philadelphia, PA), February 4, 1775, at 4; The Connecticut Journal (New Haven, CT), November 29, 1775, at 3; The New York Gazetteer (New York, NY), September 14, 1775, at 4 (“[T]he immutable laws of self-defence and preservation justify ever reasonable measure entered into to counter-act” danger, thus those that “deny the authority of the continental or this congress, or the committee of safety . . . shall cause such offender to be disarmed.”).

310 5 American Archives, supra note 269, at 1638. See also id. at 244 (Maryland Council of Safety complies and disarms disaffected persons and those that do not prescribe to the oath of allegiance); 4 id. at 271 (Connecticut Assembly resolves that any person that “shall libel or defame” Congress to “be disarmed, and not allowed to have or keep any arms”); 6 id. at 1539 (“that the Arms and Ammunition of the inimical and disaffected persons . . . and of such as refuse to take . . . [the] oath [of allegiance], be appraised and used, and applied” according to Congress); 3 Diary and Autobiography of John Adams: Diary 1782-1804, at 195 (L.H. Butterfield ed., 1961) (discussing the passing of the
The oath illuminates two important facts in understanding arms bearing in the late eighteenth century. First, it shows that arms-bearing was contingent on supporting just government. Second, and more importantly, it shows that individuals were required to subject themselves to “militia Discipline” as the means to preserve the liberties of the people,312 which the Founders felt was an essential element of a constitutional “well-regulated militia.”

A March 21, 1775 petition from the people of New Castle County, Delaware immediately dispels any doubt that the Founding generation considered a “well-regulated militia” a preexisting313 constitutional right. The petition stated, “That we conceive a well-regulated Militia . . . to be not only a Constitutional right, but the most natural strength and most stable security of a free Government . . . .”314

312 Id.
313 In 1703, Scotland’s Parliament recognized a “well-regulated militia” as a constitutional right of all free governments. See An Account of the Proceedings of the Parliament of Scotland, Which met at Edinburgh, May 6, 1703, supra note 269, at 287 (Parliament knows “that a good and well regulated Militia is of so great Importance to a Nation, as to be the principal part of the Constitution of any Free Government.”).
314 2 American Archives, supra note 269, at 128. Similarly, on January 12, 1775, when the provincial convention of Anne-Arundel County, Maryland formed
Naturally, this constitutional right would become an important fixture of the prefatory clause of the Second Amendment.\textsuperscript{315} As initially proposed on August 17, 1789, the Amendment read, “A well regulated militia, composed of the body of the people, being the best security of a free state; the right of the people to keep and bear arms shall not be infringed, but no person, religiously scrupulous, shall be compelled to bear arms.”\textsuperscript{316} Eldridge Gerry,\textsuperscript{317} however, was not pleased with the Amendment reading a “well-regulated militia” as “being the best security of a free state.”\textsuperscript{318} He feared that the section insinuated that while a militia was the “best security,” it also admitted that a standing army was a secondary option. Gerry suggested that the Amendment should read, “well regulated militia, trained to arms,” because this would make it the federal government’s duty to ensure the maintenance of the militia.\textsuperscript{319}
Although nobody supported Gerry’s motion, the language “being the best security of a free state” was eventually removed. The words “necessary to the” were put in place of “the best”, thus making the Amendment constitutionally protect what Gerry desired – that a “well-regulated militia” was the only security of a free state.\footnote{Id. at 175. For examples of militia preambles that were similarly structured, see supra pp. 43-45.}

Not surprisingly, the Constitutional Convention agreed to these changes and included the phrase “well-regulated militia.” The Constitution’s predecessor, the Articles of Confederation, included a “well-regulated militia” provision. Article VI, Section 4 stipulated that “every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.”\footnote{Arts. of Confederation art. VI, § 4 (1781).}

The Articles of Confederation’s militia clause was not empty rhetoric, for a Committee of Congress classified its “well-regulated militia” provision as constitutionally significant. The Committee was of the opinion that the “keeping up . . . a well regulated militia” was not only a “constitutional duty” of not only the states, but also a necessity which deserved “the attention of Congress.”\footnote{Reports of a Committee of Congress, containing a Plan for a Military establishment for the United States, in time of Peace, The Boston Magazine, Oct. 1784, at 533.} The Charleston Battalion of Artillery agreed, describing “a well regulated Militia [as] the best defence of a Republic” and the “axiom in politics.”\footnote{The Columbian Herald, or the Independent Courier of North-America (Charleston, SC), December 26, 1785, at 2.}

Just months after the adoption of the Articles, Joseph Reed attested to the significance of this provision. On June 23, 1781, he wrote to the Pennsylvania Assembly regarding the need for militia reform to repel the British. Reed was even willing to devote his “time and abilities to this service, and at the risqué of health and life, [to] lead such of our citizens.”\footnote{Pennsylvania General Assembly Journal: Minutes of the Third Sitting of the Fifty General Assembly: May 24-June 26, 1781 469 (Philadelphia, 1781).} A reformed militia not only would “render effective assistance,” but was important to “avail ourselves of the disposition and
virtue of this class of men.” To support his argument, Reed invoked the importance of a “well-regulated militia” in American society and the Articles of Confederation, writing:

I cannot therefore have any other view in this Address, than an anxious desire to preserve the honor and support the interest of the State, in maintaining a well regulated militia, which the Articles of Confederation and the voice of wisdom and sound judges declare not only to be highly proper, but indispensably necessary . . .

Given that congressional powers in the Articles of Confederation were limited, it was not surprising that a “well-regulated militia” never flourished as so many had hoped. A year prior to the Constitutional Convention, Major General Marquis de Lafayette agreed with Washington’s plan to establish and strengthen congressional powers over a constitutional “well-regulated militia.” The success of the United States hinged on three constitutional reforms needed to “strengthen the [Articles of] Confederation.” They were the congressional powers “to Regulate trade, pay off [the Nation’s] debt or at least the interest of it,” and the establishment of a “well-regulated Militia.”

Luther Martin also wrote of the significance of a “well-regulated militia” as a constraint on the Constitution. In the 1788 tract entitled The Genuine Information, he wrote of the need for a constitutional amendment that would restrict congressional powers to organize, arm, and discipline the militia. He objected to complete federal control of state militias because they provide “the only defence and protection which the State can

325 Id.
326 Id. at 470. See also John Sullivan, The Worcester Magazine: Containing Politicks, Miscellanies, Poetry and News, July 1786 14 (“As a well regulated militia is the most safe and natural defence of this country, and, from its importance, merits every possible attention and encouragement.”).
328 3 The Papers of George Washington: Confederation Series, supra note 327, at 542.
329 Id.
have for the security of their rights against arbitrary encroachments of the general government.”

Martin also made this objection at the Maryland Convention, exclaiming that Article I, Section 8 would “take from [the states] the only means of self preservation.” In supporting his stance, Martin presented an interesting argument to counter Alexander Hamilton’s Federalist No. 29. He felt that the states were in a better position to understand the “situation and circumstances of their citizens, and the regulations that would be necessary and sufficient to effect a well-regulated militia in each.” Such concurrent authority over militia regulation would not only protect the Union but “would enable [the states] to thwart and oppose the general government.”

This right of self-preservation was important to the Framers because the power to regulate the militia was “considered as the last coup de grace to the State governments.” Martin, along with other Founders, seriously feared that absent a constitutional amendment protecting the right of a “well-regulated militia” the federal government would “oppress and enslave them,” for the states would “not have any possible means of self-defence.” Martin even went as far as to hypothesize that should...

331 Id. at 52.
332 3 The Records of the Federal Convention of 1787, supra note 21, at 359.
333 The Federalist No. 29, at 178-79 (Alexander Hamilton) ("If a well regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation, and at the disposal of that body, which is constituted the guardian of the national security.").
334 Martin, Genuine Information, supra note 21, at 53.
335 Id.
336 Id. at 54. See also Taylor, supra note 21, at 452 (Fredericksburg, Green and Cady, 1814) (Our dual system of government “has left with the state governments a power to cultivate a militia, and withheld from them that of raising mercenary armies. As no governments can exist without military protection, and as a militia constitutes that, to which alone the state governments can resort, they must make it adequate to the end or perish.”).
337 Martin, Genuine Information, supra note 21, at 54. The Second Amendment is often referred to as the armed mass of the people as a check on tyrannical government. This power to “check” the government, however, does not rest with the people per se, but with their representatives and the state government. See The Federalist No. 28, at 177 (Alexander Hamilton) (It is “through the medium of their State governments” that the people may “take measures for their own defense.”). Parliament had to deal with the philosophical underpinnings of lawful revolution during the 1642 English Civil War and the
“a State . . . put the militia in a situation to counteract the arbitrary measures of the general government,” it would be construed as “an act of rebellion, or treason; and Congress would instantly march their troops into

1689 Glorious Revolution, in which it was determined that lawful rebellion rested within the constraints of the branches of government. The Founding Fathers also understood lawful rebellion in this light, for in 1768 the Boston Town Council convened to arm the militia to exercise their right of “self-preservation and resistance.” Although the Massachusetts Convention of Towns vetoed calling up the militia, the incident shows that the Founders prescribed to understanding that lawful rebellion could only be exercised within the constraints of government. See Charles, Arms for Their Defence?, supra note 38, at 421-34; Charles, Right of Self-Preservation, supra note 30, at 26-59. See also The Pennsylvania Chronicle, and Universal Advertiser (Philadelphia, PA), August 8, 1768, at 1, (comparing the American Revolution to the Glorious Revolution, justifying resistance on the same principles, including the 1689 Declaration of Rights “have arms” provision, which the writer paraphrased as follows: “A standing army in time of peace, without consent of Parliament, denying protestant subjects the use of arms for their defence, as allowed by law.”); The Essex GAZETTE (Salem, MA), Apr. 6, 1773, at 143 (“The Law of Nature with respect to communities, is the same that it is with respect to individuals; it gives the collective body a right to preserve themselves; to employ undisturbed the means of life . . . and the power to defend themselves, the surest pledge of their safety. This affords us the strongest encouragement that our countrymen are by no means fallen into that state of pusillanimous indifference about their Rights and submission to the invasion of them, which Judge Blackstone holds so criminal and degradatory to an Englishman – These invaluable and unalienable birthrights, this same great jurist tells us, are to be vindicated, first by petition, and in failure of this, by ARMS.”); “Defence of Machiavel,” The Literary Magazine, and American Register, Jan. 1807, at 33 (tracing the right of self-preservation of government back to Machiavelli, including Blackstone’s recognition of “resistance on the part of the people in defence of their invaded liberties; he acknowledges both the right and necessity of such resistance in extreme cases, however, in very unequivocal terms”); The GEORGETOWN GAZETTE (Georgetown, SC), Jan. 9, 1799, at 1 (“The [militia] act contemplated the complete arming of the militia: for the legislature well knew, that when the liberties of a country are endangered by hostile invasion, it is the duty of all citizens to rise in arms for their defence.”). For a dissenting view and discussion, see generally David C. Williams, The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic (2003) (discussing alternative ways the people would be able to defend themselves against the federal government without a militia); David C. Williams, Death to Tyrants: District of Columbia v. Heller and the Uses of Guns, 69 Ohio St. L. J. 641 (2008).
Certainly, fear of the federal government’s disarmament of state militias was also on the Framers’ minds when drafting the Second Amendment. This is why the Virginia Convention added a “right to keep and bear arms” to its preexisting right of a “well-regulated militia” when it submitted a proposal for the federal Bill of Rights. It exemplifies that the Framers viewed the right to arms as intimately related to the constitutional right of a “well-regulated militia” – not the other way around as individual right scholars assert. As Luther Martin’s tract illustrates, the disarmament of the state militias was not the only fear in drafting the Second Amendment. There was just as much concern, if not more, that the federal government would “leave the militia totally unorganized” and “undisciplined,” as well as “disarm them.”

Martin perfectly illuminates this fact with his discussion on the constitutional significance of the militia. He wrote that the English “bill of rights” ensured that the militia was “the only natural and safe defence of a free people.” Martin did not state that the English Constitution

338 Martin, Genuine Information, supra note 21, at 54. Of course, not everyone agreed that a constitutional amendment was needed to ensure the states had concurrent power over the militia. See Alexander Contee Hanson, Remarks on the Proposed Plan of Federal Government 20 (Annapolis, Green 1788).

339 The 1776 Virginia Constitution reads: “That a well regulated militia, composed of the body of people trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.” VA. Declaration of Rights art. XIII. When the Virginia Convention proposed amendments to the federal Constitution it included the following: “That the people have a right to keep and bear arms: that a well regulated militia composed of the body of the people trained to arms, is the proper, natural and safe defence of a free State. That standing armies in times of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to the governed by the civil power.” Journal of the Convention of Virginia 39 (Richmond, Thomas White 1788).

340 Charles, The Second Amendment, supra note 17, at 44-46.

341 See supra note 12.

342 Martin, Genuine Information, supra note 21, at 54.

343 Id. at 87.
protected the right to be armed. Instead, he listed the following state constitutional protections to support his argument that a Bill of Rights was needed to check tyrannical government: (1) right to bear arms, (2) right to a well-regulated militia, (3) protection against quartering soldiers, (4) no standing armies during times of peace, and (5) the military will always be subordinate to the civil power. In other words, Martin viewed every one of these constitutional provisions as being the means to protect the militia against one very real threat – an oppressive standing army.

State constitutions of the era also expounded on the constitutional significance of a “well-regulated militia.” By 1791, out of the thirteen states, five state constitutions secured the right of the people to have a well-regulated and disciplined militia including Delaware, Virginia, Maryland, New York, and New Hampshire. Meanwhile, only four state constitutions protected a right to bear arms. Out of these four

344 Martin listed the provisions in the state constitutions of Massachusetts, Pennsylvania, Maryland, Delaware, North Carolina, and South Carolina. Id. at 88-89.
345 Id. at 87 (“[A] militia . . . keeps the jealousy of the nation constantly awake, and has proved the foundation of all the other checks.”).
346 Id. at 87-92.
347 Del. Declaration of Rights and Fundamental Rules art. XVIII. (“That a well regulated Militia is the proper, natural and safe Defense of a free government.”); Md. Const. of 1776 art. XXV (“That a well-regulated militia is the proper and natural defence of a free government.”); N.H. Const. of 1784 art. XXIV (“A well regulated militia is the proper, natural, and sure defence of a state.”); N.Y. Const. of 1777 art. XL (“And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it; this convention therefore, in the name and by the authority of the good people of this State, doth ordain, determine, and declare that the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service.”); VA. Declaration of Rights art. XIII (“That a well regulated militia, composed of the body of people trained to arms, is the proper, natural, and safe defence of a free State.”).
348 Mass. Const. of 1780 pt. I, art. XVII (“The people have a right to keep and bear arms for the common defence.”); N.C. Const. of 1776, Declaration of Rights art. XVII (“That the people have a right to bear arms, for the defence of the State.”); Pa. Const. of 1790 art. IX, § 21 (“That the right of citizens to bear arms, in defence of themselves and the State, shall not be questioned.”); Vt. Const. of 1786 ch. I, art. XVIII (“That the people have a right to bear arms,
state “bear arms” provisions, only Massachusetts protected the right to “keep arms” for the “common defence,” while the remaining three states only protected a right to “bear arms.” This gives enormous weight to the argument that the Framers viewed the maintenance of a “well-regulated militia” as the sole and primary purpose of the right to “keep and bear arms,” for although the federal government could not impede the “keeping” of militia arms, the states were given great latitude in determining who should possess arms.

A common rebuttal to this state authority approach is that the 1792 National Militia Act required every man to provide himself with arms and that this requirement shows that arms ownership was a right of a national people that the states could not infringe. This argument fails to address, however, the historical record concerning the implementation of the National Militia Act. As addressed in the introduction of this article, authority over the militia was concurrent between the state and federal government. Even James Madison acknowledged this fact in a response to calm Patrick Henry’s fear of federal authority over the militia. Madison wrote that state authority over the militia is the “the same power which the constitution is to” grant the federal government during times of national emergency, writing:

There is a great deal of indifference between calling forth the militia, when a combination is formed to prevent the

349 Mass. Const. of 1780 pt. I, art. XVII.
351 Militia Act of 1792, ch. 33, 1 Stat. 271 (1792) (repealed 1903).
352 See Parker v. District of Columbia, 478 F.3d 370, 387-89 (D.C. Cir. 2007); Halbrook, St. George Tucker's Second Amendment, supra note 12, at 139-41, 145.
353 Charles, The Second Amendment, supra note 17, at 71-79, 139-53.
354 See supra pp. 5-8.
execution of the laws, and the sheriff or constable carrying with him a body of militia to execute them in the first instance; which is a construction not warranted by the clause. There is an act also in [Virginia], empowering the officers of the customs to summon any persons to assist them when they meet with the obstruction in executing their duty. This shews the necessity of giving the [federal] government power to call forth the militia when the laws are resisted. It is a power vested in every legislature in the union, and which is necessary to every government.\

Perhaps, in no other aspect was this concurrent authority more imperative than in arming the militia. A careful reading of the National Militia Act shows there was no penalty for an individual’s failure to provide arms\textsuperscript{356} – a common provision in eighteenth century militia laws.\textsuperscript{357} The drafters excluded a federal penalty for individual maintenance of arms because it was a state matter.\textsuperscript{358} In fact, states frequently provided militia members with arms that individuals were only entitled to use during times

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\item \textsuperscript{355} 11 The Papers of James Madison 147 (Robert A. Rutland ed., 1977).
\item \textsuperscript{356} Militia Act of 1792, ch. 33, 1 Stat. 271 (1792) (repealed 1903).
\item \textsuperscript{357} Charles, The Second Amendment, supra note 17, at 31-34, 72-73.
\item \textsuperscript{358} Id. at 71-79; 1 American State Papers: Military Affairs 163 (n.p., 1832) (“[T]hat the deficiency in organization, arming, and discipline of the militia, which is too apparent in some of the States, does not arise from a defect in the part of the system which is under the control of Congress, but from omission on the part of the State Governments.”); Id. at 256 (“The constitution . . . gives to Congress only a qualified agency on the subject of the militia . . . If the States are anxious for an effective militia, to them belong the power, and to them too belong the means of rendering the militia truly our bulwark in war.”). \textit{See also} Rawle, supra note 10, at 125 (“The duty of the state government is, to adopt such regulations as will tend to make good soldiers with the least interruptions of the ordinary and useful occupations of civil life.”); Tucker, supra note 20, at 214-15 (“[T]he power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently, reserved to them, concurrently with the federal government . . . [and] if the duty of arming, organizing, training, and disciplining them, be neglected” the states may provide for the same.).
\end{itemize}
of muster,\textsuperscript{359} a practice similar to that of England’s 1757 Militia Act.\textsuperscript{360} This state practice of “keeping” arms was especially prevalent to persons who could not pay the tax to provide themselves with arms according to law.\textsuperscript{361}

The truth of the matter is that a “well-regulated militia” was seen as crucial to the progress of the United States.\textsuperscript{362} The maintenance and advancement of a “well-regulated militia” not only provided physical security to the New Republic, but it also assured that the states could arm this constitutional body of men if the federal government neglected it.\textsuperscript{363} Often a “well-regulated militia” was referred to as the bulwark or palladium of liberty.\textsuperscript{364} Individual right scholars, such as Stephen

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\item Charles, The Second Amendment, supra note 17, at 31-34. See also A Supplement to the Act Entitled, An Act to Regulate and Discipline the Militia of this State, § 30 (Md. 1799) (“[A]ny private or non commissioned officer, to whom a musket is delivered, shall use the same in hunting, gunning or fowling or shall not keep his arms . . . in neat and clean order . . . shall [pay a fine].”).
\item 30 Geo. 2, c. 25 (1757) (Eng.).
\item Charles, The Second Amendment, supra note 17, at 32, 73-74, 77.
\item See The Pennsylvania Packet, and Daily Advertiser (Philadelphia), Sept. 2, 1788, at 2. (“On the well regulation of the militia depends the prosperity and protection of the commonwealth.”).
\item See Pocock, The Machiavellian Moment, supra note 41, at 528; see also supra note 21.
\item See John W. Brownson, The Vermont Disciplinarian 8 (Bennington, Haswell & Smead 1805) (“A well regulated militia, undoubtedly constitutes the only national bulwark of a free country. It is on them alone, that we can with safety depend, for the suppression of domestic insurrection, or for the repulsion of foreign invasion . . . . It cannot be forcibly impressed upon the minds of American people, that no virtue is of more value to their country, than military virtue.”); Isaac Watts Crane, An Oration Delivered at the Presbyterian Church, at Elizabeth-Town, on the Fourth of July, 1794 15 (Newark, Woods 1795) (“It is the interest of every citizen to unite in the wisdom of our federal government, the grand palladium of our liberties – this only can make us secure as individuals; strong and powerful as a nation.”); Jonathan Maxcy, A Poem of the Prospects of America 30 (Providence, Wheeler 1787) (“A well regulated Militia will ever be the bulwark of our liberty.”); James Simmons, A Military Essay 12 (Charleston, Markland & M’Iver 1793) (“The militia of America must be considered as the palladium of our security, and the first effectual resort in case of hostility.”); Tucker, supra note 20, at 238 (describing the Second amendment “as the true palladium of liberty”); The Historical Record (1872-1874), at 424 (Sep. 1874) (“A well disciplined militia as the
P. Halbrook, assert that St. George Tucker’s description of the Second Amendment as the “true palladium of liberty”\textsuperscript{365} referred to the people armed, which accomplished the objective of a “well-regulated militia.”\textsuperscript{366} This rationalization misinterprets the Framers’ understanding of a “well-regulated militia,” and completely misstates what Tucker was trying to convey.

Tucker’s “true palladium of liberty” description really meant that the Second Amendment gave constitutional credence to the people taking part in defending their liberty.\textsuperscript{367} It was commonly feared that if the palladium of liberty, is an empty phrase in the mouth of ever patriot.”). See also David Humphreys, Considerations on the Means of Improving the Militia 16 (Hartford, Hudson & Goodwin 1803) (“And if it be demonstrable, liberty cannot, in any other way, be so well defended as by an organized and disciplined force, safe by its constitution and efficacious by its capacity, like the militia in contemplation.”); The Salem Gazette (Salem, MA), February 12, 1793, pg. 4, col. 2 (“A well armed, effective militia, that palladium of liberty.”).

\textsuperscript{365} Tucker, \textit{supra} note 20, at 238.

\textsuperscript{366} Halbrook, \textit{St. George Tucker’s Second Amendment, supra} note 12, at 142-45. For other “individual right” interpretations of the “true palladium of liberty,” see Randy E. Barnett & Don B. Kates, \textit{Under Fire: The New Consensus on the Second Amendment,} 45 Emory L.J. 1139, 1220 (1996) (arguing that the “true palladium of liberty” was in reference to armed individual self-defense); Ian Redmond, \textit{The Second Amendment: Bearing Arms Today,} 28 J. LEGIS. 325, 329 (2002) (stating that Tucker is suggesting his “agreement with the idea that citizens ought to possess an individual right to own guns.”); Ian Redmond, \textit{The Second Amendment: Bearing Arms Today,} 17 WM. & MARY BILL RTS. J. 1037, 1051-52 (2009) (“the right to bear arms was important to self-defense” and was described as the “palladium of liberty”). See also District of Columbia v. Heller, 128 S. Ct. 2783, 2805 (2008) (stating that Tucker was describing armed individual self-defense).

\textsuperscript{367} This right to arms can be found in late seventeenth century treaties. See Sidney, \textit{supra} note 46, at 157 (“Every one has a part according to his quality or merit . . . the body of the People is the publick defence, and every man is arm’d and disciplin’d . . . and every one bears a part in the losses. This makes men generous and industrious; and fills their hears with love to their Country: This, and the desire of that praise which is the reward of Virtue, raised the Romans above the rest of Mankind.”); Toland, \textit{supra} note 52, at 10 (“If the Romans admitted their vanquish’d Enemies to an equal participation of their Laws and Privileges, how much more readily should we embrace our own Country-men with both Arms, and welcome the return of our prodigal Brethren to their Duty.”); Charles, \textit{The Right of Self-Preservation, supra} note 30, at 29-41. See also War Office, \textit{A Plan for the General Arrangement of the Militia of the}
people were ever left out of this process there would be no redress for their injuries. To be precise, the people had to fight to ensure protection of their own liberties. If the people were left to rely on others for protection, many believed that the people would essentially lose these liberties, and fail to understand the concept of liberty itself.\textsuperscript{368} Furthermore, the meaning of the “true palladium of liberty” becomes clear in Tucker’s first mention of the Second Amendment as a check to Article I, Section 8.\textsuperscript{369} He wrote that should the “arming, organizing, training, and disciplining” the militia “be neglected,” it will “pave the way for standing armies; the most formidable of all enemies to genuine liberty in a state.”\textsuperscript{370} In other words, Tucker viewed a “well-regulated militia” as the “palladium of liberty”\textsuperscript{371} to check standing armies, which were “enemies to the genuine liberty of a state.”\textsuperscript{372}

Tucker was not the only commentator to describe the Second

\textsuperscript{368} Charles, The Second Amendment, supra note 17, at 50; Charles, “Arms for Their Defence”, supra note 38, at 420-21. See also Saul Cornell, St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings, 47 WM. & MARY L. REV. 1123 (2006).

\textsuperscript{369} Tucker, supra note 20, at 214-15.

\textsuperscript{370} Id. at 215.

\textsuperscript{371} Id. at 238.

\textsuperscript{372} Id. at 215. See also Saul Cornell, Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss”, 56 UCLA L. REV. 1095, 1120-22 (2009).
Amendment as the “palladium of liberty.” Writing nearly three decades later, Joseph Story similarly described the Second Amendment as “the palladium of liberties of the republic.” The Second Amendment was not the “palladium of liberties” because it gave the people a right to armed individual self-defense. Story clarified that the Second Amendment was the “palladium of liberties” because “it offers a strong moral check against the usurpation and arbitrary power of rules; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph.” He further wrote that “the importance of a well regulated militia” is what makes this truth “seem so clear.”

Therefore, to Tucker and Story, the “palladium of liberty” was not with “arms” per se, but with the moral virtue and physical protection of a constitutional “well-regulated militia.” Regarding the significance of virtue in American society, Martin Post wrote that “the felicity of a nation depends on the virtue of the people.” According to Post, “Virtue is the palladium of liberty and the bulwark of the rights of man.” Pennsylvania judge Alexander Addison, who participated in drafting the 1791 Pennsylvania Bill of Rights, similarly proclaimed that “virtue is the principle of a republican government” and to “produce public good,

374 Id.
375 Id.
376 Martin Post, An Oration Delivered at Cornwall, on the 5th Day of July, A.D. 1802, for the Anniversary of American Independence 9 (Middlebury, Huntington & Fitch 1802).
377 Id. It should be emphasized that virtue was intimately connected with American society during the Early Republic. See James Wilson, A Charge Delivered by the Honorable James Wilson, Esq. one of the Associates of the Supreme Court of the United States, to the Grand Jury Impanelled for the Circuit Court of the United States . . . Monday the 23d day of May 1791 29 (Philadelphia, Bronson & Chauncey 1804) (“[A]s excellent laws improve the virtue of the citizens so the virtue of the citizens has a reciprocal and benign energy in heightening the excellence of the laws . . . . The rational love of the laws generates the enlightened love of our country. The enlightened love of our country is propitious to ever virtue, which can adorn and exalt the citizen and the man.”).
there must be public virtue on the whole people: for in the hands of the whole people is the authority and force of the nation really vested.”\textsuperscript{379} Should “the people” lose this virtue “a democratic form of government, will not long subsist.”\textsuperscript{380} Addison elaborated on this point, writing:

\[\text{[If] the people lose sight of public good, and suffer themselves to be corrupted by selfish passions, and base views; all the wretchedness of tyranny is united with the reflection, that they are, themselves, the authors of their own misery . . . . If virtue is extinguished, if the public force is not directed to the public good, if every individual, regardless of the common interest, pursues a selfish and separate end; and the exertions of all, instead of co-operating for general prosperity, contend for private and discordant gain, individual exertions mutually defeat each other . . . [and] the liberty of government exists only in theory and form . . . .}\textsuperscript{381}

It was the “love of virtue and zeal for liberty” that Congress relied upon to call forth the Pennsylvania militia “to join the Militia of the neighboring Colonies, [and] to form camp for our immediate protection.”\textsuperscript{382} It was virtue that compelled men to fight for their liberty at Lexington and Concord. On February 19, 1776 William Smith wrote:

The resistance made at Lexington was not the traitorous act of men conspiring against the supreme powers; nor directed by the councils of any publick body in America; but rose immediately out of the case, and was dictated by

\begin{itemize}
  \item \textsuperscript{379} \textit{2 Alexander Addison, Reports of Cases in the County Courts of the Fifth Circuit . . . of the State of Pennsylvania}, at 150-51 (Washington, John Colerick 1800).
  \item \textsuperscript{380} \textit{Id.} at 151.
  \item \textsuperscript{381} \textit{Id.}
  \item \textsuperscript{382} \textit{6 American Archives, supra} note 269, at 966. There was an interesting exchange between John Adams and James Otis on the need for love of one’s country to serve in the militia, which Otis claimed Adams did not possess. \textit{See 2 Diary and Autobiography of John Adams: Diary 1771-1781}, at 65-66 (L.H. Butterfield ed., The Belknap Press 1961) (1836).
\end{itemize}
self-preservation, the first great law of nature as well as society. If there was any premeditated scheme here, it was premeditated by those who created the dreadful necessity, either of resistance or ruin. For, could it be expected that any people, possessing the least remains of virtue and liberty, would tamely submit to destruction and ravage . . . .

To the casual observer, it would seem that the Second Amendment was the only right referred to as the “palladium of liberty.” But this is simply not true. As shown above, civic virtue was the “palladium of liberty.” Furthermore, many rights were referred to as the “palladium of liberty,” including the freedom of the press, the right to jury trial, and the writ of habeas corpus. Thus, one can hardly say that the Second

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383 By “self-preservation” he was referring to Blackstone’s fifth auxiliary right and the ancient principle of lawful resistance through government. See generally Charles, The Right of Self-Preservation, supra note 30.
384 4 American Archives, supra note 269, at 1681.
385 Post, supra note 376, at 9.
Amendment is a right above any other. If anything, history provides us with infinite evidence that the right to bear arms was conditioned on supporting just government and the willingness to expose oneself to martial law.\(^{387}\)

Tucker was not the first person to describe a “well-regulated militia” as the “palladium” or “bulwark” of liberty. He was undoubtedly borrowing from other sources. For instance, in an October 1785 edition of *The Independent Ledger*, it read that “all good citizens” consider a “well-regulated militia . . . as the national bulwark and defence of those liberties which have been earned at the expence of so much treasure and the blood of our best citizens.”\(^{388}\) Meanwhile, in a July 1789 edition of *The New-York Packet*, an editorial discussed how a “well regulated Militia” requires the “habitual exercise” of military training and “manly discipline, which is the bulwark of the country.”\(^{389}\) This knowledge of the military art was the “sole means to render a standing army useless” and to “form a truly warlike militia.”\(^{390}\) It was not “arms” that secured the nation. It was knowledge of the military art, for “education is a bulwark against tyranny, it is the grand palladium of true liberty in a republican government.”\(^{391}\) Without this knowledge the “militia is only a disorderly populace, or a mass of animal machines.”\(^{392}\) Meanwhile, a 1798 militia address published in the *Connecticut Gazette* and delivered by General Cleveland, emphasized the importance of “obedience to orders and exertions to perfect yourselves in the military art.”\(^{393}\) General Cleveland further stated:

The importance and practicability of a well regulated and disciplined Militia, in a free country, cannot be doubted, this day you have evinced that such a thing is altogether

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387 Charles, The Second Amendment, *supra* note 17, at 95-130. *See also* Burgh, *supra* note 101, at 402 (discussing how a militia is “subject to martial law all the while”); *supra* pp. 59-61 (discussing the importance of allegiance to “have arms”).


390 *Id.* at 3.

391 *Id.*

392 *Id.*

393 *See* American Mercury (Hartford, CT), Nov. 1, 1798, at 2.
practicable – You are the *palladium* of which your country leans for the protection against all foreign invasion: From the Militia are to be rallied the permanent and better disciplined Armies, in case of war; and in the hour of danger you are to be prepared to march, defend and protect your country and constitution. Can any one of them doubt your importance?  

Cleveland’s address clearly defines what was meant by Tucker’s “palladium of liberty,” that a “well-regulated militia” protected the nation and the Constitution from threats – both internal and external. Of course, he was just one of the many to make this observation. An 1811 address by Pennsylvania militia General John Hamilton emphasized that the constitution’s militia is the “sure basis on which the liberties of your country must rest.” He proclaimed:

A well organized militia has been justly styled the bulwark of the nation; and so long as they are armed, and disciplined, they will supercedes the necessity of employing that potion of idleness and corruptor of morals, a *standing army* . . . . [Remember] the spirit of ’76, prove yourselves worthy of that inheritance of freedom and independence, bequeathed to you by the patriots and heroes of the revolution, meet on a parade, like a band of brothers, and maintain your rights, liberties and independence, with your last breath.

Many eighteenth century commentators and prominent Founders made similar observations. In 1787, Jonathan Maxcy wrote that “our liberty, property, and every thing dear to us, depends on the exertions of a brave, well-regulated Militia.” For this reason, and to prevent the threat that standing armies may pose, Maxcy felt that a “well-regulated militia will ever be the bulwark of our liberty.” Thomas Bond also characterized

394 *Id.*
396 *Id.*
398 *Id.*
a “well-regulated militia . . . [as] the bulwark of national defence and safety,” for through its “victorious banners” the nation will “assert the justice, honor and felicity of our country.”

James Simmons described the “militia of America” as the “palladium of our security, and the first effectual resort in case of hostility.” Isaac Crane wrote that the national assemblage of the militia was the “grand palladium of our liberties.” George Washington considered the militia as “the palladium of our security, and the first effectual resort in case of hostility.” Major General Nathanael Greene wrote that the militia is the “great bulwark of civil liberty, [which] promises security and independence to this country.”

In 1800, Massachusetts Representative Harrison Gray Otis exclaimed that the “great national resource, the militia” was “the palladium of the country.” Meanwhile Samuel Dana, a former Massachusetts

399 Thomas Bond, An Oration, Delivered at Hallowell 21 (Augusta, Edes 1802).
400 Simmons, supra note 364, at 12.
401 Crane, supra note 364, at 15.
404 4 The Papers of Thomas Jefferson 131 (Julian P. Boyd ed., 1951); The Portfolio (1801-1827), at 71 (Jul. 1813). Major General John Sullivan, whom was generally a member of George Washington’s Councils of War wrote that efforts must be continued to make the militia “complete this only bulwark of your dear bought freedom.” New Hampshire Mercury and General Advertiser (Portsmouth, N.H.), March 8, 1786, at 2.
405 10 Annals of Congress 302 (1800); see also 3 Annals of Congress 799 (1793).
Representative, member of the Middlesex bar, and Chief Justice for the Massachusetts Court of Common Pleas, similarly described the militia as the “palladium of our Country.”

Dana’s tract entitled *An Address on the Importance of a Well Regulated Militia* is especially telling, for it seemingly influenced St. George Tucker’s analysis in *A View of the Constitution of the United States*. Dana perfectly captures how the Founding generation viewed a “well-regulated militia.” The tract shows traces of Machiavelli, Trenchard, and other prominent militia commentators who understood the importance of virtue and discipline in a “well-regulated militia.” Dana summed up this point best when he wrote:

> If we [are] to preserve our liberties, to perpetuate our nation, we must lay the foundation in the cultivation of virtue, in the dissemination of useful knowledge, we must learn to know our rights with certainty, we must cultivate a spirit capable of defending them.

As so many others before him, Dana also extolled the militia principle that every citizen is a soldier and every soldier a citizen, writing:

> In our military system, that the defence of our country be confided to our own citizens, that it should consist entirely of the people; that the soldiers should always be citizens, possessed of the same sentiments and dispositions as the other citizens . . . . We should most carefully guard against making our soldiers too distinct a body from the other citizens, of turning the profession of a soldier into the trade of a mercenary.

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409 Id. at 4.

410 Id. at 6. See also Humphreys, supra note 364, at 8 (“With us, all should be soldiers as well as citizens.”). Friedrich von Steuben disagreed with Dana that
Arms were not the means for creating or preserving a “well-regulated militia.”411 They were merely a tool to accomplish a constitutional end – the common defence.412 Throughout his tract, Dana reminds his readers that a “knowledge of tactics, and a perfection of discipline, are the great objects to attain to.”413 A militia without discipline was nothing but a “wieldy mass” that “instead of being a bulwark, a defence, they would prey upon, and finally destroy the very country they were designed to protect.”414 A citizen’s first duty in a “well-regulated militia” was not that he was armed. Instead, a citizen’s “first, second, and third duty is obedience.”415 Meanwhile, the purpose of arms in a “well-regulated militia” was that the people were instructed in their use to “constantly inspire them with the idea, that they bear them for their own defence.”416

By “own defence,” Dana was articulating the principle that, in

this was even possible. See von Steuben, supra note 367, at 7.

411 When William Emerson delivered a speech to the militia at Harvard, he too did not state arms were the means to ensure an effective militia. He stated, “To preserve yourselves free and independent . . . two things must principally conduce. They are a due cultivation of useful and religious knowledge, and some very considerable attention to the military art.” William Emerson, A Discourse, Delivered in Harvard, July 4, 1794, at 10 (Boston, Belknap, 1794).

412 See The Federalist No. 46, at 214 (James Madison) (Jim Manis ed., 2001) (“To [our enemies, foreign or domestic,] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.”); Samuel Dana, An Oration, Pronounced at Groton, In the Commonwealth of Massachusetts, on the Fourth of July, A.D. 1807, at 15 (Amherst, N.H., Joseph Cushing, 1807) (“The possessors of the country must be the defenders of it. Persevere, then, in acquiring the art of tactics; let your uniforms always be neat and clean, your arms bright, and all your equipments in good order; then may your country repose in safety upon your columns. . . .”).

413 Dana, An Address, supra note 367, at 8. See also Tucker, supra note 20, at 214-15 (“Uniformity in the system of organization, and discipline of the militia, the constitutional defence of a free government is certainly desirable, and must be attended with beneficial effects . . . .”).

414 Dana, An Address, supra note 367, at 8.

415 Id. at 9. See also Vattel, supra note 170, at 615-16 (discussing obedience and subjecting oneself to martial law as the first duties of a soldier).

416 Dana, An Address, supra note 367, at 9.
a “well-regulated militia,” every citizen had an interest in preserving liberty, property, and family, both individually and collectively,\(^{417}\) as well as in preserving the very government that secured their inalienable rights. Dana made this point clear:

Let us cheerfully submit to sacrifice some part of our time, some portion of our property, to acquire the art of defending the residue. It is the price, which must be paid for a national defence. The right of bearing arms for the common defence, is recognized among our unalterable laws. These arms must not be suffered to rust in our houses, which would render them as useless, as if they were stored in the enemies’ magazines.\(^{418}\)

Of course, Dana was not the only writer that impacted Tucker’s view\(^ {419}\) of the Second Amendment and a “well-regulated militia.” Joel Barlow, a former Connecticut lawyer and prominent eighteenth century literalist,\(^ {420}\) also wrote of the significance of a constitutional militia. Although Barlow did not describe the militia as the palladium or bulwark of liberty, his legal philosophy corresponds with Dana, Tucker, Story, and the ancient militia commentators before him. Barlow knew that people had to sacrifice themselves for the greater good and it was imperative that

\(^{417}\) *Id.* at 14 (“Without a well regulated effective defence, no profession, art, trade, or business can long remain secure.”). *See also* Editorial, *On a Well Regulated Militia*, *The Oracle of the Day* (Portsmouth, N.H.), July 16, 1793, at 1 (“[W]hen every officer is our fellow citizen equally concerned in the preservation of freedom and when each according to his rank hath a lesser or greater property at stake as a security to the nation at large, and to every man in it for his fidelity and patronage of that liberty which cannot be destroyed without the destruction of that property.”).

\(^{418}\) *Dana, An Address, supra* note 367, at 9-10.


\(^{420}\) *See* Milton Cantor, *Joel Barlow: Lawyer and Legal Philosopher*, 10 Am. Q. 165 (1958). Barlow’s work was so prominent and recognized by the Founding generation that, in 1780, George Washington invited Barlow to dine with him at camp. *See* Theodore A. Zunder, *Joel Barlow and George Washington*, 44 Modern Language Notes 254 (1929).
they developed a balance of civil and military virtue to properly effectuate a militia.\textsuperscript{421} He wrote:

Every citizen ought to feel himself to be a necessary part of the great community, for every purpose to which the public interest can call him to act; he should feel the habits of a citizen and the energies of a soldier, without being exclusively destined to the functions of either. His physical and moral powers should be kept in equal vigour; as the disuse of the former would be very soon followed by the decay of the latter.\textsuperscript{422}

In addition to balancing civil and military virtue, a militia required constitutional balance within the branches of government.\textsuperscript{423} The power

\textsuperscript{421} Individual right scholars place too much credence in Barlow’s discussion of arms. \textit{See} Joel Barlow, \textit{Advice to the Privileged Orders, in the Several States of Europe, Resulting From the Necessity and Propriety of a General Revolution in the Principle of Government} 69-70 (New York, Childs & Swains, 1792) \textit{[hereinafter Barlow, Advice to the Privileged Orders]} (“Another deduction follows, That the people will be universally armed: they will assume those weapons for security, which the art of war has invented for destruction.”); Shalope, \textit{supra} note 40, at 607-08. As Barlow makes clear, these arms were to remove “the necessity of a standing army” and for “the arrangement of the militia.” Barlow, \textit{Advice to the Privileged Orders}, \textit{supra} note 421, at 70. Furthermore, Barlow emphasizes that “arms” is not what won the American Revolution. It was virtue – “[Washington’s] virtue was cried up to be more than human; and it is by this miracle of virtue in him, that the Americans are supposed to enjoy their liberty at this day.” \textit{Id.} Barlow further attributed victory to the fact that “the soldiers were all citizens” and the citizens were all soldiers, thus reiterating the principle that the people must possess civil and military virtue. \textit{Id.} at 71.

\textsuperscript{422} Joel Barlow, \textit{A Letter to the National Convention of France on the Defects of the Constitution of 1791, and the Extent of the Amendments Which Ought to Be Applied} 66-67 (New York, Greenleaf for Fellows, 1792) \textit{[hereinafter Barlow, A Letter to the National Convention of France]}.

\textsuperscript{423} \textit{See} e.g., \textit{supra} p. 49. The balance could not favor one branch of government over the other. Otherwise, one branch would have the “power of the sword” and “have it their power to make what revolutions they please.” Burgh, \textit{supra} note 101, at 345. Balance was the entire purpose of the Constitution. \textit{See} 2 Addison, \textit{supra} note 379, at 192 (“Where there is all power, there is no control;
over the military, including the militia, must be distributed equally among the branches of government and the people.\footnote{See Barlow, A Letter to the National Convention of France, supra note 422, at 67.} It was the only way to prevent the creation of a permanent “military establishment.”\footnote{See Joel Barlow, To His Fellow Citizens of the United States, Letter II: On Certain Political Measures Proposed to Their Consideration 36 (Philadelphia, 1801) [hereinafter Barlow, To His Fellow Citizens of the United States]. See also 1 Portrait of a Patriot, supra note 217, at 147 (“a corrupt parliament, they will never duly encourage or promote a true military spirit among our soldiers . . . and experience as well as reasons, must convince us, that while they are provided by parliament with a standing army, they will discourage, as much as possible, any sort of martial spirit or military discipline among the rest of the people.”).} As Barlow wrote, a true constitutional militia prevented a scenario where people strove for “excellence in warlike achievements . . . without regard to the cause” and for “no other motive than that of providing places for sons, brothers, cousins, or the voters themselves.”\footnote{Barlow, To His Fellow Citizens of the United States, supra note 425, at 36-37.}

It is interesting that today we refer to the Second Amendment as “the right to keep and bear arms.” When most Americans think of this right, they think of defense of one’s person. Americans no longer think of “We the people,” but “Me the individual.” This was not the case at the Founding or in the Early Republic. In addition to the numerous examples above, one may look to John Taylor’s An Inquiry Into the Principles and Policy of the Government, which discussed the “rights held by the people of the United States independently of their government” and how these “rights are so linked together.”\footnote{Taylor, supra note 21, at 274.}

What is interesting about Taylor’s treatise is that he spoke of the right to election, freedom of religion, freedom of speech, and freedom of the press. However, Taylor did not make reference to a right to “keep and bear arms.” Instead, he spoke of a right to have “a real national militia.”\footnote{Id.} As so many before him, Taylor wrote of the importance of a but the passions of men need checks and restraint. Power must therefore be balanced against power, and authority so combined with authority, that each, without obstructing or impeding another, may move in a prescribed regular course, giving energy and use to the whole.”).
The militia being nearly the nation itself, is the solitary appendage of civil power by which this principle of our policy can be enforced. If it is rendered incompetent to this end, election, a mere moral power, has no remaining ally able to save it, and hence almost every composition, constitution the code of our policy, has asserted the indispensible necessity of a well regulated militia . . . . A naked permission to keep and bear arms, is an insufficient ally of election or civil sovereignty . . . . Without a “well regulated militia,” the military sovereignty of a nation, exactly resembles its civil sovereignty under a government of heredity orders.  

Here, Taylor implicitly acknowledges that “arms” were not the foundation of a constitutional militia, for “arms” served no purpose unless members were trained and disciplined, possessed Machiavelli’s virtù, and had an esprit de corps among them. Even the United States War Department acknowledged this purpose, stating that the militia laws intended to elicit “patriotism and pride of every individual in the militia, to support the legal measures of a free government” and to “render every man active in the public cause, by introducing the spirit of emulation; and a degree of personal responsibility.” Thus, it was not the “arms” that were essential to check standing armies, subordinate the military to the civil power, and defend the nation. Only a “well-regulated militia” could accomplish these constitutional purposes.

429 Id. at 274-75.
430 A Plan for the General Arrangement, supra note 367, at 30; see also id. at 6 (A constitutional militia formed “the manners of the rising generation on principles of republican virtue; of infusing into their minds, that the love of their country, and the knowledge of defending it, are political duties of the most indispensible nature.”).
431 Taylor, supra note 21, at 276 (“[B]ecause [the people] have no mode of effecting a subordination of the military to their civil power, except by a well regulated militia.”); see also Crane, note 365, at 3 (“[T]he security of our national existence [rests] upon militia, that the militia should be so organized and disciplined as to answer the great end proposed.”).
V. Commentary on the Future of Second Amendment Jurisprudence Including a “Well-Regulated Militia”

According to one 1793 newspaper editorial, men “may differ in opinion in respect to political measures,” but a “well Regulated Militia” is “one criterion that will ever distinguish the friend from the enemy to his country.” The anonymous author was trying to convey that a security of the New Republic rested with a constitutional “well-regulated militia” because it was of such “utility and importance . . . in a free country.”

Lieutenant Bernard Hubley conveyed similar sentiments on the significance of establishing a “well regulated militia” as the Constitution required, writing:

I am of opinion a Plan might be adopted that would be more satisfactory to the People in General, a well Regulated militia corresponding with the Constitution might answer a salutary end, and such a one might be formed without a grievance, the present mode does not seem to answer the best end, it appears to me the People are not able to perform any maneuvers equal to those they did before the last war, there is not that ambition, almost every person seems careless about it, there is not one among a Hundred now found that can any more go through the manual Exercise.

Hubley’s letter seemingly foreshadows the failure of the American

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432 Editorial, On a Well Regulated Militia, supra note 417, at 1.
433 Id.
434 Letter from Lt. Bernard Hubly to Thomas Mifflin, supra note 8, at 738; see also 2 Ira Allen, Particulars of the Capture of the Ship Olive Branch, Laden with a Cargo of Canon and Arms, the Property of Major-General Ira Allen, Destined for Supplying the Militia of Vermont, and Captured by His Britannic Majesty’s Ship of War Audacious 138 (Philadelphia, 1805) (describing the “constitution and the laws of the United States” as ensuring “its military force consists in a well regulated Militia . . . [t]hat Government have nothing to fear from its Militia, who are a band of brothers, to protect a Government they have an interest in supporting against foreign invasion . . . .”).
militia ideology, for a “well-regulated militia” never developed and prospered as the Framers intended.\(^\text{435}\) It did not matter that a “well-regulated” and “well-organized militia” was toasted throughout the United States.\(^\text{436}\) As the anonymous \textit{Vox Communis} wrote in 1818, “instead of being a national defence,” the Constitution’s “well-regulated militia” was a “national curse.”\(^\text{437}\) Timothy Pickering agreed with these sentiments, writing that a “well disciplined militia, as the palladium of liberty, is an empty phrase in the mouth of every Patriot.”\(^\text{438}\)

There were certainly attempts to make the militia the constitutional body that the Framers set out to establish as the “palladium of liberty.” As early as 1777, Washington attributed part of the problem to the selfishness of the people, writing that the Southern militias “never were well regulated” because “the people have adopted a mode of thinking & acting for themselves” instead of for the cause.\(^\text{439}\) A 1785 editorial entitled \textit{Thoughts on the Militia} asserted that the decline of the militia was imminent if something was not done to correct the deficiencies with the current militia laws.\(^\text{440}\) The anonymous author, “Synesius,” knew that there was a “connection between a well regulated militia and a republican government.”\(^\text{441}\) However, the militia as constituted was not accomplishing its constitutional purpose. The author proposed: “Let us either make the militia what the constitution supposes, and what

\(^{435}\) See generally Cress, \textit{Republican Liberty and National Security: American Military Policy as an Ideological Problem}, 1783 to 1789, supra note 403. Friedrich von Steuben predicted the problems with establishing a national militia even before the Constitution was drafted. See generally von Steuben, supra note 367.

\(^{436}\) The United States Chronicle (Providence, RI), July 10, 1788, at 2 (toasting to the “Success of American arms in every righteous cause” and a “well-regulated militia in lieu of standing armies”); Claypoole’s American Daily Advertiser (Philadelphia, PA), March 11, 1796, at 1; The Maryland Herald, and Elizabethtown Advertiser, August 22, 1799, at 2; Salem Register (Salem, MA), July 8, 1805, at 2; The Salem Gazette (Salem, MA.), February 22, 1791, at 3.


\(^{438}\) The Historical Record (1872-1874), supra note 364, at 424.

\(^{439}\) 8 The Papers of George Washington: Revolutionary War Series, supra note 282, at 531.

\(^{440}\) The Independent Chronicle and the Universal Advertiser (Boston, MA), November 3, 1785, at 2.

\(^{441}\) Id.
the public safety requires it to be, or discard it. There can hardly be a medium. The militia must either be made a well regulated body, or it will sink into a mere armed multitude.”442

In 1802, Maryland Governor John Francis Mercer made a similar plea in an address to the Maryland General Assembly.443 Citing “public opinion” and the “principles of our constitution,” Mercer advocated for “resting our defence on a national militia.”444 Maryland’s militia was in “disorganization,” and he hoped to carry a plan into effect that would not only allow “the state [to] furnish muskets, bayonets, cartridge, boxes, and belts,” but would also “[t]each men the use of arms.”445 Mercer gawked at those who thought that discipline and training was unnecessary. He knew that placing arms in the people’s hands made it “necessary to induce them to acquire and preserve the habits of military discipline.”446 Otherwise, the people as a militia would be “sacrificed, and their country not saved,”447 for Mercer believed a “military spirit should at all times be encouraged, for of all virtues, military virtue is the most valuable to a country.”448

Unfortunately, similar to the problems England faced a century earlier, the ideology of a “well-regulated militia” was too difficult to realize.449 Just as the ink on the Constitution was drying, the Framers

442 Id.
443 For the politics concerning this bill, see Charles, The Second Amendment, supra note 17, at 71-79, 139-53.
444 Bartgis’s Republican Gazette (Fredericktown, MD), November 26, 1802, at 2.
445 Id.
446 Id.
447 Id.
448 Bartgis’s Republican Gazette (Fredericktown, MD), December 3, 1802, at 1.
449 Benjamin Rush was one of the few individuals not in favor of the continuous military exercise of the people. See Letter from Benjamin Rush to James Madison (Feb. 27, 1790), in 13 The Papers of James Madison 67, 69 (Charles F. Hobson & Robert A. Rutland eds., 1981) (“The report of your Secretary of War seems to indicate a retrograde progress upon the Subject of Murder by War. He seems to consider Man as created not to cultivate the earth – or to be happy in any of the pursuits of civilized life, but to carry a Musquet – to wear a regimental coat – & to kill or be killed. It is better to prevent Wars, than to learn the Art of carrying them on successfully. For this purpose let military Shews (so fascinating to the young people) be rare . . . and even rendered unpopular.”
were already disputing the meaning and scope of its provisions, and this was especially true with the establishment of a “well-regulated militia.” Certainly, the 1792 National Militia Act was a valiant attempt to accomplish an important constitutional end. However, problems immediately surfaced with carrying out its provisions on a national scale. While some states were able to execute and balance the needs of a national and local militia, others could not even adequately arm its members.

Timothy Pickering conveyed his sentiment on the National Militia Act in a letter to James Lloyd, writing, “I consider the militia, on its present footing, a public evil.” The problems were numerous, including infrequent exercise, inadequate arms, and the inability to find capable military officers to instruct military exercises. “A well disciplined militia is a hackneyed theme; and is familiarly talked of, as the proper defence of a free people: but such a militia, comprehending the whole body of citizens, of an age & constitution fit for soldiers, has never existed, since the earlier periods of the Roman Republic,” wrote Pickering. While Pickering knew that the Constitution’s militia sought to protect Americans’ liberties from a “large standing army,” the National Militia Act was ineffective in providing it because such a militia was “extremely expensive” and “wholly inefficient.”

Despite these failures, this should not change how “We the people” understand and interpret the Second Amendment’s “well-

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451 1 Stat. 271 (1792).

452 See Charles, The Second Amendment, supra note 17, at 71-79, 139-53.

453 Id.

454 Letter from Thomas Pickering to the Honorable James Lloyd (Dec. 20, 1822) (on file with the Historical Manuscript Collection, Society of the Cincinnati, Washington, DC.).

455 Id.

456 Id.

457 Id.
regulated militia.” The New York Legislature described it as the “bulwark of national safety, and the palladium of free states” and “an impregnable defence of the country.”\(^{458}\) An 1805 editorial described it as the means of “public defence,” which embodied our “love of liberty,” and constituted the “great constitutional guard of the nation and laws.”\(^{459}\) Elbridge Gerry felt the militia embodied “patriotic and martial spirit” and was the “sole Palladium of Liberty.”\(^{460}\) It was a constitutional body of citizen soldiers, based upon the Roman constitution,\(^{461}\) whereby virtù and espirit de corps would flourish. As William Emerson stated in 1794, the militia was the Founders’ means “to preserve their independence, train their bodies to the exercise of arms, as well, as their mind to knowledge and virtue.”\(^{462}\) Similarly, Captain Bernard Magnien and Lieutenant John Brooks wrote that a “well-regulated militia” was an institution that was “patriotic” and bestowed a duty on “all good citizens and militiamen to rally round the standard of government, and defend our rights against all encroachments.”\(^{463}\)

The Founders saw “an immense difference between [a] disciplined and undisciplined militia.”\(^{464}\) In August 1776, George Washington made this “distinction between a well-regulated army, & a mob” as “the good order & discipline of the first, & the licentious & disorderly behaviour of the latter.”\(^{465}\) Washington knew those who took up arms must “have step’d forth in defence of every thing that is dear & valuable, not only to themselves but to posterity,” and “take uncommon pains to conduct


\(^{459}\) *The Daily Advertiser* (Baltimore, MD), January 24, 1805, at 2.


\(^{463}\) *The Time Piece; and Literary Companion* (New York), May 18, 1798, at 2.

\(^{464}\) Humphreys, *supra* note 364, at 10.

themselves with uncommon propriety & good order.” In 1803, David Humphreys elaborated on this point, writing, “An armed crowd insubordinate and undisciplined, is but a mob on which no dependence can be placed.” To be precise, Humphreys knew that a constitutional militia required virtue and discipline:

A Militia without energy is a satire on its friends and a mockery to its foes. A people so abandoned to avarice and apostate from patriotism, as to refuse making those few preparatory sacrifices in time and money, which may be necessary for their defence, are unworthy of Independence.

Gun advocacy groups and individual right scholars reverse what is imperative to comprise a “well-regulated militia.” They view “arms” as the key component. As shown above, this interpretation cannot survive. Gun advocacy groups and individual right scholars fail to address that militia service, not arms, was a principal badge of citizenship. It was an integral system as to how individuals gained knowledge and virtue – civil and military. In his diary, John Adams confirmed this when he wrote that the militia was one of the “four Causes of Gro[w]th and Defence of N. England.” “The Towns, Militia, Schools, and Churches” were where the “Virtues and Talents of the People [were] . . . formed.”

466 Id.
467 Id. at 8; see also id. at 10-11 (“I entertain no good opinion of an armed nation, destitute of order and skill. Whenever such a nation should be made to rise en masse, instead of furnishing the expected support, it would like every other enormous structure raised on rotten foundations, be crushed by its own weight.”).
468 Id. at 18; see also Crane, supra note 364, at 4-5, 9; John Cushing, A Discourse, Delivered at Ashburnham, July 4th, 1796, at the Request of the Militia Officers in Said Town; Who, with the Infantry Under Their Command, and a Troop of Cavalry, Were Assembled Under Arms, to Celebrate the Anniversary of the Independence of the United States of America 23 (Leominster, Charles Prentiss, 1796) (discussing the need for knowledge in the art of war and of all necessary maneuvers).
469 See supra note 12.
470 3 Diary and Autobiography of John Adams, supra note 310, at 195.
471 Id.
the virtues of “Temperance, Patience, Fortitude, Prudence, and Justice, as well as their Sagacity, Knowledge, Judgment, Taste, Skill, Ingenuity, Dexterity, and Industry.”472

These historical facts do not deter individual right scholars who claim that “[k]eeping and bearing arms for hunting was seen as supportive of the ‘well regulated militia’ . . . .”473 It is difficult to see how the individual exercise of arms for self-defense and hunting creates common virtù and an espirit de corps. As any veteran knows, one is not given “arms” on the first, second, third, or even twentieth day of service. Even Samuel Dana wrote that the “first, second, and third duty [of militia service] is obedience.”474 Beyond obedience, an effective citizen soldier learns about history, virtue, teamwork, marching, drilling, military maneuvering, and leadership well before they possess a rifle.

Any veteran will also tell you that the knowledge they attained in the military exercise and the art of war creates a common bond that cannot flourish by a random assembling of citizens with arms. The former is known as espirit de corps, while the latter is what Dana described as a “wieldy mass;”475 it is what Joseph Story thought would “gradually undermine all the protection intended by” the Second Amendment,476 and what William Rawle characterized as a “disorderly militia . . . disgraceful to itself, and dangerous not to the enemy, but to its own country.”477 Nevertheless, individual right scholars and many Americans equate individual exercise and possession of arms as effectuating a “well-regulated militia.” Even the militia that assembled at Lexington and Concord had been drilling together for nearly a year in preparation for their common defense.478 Such training and discipline had been in place since the mid-seventeenth century.479 The men that assembled that day

472 Id.
474 Dana, An Address, supra note 367, at 9.
475 Id. at 8.
477 Rawle, supra note 10, at 125.
478 Supra note 278 and accompanying text.
479 See supra pp. 44-46.
did not fall into line by themselves. Every maneuver required as many as ten, twenty, or thirty disciplined military counts,\footnote{See The Essex Gazette (Salem, MA), April 10, 1770, at 1 (editorial discussing in detail the importance of military counts, and proper training from experienced officers in effectuating a proper militia). See generally The New Exercise of Firelocks and Bayonets: With Instructions how to Perform Every Motion by Body, Foot and Hand; Together With the Number of Operations in Performing the Several Words of Command (T. Green 1717); Jonathan Rawson, A Compendium of Military Duty, Adapted for the Militia of the United States (Eliphalet Ladd 1793); Roger Stevenson, Military Instructions for Officers detached in the Field: Containing a Scheme for Forming a Corps of a Partisan (R. Aitken 1775).} all of which were instructed by experienced officers.\footnote{Indeed, the militias that assembled during the American Revolution were not as disciplined as professional soldiers. However, this does not override the fact that they were disciplined and regulated as effectively as possible. See Charles, The Second Amendment, \textit{supra} note 17, at 114-22.} Placing arms in the hands of an untrained and undisciplined militia was dangerous to the community and the nation, for arms were about the militia working as one,\footnote{See A Word in Time to Both Houses of Parliament, \textit{supra} note 182, at 9-10.} not as individuals. A 1717 militia training manual illustrated this point, stating that the “Militia is properly term’d the Bulwark of a Kingdom,” but:

\begin{quote}
[W]ithout Practice, and Exercise, the compleatest Arms, are not only troublesome Burthens, unto the unskilful Bearers, but too often prove Dangerous, and Hurtful, both to themselves, and Fellows, that Rank and File with them. . . . that by Practice they will gain Knowledge: Knowledge begets Courage, and makes a good Assurance; few or none being fearful to put that in Execution, with a commendable Celerity, which by frequent Practice they have thoroughly Learnd.\footnote{William Breton, Militia Discipline: The Words of Command, and Directions for Exercising the Musket, Bayonet, and Cartridge . . . For the Instruction of Young Soldiers, at “To the Reader” (2nd ed., London, R. Harbin & J. Morpew 1717).}
\end{quote}

Nevertheless, future Second Amendment jurisprudence will entail arguments such as how hunting restrictions affect the people’s ability
to train and provide the United States with a “well-regulated militia.” Another argument will be that laws restricting one’s ability to carry or conceal guns prevents their ability to provide the United States with a “well-regulated militia.” These arguments may seem far-fetched, but Ninth Circuit Court of Appeals Justice Ronald M. Gould did not think so. In his concurring opinion in *Nordyke v. King*, he wrote:

> The right to bear arms is a bulwark against external invasion. We should not be overconfident that oceans on our east and west coasts alone can preserve security. We recently saw in the case of the terrorist attack on Mumbai that terrorists may enter a country covertly by ocean routes, landing in small craft and then assembling to wreak havoc. That we have a lawfully armed populace adds a measure of security for all of us and makes it less likely that a band of terrorists could make headway in an attack on any community before more professional forces arrived. Second, the right to bear arms is a protection against the possibility that even our own government could degenerate into tyranny, and though this may seem unlikely, this possibility should be guarded against with individual diligence.\(^{485}\)

To summarize, Justice Gould asserted that “arms” provide the security of this nation, not discipline, regulation, espirit de corps, or virtue. This interpretation does not comport with the Framers’ understanding of a “well-regulated militia.” This *faux originalism* and popular recasting of the Second Amendment poses interpretational problems for future courts, for whose originalism are the courts to trust? Should the courts rely on legal scholars, who are not held academically responsible for

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485 *Nordyke v. King*, 563 F.3d 439, 464 (9th Cir. 2009) (Gould, J., concurring), *vacated en banc*, 575 F.3d 890, 890 (9th Cir. 2009).
The Constitutional Significance of a “Well-Regulated” Militia Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence

recasting history to support a legal argument, or should they rely on the established work of historians, whose entire career might be jeopardized and scrutinized should they take a calculated misstep? The consequences in the two professions are important. The legal community looks at inaccurate history as nothing more than an insufficient pleading, and moves on to the next argument with little, if any, repercussions. There is not anything in the rules of professional conduct that punishes lawyers for asserting false history – it is their job to be advocates. Meanwhile, professional historians are held to a higher standard. There is a policing mechanism and a code of honor within academic institutions. Should a professional historian improperly recast history, it could ruin his or her career.

It is interesting that gun advocates and individual right scholars, in their faux originalism, herald such Founding documents like the Pennsylvania Minority dissent’s “bear arms” proposal, yet they do not incorporate the entire proposal because it conflicts with their political preferences. The proposal reads:

That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in time of peace are dangerous to liberty, they ought not be kept up; and that the military shall be kept under strict subordination to and governed by the civil powers.

Individual right scholars and gun advocates have traditionally focused on the language “bear arms for defence of themselves” and “for

486 For critiques on the “new originalism” used by the Heller majority, see generally Bret Boyce, Heller, McDonald and Originalism, 2010 CARDOZO L. REV. DE NOVO 2 (2010); Mark Tushnet, Heller and the New Originalism, 69 OHIO ST. L.J. 609 (2008).

the purpose of killing game." 488 What they fail to bring to the public's attention is the Pennsylvania Minority's reference to the people being disarmed if there is "real danger of public injury from individuals." 489 This is particularly significant because the Minority's proposal does not protect a right to "keep arms." 490 The definition of those who may "keep arms," which was language generally used in colonial militia laws, 491 had always been a matter of state sovereignty. 492

The fact of the matter is that the Pennsylvania Minority was willing to give the federal government great latitude in deciding who may "keep arms" and where such arms may be "kept." 493 Thus, the Pennsylvania Minority's right to "bear arms" resembled that of England's 1689 Declaration of Rights, where Parliament gave the crown nearly unfettered discretion to disarm disaffected and dangerous persons. 494 Here again, it is of note that the Founding Fathers exercised similar discretion when they disarmed dangerous and disaffected persons throughout the American Revolution. 495

Therefore, under a true originalism paradigm we can make


490 By 1792, only one state constitution protected the right to "keep arms," and that was only for the "common defence." Mass. Const. pt. 1, art. XVII ("The people have a right to keep and bear arms for the common defence"). See also David Thomas Konig, Arms and the Man: What Did the Right to "Keep" Arms Mean in the Early Republic?, 25 Law & Hist. Rev. 177, 185 (2007) (discussing that "keep arms" was not an unfettered right).

491 3 American Archives, supra note 269, at 1019; 5 American Archives, supra note 269, at 1609; Charles, The Second Amendment, supra note 17, at 31-34; 11 The statutes at large: being a collection of all of the laws of Virginia, from the first session of the legislature, in the year 1619 478-79 (William W. Hening ed., Franklin Press 1819) (1808).

492 The composition of "keep arms" in state Second Amendment analogues circa 1789, 1803, and 1868 show that the "keeping" of arms had always been a matter of state sovereignty. See Charles, The Historical Guideposts, supra note 350.


494 14 Car. 2, c. 3, §13 (1662) (Eng.); Sadler, supra note 201, at 159; Charles, "Arms for Their Defence"?, supra note 38, at 358-361.

495 See supra pp. 59-61.
the following determinations on the future of Second Amendment jurisprudence: first, it would be constitutional for state or local governments to secure and “keep” the arms of its citizens in the interests of public safety. The government’s “keeping” of such arms dates back to mid-sixteenth century,496 and many American colonies adopted similar practices.497 Second, under this paradigm, it is lawful for the state, local, or federal government to disarm individuals who are associated with groups that are inimical to just government, such as gangs, organizations that support anarchy, and even individuals who refuse to take up arms in the “common defence.”

It is important to stress that allegiance to government498 and the

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496 See 4 & 5 Phil. & Mary c. 2, § 5 (1557-8) (Eng.) (the arms of cities, bouroighs, towns, parishes, and hamlets shall “be kepe in suche Place as by the sayd Commissioners shalbe appointed”). Exactly two hundred years later, the 1757 Militia Act also required arms to be kept by the appointed commissioners. See 30 Geo. 2, c. 25 (1757) (Eng.). When James Burgh discussed militia reform in his 1775 treatise Political Disquisitions, he similarly proposed that “firelocks be kept in every parish,” implying that the local governments keep and maintain them. Burgh, supra note 101, ch. 4, bk. 3, at 416.

497 Charles, The Second Amendment, supra note 17, at 31-34.

498 Numerous treatises attest to the fact that a “well-regulated militia” required its members have the same interests as that of the state, i.e. be in support of just government. See Burgh, supra note 101, ch. I bk. III, at 392 (discussing how the “constitution of Rome was founded on the principle, That those only should be soldiers, who had property to answer to the republic for their conduct.”); id. at 402 (“A militia consisting of any others than the men of property in a country, is no militia; but a mungrel army.”); Hancock, An Oration, supra note 296, at 16 (“[W]ell regulated militia we have nothing to fear; their interest is the same with that of the state.”); Howard, supra note 302, at 199 (“A safer way, and which has always been esteemed the wisest and best, by impartial men, is to have the power of defence in the body of the people, to have a well regulated and well disciplined militia. This is placing the sword in hands that will not be likely to betray their trust, and who will have the strongest motives to act their part well, in defence of their country, whenever they shall be called for.”); Quincy, Observations, supra note 216, at 41 (a well-regulated militia composed of “those who have an interest in the safety of the community, who fight for their religion and their children . . . Such are a well regulated militia” because it is “composed of the freeholders, citizen and husbandman, who take up arms to preserve their property as individuals, and their rights as freemen.”)
law\textsuperscript{499} has always been the key to arms bearing.\textsuperscript{500} As shown above, both England and the Founders required due allegiance as a prerequisite to have and bear arms. Remember, in 1752, William Thornton exclaimed that he could not “conceive that any one would be so rash as to take up Arms in the Militia, under an Appearance of supporting the States, when their Hearts are averse to our Government and Laws.”\textsuperscript{501} Meanwhile, in 1739, Samuel Mather wrote that those that “pretend to appear in Arms, which They know not how to use, because They never exercised and proved Them . . . deserve to be condemned for their Folly and Rashness.”\textsuperscript{502}

In fact, if individual rights scholars and gun advocates really want to be true originalists, it would be constitutional for state and local governments to return to the \textit{Hue and Cry}.\textsuperscript{503} Governmental bodies

\begin{thebibliography}{9}
\bibitem{499} See 2 \textit{Addison}, supra note 379, at 50 (“If one individual assume the right of doing what he pleases to another; this other may assume the right of doing what he pleases to him, and to every one else. It is no longer law, reason, and justice, but force, fraud, and malice, that govern . . . . It is not necessary for me, to say [that disobeying the law] . . . by force and arms, is fatal to liberty, and just government: for, on the principles which I have stated, and do sincerely believe, private force, opposing any law, good or bad, is the worst of all political evils”).
\bibitem{500} Some legal commentators have drawn constitutional comparisons between the First Amendment and the Second Amendment. See William Van Alstyne, \textit{The Second Amendment and the Personal Right to Arms}, 43 Duke L.J. 1236 (1994); Darryl Miller, \textit{Guns as Smut: Defending the Home-Bound Second Amendment}, 109 Colum. L. Rev. 1278 (2009); Eugene Volokh, \textit{The First and Second Amendments}, 109 Colum. L. Rev. Sidebar 97 (2009). I respectfully disagree with any comparisons in either law or history. Certainly the First Amendment protects an individual’s right to believe in anarchy, totalitarianism, the overthrow of government, or to affiliate with gangs. However, these First Amendment freedoms do not coincide with historical Second Amendment jurisprudence, for associations that would deem an individual or class of individuals dangerous or disaffected to government could be disarmed. See supra pp. 56-61.
\bibitem{501} Thornton, supra note 120, at 28.
\bibitem{502} Mather, \textit{War is Lawful}, supra note 237, at 20.
\bibitem{503} For examples, see \textit{The General Laws and Liberties of the Massachusetts Colony}, supra note 229, at 31 (“every Constable shall have the full power to make, signe, and put forth, pursuits or \textit{Hues & cries}, after \textit{Murderers, Manslayers, Peace-breakers, Theeves, Robbers, Burglarers}, and other Capital offenders, as also to Apprehend without warrant, such as are overtaken with \textit{Drinke, Swearing, Sabbath-breaking, Lying, Vagrant persons, Night-walkers”}; \textit{Conductor Generalis}; or, \textit{A Guide for Justices of the Peace . . . and Other Necessary Instruments} 93 (1711) (“Constables can require individuals to
could require all gun owners to be civilly and criminally liable for either failing to act, using excessive force, and any negligence as a result of their actions.\textsuperscript{504} Just as eighteenth century constables had the authority to draft and assemble the people to aid in the execution of the law, today’s law enforcement officers could recruit arms owners to assist them in locating criminals or arresting individuals, all the while being civilly liable for their actions.

Hence, as we move forward with Second Amendment jurisprudence, the threshold question is, “How far do gun advocacy groups and individual right scholars want to take originalism?” Do they only support \textit{faux originalism} that gives people libertarian individual freedoms to have and use guns at their discretion? Do they support true originalism in the sense that the Framers viewed arms ownership as imposing societal burdens and duties on the individuals who possess them? Do they support arms ownership that requires allegiance to the government, its laws, and the community at large? Do they support arms ownership that requires obedience and submission to martial law during

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“make diligent Search in all suspected Houses, Barns, and Out-houses, and other Houses at their Discretion, and all Places within their Liberty and Precints, and have Power to stop any Suspected Persons as in Search or Pursuit they shall find of suspect”); 2 John Morgan, \textit{The Attorney's Vade Mecum} 1-11 (Dublin, W. Porter 1792); George Webb, \textit{The Office and Authority of a Justice of the Peace} 147-48, 181-83 (Williamsburg, William Parks 1736).
\end{quote}

\textsuperscript{504} 1 Mary st. 2, c. 12, § 11 (1553) (Eng.) (refusing to assist the sheriff could lead up to a year in prison); \textit{The General Laws and Liberties of the Massachusetts Colony}, \textit{supra} note 229, at 31 (neglecting to assist was at the penalty of 10 shillings, and willfully refusing to assist was a penalty of 40 shillings); \textit{1 Statues at Large of Virginia} 483 (1823) (a fine of 150 pounds of tobacco was the penalty for failure to aid the constable in the hue and cry) [see chart for hening's issues again]; \textit{Conductor Generalis}, \textit{supra} note 503, at 95-96 (those who do not respond to the hue and cry may be severely “Fined and Imprisoned”); J. Davis, \textit{The Office and Authority of a Justice of the Peace} 205-6 (Newbern, N.C. 1774) (failure to pursue makes one susceptible to being “fined and imprisoned by the Justices”); John Haywood, \textit{The Duty and Office of Justices of the Peace . . . According to the Laws of North Carolina} 112 (Halifax, N.C., Abraham Hodge 1800) (failure to pursue is susceptible to “fine and imprisonment”); William Simpson, \textit{The Practical Justice of the Peace and Parish-Officer, Of His Majesty's Province of South Carolina} 11 (Charlstown, S.C., Robert Wells 1761) (failure to pursue “is neglect punishable by fine and imprisonment”).
times of emergency?

It is difficult to ascertain the answers to these questions, among others. Certainly, there are many individuals who would gladly support and defend this nation and their respective communities if asked to do so. But would these individuals assume the civil and criminal responsibility that goes with it? Would they subject themselves to military discipline and martial law when required? Meanwhile, there are others who would prefer only to possess modern weaponry for self-defense, believing it is their individual freedom to choose how, when, and where they “bear arms.” However, this libertarian approach of “individual armed liberty” conflicts with everything the Framers intended in drafting the Second Amendment and the Constitution as a whole – the public good.

Former Pennsylvania judge and Federalist Alexander Addison would describe our modern approach to obtain individual gun preferences absent a goal of “mutual protection” as “mutual plunder.”505 “The nation, instead of a band of patriots, united for the common aid, becomes a gang of pilferers and robbers, without union or confidence, plundering their fellows and the world,” wrote Addison. In such instances, “All principles and right” would be “sacrificed to selfish passion.”506

But Addison did not blame “the people” for pursuing individual preferences in lieu of the “public good.” Instead, he placed the blame with those officials elected and appointed as officers of the Constitution. Addison felt:

[If] Officers are . . . seduced, by a love of what is called popularity, to give that kind of flattery to the people . . . in accommodating their conduct to the humour of the day, or the solicitation of the applicant,” instead of the “public good,” the “true end of the office, serving the public is perverted into a false end, pleasing the public; the duty of the office is betrayed; the constitutional end of the office


506 2 ADDISON, supra note 379, at 154,
is defeated . . . . 507

As had Machiavelli and so many before him, 508 the crux of the “public good” and the sustainment of a democratic republic, including the militia, was virtue. Virtue was “a disposition and conduct useful to the nation or community, in which we live, to all within our reach, and especially to those with whom we are closely connected.” 509 Addison elaborated, writing:

To produce virtue, or public utility, is the true end of government. Virtue is most effectively produced, by making it the interest of each individual, to promote the public good. That form of government must be good, which necessarily combines the individual, with the general, interest; and that form of government must be bad, which necessarily disjoins them. That therefore must be the best form of government, which most effectually and inseparably combines and unites the general and individual interest: and this is most effectually done, in a democratic republic. 510

Perhaps as Second Amendment jurisprudence moves forward, courts should take Addison’s advice and ask whether furthering Second Amendment rights for armed individuals is for the “public good.” “We the

507 Id. at 157-58.
508 See, e.g., p. 13.
509 2 Addison, supra note 379, at 92-93. A 1785 charge to the grand jury delivered to Wilkes County, Georgia discussed this: “It must be acknowledged . . . upon the present occasion, that one good effect arose from the muster, and that was, a demonstration to what an extensive degree of strength and vigor this country is rapidly progressing. In the northern, more antient and populous state of usefulness, with respect to the community as well as themselves, is the object of government, should be the exertion of the laws, and the practice of every good citizen. For which purpose all should unite to establish order and subordination, and to impress on each other the necessity of constant attention to moral obligations and religious duties; and by such examples encrease the sum of public happiness.” Charleston Evening Gazette, December 10, 1785, at 2.
510 2 Addison, supra note 379, at 93.
people,” Congress, and the judiciary should not be asking how individual gun rights can be furthered through the “well-regulated militia” clause, for, certainly, this part of the Constitution was never about individualized liberty. It was about something greater: the defense of our nation, our liberties, the government, and the Constitution itself – what Judge Addison would characterize as the “public good” of the right asserted.

**Conclusion**

There was a question at Northeastern’s 2010 Second Amendment symposium that was intended to support the argument that the legal community should respect and defend many Americans’ belief that the Second Amendment is a vital source of protection for armed individual self-defense in the home, on the street, and in public places. To paraphrase, the question was: “How would you feel if your favorite constitutional right was disparaged and cast aside as unimportant?” As shown above, the principal purpose for including the Second Amendment in the Constitution was to unite the people in defense of our rights, liberties, and property; to extol Machiavelli’s virtù and unite the people as a common community; to set forth a system where men would train together in the art of war and an esprit de corps would flourish; to prevent the establishment of standing armies; and to provide a constitutional check on the federal government’s power to organize, arm, and array the people as a “well-organized militia.”

Considering this well-established historical fact, should we not question those who have disparaged an ancient and indelible right to mean nothing more than individualized armed defense of one’s person, property, and home? As a nation we have come far in protecting the rights of the people, but in regards to the Second Amendment we have completely removed ourselves from the Framers’ intent in drafting the right to “keep and bear arms,” and perhaps the Constitution itself. Instead of uniting as a people to further the Republic, we have seen society elevate a subsidiary interest, at best, as the “central component”\(^\text{511}\) of the Second Amendment.

The Second Amendment’s “well-regulated militia” was a constitutional entity that was of such “utility and importance” that it was believed it would “ever distinguish the friend from the enemy to

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this country.”512 Today we ignore the constitutional purpose of a “well-regulated militia” by relying on paid volunteers, maintaining a permanent standing army, and elevating military service above our civil obligations. It should be emphasized that a “well-regulated militia” was not only a constitutional entity to defend the nation, but was also seen as necessary to repel tyranny. Perhaps the greatest misnomer by gun right advocates is that “arms” in the hands of individuals is what provides a constitutional check against tyranny. It is well documented that an untrained and undisciplined “armed” nation served no constitutional purpose, for even Blackstone’s right of “resistance and self-preservation”513 came under “Rules and Forms.”514 Many constitutional commentators, pamphleteers, and members of the Founding generation have attested that without obedience, discipline, training, virtue, and knowledge in the art of war, an armed nation was “dangerous not to the enemy, but to its own country.”515

As the courts move forward with the Second Amendment as an incorporated right, one can only hope that the true constitutional purpose of a “well-regulated militia” is remembered, respected, and not disparaged in an attempt to further individual preferences. Too often, politicians, news networks, and advocacy groups use faux originalism to claim that the Founding Fathers would support a certain cause or political stance; this is perhaps even most prevalent with the “right to arms.” It is argued that the Founding Fathers viewed arms restrictions as dangerous to liberty and to our personal safety. But nothing could be further from the truth. It was a constitutional “well-regulated militia” that was intended to preserve our Constitution, and “arms” were merely a tool to accomplish

512 The Oracle of the Day (Portsmouth, N.H.), July 16, 1793, at 1.
513 Blackstone, supra note 224, at *139; Charles, The Right of Self-Preservation and Resistance, supra note 30, at 24-40.
514 Gilbert Burnet, An Enquiry into the Measures of Submission to the Supream Authority, and the Grounds Upon Which it may be Lawful, or Necessary for Subjects to Defend their Religion Lives and Liberties 2 (1688). See also Charles, The Right of Self-Preservation and Resistance, supra note 30, at 24-60. Judge Alexander Addison described tyranny similar to what happened in England in the 1642 English Civil War and the 1688-89 Glorious Revolution when one branch of government assumes the powers of the other. See 2 Addison, supra note 379, at 195-96 (When “two branches of the sovereignty are united in one; the branch chosen for one purpose exercises the powers of another, and this amounts to usurpation and tyranny.”).
515 Rawle, supra note 10, at 125.
the constitutional end of national “self-preservation.”
FROM HELLER TO CHICAGOLAND: WILL RECONSTRUCTION COME TO THE WINDY CITY?

Stephen P. Halbrook*

I. Introduction

After the Supreme Court held in District of Columbia v. Heller that a handgun ban violates the individual right to have arms for self defense,1 lawsuits were filed against Chicago and adjoining municipalities claiming that their handgun bans violate the Second Amendment as incorporated into the Fourteenth Amendment. Some repealed their ordinances, while Chicago and Oak Park held firm. The U.S. Court of Appeals for the Seventh Circuit held that the issue could only be decided by the Supreme Court, which in turn held that the right to keep and bear arms is protected from infringement not only against the federal government, but also against the states and localities.2

In front of the Supreme Court, Chicago argued that the Fourteenth Amendment was not understood to protect Second Amendment rights from infringement by states and political subdivisions thereof. It further contended that, for legal and policy reasons, the right should not be incorporated. The following critically analyzes Chicago’s arguments from this author’s perspective. The Supreme Court’s analysis and rejection of those arguments will undoubtedly be the subject of commentaries for some time to come.

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2 Nat’l Rifle Ass’n v. City of Chicago, 567 F.3d 856 (7th Cir. 2009), rev’d. sub nom., McDonald v. City of Chicago, 130 S. Ct. 3020 (2010). The Court granted certiorari in McDonald but not in Nat’l Rifle Ass’n. However, the NRA remained a party under the category of respondent in support of petitioner. The author is counsel for the NRA.
II. The Fourteenth Amendment Was Understood to Protect the Right to Keep and Bear Arms

The Fourteenth Amendment was commonly understood to protect the right of the people to keep and bear arms from state infringement. Chicago would rewrite the Amendment to include nothing more than nondiscrimination, which would allow the deprivation of rights, as long as it is applied equally to all citizens. If only the Black Code prohibitions on possession of firearms applied to everyone equally, Chicago implies, they would have been acceptable.

While keeping and bearing arms was universally described as a “right,” Chicago seeks to pigeon-hole that activity solely as a purported “privilege or immunity” about which only confusion existed. Chicago also argues that total incorporation was not envisioned, while the only issue here is whether Second Amendment incorporation was understood.

A. The Historical Record Supports an Understanding that the Second Amendment is Incorporated

1. The Text

When the Fourteenth Amendment was adopted, it was commonplace to refer to Bill of Rights guarantees as “rights, privileges, and immunities.” While the Bill of Rights uses the term “right” but not “privileges or immunities,” the Amendment was understood to protect substantive “rights.” The premise of the Due Process Clause is the right of every person not to be deprived of life, liberty, or property without due process. That the Court’s jurisprudence has found fundamental Bill of Rights freedoms to be protected under the Due Process Clause rather than the Privileges-or-Immunities Clause is consistent with the general understanding that the Amendment would protect such freedoms.

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3 Brief for Respondents City of Chicago and Vill. of Oak Park at 53-80, McDonald v. City of Chicago, No. 08-1521 (U.S., Dec. 30, 2009) [hereinafter Chicago Brief].

4 Id. at 54-55.

5 See, e.g., The Declaration of Independence para. 1 (U.S. 1776) (all men are endowed with “certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”).
Chicago endorses Rep. Michael C. Kerr’s remarks distinguishing “rights” from “privileges or immunities,” but ignores the fact that Kerr was arguing that the Fourteenth Amendment did not protect “rights” and thus protection for “rights, privileges, and immunities” in what became the Civil Rights Act of 1871 (today’s 42 U.S.C. § 1983) was unconstitutional. In introducing the bill, Rep. Samuel Shellabarger explained that it would enforce “rights” protected by the Amendment. In upholding protection for these same rights, the Court has relied on Shellabarger and other supporters and rejected arguments made by opponents such as Kerr.

For Chicago to suggest at this late date that the Fourteenth Amendment does not guarantee “rights” because that word does not appear in the text would render the Amendment meaningless.

2. Judicial Decisions

Chicago argues that judicial decisions released just after adoption of the Amendment reflect no incorporationist understanding. However, none of these cases involved whether the Second Amendment or other Bill of Rights guarantees were incorporated.

The Fourteenth Amendment was not mentioned in Twitchell v. Pennsylvania (1868) or Edwards v. Elliott (1874). In the Slaughter-
House Cases (1872), Chicago concedes, “the precise question whether Bill of Rights guarantees were privileges or immunities of national citizenship was not presented . . . .”

United States v. Cruikshank (1876) held only that First and Second Amendment rights, which predated the Constitution, may not be violated by private parties. State action not even being involved, the Court had no occasion to discuss incorporation.

3. Congressional Action

Chicago argues that nondiscrimination was the only effect of the Fourteenth Amendment and related civil rights legislation, as if the Black Codes were deficient only because their prohibitions did not apply to everyone equally.

The Freedmen’s Bureau Act (1866) protected the “full and equal benefit” of laws for “personal liberty” and “personal security,” “including the constitutional right to bear arms.” The Civil Rights Act of 1866 protected the “full and equal benefit” of laws “for the security of person and property.” These words belie Chicago’s claim that the enactments protected only equality.

Just because equality was one purpose, Chicago argues that it was

14 Chicago Brief, supra note 3, at 60.
16 As Justice Bradley opined in the lower court, the Fourteenth Amendment “prevents the states from interfering with the right to assemble,” but, as also with the court alleging “conspiracy to interfere with certain citizens in their right to bear arms”: “In none of these counts is there any averment that the state had, by its laws interfered with any of the rights referred to . . . .” United States v. Cruikshank, 25 Fed. Cas. 707, 714-15 (C.C.D. La. 1874) (No. 14,897).
18 Chicago Brief, supra note 3, at 62-70.
20 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).
21 Chicago Brief, supra note 3, at 62-63.
the only purpose of the Fourteenth Amendment.22 It quotes Rep. Henry Raymond on "equality of rights," but neglects his statement that as a citizen, the African American has "a right to defend himself and his wife and children; a right to bear arms . . . ."23

Noting that Southern courts voided the Civil Rights Act, Rep. George W. Julian pointed to laws prohibiting African Americans from testifying, possessing firearms, or renting land: "Cunning legislative devices are being invented in most of the States to restore slavery in fact."24 The goal was not to allow restoration of such incidents of slavery among citizens equally, but to recognize fundamental rights.

Introducing the Fourteenth Amendment, Senator Jacob Howard referred to "personal rights" like "the right to keep and bear arms," explaining that the Amendment would compel the States "to respect these great fundamental guarantees."25 He did not mention indictment by grand jury or jury trial in civil cases.26 He distinguished the rights of "all persons" from the "privileges and immunities" held only by "citizens."27

Howard further referred to "those great fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism."28 Firearms were prohibited to slaves, and despots banned possession of firearms by commoners.29 However, lack of a grand jury or civil jury did not reduce a people to slavery or despotism.

Not even the opponents of the Amendment on which Chicago relies30 (without identifying them as such) disputed Howard's explanation.

22 Id, at 64-65.
24 Id. at 3210.
25 Id. at 2765-66.
26 Id. at 2765.
27 Id. at 2766. Chicago inaccurately portrays Howard as limiting Bill of Rights provisions to "privileges or immunities of national citizenship." Chicago Brief, supra note 3, at 66.
29 A popular school textbook commented: "Some tyrannical governments resort to disarming the people, and making it an offence to keep arms . . . . In all countries where despots rule with standing armies, the people are not allowed to keep guns and other warlike weapons." Joseph Bartlett Burleigh, The American Manual; of the Thinker, (Part III., Complete in Itself.) 212 (Philadelphia, Lippincott, Grambo & Co. 1854).
30 Chicago Brief, supra note 3, at 66.
Sen. Thomas A. Hendricks (D-Ind.) objected that “the rights and immunities of citizenship” were not “very accurately defined.” Yet such terms seemed clear enough when he objected to the Freedmen’s Bureau Bill because it might apply in his State: “We do not allow to colored people there [sic] many civil rights and immunities which are enjoyed by the white people.” One such right was the right to bear arms.

Sen. Reverdy Johnson (D.-Md.) objected to the Privileges-or-Immunities Clause, saying “I do not understand what will be the effect of that.” But as counsel for the slave owner in *Dred Scott*, Johnson was aware that citizenship “would give to persons of the negro race . . . the full liberty of speech . . ., and to keep and carry arms wherever they went.”

Chicago suggests that Rep. John A. Bingham “did not clearly articulate” incorporation. Yet Bingham said that the Amendment would “arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today.”

Chicago discounts Bingham’s reiteration of incorporation in debate on the Civil Rights Act of 1871 because it was “long after the ratification of the Amendment.” But the Court has relied on that same speech in explaining the scope of the Amendment. On the same page of that speech, Bingham characterized “the right of the people to keep and bear arms” as one of the “limitations upon the power of the States . . . made so by the Fourteenth Amendment.”

Chicago quotes speeches which did not refer to the Second

32 Id. at 318.
34 Chicago Brief, supra note 3, at 66-67 (citing Cong. Globe, 39th Cong., 1st Sess. 3041 (1866)).
35 Scott v. Sandford, 60 U.S. 393, 416-17 (1857).
36 Chicago Brief, supra note 3, at 67.
38 Chicago Brief, supra note 3, at 67-68.
Amendment or the Bill of Rights. Yet there were countless references to the Second Amendment not only in speeches, but also in executive branch reports and in hearings before committees investigating abuse of freedmen’s rights.

4. Ratification

Records in the states that ratified the Amendment indicate that it was understood to protect Second Amendment rights. Chicago incorrectly asserts that there was “no incorporationist understanding” in the states. Yet its own authority describes the relationship among the Amendment, the Civil Rights Act, and the Freedmen’s Bureau Act, as well as the Black Codes those provisions negated. The right to have arms was a central issue involving those provisions. Further, the Amendment was said broadly to protect “natural rights” such as “life, liberty, self-protection.”

41 Chicago Brief, supra note 3, at 69.
42 See Halbrook, supra note 17, at 1-55.
43 The Southern states were required to adopt constitutions and laws consistent with the Fourteenth Amendment. Georgia adopted the language of the Second Amendment, Ga. Const. art. I, § 14 (1868) reprinted in The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States, Part 1 at 412 (Ben Perley Poore ed., Washington, Government Prtg. Office 2d ed. 1878), and passed a law and declaring as rights “the enjoyment of personal security, of personal liberty, private property . . ., and to keep and bear arms.” Cong. Globe, 40th Cong., 3d Sess. 3 (1868). A proposal in the 1868 Texas convention would have applied to that State “the inhibitions of power enunciated in articles from one to eight inclusive, and thirteen, of the amendments to the Constitution of the United States,” which was said to cover the same ground as the previous State Bill of Rights. 1 Journal of the Reconstuction Convention: Which Met at Austin, Texas 233, 235 (Austin, Tracy, Siemering & Co. 1870). See generally Halbrook, supra note 17, at 71-74, 87-106.
44 Chicago Brief, supra note 3, at 70 (citing James E. Bond, The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, & Pennsylvania, 18 Akron L. Rev. 435, 448-49 (1985)).
45 Bond, supra note 44, at 443-44.
46 Id. at 445-46 (quoting DANVILLE PLAINDEALER (Ill.), Sept. 6, 1866, at 2, cols. 1-2). See State v. Carew, 47 S.C.L. (13 Rich.) 498, 547 (Ct. Err. 1866) (Aldrich, J., dissenting) (“freedom of speech” and “the right of the people to keep and bear arms” were “natural rights which existed independently of law, and with
Chicago quotes the 1908 study by Horace Flack as stating that public statements did not show “whether the first eight Amendments were to be made applicable to the States or not.”47 However, Flack’s sentence did not end with “or not” – it continued: “but it may be inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it.”48

Flack also wrote of Sen. Howard’s speech explaining that the Amendment would protect the right to have arms and other Bill of Rights guarantees: “By declarations of this kind, by giving extracts or digests of the principal speeches made in Congress, the people were kept informed as to the objects and purposes of the Amendment.”49 Chicago underrates publication of Howard’s speech in the New York Times and elsewhere because it was “lengthy” and “special attention” was not given to the portions about Bill of Rights guarantees.50 Yet contemporaries found his speech “clear and cogent”51 and “very forcible and well put.”52

Chicago argues that some states did not amend their laws to require certain Bill of Rights procedures such as indictment by grand jury.53 Such inaction about obscure procedural matters of little interest to the public shows nothing about the understanding of First and Second Amendment protections. Moreover, support for civil rights was not universal.54

which neither States nor Congress were allowed to interfere.”).

47 Chicago Brief, supra note 3, at 70 (quoting Horace E. Flack, The Adoption of the Fourteenth Amendment 153-54 (1908)).
48 Flack, supra note 47, at 153-54 (1908).
49 Id. at 142.
50 Chicago Brief, supra note 3, at 72.
51 The Reconstruction Committee’s Amendment in the Senate, N.Y. Times, May 25, 1866, at 4.
52 Halbrook, supra note 17, at 36 (citing Chicago Tribune, May 29, 1866, at 2, col. 3).
53 Chicago Brief, supra note 3, at 73.
54 After rejecting the Fourteenth Amendment, Maryland held a constitutional convention. It rejected a proposal that “every citizen has the right to bear arms in defence of himself and the State” after an amendment failed to say “white citizen”; it was objected that “Every citizen of the State means every white citizen, and none other.” Phillip B. Perlman, Debates of the Maryland Constitutional Convention of 1867 151 (1867). However, Maryland demanded compensation to slave owners. Md. Const. art. III, § 37 (1867)
5. Treatises

Timothy Farrar, George W. Paschal, and John N. Pomeroy agreed that the states may not infringe on the right to keep and bear arms.55 Joel P. Bishop did not believe the Grand Jury Clause to be applicable to the states,56 but he wrote that the Second Amendment “seems to be of a nature to bind both the state and national legislatures . . . .”57

Thomas W. Cooley merely restated the Barron rule in his Constitutional Limitations (1868, 1871),58 but incorporation was not mentioned. Francis Wharton's Treatise on the Criminal Law (1874) stated that certain procedural guarantees did not apply to the states.59 But he wrote about the Fourteenth Amendment: “The incapacity of state legislatures to destroy personal rights is now as fully manifested, as at the time of the adoption of the first group of amendments, was the incapacity of congress to destroy personal rights.”60

A. The Amendment was Understood to Eradicate State Violation of Rights Such as Having Arms, Not to Allow Equal Deprivation

Civil rights legislation and the Fourteenth Amendment were understood to eradicate violations of rights such as free speech and having

reprinted in Perley, supra note 43 at 899.


56 Chicago Brief, supra note 3, at 74.

57 2 Joel Prentiss Bishop, Commentaries on the Criminal Law 74 (Boston, Little, Brown, and Co. 4th ed. 1868), cited with approval in English v. State, 35 Tex. 473, 474-75 (1872).

58 Chicago Brief, supra note 3, at 73.

59 Id. at 74 (citing 1 Francis Wharton, A Treatise on the Criminal Law of the United States: Principles, Pleadings, and Evidence 208-09, 467-68 (Philadelphia, Kay & Brother 1874)).

60 Francis Wharton, Commentaries on Law 718 (Philadelphia, Kay & Brother 1884).
arms, not – as Chicago maintains – to allow the states to violate the rights of all persons equally.61

Commenting on the petition of South Carolina freedmen complaining that they were prohibited from firearms possession, Chicago claims that there was “no hint that an equality requirement would not suffice.”62 But Sen. Charles Sumner said that “they should have the constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press” – not that they could be equally deprived of these rights.63 Nor was equal treatment the only issue64 that Sen. Henry Wilson had in mind when he complained that state forces were “visiting the freedmen, disarming them, perpetrating murders and outrages on them . . . .”65

The prohibitions on African Americans to which Lyman Thrumbull referred included not only “having firearms,” but also “exercising the functions of a minister of the Gospel” and other “badges of slavery.”66 He referred to “the great fundamental rights set forth in this bill,” not to mere equality.67 The same could be said for Sen. John Pool when he noted that Klansmen would say “that everybody would be Kukluxed in whose house fire-arms were found,” and referred to “the right to security in one’s own house,”68 and when Sen. Thayer referred to violation of “[t]he rights of citizenship, of self-defense, of life itself . . . .”69

Chicago asserts that the state firearm laws were not understood to be subject “to a more stringent nationalized standard.”70 Yet the states could not prohibit mere possession of firearms, such as in the Black Codes. Gen. Sickles’ order recognized “civil rights and immunities” as including “[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms,” excluding the unlawful carrying of concealed weapons.71

61 See Chicago Brief, supra note 3, at 75-76.
62 Id. at 75-76.
64 See Chicago Brief, supra note 3, at 76.
66 Id. at 474.
67 Id. at 475.
68 Id., 41st Cong., 2d Sess. 2719 (1870) (“that everybody . . . .”); id. at 2722 (“the right to security . . . .”).
69 Id. at App. 322.
70 Chicago Brief, supra note 3, at 77.
That Congress disbanded the militias in the Southern states does not support Chicago’s position.\textsuperscript{72} Sen. Wilson’s bill would have made the militias – which he said were “taking arms away from men who own arms, and committing outrages” – “disbanded and disorganized.”\textsuperscript{73} But since the militias were defined to include all male citizens, Sen. Willey noted the “constitutional objection against depriving men of the right to bear arms . . . .”\textsuperscript{74} The term “disarmed” was stricken from the bill, which then passed.\textsuperscript{75}

Chicago points to state laws and decisions that do not reflect an understanding that the Fourteenth Amendment would prohibit states from prohibiting firearms in common use.\textsuperscript{76} Yet the laws merely regulated the carrying of arms; they did not prohibit them.

Reconstruction-era decisions cited by Chicago reflect the understanding that the right to have arms protected rifles, shotguns, and handguns. \textit{Andrews v. State} held “that the rifle of all descriptions, the shot gun, the musket, and repeater, are such [protected] arms; and that under the Constitution the right to keep such arms, cannot be infringed or forbidden by the Legislature.”\textsuperscript{77} \textit{English v. State} held that “arms’ . . . refers to the arms of a militiaman or soldier,” which included “the musket and bayonet” and “the sabre, holster pistols and carbine.”\textsuperscript{78} \textit{Hill v. State} upheld a ban on carrying certain arms “to any court of justice,” on the basis that the people, “being unrestricted in the bearing and using of [arms], except under special and peculiar circumstances, there is no infringement of the constitutional guarantee.”\textsuperscript{79}

Finally, as with voting rights under the Fifteenth Amendment, it cannot be assumed that all state laws on the books after the adoption of

\begin{thebibliography}{99}
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\item \textsuperscript{72} See Chicago Brief, supra note 3, at 77.
\item \textsuperscript{73} Cong. Globe, 39th Cong., 2d Sess. 1848-49 (1867).
\item \textsuperscript{74} Id. at 1848.
\item \textsuperscript{75} Act of March 2, 1867, ch. 170, 14 Stat. 485, 487 (1867).
\item \textsuperscript{76} See Chicago Brief, supra note 3, at 77-78.
\item \textsuperscript{77} 50 Tenn. 165, 179 (1871) (emphasis in original); see id. at 187 (“the pistol known as the repeater”).
\item \textsuperscript{78} 35 Tex. 473, 476 (1872). Similarly, State v. Workman, 14 S.E. 9, 11 (W. Va. 1891), opined that “the kind of arms referred to in the [second] amendment” were “weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets . . . .”
\item \textsuperscript{79} 53 Ga. 472, 474-76 (1874).
\end{thebibliography}
the Fourteenth Amendment were consistent therewith.80

III. THE FOURTEENTH AMENDMENT PROTECTS THE RIGHT TO KEEP AND BEAR ARMS

A. Application of the Second Amendment Does Not Impact Federalism

Requiring states to recognize the same fundamental rights as the United States does not impact the interests which federalism secures.81 The Second Amendment embodied a right “inherited from our English ancestors,”82 while “federalism was the unique contribution of the Framers to political science and political theory.”83 As the Supreme Court has said, “to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual.”84

The “States-as-laboratories” dictum is cited as an argument against incorporation.85 But as the majority stated: “The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.”86

Chicago avers that the Second Amendment is the only Bill of

80 See Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring) (“the Act was passed for the purpose of disarming the negro laborers... T]here has never been... 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”).
81 See Chicago Brief, supra note 3, at 10-13.
85 See Chicago Brief, supra note 3, at 11 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
86 New State Ice Co., v. Liebmann, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting) (citing, inter alia, Near v. Minnesota, 283 U.S. 697 (1931)) (“[In Near], the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press.”).
Rights provision recognizing a right to possess a “highly dangerous physical item.” Yet the pen protected by the First Amendment is arguably mightier than the sword protected by the Second. Untold millions perished because of the ideologies of Communism and Nazism, but the Communist Manifesto and Mein Kampf may be freely read. The terrorists of 9/11 who used box cutters were inspired by religious fanaticism, yet such religious ideas may be freely taught.

Chicago asserts “a wider range of opinion” on firearms regulations “than on any other enumerated right.” Like the suppression of illegally seized evidence, which is widely seen as a “technicality”? And just how diverse is opinion on handgun bans, which do not exist anywhere in the United States but Chicago and Oak Park?

Chicago argues that the rights protected by the Due Process Clause may expand and shrink over time. Yet Lawrence v. Texas (2003) taught of an expansion, not a restriction, of rights: “laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

B. Policy Arguments are Irrelevant to the Incorporation Issue

Chicago argues that firearm prohibitions limit crime, and thus that the city may subordinate the firearm rights of owners to the state’s interest in protecting its citizens. Yet the issue here is purely legal – whether the Fourteenth Amendment protects the right to keep and bear arms, because it was originally understood to do so and because that right is fundamental. “The very enumeration of the right takes out of the hands of government . . . . the power to decide on a case-by-case basis whether the right is really worth insisting upon.”

87 Chicago Brief, supra note 3, at 11.
88 Id.
89 See id., at 12 (citing Lawrence v. Texas, 539 U.S. 558, 578-79 (2003)).
90 Lawrence, 539 U.S. at 579. As for Chicago’s ban on handguns in the home, Lawrence has a lesson: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.” Id. at 562.
91 Chicago Brief, supra note 3, at 12-17.
Chicago argues that “in ‘an urban landscape, the Second Amendment becomes the enemy of ordered liberty, not its guarantor.’”93 Yet only the law-abiding are protected by the Amendment, which would not be implicated in the parade of horribles imagined by Chicago: “Criminal street gangs with the right to carry guns” using violence “to control the drug trade.”94

Chicago objects that Heller’s “common use” test may include “a weapon generally in common use for lawful purposes in one locale (such as a high-powered hunting rifle with precision sighting equipment popular in rural Illinois),” thus “precluding a ban on use by Chicago gangs seeking to assassinate rivals.”95 This illustrates Chicago’s assumption that it can demonize and ban any firearm. Law-abiding Chicago residents also hunt with scoped rifles, not to mention that “gangs seeking to assassinate rivals” have already violated far more serious laws.

C. The Constitution, not English Practice, is the Supreme Law of the Land

Chicago argues that the right to have arms is not implicit in the concept of ordered liberty because countries such as England have firearm prohibitions that would be impermissible under the Second Amendment.96 However, that very distinction led to the creation of the United States – the Crown’s attempts to disarm the colonists during 1768-1775 was a significant cause of the American Revolution.97 James Madison referred to “the advantage of being armed, which the Americans possess over the people of almost every other nation,” in contrast to Europe, where “the

findings and empirical studies on which Chicago seeks to rely. Id. at 2854-61 (Breyer, J., dissenting).


94 Chicago Brief, supra note 3, at 16.

95 Id. at 19 n.9.

96 Id. at 21.

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governments are afraid to trust the people with arms.”

98 In calling the right to arms “the true palladium of liberty,” St. George Tucker contrasted England, where “the people have been disarmed.”

99 Parliament recently repealed the 800-year-old guarantee against double jeopardy, allowing retrial of an acquitted person if the prosecution has “new and compelling evidence.”

100 Does this mean that our double jeopardy prohibition no longer “represents a fundamental ideal in our constitutional heritage”?

D. State Traditions Do Not Negate Incorporation

Chicago argues that the way states regard the right to have arms does not support incorporation. Yet forty-four state constitutions with arms guarantees shows overwhelming recognition of the right. One state court said, “[d]espite the many variations in wording, the states’ constitutional provisions guaranteeing the right to bear arms share a common historical background.” Chicago suggests that the state guarantees subject laws only to a toothless “reasonableness” standard, but courts using that term often apply a rigorous test. While the term “reasonableness” may be used loosely in many courts in regard to many rights, a higher standard is frequently applied, including in the states cited by Chicago. Regarding a handgun-carrying ban, the Connecticut Superior Court in Rabbitt v. Leonard (1979) held that each citizen under

100 Criminal Justice Act, 2003, c. 44, Part 10, § 78 (Eng.).
102 Chicago Brief, supra note 3, at 23-31.
103 State v. Kessler, 614 P.2d 94, 95 (Or. 1980).
104 Chicago Brief, supra note 3, at 24.
105 Bleiler v. Chief, Dover Police Dep't., 927 A.2d 1216, 1223 (N.H. 2007), upheld the requirement of a license to carry a concealed weapon as “reasonable” because it “does not prohibit carrying weapons; it merely regulates the manner of carrying them. . . . Even without a license, individuals retain the ability to keep weapons in their homes or businesses, and to carry weapons in plain view.”
106 Chicago Brief, supra note 3, at 24.
the Connecticut state constitution “has a fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process.”107 Invalidating a ban on possession of a firearm in a vehicle or place of business, the Colorado Supreme Court in *City of Lakewood v. Pillow* (1972) reasoned that a legitimate government purpose “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”108

Chicago minimizes state decisions invalidating restrictions.109 That the courts of some states have never done so only suggests that the right has been respected. Decisions upholding laws often reinforce adherence to the guarantee.110

Contrary to Chicago,111 state courts followed the “common-use” test long before *Heller*. *Rinzler v. Carson* (Fla. 1972) held protected arms to be those that “are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles.”112

Chicago cites only a single state case from American history, *Kalodimos v. Village of Morton Grove* (Ill. 1984),113 which upheld a handgun ban. In an earlier epoch, that same court implied that the Second Amendment applies to the states.114

No other court has ever upheld a ban on possession of any of the three basic types of firearms – handguns, rifles, and shotguns. Chicago

110 See, e.g., State v. Reid, 1 Ala. 612, 616-17 (1840) (“A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.”).
112 Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972). See also State v. Duke, 42 Tex. 455, 458-59 (1875) (“such arms as are commonly kept, according to the customs of the people”); State v. Kerner, 107 S.E. 222, 224 (N.C. 1921) (“all ‘arms’ as were in common use”).
114 People v. Liss, 94 N.E.2d 320, 323 (Ill. 1950).
points to the fact that only bans on narrow subsets of firearms have been upheld.\textsuperscript{115}

The nineteenth century decisions Chicago cites on concealed weapons laws are adverse to Chicago.\textsuperscript{116} \textit{Aymette v. State} (1840) supported the right to possess any arms used in “civilized warfare,” so that citizens could “repel any encroachments upon their rights . . . .”\textsuperscript{117} \textit{English} upheld protection for militia arms – the musket, holster pistols, and carbine.\textsuperscript{118} \textit{Andrews} held that rifles, shotgun, and repeating pistols may not be “forbidden by the Legislature.”\textsuperscript{119}

IV. Conclusion

In holding that the Second Amendment applies to the states through the Fourteenth Amendment,\textsuperscript{120} the Supreme Court in \textit{McDonald} addressed some of the facets of Chicago’s argument, and was silent on others. \textit{McDonald} is a blockbuster precedent on a previously neglected issue, and the perspectives of its majority, plurality, concurring, and dissenting opinions will be analyzed for some time to come. The majority opinion written by Justice Alito held that the Second Amendment applies to the states through the Fourteenth Amendment, but a plurality of only four Justices thought it did so through the Due Process Clause\textsuperscript{121} – Justice Thomas would have relied on the Privileges-or-Immunities Clause.\textsuperscript{122} Four Justices dissented.

Now that \textit{Heller} has established that the Second Amendment protects individual rights and \textit{McDonald} has established that it is incorporated against the states through the Fourteenth Amendment,

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\item[116] Chicago Brief, supra note 3, at 28-30.
\item[117] Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840).
\item[118] English v. State, 35 Tex. 473, 476 (1872).
\item[119] Andrews v. State, 50 Tenn. 165, 179 (1871). Chicago also points to a ban on the sale of handguns enacted in South Carolina in 1901. Chicago Brief, supra note 3, at 30 n.16. South Carolina’s criminal code in that period also enforced peonage contracts. \textit{Ex parte} Hollman, 60 S.E. 19 (S.C. 1908).
\item[120] McDonald v. Chicago, 130 S. Ct. 3020 (2010).
\item[121] Id. at 3050 (plurality opinion).
\item[122] Id. at 3059 (Thomas, J., concurring).
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it remains to be seen how this incipient jurisprudence will develop. Challenges to state and local laws are sure to follow, as they did when other Bill of Rights guarantees were incorporated. If Reconstruction has now come to Chicago, the extent of the resistance to it, there and elsewhere, remains to be seen.
America’s elected representatives do many things well, but making firearms policies and assessing Supreme Court nominees are two tasks with which they have struggled greatly in recent decades. Indeed, it is tough to say which of the two areas – regulating guns or evaluating potential justices – has become the greater source of disappointment and discontent.

Gun control is one of the nation’s most volatile public policy issues. Many contend that the country pays a heavy price every day as a result of woefully inadequate legal controls on firearms. Others believe that legal restrictions on guns are counterproductive and that the freedom to have guns is in great peril. This gun control versus gun rights debate “reached a painful stalemate long ago.”\(^1\) It has “become deeply enmeshed in the culture wars between liberals and conservatives, between people who live in cities and people who live in the country” and it is now “one of the arenas in which we as Americans try to figure out who we are.”\(^2\) Gun laws remain “an often incoherent patchwork of provisions” with “unjustifiable gaps,”\(^3\) and little hope remains for a more sensible approach because gun issues have become a “premier lethal third rail in American politics.”\(^4\)

Whatever one believes to be the ideal regulatory approach,

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4 Harry Rosenfeld, *Killings Renew Gun Control Issue*, TIMES UNION (Albany,
the government’s handling of the issue has frequently been a national embarrassment.

Similarly, few people have good things to say about the process by which the U.S. Senate decides whether to confirm those nominated to become Supreme Court justices. Hypocrisy abounds, and intellectual consistency is rare, as senators decry tactics and arguments used against a nominee they favor, but then turn around and employ exactly the same means of attack when they oppose a nominee’s confirmation. “Nobody is interested in playing by a fair set of rules” and “still less do many people seem to care how much right and left have come to resemble each other in the gleeful and reckless distortions that characterize the efforts to defeat challenged nominations.” In particular, observers condemn the Senate Judiciary Committee’s hearings on Supreme Court nominations as farcical charades marked by fatuous political grandstanding and “Mickey Mouse maneuvers and insinuations, spiced here and there with outright lies.” Meanwhile, nominees take “the judicial Fifth” and decline to answer questions that would reveal their views about any controversial legal issues. The hearings degenerate into “dreary rituals,” a sort of


7 Carter, supra note 5, at ix.

8 Thomas Sowell, Hypocrisy and Grandstanding at the Senate Condemnation Hearings, Balt. Sun, Jan. 19, 2006, at 15A.


“Kabuki theatre” with “rigidly structured performances featuring strictly scripted role-playing by the leading characters.”\textsuperscript{11}

This Article looks at the intersection of these two much-maligned areas of American law, politics, and policy. It reviews the role that the Second Amendment and other gun issues have played in the Senate’s consideration of Supreme Court nominations over the past forty years, and in doing so, it aims to provoke thinking about the role these issues may play in future confirmation fights. While it was once rare for guns even to be mentioned in the hearings or debate over Supreme Court nominees, that is no longer the case. Gun issues played a particularly prominent role in the Senate’s consideration of Samuel Alito, Sonia Sotomayor, and Elena Kagan, with the first suspected of being too hostile to gun control measures and the latter two nominees accused of being too inhospitable to gun rights. These nominations provide an interesting perspective on how fairly the controversial and complicated legal issues surrounding guns can be handled by nominees, senators, interest groups, media, and others involved in or affecting the confirmation process. The significance of gun issues in the assessment of potential justices will likely continue to grow in the wake of the Supreme Court’s landmark Second Amendment decisions in \textit{District of Columbia v. Heller}\textsuperscript{12} and \textit{McDonald v. City of Chicago},\textsuperscript{13} cases that highlighted the importance of the gun debate’s constitutional dimension and left a host of unresolved questions about implementation of the newly invigorated right to keep and bear arms.

Part I of this Article looks back at Supreme Court nominations and confirmations from the early 1970s to the mid-2000s. It describes how the Second Amendment and other gun issues usually drew little attention, even when the nominee’s record seemingly should have raised significant questions in the minds of gun control advocates or gun rights supporters in the Senate. On the few occasions when senators asked gun-related questions, however, the nominees’ seemingly bland answers sometimes offered telling clues about the positions they would later take as members of the Court. Part II turns to the nomination of Samuel Alito and looks closely at the controversy over a dissenting opinion he wrote, while serving as a member of the U.S. Court of Appeals for the Third Circuit in a case about the federal authority to regulate machine guns. I

\textsuperscript{11} Too Much Showmanship, Star-Ledger (Newark, N.J.), July 17, 2009, at 14.
\textsuperscript{12} 128 S. Ct. 2783 (2008).
\textsuperscript{13} 130 S. Ct. 3020 (2010).
argue that the Senate’s confirmation hearings served a beneficial function in this instance, providing an opportunity for a fairly reasonable and sophisticated airing of the issue. Part III looks at how a Second Circuit decision about the Second Amendment became one of the key weapons in the arsenal of those opposed to Sonia Sotomayor’s nomination, and how once again the confirmation hearings provided an important means of pushing the debate away from crude distortions and oversimplifications and toward a more fairly reasoned weighing of the real issues. Finally, Part IV examines the impact of gun issues on the Senate’s consideration of the most recent Supreme Court nominee, Elena Kagan. In this instance, many senators talked a great deal about guns, but unfortunately they seemed eager to show off their zeal for gun rights but less interested in actually using the confirmation hearings to learn about the nominee’s experiences and views. After reflecting on these nominations, I conclude the Article with some parting thoughts about confirmation battles to come.

I. From Rehnquist to Roberts

It was not until the mid-1970s that gun control became an intensely bitter and persistent national controversy. Before that, Congress had passed a few significant firearm laws, but policy debates regarding guns were sporadic and the level of rancor generated by the issue paled in comparison to that of recent decades. No major organizations pushing for stricter gun control measures even existed until 1974. On the other side, the National Rifle Association (NRA) had been around for a century, but focused on hunting, target shooting, and conservation, while putting relatively little emphasis on political issues during most of that time. Likewise, guns occupied little of the Supreme Court’s attention. The Court had not said anything of real significance about the Second Amendment or gun laws since 1939. Not surprisingly, then, guns were

16 Spitzer, supra note 14, at 75-76, 81, 82.
not an important issue when it came to scrutinizing Supreme Court nominees. For example, no one mentioned anything about the Second Amendment or gun control at the confirmation hearings conducted by the Senate Judiciary Committee for William Rehnquist and Lewis Powell in 1971\(^\text{18}\) or for John Paul Stevens in 1975.\(^\text{19}\)

No one else would be nominated for a seat on the Supreme Court until Sandra Day O’Connor in the fall of 1981.\(^\text{20}\) By that point, the modern battle lines on gun issues had begun to appear. The fledgling national gun control organizations launched significant but largely unsuccessful initiatives seeking to convince legislators and voters to ban handguns.\(^\text{21}\) “Hardliners” took over the NRA, and they were determined to ramp up the organization’s lobbying and electioneering efforts. They fought more aggressively and uncompromisingly against any proposed gun control measures.\(^\text{22}\) The murder of John Lennon in December 1980 and the attempted assassinations of President Ronald Reagan and Pope John Paul II in the spring of 1981 drew new attention to the hazards of guns in the wrong hands and further intensified the national debate over the problem.\(^\text{23}\)

Nevertheless, the constitutional and other legal issues surrounding guns seemed to be of only mild interest to the senators weighing O’Connor’s nomination. Republicans briefly quizzed O’Connor about the Second Amendment at her confirmation hearings.\(^\text{24}\) When Strom Thurmond, the arch-conservative Senator from South Carolina, asked whether Congress could curtail the right to keep and bear arms, O’Connor explained that *United States v. Miller*\(^\text{25}\) was the only major Supreme Court precedent on the point, and that the Court, in *Miller*, decided that the Second Amendment did not guarantee the right to have any certain type

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19 Nomination of John Paul Stevens to Be a Justice of the Supreme Court: Hearings Before the S. Comm. on the Judiciary, 94th Cong. (1975).
20 Nomination of Sandra Day O’Connor: Hearings Before the S. Comm. on the Judiciary, 97th Cong. (1981) [hereinafter O’Connor Hearing].
21 Goss, supra note 15, at 691-93.
22 Spitzer, supra note 14, at 89-90.
of weapon, and that lower courts generally had interpreted the Second Amendment “as being a prohibition against Congress in interfering with the maintenance of a State militia, which appeared to be the thrust of the language in the amendment.”26 O’Connor added that many states had laws restricting possession and use of guns in various ways, such as laws prohibiting the carrying of concealed guns, and that these laws were enacted pursuant to the “police power which is reserved to the States.”27 O’Connor’s answer implied that she considered these laws to be valid exercises of state authority, although she did not explicitly say so. Thurmond did not comment on O’Connor’s response or ask any other questions on the topic, suggesting that he was not terribly bothered that O’Connor seemed more likely to support reasonable gun control measures than to push for any dramatic expansion of gun rights.

That afternoon, another long-serving Republican, Bob Dole, followed up with another question about the Second Amendment’s effect.28 Like Senator Thurmond before him, Dole seemed to be offering O’Connor a chance to make a statement about the importance of gun rights, but her answer again leaned cautiously in the other direction. O’Connor once again emphasized that the Supreme Court in Miller had interpreted the Second Amendment as being a prohibition against Congress interfering with the maintenance of state militias.29 She reiterated that “the States, acting in their police power, had adopted a wide range of statutes regulating the possession and use of firearms,” adding that the right to own and use guns for sport purposes or self-defense was well protected in most places, including in her home state of Arizona, simply because legislators had chosen to put only limited restrictions on guns.30 Like Thurmond, Dole let the subject drop without further questions. O’Connor gave fairly guarded answers to Thurmond’s and Dole’s queries, primarily sticking to factual observations rather than expressing her personal views. To the extent that O’Connor’s answers revealed something about her attitude toward guns, she sounded like a moderate supporter of reasonable gun control measures, but the gun issue simply did not play a prominent role in the consideration of O’Connor’s

26 O’Connor Hearing, supra note 20, at 135.
27 Id.
28 Id. at 164.
29 Id.
30 Id. at 165.
nomination. O’Connor went on to win Senate approval by a 99-0 vote.\textsuperscript{31}

Antonin Scalia walked an equally smooth path to approval by the Senate in 1986.\textsuperscript{32} During his hearing before the Senate’s Judiciary Committee, no one asked Scalia about the Second Amendment or anything else relating to guns.\textsuperscript{33} Although Scalia’s track record as a member of the U.S. Court of Appeals for the D.C. Circuit included several interesting cases relating to firearms,\textsuperscript{34} no one asked him to comment on those cases.\textsuperscript{35} On the same day that it unanimously approved Scalia’s appointment to the Court, the Senate also confirmed William Rehnquist’s elevation to Chief Justice.\textsuperscript{36} Again, no senator questioned Rehnquist about anything relating to gun laws or the Second Amendment.\textsuperscript{37}

Just a year later, Robert Bork became the next Supreme Court nominee to go before the Senate for confirmation hearings. Bork’s nomination, and ultimate rejection by the Senate, was replete with controversy. Guns became a contentious issue in the Bork drama,

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\item[31] Fred Barbash, \textit{O’Connor Confirmed as First Woman on Supreme Court; Senate Confirms O’Connor 99-0}, Wash. Post, Sept. 22, 1981, at A1.
\item[33] \textit{Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary}, 99th Cong. (1986) [hereinafter \textit{Scalia Hearing}].
\item[34] See Romero v. Nat’l Rifle Ass’n of Am., Inc., 749 F.2d 77 (D.C. Cir. 1984) (rejecting claims that the NRA should be liable to the widow of a man killed with a pistol and ammunition stolen from an NRA office); Nat’l Coal. to Ban Handguns v. Bureau of Alcohol, Tobacco & Firearms, 715 F.2d 632 (D.C. Cir. 1983) (holding that a person is not required to have a bona fide commercial enterprise or business premises in order to obtain a federal license to sell firearms). One witness at Scalia’s confirmation hearings, Audrey Feinberg of the Nation Institute, a civil liberties research group, suggested that Scalia’s decisions in these cases revealed him to be a right-wing extremist on legal issues relating to gun control. \textit{Scalia Hearing}, \textit{supra} note 33, at 248.
\item[35] Scalia would go on to write the Supreme Court’s landmark opinion about the Second Amendment in \textit{District of Columbia v. Heller}, 128 S. Ct. 2783 (2008) (striking down laws that banned handguns and required other guns to be kept unloaded and either disassembled or secured by a trigger lock). \textit{See also} McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) (finding that the Fourteenth Amendment’s Due Process Clause incorporates the right to keep and bear arms).
\item[36] Kamen, \textit{supra} note 32.
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but only behind the scenes. Bork apparently had little interest in the constitutional or policy issues surrounding firearms. Concerned that Bork was not making a good impression in the Senate hearings, a White House staff member advised Bork to try to steer the discussion toward America’s great love affair with guns. Bork simply did not share that passion:

Will Ball of the White House staff told Bork that he needed to “score a few more points.” At one point, he said, perhaps Bork could bring the discussion around to the right to bear arms, a popular issue in the heartland. Bork said he had never really thought about that right. “Judge, goddamn, surely you’ve thought about the Second Amendment,” protested Ball in his down-home southern accent. “Not really,” Bork said, and the issue died.  

In the flurry of recriminations within conservative circles after Bork’s defeat, some complained that the NRA, one of the nation’s most powerful lobbying groups, had stayed on the sidelines rather than joining the push to confirm Bork. The NRA failed to come to Bork’s aid, even though, as a member of the U.S. Court of Appeals for the D.C. Circuit, Bork made several decisions favorable to the interests of gun advocates, and Bork-backers contacted every member of the NRA’s board in a last-ditch effort to enlist the NRA’s support. The reasons for the NRA’s inaction are the subject of sharp dispute. The NRA claimed that the White House asked it to stay out of the fight over Bork because the NRA’s help would be counterproductive and only serve to further polarize the matter. Sources close to Bork offered a different explanation, saying that the NRA was troubled by Bork’s opposition to the exclusionary rule. Gun dealers frequently invoked that rule in seeking to suppress

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39 For example, Bork joined Scalia in rejecting tort claims brought against the NRA. See Romero, 749 F.2d 77 (D.C. Cir. 1984) and discussion supra note 34.
41 Id.
42 Bronner, supra note 38, at 203; McGuigan & Weyrich, supra note 40, at 79.
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evidence from searches of their stores,\textsuperscript{43} while gun owners used it to fight prosecution when police seized unregistered firearms from automobiles during traffic stops.\textsuperscript{44} Bork’s son later criticized the NRA for failing to back Bork because of its concerns about how Bork would influence Fourth Amendment jurisprudence.\textsuperscript{45}

Ultimately, the NRA would not regret its failure to help Bork. A few years after his failed nomination, Bork said that the original intent of the Second Amendment was merely “to guarantee the right of states to form militia, not for individuals to bear arms.”\textsuperscript{46} Perhaps relishing the opportunity to take a stab at an organization that failed to help him, Bork mocked the NRA for thinking that the Second Amendment “protects their right to have Teflon-coated bullets.”\textsuperscript{47} He analogized the NRA’s handling of the Second Amendment to the American Civil Liberties Union’s treatment of the First Amendment,\textsuperscript{48} a comparison that, coming from Bork, was a grave insult to the NRA.\textsuperscript{49}

The legal and political issues surrounding guns thus wound up playing an interesting but indirect role in the Bork saga. Compared to the furor over Bork’s views on other issues like privacy and civil rights, guns barely factored into the debate over whether the Senate should confirm Bork’s nomination. Likewise, no one seemed interested in finding

\textsuperscript{43} See McGuigan & Weyrich, supra note 40, at 79.
\textsuperscript{44} Bronner, supra note 38, at 203.
\textsuperscript{45} R.H. Bork, Jr., The Media, Special Interests, and the Bork Nomination, in NINTH JUSTICE: The Fight for Bork, supra note 40, at 253.
\textsuperscript{46} Claudia Luther, Bork Says State Gun Laws Constitutional, L.A. TIMES, Mar. 15, 1989, § 2, at 5; see also Robert H. Bork, Slouching Toward Gomorrah 166 n.† (1996) (arguing that “[t]he Second Amendment was designed to allow states to defend themselves against a possibly tyrannical national government” and “[n]ow that the federal government has stealth bombers and nuclear weapons, it is hard to imagine what people would need to keep in the garage to serve that purpose”).
\textsuperscript{48} Bork, supra note 46, at 152.
\textsuperscript{49} Bork apparently would later change his mind about the issue and join an amici brief arguing that the Second Amendment broadly protects private possession and use of guns unrelated to militia activities. Brief for Amici Curiae Former Senior Officials of the Department of Justice in Support of Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290), available at 2008 WL 405551.
out what Anthony Kennedy, the nominee that the Senate ultimately confirmed in Bork’s place, thought about the Second Amendment or gun control. The Senate Judiciary Committee did not ask Kennedy a single question about those topics during his confirmation hearing. Kennedy, of course, would go on to be the Court’s crucial swing vote in a plethora of significant cases, including the most important Second Amendment rulings in American history.

The Senate Judiciary Committee continued to ignore gun issues in considering subsequent confirmations, even when the nominee had something in his or her background that seemingly warranted closer scrutiny. For example, after President George H.W. Bush nominated David Souter in 1990, gun control advocates uncovered a brief, signed by Souter in 1976 when he was New Hampshire’s attorney general, arguing that the Second Amendment provides no individual right to have guns and instead protects only the states’ authority to maintain militias. The brief made the argument in particularly vivid terms:

Even in the state of Texas, a jurisdiction steeped in the lore of the wild west, of the quick draw and the showdown at high noon, it has been held that the state may, in the interest of public safety, prohibit carrying a pistol on one’s person, despite a state constitutional guarantee of the right to bear arms. Surely no contrary result could be reached in a jurisdiction where no state constitutional right to bear arms exists, and where the war whoop of hostile Indians was last heard in 1763.

The brief persuaded the New Hampshire Supreme Court to uphold a conviction under the state’s law prohibiting unlicensed carrying of a

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50 Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. (1987).
53 Id.
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loaded handgun.\textsuperscript{54} Although gun control proponents touted the brief as a repudiation of the NRA’s interpretation of the Second Amendment,\textsuperscript{55} gun rights proponents seemed unconcerned. Stephen Halbrook, a leading advocate for the NRA and its constitutional theories, dismissed the brief as something that likely was written by one of Souter’s underlings in the attorney general’s office, was never seen by Souter, and bore his name only as a formality.\textsuperscript{56} The NRA’s top lobbyist James J. Baker likewise assured nervous gun enthusiasts that “[e]verything we have been able to learn indicates that Souter looks at the Constitution from an historical perspective.”\textsuperscript{57}

If the NRA was not worried, that apparently was good enough for its allies in the Senate. At Souter’s confirmation hearing, no one mentioned the brief or asked him about his views on the Second Amendment.\textsuperscript{58} Alan Simpson, a Republican from Wyoming, seemed to be the only one itching to ask a question about guns, but it was an itch that he narrowly managed to resist scratching. After questioning Souter about other matters, Simpson found himself with a few minutes left and “a great temptation” to ask Souter about gun control.\textsuperscript{59} Simpson then delivered a rambling soliloquy about how attitudes toward guns vary dramatically within the United States. He said, “[t]here is a sign in Massachusetts on the border that says if you have a gun in your possession it is a $100 fine,” but “in Wyoming you carry a gun in the gun rack of your pickup truck.”\textsuperscript{60} Simpson paused to note that his friend from Massachusetts, apparently referring to Senator Ted Kennedy, had “an ever more intimate and personal reason” to feel strongly about gun issues.\textsuperscript{61} “Talk about crazies with arms, versus the legitimate citizen with his arms,” Simpson

\textsuperscript{55} Press Release, \textit{supra} note 52.
\textsuperscript{56} Steven A. Holmes, \textit{Gun-Control Group Heartened by ’76 Souter Brief}, N.Y. Times, Aug. 19, 1990, § 1, at 17.
\textsuperscript{57} Jim Schneider, \textit{Vegetarian Fascists Stalk the Forest}, SHOOTING INDUS., Nov. 1, 1990, at 18.
\textsuperscript{58} \textit{Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary}, 101st Cong. (1990).
\textsuperscript{59} \textit{Id.} at 126.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.}
mused. In the end, Simpson opted not to ask a question, praised Souter for being a good listener, and concluded “I guess I am not going to worry about you at all” because “my President appointed you” and “I think you are going to be a splendid, splendid judge.” Some years later as a member of the Supreme Court, Souter would make clear that his position on the Second Amendment was the sort that tended to be favored more in Massachusetts than Wyoming, presumably to the dismay of Simpson and other senators who favored gun rights but failed to ask Souter any questions about that constitutional provision when they had the chance.

When Clarence Thomas came before the Senate Judiciary Committee in 1991, Senator Simpson showed the same odd combination of interest in gun issues but unwillingness to ask questions about them during hearings. While chatting with a panel of witnesses who were there to talk about Clarence Thomas’s views on issues concerning women, Simpson noted that he had refrained from asking Thomas about the Second Amendment during the hearing even though he knew that issue mattered most to his constituents.

I have been asked – I come from Wyoming, and I get my lumps on the reproductive rights issue. But I get another one. They say, Why don’t you ask him about something that really is important to us, and that is ask him about how he is on the 2d amendment and gun control. Because if he is not right on that, Simpson, junk him. Get him. We are counting on you to do that.

Well, I am not going to do that. I have asked him about that, and he said, you know, he wasn’t going to get

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62 Id.
63 Id.
65 Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 102d Cong., pt. 3, at 254 (1991). This was before the controversy over Thomas’s alleged harassment of Anita Hill engulfed the nomination. See id. pt. 4.
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... into anything of high controversy. . . .66

This time, Simpson's faith in the nominee would not be misplaced, for Clarence Thomas would turn out to be one of the Supreme Court's most ardent supporters of gun rights.67

By the time President Bill Clinton had the opportunity to make Supreme Court nominations, gun control had become a contentious issue that was frequently in the headlines. Clinton made gun issues a priority, and he seemed to relish butting heads with the NRA.68 Momentum was building in Congress for enactment of federal laws requiring background checks for gun purchasers and prohibiting certain military-style "assault" weapons.69 Not surprisingly, Clinton's nominees faced some questions about the Second Amendment during their confirmation hearings. For example, Senator Orrin Hatch, a conservative Republican from Utah, pressed Ruth Bader Ginsburg to explain why the right to keep and bear arms should not be treated as applying to state and local governments through the Fourteenth Amendment, like most other Bill of Rights provisions.70 From the opposite end of the political spectrum, Senator Dianne Feinstein, a California Democrat and ardent gun control supporter, invited Ginsburg and Clinton's subsequent nominee Stephen Breyer to endorse the proposition that the Second Amendment protects only the right to keep and bear arms in connection with service in an

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66 Id. pt. 3, at 254.
67 Long before he voted for a broad interpretation of the Second Amendment in 
_Heller_, Thomas wrote a concurring opinion that foreshadowed the Supreme Court's move toward a more robust defense of gun rights. See _Printz_, 521 U.S. at 898, 935-39 (Thomas, J., concurring). Indeed, Thomas hinted that he thought the federal laws requiring criminal background checks on gun purchasers might violate the Second Amendment, see id. at 938, a position that would make Thomas a relatively militant defender of gun rights. Cf. _Heller_, 128 S. Ct. at 2816-17 (providing presumption of validity to laws prohibiting felons from possessing firearms and imposing conditions of the commercial sale of firearms).
68 See, e.g., John King, _Clinton Provides Ammo in Attack on Gun Lobby_, Chi. Sun-
69 See _Spitzer_, supra note 14, at 120-28.
70 Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 128-29 (1993) [hereinafter _Ginsburg Hearing_].
organized militia like the National Guard.\textsuperscript{71} Ginsburg declined to reveal anything about her views on the matter, saying “I am not prepared to expound on it beyond making the obvious point that the second amendment has been variously interpreted.”\textsuperscript{72} Breyer was a bit more forthcoming. Like Ginsburg, he declined to express an opinion about the Second Amendment’s meaning.\textsuperscript{73} He went out of his way, however, to emphasize repeatedly that he believed there was a broad and virtually unanimous consensus in America that many legal restrictions on guns can be validly imposed.\textsuperscript{74}

> Every week or every month for the last 14 years, I have sat on case after case in which Congress has legislated rules, regulations, restrictions of all kinds on weapons; that is to say, there are many, many circumstances in which carrying weapons of all kinds is punishable by very, very, very severe penalties. And Congress, often by overwhelming majorities, has passed legislation imposing very severe additional penalties on people who commit all kinds of crimes with guns, even various people just possessing guns under certain circumstances.

> In all those 14 years, I have never heard anyone seriously argue that any of those was unconstitutional in a serious way. I should not say never because I do not remember every case in 14 years. So, obviously, it is fairly well conceded across the whole range of society, whatever their views about gun control legislatively and so forth, that there is a very, very large area for government to act. . . .\textsuperscript{75}

\textsuperscript{71} Id. at 241-42; Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 261-63 (1994) [hereinafter Breyer Hearing].

\textsuperscript{72} Ginsburg Hearing, supra note 70, at 128; see also id. at 241-42 (repeating that the meaning of the Second Amendment was “a controversial question” that “may well be before the Court again” and “it would be inappropriate for me to say anything more than that”).

\textsuperscript{73} Breyer Hearing, supra note 71, at 262.

\textsuperscript{74} Id. at 262-63.

\textsuperscript{75} Id. at 262.
While Breyer followed these remarks with the perfunctory reminder that he could not say how he would decide particular questions that might come before the Court in the future, anyone even mildly attuned to the debate over gun issues in America could have easily predicted that Breyer would favor giving governments wide latitude to regulate guns in the interest of public safety. And when the Supreme Court finally tackled the Second Amendment in *District of Columbia v. Heller*, that is exactly what Breyer did. His dissenting opinion in *Heller* struck exactly the same chord as the remarks he made about the Second Amendment at his confirmation hearing, emphasizing the pragmatic reasons why courts should defer to reasonable legislative determinations that gun control laws will advance significant public policy goals like reducing crime and injuries.

A decade later, during his confirmation hearings to become the Court's Chief Justice, John Roberts would give similarly revealing clues about his views on the Second Amendment during what seemed to be an innocuous deflection of a question. Senator Russ Feingold, a Democrat from Wisconsin with a mixed record on gun issues, asked whether Roberts believed the Second Amendment protects an individual right to have guns for private purposes or only a collective right to keep and bear arms in connection with militia service. Roberts declined to express a view on the matter, explaining that there was a circuit split on the issue and so it was likely to be a question before the Supreme Court at some point. But after brushing off the question in that routine way, Roberts dropped a subtle but significant hint about his real views on the Second Amendment. Referring to the Supreme Court’s last major ruling on the right to keep and bear arms, *United States v. Miller*, Roberts said:

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77 *Id.* at 2847; *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3124-29, 3134-38 (2010) (Breyer, J., dissenting) (arguing that courts should defer to reasonable state legislative determinations about costs and benefits of gun regulations).
80 *Id.* at 360-61.
I know the *Miller* case side-stepped that issue. An argument was made back in 1939 that this provides only a collective right, and the Court didn’t address that. They said instead that the firearm at issue there – I think it was a sawed-off shotgun – is not the type of weapon protected under the militia aspect of the Second Amendment.

So people try to read into the tea leaves about *Miller* and what would come out on this issue, but that’s still very much an open issue.82

To those deeply immersed in the Second Amendment debate, this was a dead giveaway, like a “tell” that reveals the strength of a poker player’s hand. “When he said that, it was a signal, to my ears,” explained Dennis Henigan, the lead lawyer at the Brady Center to Prevent Gun Violence.83 While gun control advocates had long taken the position that *Miller* conclusively rejected the “individual rights” interpretation of the Second Amendment, gun rights advocates insisted that *Miller* “side-stepped” the question and it was still an “open issue.”84 Sure enough, just a few years later, Roberts would go on to be part of the Supreme Court majority finding that *Miller* had side-stepped the issue and concluding that the Second Amendment provides an individual right unconnected to militia service.85

Gun control issues and the Second Amendment thus generally played a surprisingly limited role in the evaluation of Supreme Court nominees in recent decades, even though political and legal controversies surrounding guns grew more intense during this time. In most instances, no one on the Senate Judiciary Committee even bothered to ask about the nominee’s views on gun issues. When someone did broach the

82 *Roberts Hearing, supra* note 79, at 361.
84 *Id.*
85 See District of Columbia v. Heller, 128 S. Ct. 2783, 2813-14 (2008) (finding that *Miller* addressed only the type of weapons covered by the Second Amendment and said nothing about the type of people or activities protected by the provision).
subject, the results were often quite interesting. Even when trying to give a bland, uncontroversial answer, nominees like Stephen Breyer and John Roberts let some striking clues slip about their fundamental stances in the gun debate. Guns never became a key issue for any Supreme Court nominee, however, until the three most recent high court hopefuls, Samuel Alito, Sonia Sotomayor, and Elena Kagan, had their chances to go before the Senate seeking confirmation.

II. Machine Gun Sammy

Guns became a significant issue in the debate over Samuel Alito’s nomination largely because of a dissenting opinion that Alito wrote in United States v. Rybar while serving as a member of the U.S. Court of Appeals for the Third Circuit. The Rybar case concerned the federal laws that regulate machine guns. Since the passage of the National Firearms Act of 1934, machine guns have been subject to a special federal system of registration, taxation, and other restrictions. In 1986, Congress went further and essentially cut off the supply of new machine guns to the civilian market, allowing automatic weapons already registered under the National Firearms Act to remain in circulation but prohibiting registration of any other machine guns.

Raymond Rybar ran afoul of these federal laws when he sold two submachine guns to a firearms collector at a gun show in western Pennsylvania in 1992. Rybar learned about machine guns while serving as a U.S. Army paratrooper in Vietnam, and he had a small

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86 See supra notes 73-77 and accompanying text.
87 See supra notes 80-85 and accompanying text.
89 A machine gun is an automatic weapon, meaning that it can fire more than one shot with a single pull of the trigger. 26 U.S.C. § 5845(b) (2006).
92 Rybar, 103 F.3d at 275.
93 Defendant’s Response to Government’s Objections to Presentence Report and Memorandum in Aid of Sentencing, United States v. Rybar, Crim. No. 94-243
metalsmithing business that included repairing machine guns and making parts for them.\textsuperscript{94} Although Rybar had federal licenses authorizing him to manufacture and sell firearms, the submachine guns he sold at the gun show were not registered under the National Firearms Act.\textsuperscript{95} When the collector ran into trouble with federal law enforcers, he named Rybar as the source of the submachine guns\textsuperscript{96} and a grand jury soon indicted Rybar for illegally possessing and transferring the two weapons.\textsuperscript{97}

The district court threw out the charges against Rybar for illegally transferring unregistered machine guns, concluding that it would be fundamentally unfair to punish a person for failing to register weapons that Congress’s 1986 enactment had made impossible to register.\textsuperscript{98} However, the district court upheld the charges of unlawful possession of machine guns. Rybar entered a conditional guilty plea to those charges, maintaining his right to challenge on appeal the constitutionality of the federal laws underlying his conviction.\textsuperscript{99}

Rybar began serving an eighteen-month prison sentence,\textsuperscript{100} but hoped that the Third Circuit would overturn his conviction on appeal. Although he would also rely on the Second Amendment right to keep and bear arms, his chief argument was that Congress had exceeded its authority under the Commerce Clause by prohibiting purely intrastate possession of unregistered machine guns.\textsuperscript{101}

Just a few days before the due date for Rybar’s appellate brief,\textsuperscript{102} the Supreme Court issued a decision that provided surprising new


\textsuperscript{96} \textit{Id}.

\textsuperscript{97} \textit{Rybar}, 103 F.3d at 275.

\textsuperscript{98} \textit{Id}.

\textsuperscript{99} \textit{Id}.

\textsuperscript{100} \textit{Id}.

\textsuperscript{101} Brief for the Appellant at 7-24, United States v. Rybar, 103 F.3d 273 (3d Cir. 1995) (No. 95-3185), 1995 WL 17197799.

\textsuperscript{102} See \textit{id}. at 12-24.
support for Rybar’s position. In United States v. Lopez,103 the Supreme Court struck down the Gun-Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm within one thousand feet of a school.104 The Court concluded that, in enacting the statute, Congress exceeded its authority to regulate interstate commerce because the possession of a gun near a school is not a commercial activity.105 The statute applied to all firearms, not just those proven to have a connection to or effect upon interstate commerce.106 Citing Lopez, Rybar argued that if the federal government does not have the power to ban possession of firearms near schools, it also does not have the power to punish him for possession of machine guns.107

Judge Alito agreed. He saw no basis for distinguishing the law struck down in Lopez from the federal statute restricting possession of machine guns under which Rybar had been convicted.108 In Alito’s view, the Lopez decision was not merely a “constitutional freak”; instead, it showed that “the Commerce Clause still imposes some meaningful limits on congressional power.”109 Alito emphasized that his position on the issue would not prevent lawmakers from enacting “adequate regulation” of machine guns.110 Congress could cure the constitutional defect in the statute by making credible findings that possession of machine guns substantially affects interstate commerce, by assembling sufficient evidence to that effect, or by adding a jurisdictional element to the statute so that federal prosecutors would be required in each case to prove that

105 514 U.S. at 561.
106 Id. at 561-62. After Lopez, Congress amended the statute that had been struck down, making it apply only to “a firearm that has moved in or that otherwise affects interstate or foreign commerce.” 18 U.S.C. § 922(q)(2)(A) (2000), amended by Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 369-71 (1997). The amended statute has been upheld as a valid exercise of federal authority over interstate commerce. See, e.g., United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005); United States v. Danks, 221 F.3d 1037, 1038-39 (8th Cir. 1999).
107 United States v. Rybar, 103 F.3d 273, 277-78 (3d Cir. 1995).
108 Id. at 286-87 (Alito, J., dissenting).
109 See id. at 286.
110 Id. at 287.
the defendant’s machine gun had moved in or otherwise affected interstate commerce.111 Alito also pointed out that even if the federal government did not regulate machine gun possession, every state would remain free to do so.112

Unfortunately for Raymond Rybar, Judge Alito was the only one of the three judges on the Third Circuit panel in the case who saw the issue that way. Over Alito’s dissent, the other two judges voted to uphold Rybar’s conviction on the ground that Congress reasonably could have believed that banning possession of machine guns would have a substantial effect on interstate commerce.113 The vast majority of federal appellate judges across the nation similarly found that the machine gun statute is valid,114 although a few judges in other circuits shared Alito’s sentiment that the statute exceeds Congress’s proper reach.115

As soon as Alito’s nomination to join the Supreme Court was announced on October 31, 2005,116 his dissenting opinion in Rybar became a key element in the debate over the nomination. Alito’s supporters hailed the Rybar dissent as a courageous defense of gun rights.117 Critics condemned it as a prime example of Alito’s “aggressively outlying record”

111 Id.
112 Id.
113 Id. at 282-83 (majority opinion).
114 See, e.g., United States v. Franklyn, 157 F.3d 90, 93-97 (2d Cir. 1998); United States v. Knutson, 113 F.3d 27, 29-31 (5th Cir. 1997); United States v. Kenney, 91 F.3d 884, 886-91 (7th Cir. 1996); United States v. Rambo, 74 F.3d 948, 951-52 (9th Cir. 1996); United States v. Wilks, 58 F.3d 1518, 1519-22 (10th Cir. 1995).
115 See United States v. Beuckelaere, 91 F.3d 781, 787-88 (6th Cir. 1996) (Suhrheinrich, J., dissenting); United States v. Kirk, 70 F.3d 791, 798-802 (5th Cir. 1995) (Jones, J., dissenting); cf. United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003) (holding that the federal government could ban possession of a machine gun that had been transferred from one person to another at some point before being illegally possessed, but not a homemade machine gun produced and possessed only by defendant himself), vacated, 545 U.S. 1112 (2005), remanded to 451 F.3d 1071 (9th Cir. 2006) (upholding the federal law even for a homemade machine gun).

Interest groups opposed to Alito’s nomination quickly bestowed on him the nickname “Machine Gun Sammy.”\footnote{Press Release, Brady Campaign to Prevent Gun Violence, ‘Machine Gun Sammy,’ a Perfect Halloween Pick, Says Brady Campaign (Oct. 31, 2005), available at LEXIS, PR Newswire file.} Their creative efforts to draw attention to the \textit{Rybar} dissent included production of a “wanted” poster, declaring that Alito had been consorting with “practically criminal organizations, including the NRA” and that he should be considered “armed (with extreme political views) and dangerous (to the nation’s future).”\footnote{Gun Guys, WANTED: “Machine Gun Sammy,” http://www.gunguys.com/mgsammy.php (last visited Apr. 14, 2010) [hereinafter WANTED: “Machine Gun Sammy”]. Gun Guys was at the time a project of the Freedom States Alliance (which subsequently merged into States United to Prevent Gun Violence). Gun Guys, About Us, http://www.gunguys.com/?page_id=3598 (last visited Aug. 23, 2010).} The “wanted” poster featured an image of Alito’s face photoshopped onto the body of a dapper Prohibition-era gangster holding a “Tommy” submachine gun.\footnote{WANTED: “Machine Gun Sammy,” supra note 120.}

Of course, one must bear in mind that rhetorical exaggeration and hyperbole are routine tools of issue advocacy groups across the political spectrum. Special interest groups struggle mightily to arouse support and draw attention to their messages, and, in doing so, they inevitably employ a certain degree of dramatic license. Just as the law affords leeway to the “puffery” of merchants hawking their wares,\(^{124}\) or the overheated raves of Hollywood publicists,\(^{125}\) we can expect and tolerate rhetorical flourishes from interest groups that we might condemn if they came from other sources like scholars, journalists, or politicians.

The *Rybar* dissent was a significant topic of discussion during Alito’s confirmation hearing before the Senate Judiciary Committee.\(^{126}\) Alito and the senators handled the issue in a reasonable and fair manner. Before Alito had even begun to speak, several senators brought up the *Rybar* case in their opening statements. In measured terms, they advised Alito of their concerns about his *Rybar* dissent and how it suggested that Alito had an unduly narrow view of congressional authority. No one claimed that Alito had taken a frivolous position in *Rybar* or accused him of seeking to flood the streets with automatic weapons. Senator Dianne Feinstein, for example, rightly pointed out that Alito wanted to strike down the machine gun law “based essentially on a technicality.”\(^{127}\) In other words, rather than undercutting federal power in any truly significant way, Alito’s position in *Rybar* would have forced the federal government to jump through some additional hoops to accomplish essentially the same end result. Feinstein and other senators certainly were entitled to be skeptical of what seemed to be a hyper-technical approach to federal authority in the *Rybar* dissent and to quiz Alito about whether he would similarly seek to minimize federal power in future instances when the stakes might be much higher.

At the hearing, Alito had fair opportunities to defend his *Rybar*

\(^{124}\) See David G. Owen, Products Liability Law § 3.2, at 123 (2d ed. 2008).

\(^{125}\) See Presidio Enterprises v. Warner Bros. Distrib., 784 F.2d 674 (5th Cir. 1986) (rejecting fraud claims against film studio that declared its movie about killer bees invading America would be a blockbuster hit).

\(^{126}\) Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) [hereinafter Alito Hearing].

\(^{127}\) Id. at 26; see also id. at 38 (statement of Sen. Schumer) (expressing concern about whether Alito still holds the “cramped views of congressional power” evident in his *Rybar* dissent).
dissent. He explained why he felt it was consistent with the Supreme Court’s reasoning in *Lopez* and why it posed no significant obstacle to strict government regulation of machine guns.128 Alito emphasized that his “position in *Rybar* was really a very modest position, and it did not go to the question of whether Congress can regulate the possession of machine guns.”129 He noted that his opinion spelled out how “it would be easy for Congress” to fix the statute by making more specific findings about how possession of machine guns generally affects interstate commerce or by requiring prosecutors to prove in each case brought under the statute that the particular machine gun in question had some connection to interstate commerce.130 Alito conceded that he might have reached a different conclusion if the Supreme Court’s subsequent decision in *Gonzales v. Raich*,131 which upheld federal authority to ban medical use of marijuana, had been available to him when *Rybar* was decided.132

At one point during the proceedings, Senator Arlen Specter described Supreme Court nomination hearings as “a subtle minuet, with the nominee answering as many questions as he thinks necessary in order to be confirmed.”133 Senator Joe Biden later said he hoped Alito’s hearing could be a conversation rather than a minuet, because “we – you and I and this Committee – owe it to the American people in this one democratic moment to have a conversation about the issues that will affect their lives profoundly.”134 Unfortunately, the Alito hearing did not generate an informative and useful airing of every issue. Alito, for example, purported not to know enough about *Bush v. Gore*,135 one of the most famous and important decisions in recent history, to be able to

128 See, e.g., id. at 377-78, 395-98, 406-07, 444-45, 633. To the extent that anyone said anything arguably misleading about the machine gun issue during the hearing, it was when Alito’s supporters cited a Ninth Circuit ruling as support for Alito’s views but neglected to mention that the ruling had been vacated by the Supreme Court. See, e.g., id. at 377 (statement of Sen. Kyl) (referring to United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), vacated, 545 U.S. 1112 (2005), remanded to 451 F.3d 1071 (9th Cir. 2006)).

129 *Alito Hearing*, supra note 126, at 377.

130 Id. at 377-78.

131 545 U.S. 1 (2005).

132 *Alito Hearing*, supra note 126, at 628-29.

133 Id. at 3.

134 Id. at 18.

say whether it was rightly decided.\textsuperscript{136} He obfuscated rather than trying to shed any real light on hot-button issues like abortion.\textsuperscript{137} But with respect to the \textit{Rybar} issue, Alito’s hearing generally fulfilled the hopes for more than a meaningless minuet. The hearing provided a fair exploration of Alito’s position in \textit{Rybar} and a reasonably sophisticated dialogue about differing conceptions of the reach of the federal government’s commerce power.

\textit{Rybar} was not a major point of discussion when the Judiciary Committee met a few weeks later and voted on sending Alito’s nomination to the full Senate.\textsuperscript{138} Although the Committee remained divided over the nomination, with all ten Republicans voting in Alito’s favor and all eight Democrats voting against him, interest in \textit{Rybar} and gun control in general had receded to the point where only a few of the committee’s members mentioned those matters in the remarks preceding and explaining their votes.\textsuperscript{139} To the extent that senators mentioned gun issues, the discussion seemed to move back in the direction of oversimplification and away from the careful and precise articulation of the issues that had characterized the dialogue with Alito at the hearings. For example, Senator Herb Kohl, a Democrat from Wisconsin, complained that Alito “was in the extreme minority of judges around the country when he found that Congress has no ability to regulate machine guns.”\textsuperscript{140} Again, Alito arguably took an unduly narrow and exacting view of congressional authority in \textit{Rybar}. He would have forced Congress to be more precise in its findings about how machine guns affect interstate commerce or perhaps limit the federal statutes so that they would apply only to machine guns shown to have

\begin{footnotes}
\item[136] \textit{Alito Hearing}, supra note 126, at 386.
\item[137] See, e.g., id. at 432-34.
\item[138] \textit{The Nomination of Samuel Alito to the Supreme Court: Meeting of the S. Comm. on the Judiciary, 109th Cong.} (2006), available at LEXIS, Federal News Service file [hereinafter \textit{Alito Committee Meeting}].
\item[139] \textit{Id.} (statements of Senators Kohl, Feinstein, and Schumer).
\item[140] \textit{Id.} At the press conference following the committee vote, Senator Charles Schumer similarly characterized Alito as having taken the position that “the federal government can’t regulate machine guns.” Sen. Harry Reid et al., \textit{Press Conference with Democratic Leaders and Members of the Senate Judiciary Committee Following Committee Vote on Nomination of Judge Samuel Alito to Be an Associate Justice of the Supreme Court} (Jan. 24, 2006), available at LEXIS, Federal News Service file.
\end{footnotes}
The Past and Future Role of the Second Amendment and Gun Control in Fights Over Confirmation of Supreme Court Nominees

some connection to interstate commerce. The fact that Alito would make Congress take those steps to revise the machine gun laws might suggest that Alito would limit Congress’s ability to act in other important contexts where its ability to work around the Supreme Court’s objections might be less clear. As Senator Feinstein argued to her fellow Judiciary Committee members before their vote, Alito had merely made a technical objection to the way in which Congress enacted the machine gun law, but that sort of nitpicking about federal authority might suggest that Alito, if allowed to become a member of the Supreme Court, would be inclined to make it very difficult for Congress to pass additional laws relating to gun violence and other important issues like worker safety and consumer protection. While it oversimplifies the issue to say Alito’s position would have left Congress with no ability to regulate machine guns, legitimate reasons for concern about Alito’s vision of federal authority certainly existed.

A few days later, the same general pattern emerged in the full Senate’s debate on Alito’s nomination. In a few isolated instances, Alito’s critics oversimplified or exaggerated the Rybar issue. For example, Senator Barbara Boxer warned that if the Senate confirmed Alito, “our children could end up living in a very different America,” one where “[d]angerous automatic weapons might become broadly available.” But most senators simply and fairly argued that Rybar and other evidence in Alito’s record suggested Alito would take a restrictive view of congressional authority, not just for firearms but also with respect to other significant issues like civil rights, environmental laws, health and safety regulations, and major federal programs like Social Security and Medicare. In response, Alito’s supporters in the Senate offered a plausible defense of the Rybar dissent, saying it merely represented Alito’s conscientious effort to follow Supreme Court precedent and pointing out that Alito provided “a virtual roadmap for how Congress could regulate the possession of guns in a way consistent

141 See supra note 111 and accompanying text.
142 Alito Committee Meeting, supra note 138.
with the Constitution and Supreme Court case law.”

The process led to a reasonable exploration and airing of the issue. In the end, attentive observers, including senators on both sides of the aisle, surely knew that Alito was unlikely to lead a judicial crusade to wipe out all legal restrictions on machine guns. But at the same time his dissenting opinion in *Rybar* was a telling indication that he would tend to take a relatively narrow view of federal authority in general, and that he was likely to look favorably on gun rights arguments in particular. In short, the senators knew what they were getting with Alito, and they confirmed his nomination, albeit by a fairly narrow margin, with 58 senators voting for Alito and 42 voting against him. Alito lived up to expectations by becoming a crucial fifth vote for the majority opinion in *Heller*, a decision unlikely to bring about unfettered access to automatic weapons, but one that nevertheless dramatically re-drew the lines in constitutional law with respect to guns.

### III. The Gun Grabbers’ Dream Come True

Gun enthusiasts seemed to draw little reassurance from the Supreme Court’s pronouncements about the Second Amendment in *Heller*. Barack Obama’s victory in the presidential election in November 2008 sparked a binge of gun purchases across the nation. Although the Obama Administration has thus far been uninterested in doing anything relating to firearms (except making it legal to carry them in more places), many Americans remain convinced that a crackdown on

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147 To date, courts have shown no inclination to believe that *Heller* casts doubt on the validity of federal restrictions on machine guns. *See, e.g.*, Hamblen v. United States, 591 F.3d 471, 474 (6th Cir. 2009); United States v. Fincher, 538 F.3d 868, 873-74 (8th Cir. 2008).
148 Alito would go on to write the opinion in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), concluding that the right to keep and bear arms applies to state and local governments through the Fourteenth Amendment.
150 *See* Brady Center to Prevent Gun Violence, *President Obama’s First Year: Failed Leadership, Lost Lives* 2 (2010) (giving Obama a report card with all “F” grades for his handling of gun policy issues during his first year in
gun access is somehow right around the corner.\textsuperscript{151}

The Supreme Court’s ruling in \textit{Heller} left many questions unanswered, one of the most crucial being whether the right to keep and bear arms should be “incorporated” into the Fourteenth Amendment so as to restrain the actions of state and local governments.\textsuperscript{152} Although the Bill of Rights applies directly only to the federal government, the Supreme Court has decided, in a string of rulings stretching over many years, that most of the provisions of the Bill of Rights are fundamentally important and therefore apply to state and local governments through the Fourteenth Amendment’s due process clause.\textsuperscript{153} For example, freedom of speech is expressly protected against federal infringement by the First Amendment, but freedom of speech is also a fundamental part of what it means to receive due process of law as promised by the Fourteenth Amendment.\textsuperscript{154} The Supreme Court has balked at incorporating only a few Bill of Rights provisions, most notably the Fifth Amendment’s clause requiring serious criminal prosecutions to be initiated by grand jury indictments and the Seventh Amendment’s guarantee of the right to a jury trial in civil cases.\textsuperscript{155} Without incorporation of the right to keep and bear arms, \textit{Heller’s} impact would be dramatically limited. States, cities, and counties could remain free to ban or restrict guns in any manner.

In several cases decided more than a century ago, such as \textit{United States v. Cruikshank}\textsuperscript{156} and \textit{Presser v. Illinois},\textsuperscript{157} the Supreme Court indicated that the Second Amendment could be infringed only by the federal government and did not apply to the states. Those rulings, however, were issued before any part of the Bill of Rights had been incorporated into

\textsuperscript{151} See Rostron, \textit{supra} note 149, at 347-48.

\textsuperscript{152} See generally \textsc{John E. Nowak & Ronald D. Rotunda, Constitutional Law} § 10.2, at 396-99 (7th ed. 2000) (providing an overview of the Bill of Rights provisions and their incorporation into the Fourteenth Amendment). The Supreme Court would answer this question, a year after \textit{Heller}, in the case of \textit{McDonald v. City of Chicago}, 130 S. Ct. 3020 (2010). \textit{See infra} notes 265-266 and accompanying text.

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} See, \textit{e.g.}, Gitlow v. New York, 268 U.S. 652, 666 (1925).

\textsuperscript{155} \textsc{See Nowak & Rotunda, supra} note 152, § 10.2, at 397-98.

\textsuperscript{156} 92 U.S. 542, 553 (1875).

\textsuperscript{157} 116 U.S. 252, 264-65 (1886); \textit{see also} \textit{Miller v. Texas}, 153 U.S. 535, 538 (1894).
the Fourteenth Amendment.158 As the incorporation movement gained steam during the twentieth century, the Supreme Court never had an occasion to revisit the question of whether the right to keep and bear arms should be incorporated.159 Cases like Cruikshank and Presser therefore took on an odd status as the years passed. Everyone knew these decisions were at least in some sense obsolete because they predated the emergence of the contemporary approach to incorporation questions. The rulings were incomplete in their reasoning, even if not necessarily wrong in their results. But the Supreme Court had never overruled them, and therefore they remained binding precedents that lower courts had an obligation to follow. The Supreme Court has emphasized many times that it alone has the authority to decide when one of its past decisions should be overruled, and lower courts should resist the temptation to take it upon themselves to say that a Supreme Court ruling is archaic and no longer controls.160

Even when the Supreme Court, in Heller, finally addressed the Second Amendment for the first time in many years, the Court was able to avoid the incorporation question because the case involved laws of a jurisdiction, the District of Columbia, that is a special federal territory and not a state. The majority opinion in Heller included a footnote acknowledging that the incorporation issue was not before the Court but would need to be decided in the future since old decisions like Cruikshank and Presser “did not engage in the sort of Fourteenth Amendment inquiry required by our later cases” and therefore did not settle the point.161

The incorporation issue soon popped up in courts around the country. Relying on Heller, litigants challenged the constitutionality of state and local legal restrictions on weapons. Jim Maloney was one individual who brought such a challenge, although it was unusual in that the case did not involve guns. Maloney lives on Long Island in New

158 The first step in the line of Supreme Court decisions incorporating Bill of Rights provisions into the Fourteenth Amendment is generally considered to be Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

159 The incorporation issue did not come up in United States v. Miller, 307 U.S. 174, 175 (1939), the only significant Second Amendment case heard by the Supreme Court in the twentieth century, because that case involved a constitutional challenge to a federal statute rather than a state law.


York. He is a lawyer, a U.S. Naval Reserve officer, a former paramedic, and a long-time student and practitioner of martial arts.\(^\text{162}\) In the early 1970s, when Maloney was in high school, he began studying karate.\(^\text{163}\) At that time, a boom in the popularity of “kung fu” movies had drawn attention to martial arts devices known as “nunchaku,” “nunchucks,” or “chukka sticks.”\(^\text{164}\) These devices consist of two pieces of wood or other hard material connected by a cord or chain.\(^\text{165}\) Skilled users can swing the nunchaku from hand to hand and around their bodies using a variety of intricate techniques and patterns. Maloney explained that his interest in nunchaku stemmed in part from the fact that they are good weapons for defending against knife attacks. When Maloney was five years old, an attacker killed Maloney’s father with a knife.\(^\text{166}\)

Late in the summer of 2000, a telephone company employee working outside Maloney’s home complained that Maloney pointed a rifle at him.\(^\text{167}\) Although the worker alleged that Maloney threatened him with the gun and said “I’ll shoot you,”\(^\text{168}\) Maloney claimed that he merely looked at the worker through a telescope attached to a cane, which Maloney used for bird watching, and the worker had mistaken the contraption for a rifle with a scope.\(^\text{169}\) In any event, police soon arrived, and Maloney refused to let them enter his home because they did not have a warrant.\(^\text{170}\) Maloney also refused to come out of the house, and so a

\(^{162}\) Amended Verified Complaint at 4-5, Maloney v. Spitzer, No. 03 Civ. 0786 (E.D.N.Y. Sept. 3, 2005).


\(^{164}\) See, e.g., Enter the Dragon (Concord Productions Inc. 1973); Way of the Dragon (Concord Productions Inc. 1972); Fist of Fury (Golden Harvest Co. 1972).


\(^{166}\) Maloney, supra note 163.

\(^{167}\) Id.

\(^{168}\) Brief of Defendant-Appellee Kathleen A. Rice at 5, Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2009) (No. 07-0581-CV) [hereinafter “District Attorney’s Brief”].

\(^{169}\) Maloney, supra note 163; High Court May Review Personal Weapons Ruling (NPR radio broadcast June 1, 2009), available at LEXIS, National Public Radio file.

\(^{170}\) District Attorney’s Brief, supra note 168, at 5; Maloney, supra note 163.
twelve-hour standoff ensued.\textsuperscript{171} At two o’clock in the morning, Maloney finally relented and surrendered to police, who then searched the house and seized weapons including a nunchaku found under a couch.\textsuperscript{172} Police charged Maloney with several criminal offenses including possession of the nunchaku.\textsuperscript{173} Possession of nunchaku has been prohibited in New York since 1974,\textsuperscript{174} although Maloney asserts that he was unaware the law banned mere possession in one’s own home.\textsuperscript{175}

Maloney eventually agreed to plead guilty to disorderly conduct, and in return prosecutors dropped all other charges including the nunchaku possession offense.\textsuperscript{176} Maloney nevertheless felt that New York’s ban on nunchaku was unconstitutional, so he filed a lawsuit against the state’s attorney general and local district attorney seeking to have the nunchaku law declared invalid as an infringement of freedom of speech, the right to keep and bear arms, and unenumerated rights protected by the Ninth Amendment.\textsuperscript{177} A federal district court dismissed Maloney’s case and upheld the New York nunchaku ban.\textsuperscript{178} Maloney appealed to the U.S. Court of Appeals for the Second Circuit.

The Supreme Court boosted Maloney’s hopes by handing down its decision in \textit{Heller} while Maloney’s case was still pending on appeal. At oral argument before the Second Circuit panel, Maloney quipped that his arguments about the right to keep and bear arms may have looked like “the work of someone who was insane” when he filed his briefs, but after \textit{Heller} he was “in good company.”\textsuperscript{179} Sonia Sotomayor,
one of the Second Circuit judges in Maloney’s case, pointed out that the Supreme Court in *Heller* had not resolved the incorporation issue and suggested that her court remained obligated to follow the old Supreme Court precedents, like *Cruikshank* and *Presser*, which found the Second Amendment inapplicable to state laws.\(^{180}\) “I think we have abundant case law,” Sotomayor observed, “that says we have to follow Supreme Court precedent that’s directly on point.”\(^{181}\)

A month later, Sotomayor’s reasoning carried the day when the Second Circuit issued its brief per curiam decision in the case.\(^{182}\) The court affirmed the dismissal of Maloney’s challenge to the nunchaku ban, noting that Supreme Court precedent squarely contradicted Maloney’s argument that the right to keep and bear arms extends to state and local governments.\(^{183}\) Although that precedent was old and arguably obsolete, “[w]here, as here, a Supreme Court precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.”\(^{184}\) Unless and until the Supreme Court opted to overturn its old precedents and find that the right to keep and bear arms is a fundamental right deserving heightened protection under the Fourteenth Amendment, only the lowest form of “rational basis” scrutiny could be applied, and New York’s ban on nunchaku conceivably could serve a legitimate government purpose because nunchaku are potentially dangerous weapons.\(^{185}\) In short, Judge Sotomayor and her Second Circuit colleagues chose the path of judicial restraint over activism, leaving it to the Supreme Court to decide whether keeping and bearing arms is among the fundamental rights incorporated and applied against state and local

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\(^{180}\) *Id.*

\(^{181}\) *Id.* Later in the argument, Sotomayor suggested that nunchaku might not be “arms” within the Second Amendment’s meaning. *Id.*


\(^{183}\) *Id.* at 58-59.

\(^{184}\) *Id.* at 59 (quoting Bach v. Pataki, 408 F.3d 75, 86 (2d Cir. 2005) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))) (internal quotation marks omitted).

\(^{185}\) *Id.* at 59-60.
governments through the Fourteenth Amendment.

The *Maloney* decision initially sparked no great outcry, even from the most ardent gun rights proponents, because it simply reached the conclusion that the Supreme Court soon would need to address the incorporation issue. This is not to say that *Maloney*’s reasoning was indisputable. Some scholars believed that if lower courts read the old Supreme Court cases like *Cruikshank* and *Presser* very exactlying, they could conclude that those old cases foreclosed incorporation via the Fourteenth Amendment’s privileges or immunities clause but did not squarely address and therefore did not preclude lower courts from finding the right to keep and bear arms incorporated into the Fourteenth Amendment’s due process clause.  This approach requires a very delicate parsing of the old opinions, because in every one of them the Supreme Court rejected due process as well as privileges or immunities arguments. Nevertheless, drawing a subtle distinction between the Fourteenth Amendment’s clauses, a Ninth Circuit panel soon concluded, contrary to the *Maloney* decision’s approach, that they did not need to wait for the Supreme Court to incorporate the right to keep and bear arms.

At that point, a circuit split existed. It was an odd split because each circuit’s reasoning ultimately would lead to exactly the same spot. The Ninth Circuit would incorporate the right. The Second Circuit would leave it up to the Supreme Court to incorporate the right. Either way, it was clear that the Supreme Court would soon resolve the issue.

186 See, e.g., Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185, 190-93 (2008) (discussing the possibility that Second Amendment rights could be incorporated through the Fourteenth Amendment’s Privileges or Immunities Clause).


188 Nordyke v. King, 563 F.3d 439, 446-47, 450, 454-57 (9th Cir. 2009). The Ninth Circuit soon decided to rehear the case en banc, and in doing so declared that the original panel’s opinion could no longer be cited as precedent by or to the Ninth Circuit. See Nordyke v. King, 575 F.3d 890, 891 (9th Cir. 2009). After hearing argument, the en banc court then opted to wait and let the Supreme Court resolve the issue. See Nordyke v. King, No. 07-15763 (9th Cir. Sept. 24, 2009). After the Supreme Court made its decision in *McDonald*, the Ninth Circuit vacated the original panel’s opinion and remanded the case to that panel for further consideration in light of *McDonald*. See Nordyke v. King, No. 07-15763, 2010 WL 2721856 (9th Cir. July 12, 2010).
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Given that the five justices who constituted the majority in *Heller* were still on the Court, the Court was virtually certain to rule that the right to keep and bear arms is incorporated into the Fourteenth Amendment and therefore applies to state and local governments.

The *Maloney* decision thus was, in truth, a decision of remarkably little consequence. It nevertheless suddenly became a cause célèbre for many in the gun rights camp when President Obama offered Judge Sotomayor a promotion to the nation’s highest court. Commentators immediately began to scrutinize the *Maloney* opinion, looking for any telltale signs it contained about Sotomayor’s stance on gun issues.

Many ardent defenders of gun rights offered fair assessments of the *Maloney* case. For example, UCLA law professor Eugene Volokh, a noted supporter of gun rights, acknowledged that Sotomayor did not do anything radical in the *Maloney* case.189 Volokh guessed that Sotomayor probably would be a gun control proponent, simply because she was nominated by Obama and had never said anything favorable about gun rights, but he recognized that the *Maloney* opinion revealed little about her views on the issue.190 Robert Levy, the libertarian lawyer and writer who initiated the *Heller* litigation and thus would be one of the first inductees in any Second Amendment hall of fame, similarly found that Sotomayor’s decision in *Maloney* was “well within the bounds of responsible judging.”191 Even Jim Maloney, the nunchaku aficionado against whom Sotomayor and the Second Circuit had ruled, felt that it was unfair to use his case as evidence that Sotomayor would be hostile to gun rights as a member of the Supreme Court. He told reporters:

I did not expect to win. I’ll say that much. And, you

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190 *Id.; see also* Jacob Sullum, *Guns in Unincorporated Territory*, REASON.COM, June 17, 2009, http://reason.com/archives/2009/06/17/guns-in-unincorporated-territory (“The bottom line is that an intellectually honest judge could have gone either way on the question of whether Supreme Court precedents foreclose incorporation of the Second Amendment. Sotomayor, a left-leaning Greenwich Village resident chosen by a president who never met a gun control he didn’t like, probably is not a big fan of the Second Amendment. But this particular case does not prove it.”).

know, it was clear to me that they had a very solid basis for saying that the Second Amendment is not incorporated, and that essentially they are powerless to do anything about it. They had a defensible position there.192

Other gun rights proponents were sharper in critiquing the Maloney opinion but fair in doing so. For example, David Kopel, one of the most prolific writers on gun rights issues, questioned whether the relatively cursory dismissal of Fourteenth Amendment issues in Maloney might signal that Sotomayor had more “hostility, rather than empathy,” for gun owners and their rights.193 That sort of analysis was a reasonable attempt to find whatever clues might exist about Sotomayor’s attitude toward gun issues.

The criticism of Sotomayor’s views quickly grew more intense. Newspapers reported that the NRA was “deeply troubled” by the “clear hostility Sotomayor has shown toward their most cherished ideals.”194 Another gun rights group, the Gun Owners of America, not only denounced Sotomayor as an “anti-gun radical,” but claimed her decision in Maloney “displayed contempt for the rule of law under the Constitution.”195 Again, a certain amount of hyperbole should be expected from these types of issue advocacy groups.196 But too often, the discussion of Maloney degenerated into crude oversimplifications and distortions. Senators opposed to her nomination went on television to suggest, quite erroneously, that Sotomayor had refused to follow the Supreme Court’s holding that the Second Amendment protects an individual right.197

Conservative politician and pundit Ken Blackwell

192 High Court May Review Personal Weapons Ruling, supra note 169.
196 See supra notes 124-125 and accompanying text.
perhaps went the furthest, penning an inflammatory broadside claiming that Obama’s nomination of Sotomayor was a “declaration of war against America’s gun owners and the Second Amendment.”\(^{198}\) Blackwell did not bother to say anything – not a single word – about how Sotomayor and her Second Circuit colleagues may have reasonably believed they were bound by Supreme Court precedents.\(^{199}\)

Blogs and other websites became particularly fertile sources of wild characterizations and misinformation. One essay that circulated widely on the internet dubbed Sotomayor “A Gun-grabber’s Dream Come True.”\(^{200}\) Within just a few hours after her nomination, a report appeared on the internet claiming that one of Sotomayor’s “legal theses” written at Princeton University was entitled “Deadly Obsession: American Gun Culture.”\(^{201}\) According to this report, the thesis explained that the Second Amendment not only failed to give any right to individual citizens, but it actually made it illegal for them to own firearms.\(^{202}\) Most readers failed to notice a small tag at the bottom of the story that said “satire,” and the story quickly ricocheted around the internet. The report was immediately debunked as an obvious fraud,\(^{203}\) but commentators across the electronic world continued to pass it off as true.\(^{204}\)

Just a few days after the announcement of Sotomayor’s nomination,
the U.S. Court of Appeals for the Seventh Circuit issued a decision that should have laid to rest the hysterical fulminations about *Maloney*. In that decision, written by Judge Frank Easterbrook and joined by Judge Richard Posner, two of the nation’s foremost conservative legal minds, the Seventh Circuit reached the same conclusion as the *Maloney* opinion. The Seventh Circuit judges found that the old Supreme Court decisions like *Cruikshank* and *Presser* were still binding on them. Arguments about why those old cases should be overruled and the right to keep and bear arms should be incorporated into the Fourteenth Amendment “are for the Justices rather than a court of appeals.”

The Seventh Circuit’s ruling made it unmistakably clear that *Maloney*, at the very least, was well within the mainstream of judicial thinking on the subject and did not reflect radical reasoning or defiance of precedent. To those determined to spread false fears about Sotomayor’s nomination, it made no difference. Members of the Senate, for example, went on suggesting that the Second Circuit’s opinion in *Maloney* had somehow defied the Supreme Court’s *Heller* decision and its interpretation of the Second Amendment. Sotomayor and her colleagues on the Second Circuit panel in *Maloney* went out of their way to respect and defer to the Supreme Court’s authority, and this is what they got in return for it.

Sotomayor’s confirmation hearings before the Senate’s Judiciary Committee gave her a chance to address the *Maloney* case and the unfair distortions being thrown about by her critics. As soon as she got a chance to speak on the issue, Sotomayor said that she accepted the Supreme Court’s decision in *Heller* as establishing that the Second Amendment is an individual right. She explained that *Heller* did not decide the incorporation issue, and she explained why she and her Second Circuit colleagues in the *Maloney* case concluded that only the Supreme

205 Nat’l Rifle Ass’n of Am., Inc. v. City of Chicago, 567 F.3d 856, 857 (7th Cir. 2009), rev’d sub nom., McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).
206 Id. at 860.
208 Confirmation Hearing on the Nomination of Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009) [hereinafter Sotomayor Hearing].
209 Id. at 67.
Court itself could overrule its older cases and incorporate the right to keep and bear arms into the Fourteenth Amendment.\textsuperscript{210} She added that she would have an open mind about the incorporation issue if serving as a justice when the Supreme Court decided that issue,\textsuperscript{211} although she would recuse herself if Maloney was the case in which the Court chose to grant certiorari.\textsuperscript{212} Acknowledging the varying feelings about guns in America, Sotomayor mentioned that “one of my godchildren is a member of the NRA, and I have friends who hunt,” and she emphasized that she understood “how important the right to bear arms is to many, many Americans.”\textsuperscript{213}

Senators nevertheless proceeded to question her at great length about Maloney, incorporation, and the right to keep and bear arms.\textsuperscript{214} They made grandiose pronouncements about how the right to own guns “may very well hang in the balance with your ascendency to the Supreme Court.”\textsuperscript{215} Sotomayor’s presence, however, meant that they simply could not get away with distorting or oversimplifying the matter to the same extent that they could in speeches, press conferences, or television interviews. Whenever the Senators tried to portray Maloney as representing some sort of bold defiance of Supreme Court precedent, Sotomayor was there to remind them that the core point of the Maloney opinion was that lower courts should humbly defer to the Supreme Court’s authority and not presumptuously declare a higher court’s precedents to be obsolete.\textsuperscript{216} The Maloney case “was decided on the basis of precedent,” she repeated over and over, and when there is Supreme Court precedent on point, only the Supreme Court can decide what to do, and in the meantime, the lower courts’ hands are tied.\textsuperscript{217} When the senators tried to portray Maloney as the work of wildly radical liberal judges, Sotomayor was there to point out that the conservative jurists of the Seventh Circuit had reached exactly the same conclusion.\textsuperscript{218}

\textsuperscript{210} Id. at 67-68.
\textsuperscript{211} Id. at 68.
\textsuperscript{212} Id. at 113.
\textsuperscript{213} Sotomayor Hearing, supra note 208, at 68.
\textsuperscript{214} Id. at 86-90, 112-15, 117-19, 344-47, 357, 393-95, 423-25, 439, 444-45.
\textsuperscript{215} Id. at 444 (statement of Sen. Coburn).
\textsuperscript{216} E.g., id. at 343-46, 394-95, 397, 444, 457-59.
\textsuperscript{217} Id. at 444.
\textsuperscript{218} E.g., Sotomayor Hearing, supra note 208, at 74, 394, 439, 444.
Those senators who were skeptical of Sotomayor’s views had to backpedal and talk about the issue in more specific, precise, and accurate ways to continue pressing the point. They had to acknowledge that the issue was complicated and that their criticism of Sotomayor actually rested on a relatively subtle disagreement about a fairly technical point of law. Sotomayor’s supposed sin, they eventually had to concede, was that she had not parsed the Supreme Court’s nineteenth-century cases carefully enough to realize that they only precluded her court from finding the right to keep and bear arms incorporated within the Fourteenth Amendment’s privileges or immunities clause and did not definitively close the door to incorporation via the due process clause. To put it mildly, this was an awfully slender reed on which to base the conclusion that Sotomayor was a manipulative ideologue hellbent on pursuing a radical anti-gun agenda. Meanwhile, the questioning gave Sotomayor the opportunity to hammer home the simple, understandable message that it makes sense for major constitutional issues to be decided by the nation’s highest court. The longer and deeper the discussion went on the issue, the more it sounded like Sotomayor had a fairly straightforward, common-sense position, while the senators questioning her were splitting hairs and obsessing over arcane legal trivia.

Indeed, one of the moments in the hearings that got widespread attention occurred during Senator Hatch’s questions about Maloney and whether Sotomayor’s position in that case meant she would vote to uphold virtually any state or local weapons ban. Sotomayor calmly said, “Sir, in Maloney we were talking about nunchuck sticks.” She methodically proceeded to explain the nature and potential danger of these items. To many observers, that moment epitomized the tenor of the entire proceeding. Sotomayor was being pragmatic, while senators like Hatch played partisan politics and endlessly dwelled on trifles like the right to keep and bear nunchucks.


220 See, e.g., Sotomayor Hearing, supra note 208, at 89.

221 Id. at 90.

222 See, e.g., Maureen Dowd, Op-Ed., White Man’s Last Stand, N.Y. Times, July 15,
As the nomination made its way out of the Judiciary Committee and toward a vote in the full Senate,\footnote{The Judiciary Committee voted 13 to 6 in favor of Sotomayor. \textit{Sotomayor Comm. Meeting, supra note 219.}} the NRA announced that, for the first time in its history, it would oppose the confirmation of a Supreme Court nominee.\footnote{David G. Savage & James Oliphant, \textit{Sotomayor Vote a Power Play; Senators’ Choices May Show Extent of Influence Held by NRA, Obama, Chi. Trib., Aug. 4, 2009, at C11.}} In addition, the NRA declared that it would be “scoring” the vote, meaning that it would count the vote as part of its annual ratings of legislators’ performances.\footnote{Tony LoBianco, \textit{NRA Sets Sights on Senators Who Back Sotomayor in Vote, Wash. Times, July 24, 2009, at A7.}} Insiders reported that the NRA initially was not inclined to score the vote, perhaps realizing that Sotomayor’s confirmation was inevitable and preferring not to tarnish its reputation as an interest group that legislators dared not defy.\footnote{Julie Hirschfeld Davis, \textit{NRA Takes Aim at Sotomayor and Some Senators Take Cover, News J. (Wilmington, Del.), Aug. 2, 2009.}} Republican leaders in the Senate, however, persuaded the NRA to take a stronger stand, hoping it would help to reduce Sotomayor’s margin of victory.\footnote{Id.}

having taken a radical or extreme position. The Second Circuit’s ruling in *Maloney* was unanimous, the Seventh Circuit’s conservative judges had reached the same conclusion, and the Ninth Circuit had just granted an en banc rehearing in the only case where a federal appellate court had gone the other way. It is tough to characterize someone as being outside the judicial mainstream on an issue where she adopts the majority view. As Senator Sheldon Whitehouse put it, Sotomayor’s ruling in *Maloney* was “properly conservative in a judicial sense.” Again, the senators opposed to Sotomayor’s nomination were left to pick nits and split hairs, for example, by complaining that the *Maloney* opinion was too “cursory” because it devoted only one paragraph to the incorporation issue while the Seventh Circuit’s opinion had taken two and a half pages to reach the same conclusion. One senator went so far as to say the real problem was that Sotomayor had too much respect for precedent, a charge that others rightly recognized as leaving judges “caught in a Hobson’s choice” because any judge too quick to reject precedents would surely be condemned for judicial activism.

In the end, Sotomayor won the votes of every Democrat in the Senate, even those from conservative states where the NRA maintains great

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231 Compare 155 Cong. Rec. S8928 (daily ed. Aug. 6, 2008) (statement of Sen. Conrad) (expressing hope that Supreme Court would incorporate the right to keep and bear arms but nevertheless finding that Sotomayor’s record “has been very much in the judicial mainstream on gun issues”), and 155 Cong. Rec. S8797 (daily ed. Aug. 5, 2009) (statement of Sen. Martinez) (explaining that Sotomayor’s position in *Maloney* was “too narrow and contrary to the Founders’ intent,” but “not out of the mainstream”), with id. at S8795 (statement of Sen. Burr) (insisting that Sotomayor had ignored the *Heller* decision and reached “a conclusion no other court has ever reached”), and id. at S8814 (statement of Sen. Wicker) (arguing that Sotomayor’s decision in *Maloney* had been “certainly out of the mainstream” because it relied on nineteenth-century caselaw “arguably” superseded by *Heller*).

232 See supra notes 205-206 and accompanying text.

233 See supra note 188.


237 See id. at S8906 (statement of Sen. Leahy).
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influence. She also picked up the votes of nine Republicans, including two – Lindsay Graham and Lamar Alexander – who had received “A” ratings from the NRA in the past. While some political observers believed that Sotomayor would have received additional support from Republicans but for the NRA’s scoring of the vote, others felt that the gun issue wound up having no impact on the results. Matthew Dowd, a former political strategist for President George W. Bush, said “gun rights had nothing to do with it”; most Republicans opposed Sotomayor simply because “Supreme Court nominations have become dodgeball games, with Democrats lining up on one side and Republicans lining up on our side.”

IV. Another Anti-Gun Radical

Both teams began warming up for the next round of battle over a Supreme Court nomination as soon as Justice John Paul Stevens announced in April 2010 that he soon would be retiring from the Court. Before the ink was dry on Stevens’s resignation letter, talk had already turned to what the records of the leading candidates to replace him might reveal about their views on the Second Amendment and other gun policy issues.


239 The NRA’s grades for Graham, Alexander, and other 2008 Senate candidates can be found at http://www.votesmart.org/issue_rating_detail.php?r_id=4229. The other seven Republicans who voted for Sotomayor had nothing to fear because they already had poor ratings from the NRA or were on the verge of retirement. See Chris Cillizza, Sotomayor and the 2010 Races, Wash. Post, Aug. 10, 2009, at A2.

240 David G. Savage & James Oliphant, NRA Ad Takes on Kagan, Sotomayor; The Group Urges Members to Tell Their Senators ‘Not to Fall for the Same Trick Twice’, L.A. Times, July 14, 2010, at A12 (reporting that White House officials believe the NRA’s opposition took away up to ten votes from Sotomayor).

241 Savage, supra note 238.

242 Id.


Gun rights proponents warned that they needed to brace themselves for another nominee with “radical” views on gun control.245

At that point, little was known about Elena Kagan’s views on guns.246 She had never been a judge and therefore never decided any cases about guns, and she had not written about gun issues during her time as a law professor. When President Obama announced in May 2010 that Kagan would be the nominee, initial news reports emphasized that she had taken a moderate, cautious approach to gun issues when she appeared before the Senate the previous year to be confirmed as the nation’s solicitor general, saying that she had “no reason to believe” Heller was wrongly decided and that “there is no question that the Second Amendment guarantees individuals the right to keep and bear arms and that this right, like others in the Constitution, provides strong although not unlimited protection against governmental regulation.”247 Skeptics, however, felt sure that Obama would not have nominated Kagan unless she favored strict gun control measures.248

Those scouring Kagan’s past for clues soon found several documents that fueled concerns about Kagan being hostile to gun rights. The earliest was from 1987, when Kagan worked at the Supreme


248 See, e.g., Chuck Norris, The New Abortion, Creators Syndicate, May 10, 2010, available at LEXIS, Creators Syndicate file (stating that evidence of Kagan’s beliefs about gun control was “extremely scarce” but asking “[t]hen again, does anyone suppose Obama’s desire to appoint her implies her conservative stance on the Second Amendment?”).
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Court as a law clerk for Justice Thurgood Marshall. Kagan had the task of reviewing some of the many certiorari petitions that continually pour into the Supreme Court. One petition, in the case of *Sandridge v. United States*, was brought by a person who claimed that the District of Columbia had violated his right to keep and bear arms by convicting and punishing him for unlicensed possession of a pistol. Kagan wrote a terse note to Justice Marshall, describing the case and saying that she was “not sympathetic” to the petitioner’s Second Amendment claim. The Supreme Court unanimously denied the petition, declining to hear the case.

Kagan would not have a reason to think much about gun issues again until about a decade later when she went to work as a lawyer and policy advisor for President Clinton. The White House actively pursued a number of gun control efforts during that time, such as a push to promote the availability of trigger locks for handguns and to require background checks for all gun purchasers at gun shows. Documents indicated that Kagan played some role in a number of these initiatives. For instance, after the Supreme Court ruled in *Printz v. United States* in 1997 that Congress could not force state and local law enforcement officers to carry out background checks on gun purchasers, Kagan suggested that Clinton might deal with the problem by issuing executive


251 Stohr & Jensen, supra note 249.


orders that would prohibit firearms dealers from selling handguns where law enforcement agencies refused to conduct the background checks.\(^{255}\)

For most gun control issues that arose during Kagan’s time in Washington, however, the precise extent of Kagan’s involvement was unclear. For example, gun rights proponents quickly fixated on a presidential memorandum, signed by Clinton in 1997, which directed the Treasury Department (which at that time included the Bureau of Alcohol, Tobacco, and Firearms) to crack down on imports of certain foreign-made “assault type” rifles.\(^{256}\) Kagan’s name appeared on a cover sheet accompanying a draft of the memorandum, and some reports suggested that Kagan had drafted the memorandum and was “deeply involved” in the issue.\(^{257}\) But according to Bruce Reed, who was Clinton’s chief domestic policy advisor and Kagan’s boss at the time, the memorandum was written by someone else, Kagan merely transmitted it to Clinton as requested, and thus the presence of Kagan’s name on the cover sheet was a meaningless formality.\(^{258}\) This is the sort of factual uncertainty that ideally would be resolved during the confirmation process, including Kagan’s hearings before the Senate Judiciary Committee.

Perhaps the most provocative document from Kagan’s days in the Clinton Administration was a sheet of handwritten notes which seemed to characterize the NRA in an unflattering way.\(^{259}\) While analyzing proposed legislation that would protect non-profit organization’s volunteer workers from tort liability in some instances,\(^{260}\) Kagan apparently asked a Justice


\(^{256}\) The cover sheet and memorandum can be found at http://www.clintonlibrary.gov/Documents/Kagan%20-%20Bruce%20Reed/Kagan%20-%20Bruce%20Reed%20-%20Crime%20Series/Box%2080%20-%20Assault%20Weapons.pdf.


Department official to check whether the NRA or the Ku Klux Klan would be among the organizations receiving protection under the bill.261 In notes taken during a conversation with that official, Kagan listed the NRA and KKK under the heading of “bad guy” organizations.262 To Kagan’s critics, this suggested she was “so hostile to gun rights that she would compare the top gun-rights organization in the United States with a viciously racist hate group.”263

Kagan’s past thus contained significant fodder for Senators interested in asking about gun issues at her confirmation hearings.264 Just a few hours before those hearings began, the U.S. Supreme Court focused further attention on guns by announcing its decision in McDonald v. City of Chicago.265 By a 5-4 vote, the Court held that the right to keep and bear arms applies to state and local governments through the Fourteenth Amendment’s due process clause.266 As with Heller, gun rights advocates cheered the result, but worried about the narrow margin of victory. In their view, the case underscored the need for close scrutiny of Supreme Court nominees like Kagan, for “the personal right of every American to own a gun hangs by a single vote on the Supreme Court.”267

261 Verbruggen, supra note 259.
262 Kagan’s notes, along with a memorandum from the Justice Department attorney working with her on the matter, were among documents released by the William J. Clinton Presidential Library and available at http://www.clintonlibrary.gov/KAGAN%20DPC%2021/DPC%20-%20Box%20007%20-%20Folder%20006.pdf#page=19).
263 Verbruggen, supra note 259.
266 Id.
McDonald decision also left some senators feeling betrayed by Sonia Sotomayor. Testifying at her hearing before the Judiciary Committee a year earlier, Sotomayor had said that she understood and accepted the Supreme Court’s decision in Heller as establishing that the Second Amendment protects an individual right, but Sotomayor nevertheless joined the dissenters in McDonald who found “nothing in the Second Amendment’s text, history, or underlying rationale that could warrant characterizing it as ‘fundamental’ insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes.”

While the circumstances suggested that Kagan might be subjected to a long and detailed interrogation about every aspect of her past work relating to guns, Senators spent surprisingly little time quizzing Kagan about those matters. Senator Jon Kyl asked about Kagan’s notes characterizing the NRA and KKK as bad organizations. Kagan claimed that she was merely jotting down things that someone else said and that equating the NRA with the KKK would be “ludicrous.” Senator Chuck Grassley asked Kagan about the Sandidge case and why, as Justice Marshall’s law clerk, she was “not sympathetic” to the petitioner’s Second Amendment claim in that case. Kagan explained how the legal landscape had shifted dramatically since 1987, when she reviewed


269 Sotomayor Hearing, supra note 208, at 68-69.

270 McDonald, 130 S. Ct. at 3120 (Breyer, J., dissenting, joined by Justices Ginsburg and Sotomayor). Of course, Sotomayor might argue that her dissenting vote in McDonald did not contradict her Senate testimony. For example, she might contend that she merely testified that she understood the Supreme Court’s ruling in Heller, not that she necessarily agreed with it and would vote to reaffirm it. She could also argue that believing the Second Amendment protects an individual right does not necessarily mean believing that right is fundamental in the sense required for incorporation into the Fourteenth Amendment. Compare David Kopel, Sotomayor Targets Guns Now; Justice’s Dissent Contradicts Confirmation Testimony, Wash. Times, June 30, 2010, § B, at 1, with Adam Shah, Conservative Media Figures Falsely Accuse Sotomayor of Testifying Untruthfully on Gun Rights, Media Matters for America, June 29, 2010, http://mediamatters.org/blog/201006290037.


272 Id.

273 Id.
the certiorari petition in Sandidge. At that time, there were no lower
court decisions finding the Second Amendment applicable to private,
individual activity unrelated to militia service. Twenty years later, when
the Supreme Court agreed to hear the Heller case, there was a distinct split
among the circuits, and the issue was ripe for review. Senator Grassley
also gave Kagan the opportunity to explain the suggestions she had made
about how the Clinton Administration should respond to the Printz
decision. Of course, Kagan’s explanations of these matters would not
persuade everyone, but at least the questioning gave her the opportunity
to tell her side of the story.

In many other respects, significant questions went unasked. No one inquired about the extent to which Kagan handled any of the
other significant gun control issues, such as trigger locks, gun shows, and
lawsuits against gun manufacturers, that arose while she worked for the
Clinton Administration. Indeed, no one asked Kagan about President
Clinton’s effort to ban imports of assault weapons, or why Kagan’s name
appeared on the cover sheet of the draft presidential memorandum on that
topic. Kagan’s critics trumpeted that issue as a key part of her record
of anti-gun extremism, and yet no senator on the Judiciary Committee
asked Kagan about the extent of her involvement in the matter. Kagan’s
opponents in the Senate often seemed to avoid asking questions that
would give Kagan an opportunity to undermine their criticisms of her.
Senator Jeff Sessions, for example, declared at the outset of the hearings
that Kagan was “the central figure in the Clinton-Gore efforts to restrict
gun rights,” but then had no questions for Kagan about any of the work
that she did on gun control issues.

Rather than asking questions to which Kagan might be able to
give a concrete answer, several Senators pressed her about the meaning of
the Second Amendment and the precedential significance of the Heller

274 Id.
275 Id.
276 Id.
277 Kagan Hearing – June 30, 2010, supra note 264; see supra notes 254-55 and
accompanying text.
278 See supra note 256-258 and accompanying text.
279 See, e.g., Brian Darling, Kagan Bad on Guns, HUMAN EVENTS ONLINE, May 14,
issue as “a ‘smoking gun’ that indicates Kagan’s extensive anti-gun activism”).
and *McDonald* decisions. These questions came from Senators on both sides of the political spectrum, with some worried that Kagan would be too quick to overrule these precedents and others fearing that she would be too reluctant to do so. These were basically rhetorical questions, for Kagan naturally provided the same generic response to them all. She would give the same respect to *Heller* and *McDonald* as any other Supreme Court precedents. She might vote to follow the precedents, and she might vote to overrule them if sufficient reasons existed for doing so. She would not make any promises more specific or binding than that. Senator John Cornyn complained that this was exactly the sort of vague explanation of stare decisis that Sonia Sotomayor had offered when asked about *Heller* at her confirmation hearings a year earlier, and yet Sotomayor had gone on to join the dissenter in *McDonald* and their conclusion that there is no fundamental constitutional right to keep and bear arms for private self-defense purposes.

Just after the hearing’s conclusion, the NRA issued a letter stating that it opposed Kagan’s confirmation because “throughout her political career, she has repeatedly demonstrated a clear hostility” to the right to keep and bear arms. The Judiciary Committee nevertheless soon voted to approve Kagan’s nomination and send it to the full Senate for consideration. During the Senate’s debate, the Second Amendment was one of the primary concerns raised by those opposed to Kagan’s confirmation. As evidence of her hostility to gun rights, Senators cited


284 Id.

285 Id.


288 See, e.g., 156 CONG. REC. S6614 (daily ed. Aug. 3, 2010) (statement of Sen. Kyl); *id.* at S6615 (statement of Sen. Inhofe); *id.* at S6624 (statement of Sen. Cornyn); *id.* at S6670-6671 (statement of Sen. Grassley); *id.* at S6675 statement of Sen. LeMieux); 156 CONG. REC. S6686-6687 (daily ed. Aug. 4, 2010) (statement of Sen. Hutchison); *id.* at S6694 (statement of Sen. Murkowski); *id.* at S6695 (statement of Sen. Chambliss); *id.* at S6702 (statement of Sen.
her unsympathetic response to the certiorari petition in the Sandidge case,289 her work for the Clinton Administration,290 her characterization of the NRA as a “bad guy” organization akin to the KKK,291 and even the fact that “[s]he grew up on the upper west side of New York.”292 Indeed, four of Kagan’s most determined opponents in the Senate presented a 47-minute colloquy devoted entirely to explaining how Kagan posed a grave threat to Second Amendment rights.293

During the debate, Senators repeatedly condemned Kagan on grounds that she was not asked to address when she testified before the Judiciary Committee. For example, several senators emphasized that a White House official, talking to newspaper reporters back in 1997, had described the Clinton Administration’s effort to restrict imports of assault weapons as a matter of “taking the law and bending it as far as we can to capture a whole new class of guns.”294 The Senators used that provocative quotation to suggest that Kagan wanted to ban guns and would distort the law to achieve that end, even though they had not raised the issue during Kagan’s hearing when she would have had a fair chance to explain the Administration’s policy and the role she played in crafting it.

Several Senators also attacked Kagan because, as Solicitor General, she did not file an amicus brief on behalf of the United States in the McDonald case.295 Although no one asked Kagan about this during her

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291 Id. at S6760.
295 156 Cong. Rec. S6694 (daily ed. Aug. 4, 2010) (statement of Sen. Murkowski); id. at S6697 (statement of Sen. Thune); id. at S6702 (statement of Sen. Shelby);
confirmation hearing, one Senator, Lindsay Graham, included it among his supplemental questions submitted to Kagan in writing after the hearing. Kagan had a rather compelling explanation. Decisions about incorporation, such as *McDonald*, have no direct impact on the federal government. They are really the business of state and local governments, and therefore the federal Office of the Solicitor General had a longstanding tradition of not taking a position on incorporation questions. Kagan’s opponents in the Senate ignored that explanation. Indeed, they not only insisted that Kagan’s failure to file a brief demonstrated her intense hostility to Second Amendment rights, but also wrongly suggested that Kagan was unwilling to explain the matter because a privilege shielded her decisionmaking from scrutiny.

The Senate confirmed Kagan by a vote of 63 to 37. Like Sotomayor, Kagan won the support of nine Senators with “A” ratings from the NRA. Some political pundits saw the result as a “significant rejection” of the NRA’s lobbying and “a signal that Senate Democrats – and a number of Republicans – are willing to buck the group that likes to position itself as the thousand-pound gorilla of legislative lobbying in Washington.” Others saw no reason to think the NRA had lost its

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clout and predicted that Senators would still “scurry like scared rabbits the next time an NRA vote of consequence comes up.”302 The one thing on which virtually all observers could agree is that the Senate continues to grow ever more partisan and polarized in its handling of Supreme Court confirmations.303

V. Conclusion

Guns are likely to remain a significant topic of discussion for future nominations. *Heller* and *McDonald* were 5-4 decisions, after all, and so when one of the majority’s five members leaves the Court, the scrutiny of the nominated replacement’s attitudes toward guns will be particularly intense. Moreover, even if, as I suspect, *Heller* and *McDonald* will never be expressly overruled, their real effect remains to be determined. Although the Supreme Court decided important questions about the scope of the right to keep and bear arms, questions of even greater practical significance remain unanswered. How strong is this right? Will it have virtually no effect on gun laws other than in the few jurisdictions that have handgun bans, or will it imperil a wider array of legal restrictions and controls on guns? What level of scrutiny will courts use to determine what laws infringe the right? The Supreme Court presumably will address these questions at some point in the future, and its answers will determine the real ultimate impact of what the Court did in *Heller* and *McDonald*.

Of course, nominees are unlikely to say how they will decide future cases. Therefore, senators need to find ways to talk to nominees about guns without directly asking how they would rule on the particular legal issues that could come before the Court. Even when nominees try not to reveal their views on unresolved questions, much can be gleaned from the ways in which they describe the past cases or the ways in which they talk about the questions likely to come up in the future. For example, during

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their respective confirmation hearings, Stephen Breyer and John Roberts both gave stronger clues about their Second Amendment views than they probably intended. 304

Senators also might try asking about guns purely from a policy perspective rather than as a constitutional issue. For example, senators might ask a nominee whether, as a voter or legislator, she would support various types of laws such as a ban on machine guns, a measure allowing college students to carry concealed guns on campuses, or a provision requiring all sellers at gun shows to conduct criminal background checks on gun purchasers. Again, senators could take the constitutional aspect of these issues off the table simply by asking the nominee to assume these measures would be constitutional and to explain whether she would support them as a policy matter. The answers might reveal a great deal about the nominee’s overall perspective and inclinations toward gun issues without directly calling for answers about future cases that could come before the Court.

The confirmation process is far from perfect, but the face-to-face dialogue between nominees and senators can promote more precise and reasoned consideration of important issues. For both Samuel Alito and Sonia Sotomayor, for example, the hearings performed that function and provided some antidote to the strident and simplistic characterizations being made about the nominee’s views outside the Senate’s hearing room. A reasonable and thoughtful airing of differing views about guns at Supreme Court confirmation hearings will not eliminate the bitterness and stubbornness that pervades the debate over guns in America, but it is at least a small step in the right direction.

304 See supra notes 73-85 and accompanying text.
It is a widely accepted fact that the firearm mortality rate in the United States exceeds that of any comparable nation. One careful cross-national study of the subject found American rates to be so “exceptionally high” that it had to present them in a category of their own. Homicide deaths by firearm in the United States, it found, were nineteen times higher than those of other high-income nations.¹

This article explores why, from a historical perspective, “our culture grants a far broader license to private individuals to use violence for private ends” than that of other nations, and how this has become “an artifact of pre-existing cultural traditions.”² It is not the purpose of this article to question the historical existence of such violence, which is overwhelming, but to question its historical normativity – that is, to ask why our culture has granted such a “license.”

As a descriptive matter, such violence has become a tradition; as a normative matter, by contrast, it is very much an invented tradition. What is invented, that is, is not the fact of its existence, but rather its elevation to a normative status which distorts the past and grants this tradition constitutional acknowledgment. What once was a regrettable and embarrassing fact of life has become a widely accepted, and often admired tradition.³

This general phenomenon has been described and studied most closely by two British historians, Eric Hobsbawm and Terence Ranger. Hobsbawm defines it as follows:

3 This phenomenon was indelicately described by the character played by John Huston in the film “Chinatown”: “Of course, I’m respectable. I’m old. Politicians, old buildings, and whores all get respectable if they last long enough.” CHINATOWN (Paramount Pictures 1974).
“Invented tradition” is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behavior by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.4

This definition accurately describes the way that the majority opinion in District of Columbia v. Heller5 has rewritten the past to provide a comforting and simplistic vehicle for the transformation of the “right of the people to keep and bear arms” from a collective civic model to an individual one. More directly to the point, the invention of tradition serves as a way to understand this process and its particular applicability to recent decades, in which a self-styled “standard model”6 of an individual right has emerged. In explaining the reason why societies distort history to create “a suitable historic past,” Hobsbawm’s observation is as true today as it was for the examples that he and Ranger draw from centuries ago:

[W]e should expect it to occur more frequently when a rapid transformation of society weakens or destroys the social patterns for which ‘old’ traditions had been designed, producing new ones to which they were not applicable, or when such old traditions and their institutional carriers and promulgators no longer prove sufficiently adaptable and flexible, or are otherwise eliminated . . . .7

The use and abuse of history by the Supreme Court is a story well known to historians and legal scholars, and it need not be revisited

7 Hobsbawm, supra note 4, at 4-5.
here. So, too, is the damaging impact of the Court’s history as precedent for corrupting subsequent decisions, a phenomenon already apparent in *McDonald v. Chicago.* Although Sir William Blackstone described the right of English subject to have “arms for their defence, suitable to their condition and degree, and such as are allowed by law” to be one of their “auxiliary subordinate rights,” Justice Scalia, in *Heller,* elevated it as “fundamental for English subjects.” For Justice Alito’s purpose of incorporating the Second Amendment and applying it to the states, this English right then became fundamental to our Nation’s particular scheme of ordered liberty and system of justice.

The purpose of the present article, rather, is to argue that the greater damage of created “traditions” occurs outside the courtroom. When given constitutional status, these invented traditions become norms, and they reinforce popular beliefs. It is true that “[j]udicial opinions frame legal arguments and structure much of the law,” but, in doing so, they wind up structuring societal norms. When judges invent a version of the past and anoint it as “tradition,” they give it legitimacy as normative in

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8 The literature on this matter is voluminous. Even those not addressing misuse in application to specific matters is too long to include here. For a brief overview of the general question, one should begin with Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 Sup. Ct. Rev. 119 (1965), follow the chronological development of the critique in Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History,* 13 J.L. & Pol. 809 (1997), and then move to more recent discussions in Matthew J. Festa, *Applying a Usable Past: The Use of History in Law,* 38 Seton Hall L. Rev. 479 (2008), and Jeffrey S. Sutton, *The Role of History in Judging Disputes about the Meaning of the Constitution,* 41 Tex. Tech L. Rev. 1173 (2009).

9 130 S. Ct. 3020 (2010).

10 1 William Blackstone, *Commentaries* *1* 43-44.

11 *Id.* at *1* 41.


13 *See McDonald,* 130 S. Ct. at 3042. The experience of Reconstruction offers another example. For more on how a “great civil war” developed into a war of words, laws, and narrative histories” over the historical meaning of slavery, “and how a victory in the battle of historical description affected constitutional decision-making,” see Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* 1 (1999).

14 Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* 172 (2009).
the lives of the people. It is elevated to the status of higher law, justifying its extralegal application as superior to the mundane status of enacted law. Indeed, its normative cultural authority has an impact on the political system, sapping the political will of elected representatives.

Put bluntly, once a court uses the past as a foundation for an opinion, the court redefines the meaning of the past and gives a new, expanded use for that past to a court with a much broader jurisdiction – the court of public opinion, whose black letter law is the dreaded conventional wisdom. When judges re-write history, they give it legitimacy that serves their needs and the needs of the regime they lead. That is, historical argument, when employed to give a decision more constitutional authority, confers social and political constitutive authority. Hence, if the history of such reinventions is any guide, the majority opinion in Heller will have influence beyond the immediate impact on the regulation of firearms. The popular notion of what it means “to keep and bear arms” has been given an expansive cultural definition that far exceeds the narrow legal definition.

This phenomenon cuts across the ideological spectrum. As Frederick Schauer writes,

[W]hen a court provides a reason for a decision, it gives a justification necessarily broader than that decision…. Just as providing a reason for an outcome ordinarily takes the outcome to a greater level of generality, so too does providing a reason for a reason – or a reason for a rule or a reason for a principle.15

Schauer gives the example of *Griswold v. Connecticut*,16 whose holding was based on “a reason broader than the outcome in the case and broader even than the rule that the reason justified.”17 The result was that “the right to privacy was henceforth available as a legitimate reason for a conclusion in cases not involving contraception at all.”18 So, too, with

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15 Id. at 176-77.
16 381 U.S. 479 (1965).
17 Schauer, supra note 14, at 177.
18 Schauer, supra note 14, at 177. Cass Sunstein has a contrary response to both *Griswold* and *Heller*. He writes, “In *Griswold*, the Court proceeded in minimalist fashion, with its holding focusing narrowly on the law before it. The same is
*McDonald:* where Blackstone had limited the use of deadly force to repel capital crimes, Justice Alito cites Blackstone’s comment out of context, extending it to property crimes as well.

This article looks more closely at *Heller* in this context, as well other infamous decisions that are confidently asserted as orthodox versions of history that have poisoned American identity: *Johnson v. Mc’ Intosh* and *Dred Scott v. Sandford.* What links those decisions with *Heller* is their shared overreaching and invention of traditions that have more impact on the future than they had on the reality of the past.

In their opinions, John Marshall, Roger Taney and Antonin Scalia were, to be sure, doing nothing new – and that is precisely the point here. Legal writing confers an imprimatur on a version of the past, making the judiciary a significant shaper of national culture. Alongside Shakespeare, for example, Sir Edward Coke did much to create the image of what it meant to be an Englishman living in a common law regime; the playwright and the judge did so by rewriting national history and, through the force of their genres, by entrenching it in the popular mind. Coke’s “disregard for contexts” and his creative use of dubious or slender precedents established the common law as a continuous thread of liberty reaching into the immemorial English past. What Coke wrote in his Reports, comments the great English legal historian Plucknett, was “an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history.” Nevertheless, Plucknett concedes, “even if a particular passage is in fact Coke’s comment, and not part of the case he purports to have reported, it is none the worse

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19 William Blackstone, *Commentaries* *181-82.*
21 21 U.S. 543 (1823).
22 60 U.S. 393 (1857).
In writing his Institutes, Coke would turn to the Yearbooks and “cite authorities from them on any proposition from any century in English history.” Whether he was stretching precedent or rewriting history did not matter; Coke’s office gave it authority and made it part of England’s popular tradition of the meaning of law.

By the time John Marshall decided *Johnson v. M’Intosh* in 1823, there was already a tradition of forcible removal of Native Americans from their lands. The actual nature of their rights to the soil, however, remained uncertain. In the Supreme Court’s first great case involving Native American lands, *Fletcher v. Peck*, it was argued by counsel that the Indians’ title “is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited.” Counsel then asserted a version of history to prove the argument: “The Europeans found the territory in possession of a rude and uncivilized people, consisting of separate and independent nations. They had no idea of property in the soil but a right of occupation.” The Court, however, did not accept the point, and concluded “that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.”

Thirteen years later the legal point remained unsettled, although what G. Edward White aptly calls “the implicit ideological boundaries that framed the issue of ‘Indian rights’ in early-nineteenth-century America” had become clear. Marshall elevated ideology to law by rewriting history in his decision in *M’Intosh*. “We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits,” he wrote. Marshall continued on, legitimating

25 Id.
26 Id. at 282.
27 Id. at 281-83.
28 10 U.S. 87 (1810).
29 Id. at 121.
30 Id. at 122.
31 Id. at 142-43.
33 Johnson v. M’Intosh, 21 U.S. 543, 588 (1823).
the historical fact of physical dispossession34: “[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”35 Marshall did not give free rein to the use of private violence by white settlers, but he expressed a trust in their restraint:

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest.36

Nevertheless, resistance required response:

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.37

Marshall then asked and answered the question, “What was the inevitable consequence of this state of things?”38

The Europeans were under the necessity either of

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35 *M’Intosh*, 21 U.S. at 588.

36 *Id.* at 589.

37 *Id.* at 590.

38 *Id.*
abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.39

Though the Puritan religious mission that fueled the bloody nearextermination of the “godless” and “heathen” aboriginal populations of New England in the seventeenth century had faded, it was replaced more than adequately by a secularized version that ran from “Manifest Destiny” to the discovery doctrine in the nineteenth century. Thus anointed, the dispossession of the native America proceeded.40

Kept alive throughout the nineteenth century, the paradigm of reliance on firearms as defense against the dispossessed and conquered called on memories of the Alamo and Little Big Horn; it was given wide exposure in traveling “Wild West” shows such as Buffalo Bill’s,41 and popularly spread by such works as Theodore Roosevelt’s The Winning of the West.42 Typical of Roosevelt’s language was his description of the early encounters in the colonial period:

The valley of the Ohio already belonged to the Americans by right of conquest and of armed possession; it was held by rifle-bearing backwoods farmers, hard and tenacious men,

39 Id.
41 On justifying violence to “retaliate against massacres,” see Richard White, When Frederick Jackson Turner and Buffalo Bill Cody Both Played Chicago in 1893, in Frontier and Region: Essays in Honor of Martin Ridge 201 (Robert C. Ritchie & Paul Andrew Hutton eds., 1997).
42 Theodore Roosevelt, The Winning of the West: Part IV 7-8 (1906) available at http://www.munseys.com/disktwo/westthree.pdf. Apropos of firearm violence, it is worthy of note here that when Roosevelt ascended to the Presidency on the shooting death of President William McKinley, he was recovering from a gunshot wound from a would-be assassin.
who never lightly yielded what once they had grasped. North and south of the valley lay warlike and powerful Indian confederacies, now at last thoroughly, alarmed and angered by the white advance; while behind these warrior tribes, urging them to hostility, and furnishing them the weapons and means wherewith to fight, stood the representatives of two great European nations . . . .

Though legal right had come through military conquest, it was “rifle-bearing backwoods farmers” with their own firearms who had made it a reality. “The entire frontier of this region,” a sitting president intoned, “was continually harassed by Indians; and it was steadily extended by the home-planting of the rifle-bearing backwoodsmen.”

Only when there existed no “frontier” to conquer and no threat of Native American resistance could a counter-narrative emerge, although its origin in academic discourse limited its force and denied it the emotional power of the popular heroic-armed tradition. Frederick Jackson Turner, inventing his own tradition of a vacant West occupied by peaceful farmers who created a tradition of liberal democracy, was not taken in by the myth of the “winning of the West.” In his classic 1893 essay, *The Significance of the Frontier in American History*, he conceded the fact of such violence, but he rejected it as a component of the American character. Instead, it was the elimination of such forces that characterized American identity. Acknowledging the popularity of such a myth nonetheless, he countered in a footnote:

> I have refrained from dwelling on the lawless characteristics of the frontier, because they are sufficiently well known. The gambler and desperado, the regulators of the Carolinas and the vigilantes of California, are types of that line of scum that the waves of advancing civilization bore before them, and of the growth of spontaneous organs of authority where legal authority was absent . . . . The humor, bravery, and rude strength, as well as the vices of the frontier in its worst aspect, have left traces on

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43 *Id.*

44 *Id.* at 7.
American character, language, and literature, not soon to be effaced.\(^45\)

That such “vices” were not effaced as myth was glorified over history, and, indeed, they would grow stronger with such an imprimatur. The fact of such violence, as Turner’s astute (but largely forgotten) footnote makes clear, is undeniable. As Richard Slotkin observes, “the spectacular mythologies of violence purveyed by mass media are supported, in this country, by powerful local, regional, and familial cultural traditions, which in turn have their roots deep in our communal history.”\(^46\) What is invented, that is, is not the fact of its existence, but rather its elevation to normative status that badly distorts the past and invents it as a tradition to be given constitutional acknowledgement.

Roger B. Taney’s self-described “opinion of the Court” in *Dred Scott* not only had immediate constitutional implications, but its portrayal of African Americans’ place in the Nation’s history has done far more long-lasting damage. Taney’s history might be assailed by others, but it was his “opinion of the Court” that was read in newspapers across the country. The decision did not create the racist attitudes it expressed any more than the words of John Marshall or Theodore Roosevelt spawned the violence that dispossessed Native Americans. But it did give legitimacy to those attitudes. Taney’s own view of American history was inscribed as canon, and although the Constitution was amended to strip the *Dred Scott* decision of constitutional authority, it retained a perverse moral authority. His opinion thus passed on to the future those “deep and enduring marks of inferiority and degradation” that he emphasized from the past.\(^47\) As Frederick Douglass described this effect,

\begin{quote}
The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality . . . . While the institution has been outlawed, it
\end{quote}


\(^{46}\) Slotkin, *supra* note 2, at 55.

\(^{47}\) *Dred Scott v. Sanford*, 60 U.S. 393, 416 (1857).
has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die.48

Brook Thomas, in explaining how Douglass’ description acknowledged a judicial opinion’s power to fix a lasting stigma, draws on Alfred H. Kelly’s classic critique of “the creation of history a priori by what may be called ‘judicial fiat’ or ‘authoritative revelation.’”49 More than a century later on a case originating in the same city where Dred Scott began his lawsuit, the Supreme Court acknowledged that despite the legal eradication of slavery and its “badges,” its stigma “has remained in the minds and hearts of many white men.”50

Taney had to rewrite history in order to establish that no African Americans, even those who were not slaves, “were citizens of the several States when the Constitution was adopted.”51 The necessary proof, he stated confidently, was obvious in the historical record:

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.52

It was clear, he continued, that Africans in America “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man

49 Thomas, supra note 48, at 249, 252-53 (quoting Kelly, supra note 8, at 122).
51 Dred Scott, 60 U.S. at 407.
52 Id.
was bound to respect.”53 Invoking the public understanding of his own era, he extrapolated it backwards in time to state that “no one seems to have doubted the correctness of the prevailing opinion of the time.”54 Taney was presenting the history of public opinion, however, not of law.

Associate Justice Benjamin Curtis’s dissent challenged both the law and the history that Taney relied on. He, too, would “inquire who were citizens of the United States at the time of the adoption of the Constitution.”55 But his answer directly denied Taney’s claim:

> Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.56

Taney was not inventing a cultural tradition of racism, nor, for that matter, a legal tradition of discrimination; instead, he was imposing a false narrative of social and legal consistency. To meet the challenge of antislavery in Antebellum America, proslavery apologists construed a normative narrative of slavery based on racial inferiority to deny the increasingly insistent demands of abolitionists, both black and white.57 Taney’s opinion gave racism and slavery the moral authority of the higher law through constitutional recognition.58

53 Id.
54 Id.
55 Id. at 572 (Curtis, J., dissenting).
56 Id.
57 For a more extensive treatment of this oversimplification of the past as a response to African American claims of citizenship dating from the Revolution, see David Thomas Konig, Constitutional Law and the Legitimation of History: The Enduring Force of Roger Taney’s “opinion of the court,” in The Dred Scott Case: Historical and Contemporary Perspectives on Race and Law 9-24 (David Thomas Konig, Paul Finkelman & Christopher Alan Bracey eds., Ohio University Press 2010).
58 Taney’s forensic strategy would be followed by other courts. For a prime example of the invention of a constitutional tradition employed “to compel a
Taney’s invention of African Americans’ status in society parallels the Supreme Court’s treatment of the militia origins of the Second Amendment; that is, the Court has read the militia origins out of the Second Amendment, thereby inventing a new version of the past.

To further illustrate: John Trumbull’s painting of “The Battle of Bunker Hill” shows a black soldier (Peter Salem, a free man) holding a musket next to patriot Lt. Thomas Grosvenor. A 1798 engraving made from Trumbull’s work shows the same. Later engravings, however, removed Salem from the image. Thus, few Americans were brought up knowing of the arms-bearing contributions that African Americans made to American Independence, or, for that matter, of their possessing the citizenship rights that Taney’s “opinion of the Court” denied categorically. Taney may have been right that by 1857 most Americans would agree with his statements, but that was not the case in 1789. Racial and political attitudes had changed dramatically; but instead, Taney created an unbroken continuity of history where past and present were the same.

Heller’s majority opinion reveals the same methods of judicial invention of tradition. Central to Justice Scalia’s reasoning is the existence of a traditional individual right of self-defense in the Second Amendment: “Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” To give this tradition legal and moral significance, he quotes a speech by Senator Charles Sumner. Scalia presents a fragment of this two-day oration on the Senate floor in 1856 to serve as legitimacy for a tradition that was, in itself, an invented tradition. The Massachusetts Senator, an outspoken opponent of slavery, was assailing armed “border ruffians” who were subverting the popular sovereignty of the people of Kansas through violent intimidation and murder. Justice Scalia offers Sumner’s warning that the free-soil settlers, while in danger for their lives, were being denied their constitutional right to bear arms in their own defense. Invoking a continuous tradition of bearing arms for noble purposes, Scalia quotes at length from Sumner:

next decision, as if it were inexorably linked to the historical pattern,” see Martha Minow, We, the Family: Constitutional Rights and American Families, 74 J. Am. Hist. 959, 962 (1987).


The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest. Never was this efficient weapon more needed in just self-defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached. And yet such is the madness of the hour, that, in defiance of the solemn guarantee, embodied in the Amendments to the Constitution, that ‘the right of the people to keep and bear arms shall not be infringed,’ the people of Kansas have been arraigned for keeping and bearing them, and the Senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed – of course, that the fanatics of Slavery, his allies and constituents, may meet no impediment.61

Asserting this to be an example of the use of arms “for traditionally lawful purposes,” Scalia declares this assumption to be all but universal at the time: “We have found only one early 19th-century commentator who clearly conditioned the right to keep and bear arms upon service in the militia . . . .”62

As with many of the historical references in the Heller decision, Scalia took Sumner’s quoted statement out of the actual context of the speech itself and from its larger historical context. Had he looked more closely at Sumner’s speech, in particular the paragraphs immediately before and after this quotation, Scalia would have found that Sumner was invoking a collective militia right for the antislavery Kansans, more specifically, the republican right to organize into effective, communal militias. The settlers whose right to self-defense he championed were actually members of militias, such as the Kansas Legion, whose weapons were not their personal “tutelary protector[s] against the red man and the beast of the forest,” but rather modern breech-loading rifles provided by New England antislavery groups. The Boston abolitionist Amos

61 Id. at 2807 (quoting Senator Charles Sumner, The Crime Against Kansas (May 19–20, 1856), in American Speeches: Political Oratory from the Revolution to the Civil War 553, 606-07 (Ted Widmer ed., 2006)).
62 Id.
Lawrence said of such support, “When farmers turn soldiers they must have arms.”63 The men who constituted these groups were not acting as individuals, but as “soldiers” armed with cannon and howitzer, as well as modern Sharps rifles. The Sharp rifles were the famous “Beecher’s Bibles,” shipped to Kansas by abolitionists supplying superior firepower over the personal weapons of the Missourians. Contributors to the cause were given a certificate with the Second Amendment, with the term “FREE STATE” capitalized.64

Consulting the entire speech, then, one discovers that Sumner was not defending any individual right, but rather he was responding to Senator Andrew Butler of South Carolina, who called for the disarming of the Kansas free-soil militias. Butler, quoted by Sumner, demanded that the President “serve a warrant on Sharpe’s [sic] rifles.”65 His allusion to the Sharp’s rifles had a clear public meaning at the time: it was an easily recognized “byword”66 because the “very name ‘Sharps rifle’ became a term to sober the border ruffian and give him serious pause.”67 The constitutional meaning of Sumner’s remarks—a bold call to civic republican values68—actually stands for the opposite of what the Heller majority uses them to show. To argue otherwise is to invent a “traditional” meaning of the Second Amendment. Justice Alito uncritically accepts this invented tradition.69

It is also important to address, however, Sumner’s reference to the use of a personal weapon “against the red man and the beast of the forest.” This moral or natural rights invocation of personal self-defense is open to serious doubt for the purposes of the Heller majority. As slavery became

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65 Sumner, supra note 61, at 606. Sumner’s personal attacks on Butler were the reason for his being violently assaulted on the Senate floor several days later by Butler’s cousin, South Carolina Congressman Preston Brooks.
66 Iseley, supra note 64, at 547.
67 Id. at 553.
68 On Sumner’s address as an expression of civic republicanism (as opposed to individualism), see Michael William Pfau, Time, Tropes, and Textuality: Reading Republicanism in Charles Sumner’s “Crime Against Kansas,” 6 Rhetoric & Pub. Aff. 383 (Fall 2003).
69 See McDonald v. City of Chicago, 130 S. Ct. 3020, 3038 n.17 (2010).
more securely protected by formal legal and constitutional mechanisms, antislavery rhetoric had to frequently invoke a “higher law” that trumped existing legal protections, employing, as Robert Ferguson labels much of the legal rhetoric of this era, “symbolism and exaggeration.”

Seeking a “higher truth” beyond the law of the land, Americans “learned to accept and engage in distortions of mundane reality to achieve that goal,” and readily accepted appeals to the extralegal in their courtrooms. Commentary on *Heller* has, in fact, raised the use of firearms for self-defense to the status of a “natural right.” This label confuses an absolute right that might have existed in a prepolitical state of nature with a right that is recognized but defined by law once society is constituted politically.

Sumner’s description of the pioneer’s rifle as the “tutelary protector against the red man and the beast of the forest” conjures the notion of the individual and his rifle. But it must be placed in context by investigating the linguistic usages of the day, for it, too, is part of an invented tradition. The statement echoes nostalgia of a bygone age where rugged individualism once prevailed, but was later replaced by the institutions of a civilized society living under legal rules. Sumner’s rhetorical reference to the self-reliant frontiersman invokes a popular literary convention of the age, one best represented by Natty Bumppo, also known as Leatherstocking, the central character in James Fenimore Cooper’s *The Pioneers.* In *The Pioneers*, Leatherstocking is arrested for resisting arrest by pointing his rifle at a magistrate who attempts to serve him a warrant and search his hut. Standing before a judge, he is asked, “Would any society be tolerable, young man, where the ministers of justice are to be opposed by men armed with rifles?” Given the violence on the frontier, the judge continues, “it becomes doubly necessary to protect the ministers of the law.” Leatherstocking is unconvinced. His answer

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71 *Id.* at 127.
72 *Id.* at 141.
appeals to an era that the public hungered for; one that, in the East, was fading even in 1823. “Talk not to me of law, Marmaduke Temple,” he retorts to the judge. Using one of the more common tropes of the time (and one used by Sumner), he asks, “Did the beast of the forest mind your laws, when it was thirsty and hungering for the blood of your own child”\textsuperscript{75}

As Perry Miller explains, this courtroom encounter epitomizes an American mythic tradition of elevating the individual man of nature living ruggedly alone outside the law.\textsuperscript{76} It is, like so many traditions, an invented one constructed in response to the passing of an age. Historian Alan Taylor’s Pulitzer Prize winning study of the Cooper family notes that the author gave Leatherstocking “a full and sympathetic hearing,” but that his way of life is ultimately revealed to be “doomed and properly so.”\textsuperscript{77} As invented tradition, Cooper’s story and its characters offer “an intensely reimagined past as an act of reverie and repossession.”\textsuperscript{78}

It is this “tradition” that the \textit{Heller} decision reinvents and reinforces. With a respondent seeking a firearm for self-defense, it speaks to a tradition of justifying the use of violence as a response to violence. The fear of slave revolts gave great impetus to the idea of self-defense. Samuel Colt unselfconsciously admitted as much when reminiscing about the invention of the revolver. Referring to himself in the third person, Colt recalled:

Mr. Colt happened to be near the scene of a sanguinary insurrection of negro slaves, in the Southern district of Virginia. He was startled to think against what fearful odds the white planter must ever contend, thus surrounded by a swarming population of slaves. What defense could there be in one shot, when opposed to multitudes, even

\textsuperscript{75} Perry Miller, \textit{The Life of the Mind in America: From the Revolution to the Civil War} 100-101 (1965) (discussing Cooper, \textit{supra} note 74).

\textsuperscript{76} \textit{Id.} Brook Thomas builds on Miller’s point: “If \textit{The Pioneers} does not directly reflect a historical reality, it does offer a persuasive way to narrate the conflict between the individual and the law that so many Americans have felt.” Brook Thomas, \textit{Cross-examinations of Law and Literature: Cooper, Hawthorne, Stowe, and Melville} 22 (1987).

\textsuperscript{77} Allan S. Taylor, \textit{William Cooper’s Town: Power and Persuasion on the Frontier of the Early American Republic} 420 (Knopf 1995).

\textsuperscript{78} \textit{Id.} at 7.
though multitudes of the unarmed? The master and his family were certain to be massacred. Was there no way, thought Mr. Colt, of enabling the planter to repose in peace? no longer to feel that to be attacked, was to be at once and inevitably destroyed? that no resistance could avail, were the negroes once spirited up to revolt? . . . The boy’s ingenuity was from that moment on the alert.\textsuperscript{79}

Colt’s invention had more than regional appeal. Within a half-century, it contributed not only to the armed night riders of the Reconstruction South but to an unwritten “Code of the West” and, for that matter, a national gun culture. Law then followed culture: in the mid-nineteenth century, judicial decisions and statutes steadily eroded legal restraints on justifiable use of deadly force under the principle of “self-defense.”\textsuperscript{80} By 1877, in an appellate decision carefully analyzed and contextualized in this culture by historian Richard Maxwell Brown, the Indiana Supreme Court cited “the tendency of the American mind” as authority to support its holding that self-defense need not require a duty to retreat from the potential harm.\textsuperscript{81} Indeed, the court wrote that the right of self-defense was “founded on the law of nature; and is not, nor can be, superseded by any law of society.”\textsuperscript{82} In 1921, Justice Oliver Wendell Holmes would begin his opinion of the same doctrine in \textit{Brown v. United States}\textsuperscript{83} by confessing, “[t]he law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature.”\textsuperscript{84}

The new doctrine was not without its harsh critics. In 1903, after a series of state decisions but before Holmes’s \textit{Brown} opinion, Professor Joseph H. Beale responded with two law review articles.\textsuperscript{85} He reserved

\begin{itemize}
\item \textsuperscript{81} \textit{Runyan v. State}, 57 Ind. 80, 1877 WL 6854, at *3 (1877).
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} 256 U.S. 335 (1921).
\item \textsuperscript{84} \textit{Id.} at 343.
\item \textsuperscript{85} \textit{Brown}, supra note 80, at 24-26 (describing Beale’s counterattack in two articles: Joseph H. Beale, Jr., \textit{Homicide in Self-Defence}, 3 Colum. L. Rev. 526
\end{itemize}
his stronger assault for the *Harvard Law Review*, where he dissected the legal arguments applied as “the ethics of the duelist, the German officer, and the buccaneer.” He acknowledged that the “hip-pocket ethics of the Southwest are doubtless based on a deep-felt need,” but that those claiming self-defense were now pleading it in the courtroom in defense of deadly force in situations that threatened honor rather than life, and that judges were elevating it to doctrine. “The feeling at the bottom of the argument is one beyond all law,” he argued, and courts should not place their imprimatur on them as encouragement to others. In concluding his article, he distinguished between natural impulses and the rule of law:

> But, after all, such feelings . . . are merely the natural uncontrolled impulses of the individual; and it is to control such feelings, both forcibly and by putting an end to the necessity for their exercise, that law itself exists.

The invention of a normative tradition of legally sanctioned gun use reminds us that judges have a powerful voice in shaping the public opinion that then returns as pressure on government institutions. Justice Scalia’s invention and endorsement of tradition in a Supreme Court opinion is nothing new. Indeed, one aspect of his insistence on returning to a faithful embodiment of constitutional ideals as understood at the Founding ironically embodies an ideal of the Founders: namely, that of the Supreme Court justice acting as “schoolmaster.” Ralph Lerner applies this term in his 1967 essay revisiting the history and dynamics of the well-known “close connection between judicial power and public opinion.” Lerner could go back to Tocqueville, and beyond, to observe that in the early republic the needs of a stable democracy “thrust [the judge] – and the whole machinery of justice – into the role of an educator, molder, or guardian of those manners, morals, and beliefs that sustain republican

(1903) and Joseph H. Beale, Jr., Retreat from a Murderous Assault, 16 Harv. L. Rev. 567 (1903)).

86 Beale, Retreat from a Murderous Assault, supra note 85, at 577.
87 Id. at 580.
88 Id. at 581.
89 Id. at 582.
government.” As a result, “the earliest generation of national judges consciously acted as statesmen-teachers.” Indeed, they were “expected . . . to engage in high political education.”

Lerner provides numerous examples of this role as assumed by Supreme Court justices instructing federal grand juries on circuit. “Whether the Justice should teach the public is not and cannot be in question,” observes Lerner, “since teaching is inseparable from judging in a democratic regime.” But, referring to his readers as students of the Supreme Court, he cautions “whether the Justice has taught well . . . is highly debatable.” Our earliest Supreme Court justices rode circuit, and their directions to grand juries (circuit courts were the primary trials courts of first instance in the new nation) necessarily conveyed judicial ideology.

The ideological quality of the Heller decision hearkens back to the didacticism of the early Court, and, in presenting its own version of the past as fact, it exercises the more modern role of judicial fact finding at the appellate level. When applied to cases of profound national importance, that role, for example, has come under criticism when ill-equipped judges evaluate scientific evidence. It might be questioned with equal skepticism when judges try to evaluate history. Although there may not be millions of dollars at stake, like in Daubert v. Merrell Dow Pharmaceuticals, these cases are no less serious because of their pervasive social impact. Citizens interpret the law as they wish, as did the jury in 1993 that acquitted a Louisiana man who shot and killed a Japanese exchange student he mistook for an intruder. The stakes at the legislative level are even

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91 Id. at 128.
92 Id. at 129.
93 Id. at 180.
94 Id.
95 Examples of the justices’ charges to grand juries abound in 2-3 Documentary History of the Supreme Court of the United States, 1789-1800 (Maeva Marcus ed., 1988).
higher, as states respond to the holdings of *Heller* and *McDonald* to conform their laws to the new and looser constitutional standards. The impact of a popular wisdom of “tradition” on firearms legislation will be especially heavy and similar to that observed by Elizabeth Warren of legislative attempts to apply social science findings to commercial law:

> In the rough and tumble world of legislative policy-making and campaigns to shape public opinions, there is no Daubert, no concept of junk science, no datum too filthy or too bizarre to be barred from the decision-making process. Instead, when legislative decision-making is at stake, the free market of the economists’ happiest dreams exists: an unrestricted and rough world of competing ideas, information, and misinformation that parties will evaluate based on quality signals – and their own idiosyncratic needs.98

Today’s political culture has embraced an invented tradition that rejects the older republican one and eagerly embraces a version of the past presented by expert witnesses immune to liability. “Dismay at massive change,” writes David Lilienthal, “stokes demand for heritage.”99 The heritage being supplied is an invented tradition of broad attractiveness. The symbolic manifestation of this concept, as applied to the historical “right to keep and bear arms,” has been astutely noted by Saul Cornell; he points to the individualist motif in Concord Minuteman and its transformation from an image to “encourage civic participation and collective sacrifice” in World War II, to “a more individualistic and antigovernment ethos.”100 Explaining this confluence of cultural need and politics, John Bodnar sums up much historical analysis of the second half of the twentieth century to remark, “[i]n recent decades the power of the nation-state has been contested to a greater extent, and public expressions of vernacular

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That “vernacular memory,” “heritage,” or “tradition” provides powerful support for public policy and behavior.

It is for that reason that Heller’s legacy will be so powerful. The Court’s role as schoolmaster represents not only an irony, but a distortion of the ideal as originally meant by the Framers. If the historic role of judge-as-schoolmaster is to be accepted, the notion of republican citizenship behind it must also be accepted. The two cannot be separated any more than the preamble can be separated from the Second Amendment. The lesson – and the justification for the lesson – was republicanism. It is no accident that the classroom which Lerner identifies as the forum for such teaching was a republican institution – the grand jury. The message expressly rejected as heresy Patrick Henry’s belief that “[t]he real rock of political salvation is self-love, perpetuated from age to age in every human breast, and manifested in every action.” The message was commitment to law and republican institutions, not the assertion of any individual or natural right. A justice cannot claim the role of republican schoolmaster and simultaneously reject republicanism, as Scalia does in Heller.

The distortion involves the judicial duty envisioned by the

101 John Bodnar, Remaking America: Public Memory, Commemoration, and Patriotism in the Twentieth Century 251 (1992). Writing in 1994, Bodnar predicted the continuation of the trend that “state power may be on the wane. Conservative interests in the United States have attacked the ability of the state to intervene in economic and social affairs and support entitlement programs that are capable of sustaining some level of national loyalty.” Id. at 252. Addressing the rise of such sentiment that same year, John R. Gillis writes, that “temporal and topographic memory sites emerge at those times and in those places where there is a perceived or constructed break with the past.” John R. Gillis, Memory and Identity: The History of a Relationship, Commemorations: The Politics of National Identity 8 (John R. Gillis ed., 1994).

102 On the misuse of nineteenth-century history to interpret eighteenth-century constitutional language and sever the preamble from the rest of the Second Amendment, see David Thomas Konig, Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America, 56 UCLA L. Rev. 1295 (2009).

103 Lerner, supra note 90, at 157-58 (citing 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787, at 164-65 (Jonathan Elliott ed., J.B. Lipincott & Co. 2d ed. 1876)).
Framers. In a democracy, judicial opinions must acknowledge popular opinion. But the Framers intended for the judiciary to lead public opinion, not follow it. It has been powerfully argued that the judiciary is not the ultimate source of constitutional meaning or authority, and that a “popular constitutionalism” has existed in tension with judicial authority throughout American history. 104 But “popular constitutionalism” lacks the clarity of judge-made law as well as the express limits which, albeit far from perfectly, operate to prevent its abuse and, indeed, its broadly destructive effects. John Marshall’s confident assertion that “[h]umanity, . . . acting on public opinion,” 105 provides the proper constraints has proven as misplaced with regard to firearm violence as it did with the dispossession of the Native Americans.

The judiciary should not bow to popular misconceptions of rights, nor should it accept a popular or conventional understanding of history. The judiciary’s greatness lies in its supposed personal and intellectual fortitude to resist those false steps. “We are well aware,” wrote a North Carolinian in 1789, that “this doctrine will sound ruffly in the ears of many of our demagogues of power.” 106 But it is all the more necessary to observe that when the judiciary joins forces with what historian Richard Maxwell Brown describes as “a sort of underground matrix of American violence,” it “frequently guide[s] Americans in their behavior” despite “lacking the approval of opinion leaders and citizens in their better moments.” 107

106 Lerner, supra note 90, at 177 (citing Aratus, Letter No. III, State Gazette of N.C. (Edenton), June 4, 1789, at 1).
107 Brown, supra note 80, at 156.
I. Introduction: Heller, McDonald, and Three Decades of Effort

The purpose of this article is to explore the potential impact of *District of Columbia v. Heller*, which recognized the individual right to arms, and of *McDonald v. City of Chicago*, which incorporated it against the States. But before speculating upon the future, it is necessary to briefly examine the past.

When I first wrote on the subject in 1974, the field was not just empty, it was a near-vacuum. Some years before, the National Commission on the Causes and Prevention of Violence had commissioned a 268-page staff report on firearms, crime, and possible firearms laws; the report devoted only two paragraphs to the Second Amendment, and assured the Commission (without citation to any authority) that the Amendment related “solely to collective military preparedness.”

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2 130 S. Ct. 3020 (2010).
4 There had been a few articles written five to ten years before, with no noticeable impact. See, e.g., Stuart R. Hayes, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381 (1960); Ronald B. Levine & David B. Saxe, *The Second Amendment: The Right to Bear Arms*, 7 Hous. L. Rev. 1 (1969).
5 George D. Newton & Franklin E. Zimring, *Firearms and Violence in American Life* 113 (1969). In contrast, the report devoted four pages to possible Fifth Amendment problems with firearms laws.
At that time, the report’s assertion was a common belief, a received wisdom that required no research to justify. The review for which I was a student writer turned down the article, which eventually found a home elsewhere. Soon thereafter, the late David Caplan entered the field, followed quickly by Prof. Joyce Malcolm, Steve Halbrook, and Robert Dowlut. Starting in 1981, Halbrook also expanded into the 14th Amendment arena, demonstrating that the framers of that amendment had extensively discussed the right to arms.

The growing conflict between what had been believed and what was being discovered was documented in a 1982 report by the Senate Judiciary Committee’s Subcommittee on the Constitution. The report began with commentary by the chairman that read: “I have constantly been amazed at the indifference or even hostility shown the Second Amendment by courts, legislatures, and commentators.” The ranking minority member continued: “I have personally been disappointed that the issue has been so . . . minimally debated, both in Congress and in the courts.” The report summarized what we had discovered to that point, much of which would be repeated a quarter-century later in Heller or McDonald: the English experience; disarmaments under the 1662 Militia Act; the legislative history of the 1688/89 Declaration of Rights; the demands of state ratifying conventions for a bill of rights to be added to the new federal constitution;

6 “But that’s specious,” was the response of the editor in chief.
8 Joyce Lee Malcolm, The Right of the People to Keep and Bear Arms: The Common Law Tradition, 10 Hastings Const. L.Q. 285 (1983). The articles I cite here represent what I believe are the earliest publications of each author. Most continued on to write treatises and numerous additional articles.
9 Stephen P. Halbrook, To Keep and Bear Their Private Arms: The Adoption of the Second Amendment 1787-1791, 10 N. Ky. L. Rev. 13 (1982).
11 Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right 107-53 (1984); Stephen P. Halbrook, The Jurisprudence of the Second and Fourteenth Amendments, 4 Geo. Mason U. L. Rev. 1, 18-33 (1981). In reviewing these works post-McDonald, I was struck by the fact that many large segments of the majority opinion reflect what Halbrook had discovered and documented nearly 30 years before.
12 Subcomm. on the Constitution, S. Comm. on the Judiciary, 97th Cong., The Right to Keep and Bear Arms v, ix (Comm. Print 1982).
the interpretations of great commentators, St. George Tucker, William Rawle, and Joseph Story; and the origins of the 14th Amendment as a reaction to post-Civil War state disarmament of free blacks and unionists.13

Then came a watershed event. In 1983, Don Kates published an article in the *Michigan Law Review* outlining the discoveries and advocating an individual rights-centered view of the Second Amendment.14 Kates’ article bore substantial fruit. Sanford Levinson of Texas, William van Aystnhe, then of Duke, Akhil Amar of Yale, and Pulitzer-winning legal historian Leonard Levy, all published work endorsing the individual rights view of the right to arms.15 The tide had turned. By the mid-1990s, Professor Glen Harlan Reynolds termed the individual rights view the “Standard Model” of the Second Amendment,16 and Professor Randy Barnett wrote of the individual rights view as the Amendment’s “new consensus.”17 The judiciary moved more slowly than academia. The Supreme Court’s one attempt to construe the Second Amendment came in *United States v. Miller*,18 a 1939 ruling whose guidance was handicapped by a few considerations, namely that: the appeal seemingly was a set-up,19 the government was the only party to brief the case or show up for oral argument,20 and the opinion was assigned to the notoriously untalented

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13 *Id.* at 1-9.
14 Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983). A side-effect of Kates’s article is that one of the editors working on it, David B. Kopel, was interested and would go on to become one of the more prolific Second Amendment authors.
20 *Miller*, 307 U.S. at 175. The author has examined the Court’s *Miller* file, now in National Archives, and found two telegrams from Miller’s attorney explaining that he will not attend argument, and that the Court should deem the case submitted on the government’s brief.
and lazy Justice James McReynolds. The result was a ruling with the clarity of mud. The appeal stemmed from the dismissal of charges arising out of possession of an unregistered short-barreled shotgun, and the Court reversed and remanded due to a lack of evidence regarding the suitability of the shotgun for militia-related uses. Thereafter, most lower courts locked themselves into what were arguably misconstructions of the Miller decision, asserting, for example, that it held that only National Guard operations were protected.

The first real breach of the issue came in United States v. Emerson, where the Fifth Circuit, while upholding the statute at issue, held that the Second Amendment protected an individual right. This ruling created a certiorari petitioner’s dream: a circuit split. The split was reinforced when the D.C. Circuit joined with the Fifth Circuit, striking the District’s handgun ban. The Supreme Court accepted the District’s certiorari petition, and District of Columbia v. Heller became the Court’s first clear establishment of an individual right to arms. The Court followed with McDonald v. City of Chicago, which held that the right is binding on the states pursuant to the 14th Amendment.

From 2008 to 2010, the right to arms has become firmly established as an individual and fundamental right, a prospect that would have been almost unthinkable four decades ago. Just how far the right extends, however, remains to be seen.

II. What “Arms” Are Protected: Dicta from Heller

In defining which “arms” the Second Amendment protects, Heller suggests two related tests: those “in common use” and not those which are

21 See Barry Cushman, Clerking for Scrooge, 70 U. Chi. L. Rev. 721, 730-31 (2003). McReynolds once wrote an opinion in 3 ½ hours – and that included reading the briefs. Id. at 730.
23 270 F.3d 203, 260 (5th Cir. 2001).
25 128 S. Ct. 2783 (2008). Parker became Heller because the D.C. Circuit held that Heller was the only plaintiff to have standing. Parker v. District of Columbia, 478 F.3d 370, 375, 377 (D.C. Cir. 2007).
26 130 S. Ct. 3020 (2010).
“dangerous and unusual.” Apart from the problem of circularity, both tests also have serious difficulties in terms of their historical bases.

A. **Protected: Arms “In Common Use at the Time”**

The *Heller* majority first cites *United States v. Miller*:28 “We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sort of weapons protected are those ‘in common use at the time.’”29

This limitation has certain difficulties. First, *Miller* did not reach the conclusion stated here; in fact, it suggested the opposite. The *Miller* Court mentioned several attributes of the militia, the last of which describes their arms:

> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. ‘A body of citizens enrolled for military discipline.’ And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.30

This is *Miller’s* description of traditional militia armament, not of the limits of the right to arms. To be fair, given that *Miller* at least suggested strong parallels between the militia function and the right to arms,31 the opinion might be read to suggest that the right to arms was coterminous with militia arms. But *Heller* largely de-links the militia function from the right to arms; after *Heller*, the Second Amendment’s militia clause is seen as the reason why the right was expressly enumerated, but not as a limitation on the right.32

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27 An arm that is outlawed will probably not become “in common use” and will remain “unusual” to possess. *Heller*, 128 S. Ct. at 2817.
29 128 S. Ct. at 2817.
30 307 U.S. at 179.
31 Id. at 178.
32 128 S. Ct. at 2801.
“In common use at the time” is also ambiguous; does the phrase refer to common use by civilians or by the military? In the early Republic, and indeed, well into the 20th Century, small arms used by the military and those used by civilians were largely identical. Only with the military’s adoption of the full-automatic M-16 in the 1960s, did the difference become pronounced. But Miller’s holding, to the extent that one can be discerned, suggests that protected arms are those with military, and thus militia-related, utility:

In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

This suggests that either (1) Miller sees no connection between arms in common use and those protected by the Second Amendment, or (2) arms in common use are those in common military use, i.e. “part of the ordinary military equipment.”

B. Not Protected: “Dangerous and Unusual Weapons”

Heller continues: “We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”

33 The author’s first deer rifle was a Springfield 1903, the bolt action rifle that was the standard American military rifle from 1903 until the mid-1930s, and which was re-issued during World War II. The standard military handgun was the Browning model 1911, until its recent replacement by the Berretta 92. Both the 1911 and the Berretta are popular civilian handguns.

34 The full automatic M-16 was first issued in quantity in 1963; the military stopped ordering its semi-automatic predecessor in mid-1964. Alexander Rose, American Rifle: A Biography 380 (2008).

35 Miller, 307 U.S. at 178.

36 128 S. Ct. at 2817.
The difficulty here is that the common law restrictions at issue were related to the *carrying* of such weapons, not to their private possession; the purpose was to avoid the terrorizing of the public. As Blackstone explained, “The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land . . . .” As the Court of King’s Bench ruled in 1686, the purpose of the rule “was to punish people who go armed to terrify the King’s subjects.” The key to the offense was not so much the nature of the arm, as the specific intent to cause terror. This suggests that a more accurate description of the historical intent mentioned in *Heller* is that exceptionally dangerous arms should be dealt with by reasonable regulations, as opposed to by a blanket exclusion from the scope of the right.

III. “Longstanding” and “Presumptively Valid” Regulations of the Right to Arms

One sentence in *Heller*, along with its explanatory footnote, has occasioned more discussion and conflict in the lower courts than has any other portion of the opinion:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

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Footnote 26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.\textsuperscript{40}

Some lower courts have treated this portion of the decision as entirely precluding challenges to the listed restrictions; under this interpretation, “longstanding” implies a boundary of the right known in the Framing period, meaning that such regulations are unfettered by the Second Amendment.\textsuperscript{41} On the other hand, a Seventh Circuit opinion,\textsuperscript{42} which has since been granted en banc review,\textsuperscript{43} argued there was tension between \textit{Heller}’s recognition of the right as fundamental, and its treatment of the listed restrictions as being entitled to a presumption of validity.\textsuperscript{44} Based on this tension, the Seventh Circuit called for a dual level of review: regulations of the type mentioned in the \textit{Heller} passage that only modestly restricted the right to bear arms would receive intermediate level scrutiny, while other regulations would be subject to strict scrutiny.\textsuperscript{45} In an unpublished opinion, the Fourth Circuit has likewise reversed and remanded a district court ruling that rejected a challenge based upon the

\begin{itemize}
\item \textsuperscript{40}128 S. Ct. at 2816-17, 2817 n.26.
\item \textsuperscript{41}See United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009) (felon in possession: “But \textit{Heller} provides no basis for reconsidering \textit{Darlington},” a pre-\textit{Heller} circuit decision); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009) (felon in possession; challenge rejected in a one-sentence citation of the \textit{Heller} passage); \textit{In re} United States, 578 F.3d 1195, 1195, 1200 (10th Cir. 2009) (possession by person convicted of domestic violence misdemeanor; challenge rejected with citation to \textit{Heller} passage and its footnote, rejecting dissent’s proposal for further briefing, despite dissent pointing out that this restriction is not mentioned in \textit{Heller} and dates only to 1996).
\item \textsuperscript{42}United States v. Skoien, 587 F.3d 803 (7th Cir. 2009).
\item \textsuperscript{43}\textit{Id.}, reh’g granted, United States v. Skoien, No. 08-3770 (7th Cir. Feb. 22, 2010).
\item \textsuperscript{44}587 F.3d at 810-12. Employment of a dual-level standard of review is rare, but not unknown. The Supreme Court has often used such a standard in the electoral context, where states impose requirements on candidacy or political parties. See Clingman v. Beaver, 544 U.S. 581, 586-87 (2005); Burdick v. Takushi, 504 U.S. 428, 434 (1992). However, these cases arose from the atypical situation presented by elections, where the right to vote is protected, and yet cannot be practically exercised without the state dictating the time and place of exercise and the composition of the ballot.
\item \textsuperscript{45}\textit{Id.} at 811-14.
\end{itemize}
I suggest that both of these approaches resulted from a misreading of the *Heller* passage. Courts should read this portion of the opinion not as establishing some manner of test or tests, but simply as an assurance that *Heller* will not require the striking of certain long-established and modest gun control measures.

The passage states that the listed restrictions are “longstanding,” not that they were known to the Framing period. The first listed category – laws prohibiting firearms in the hands of felons – is a 20th Century concept. While there were some prohibitions on firearms possession prior to this time, they were focused on the politically unreliable – Roman Catholics in the Old World and suspected Tories in the New World. There were also restrictions on sale of firearms to Indians, which long outlived the Indian Wars. While the Framers would have known the general concept of prohibiting certain high-risk individuals from owning arms, these related to persons who might overthrow the government, not common criminals.

The earliest modern gun control regime – New York’s 1911 Sullivan Act – required a permit to possess a handgun, but the statute did not bar felons from obtaining the permit. In 1924, the first tentative form of the Uniform Firearms Act barred all felons and unnaturalized aliens from handgun (but not long-arm) possession. The second draft, written in 1925, removed the prohibition against alien possession but retained the prohibition against felon possession. The 1926 version was

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46 United States v. Chester, No. 09-4084, slip op. at 2-3 (4th Cir. Feb. 23, 2010).
48 Arizona’s ban (which at least excepted shotguns and birdshot cartridges) was recodified in 1939. *Ariz. Code Ann.* § 43-2202 (1939).
49 1911 N.Y. Laws 442 (amending N.Y. penal law by forbidding possession by non-citizens, and sales to persons under 16).
50 The 1924 draft forbade handgun possession by any “unnaturalized foreign-born person” and by anyone “convicted of a felony against the person or property of another or against the Government of the United States or of any State or subdivision thereof.” *A Bill to Provide for Uniform Regulation of Revolver Sales*, § 5 Report of the Comm. on a Uniform Act to Regulate the Sale and Possession of Firearms 20-21 (1924).
the first to be finalized and approved by the ABA; it barred handgun possession by anyone “convicted in this State or elsewhere of a crime of violence . . . .” The Federal Firearms Act of 1938 likewise limited its ban on receiving (but not possessing) firearms to violent offenders and fugitives fleeing charges of violence. It was not extended to nonviolent felons until 1961.

The Gun Control Act of 1968, for the first time, extended the federal bar to possession, and it added to the prohibited classes, persons who had been committed for mental treatment, persons who renounced U.S. citizenship, and persons granted a dishonorable military discharge. To mitigate concerns that these classes might include many persons with no likelihood of future violence, Congress gave the administering agency broad discretion to issue “relief from disability” on an individual basis; this relief has, however, been eliminated by budget riders that forbade use of appropriated funds for this purpose.

The other restrictions cited in the Heller passage appear to be of no greater antiquity. Prohibitions against possession of firearms in government buildings were hardly feasible before widespread use of metal detectors, a recent phenomenon; and regulations on commerce in firearms were miniscule prior to the Gun Control Act of 1968.

at 698.

52 A Uniform Act to Regulate the Sale and Possession of Firearms, § 4, Uniform Firearms Act drafted by the Nat’l Conf. of Commissioners on Uniform State Laws 3 (1926).
53 Federal Firearms Act, ch. 850, § 2(f), 52 Stat. 1250, 1250-51 (1938) (any person who has been “convicted of a crime of violence or is a fugitive from justice” forbidden to receive (but not to possess) any firearm). “Crime of violence” and “fugitive from justice” are defined as covering violent offenses and also housebreaking. Id. § 1(6)-(7). The statute appears to have been drafted in haste. “Sec. 1” is left out, and “fugitive” is misspelled as “fugutive” three times.
57 The author worked with a governmental agency in Washington, D.C. until 1992; the only metal detectors he can recall were those at the entry to galleries overlooking Congress, and at the entrance to the Supreme Court. The Justice Department, Interior, and Treasury had no such screening.
58 Federal Firearms Act, ch. 850, §§ 2(g), 3(d), 52 Stat. 1250, 1252 (1938) (requiring firearms dealers to obtain a license if they shipped or received firearms
In short, Justice Scalia seemingly included the passage in *Heller* concerning “longstanding” restrictions that are “presumptively” valid to provide reassurance, not to define boundaries of the right to arms. The regulations at issue were “longstanding” in the sense of being some decades old, not in the sense being known to the Framing generation—the only form of “longstanding” that would have constitutional bearing. When the Court describes these regulations as “presumptively valid,” it is important to remember that “presumptively” can have at least two meanings: (1) a technical one, that the challenger of a law bears the burden of persuasion;\textsuperscript{59} or (2) a colloquial one, that the Court assumes that bars on gun possession by felons and mental patients, or possession in courthouses and other government buildings, will not be difficult to defend. The first reading is inconsistent with *Heller*’s description of the right as fundamental\textsuperscript{60} and its express rejection of rational basis scrutiny,\textsuperscript{61} since even intermediate levels of review place the burden on the defender of the restriction\textsuperscript{62} to justify its impact.\textsuperscript{63}

It thus seems likely that the *Heller* majority used “presumptively” in a colloquial sense, instructing courts to assume that certain regulations will likely prove constitutional when challenged. This understanding

\textsuperscript{59} Fed. R. Evid. 301 (provides that a presumption shifts the burden of going forward, not the burden of persuasion; but as noted above, the circuit rulings interpreting this passage treat “presumptively” as shifting both, and perhaps as an irrebuttable presumption of constitutionality).

\textsuperscript{60} District of Columbia v. Heller, 128 S. Ct. 2783, 2798 (2008) (“By the time of the founding, the right to have arms had become fundamental for English subjects.”).

\textsuperscript{61} Id. at 2817 n.27.


\textsuperscript{63} See, e.g., Craig v. Boren, 429 U.S. 190, 200-05 (1976). In *Boren*, a gender discrimination case, the Court struck down a measure after carefully examining the State’s justifications and finding them insufficient. That the State’s justifications were weak would not have mattered if the measure truly was presumed constitutional, so that the State could win if no evidence at all was introduced.
IV. Future Issues

Prior to Heller and McDonald there was little judicial enthusiasm for enforcement of the right to arms as an individual right. Over the decades, a considerable number of statutes accumulated that restricted the ownership and use of arms. Large portions of these statutes may now be open to challenge. We can foresee several areas in which challengers may seek to invalidate these statutes in the near future.

A preliminary consideration in all such challenges will be the standard of review. Heller rules out rational basis.65 Its reference to the right to arms as fundamental,66 and the right’s explicit treatment as such in McDonald,67 are both suggestive of strict scrutiny. The courts that have reached the issue thus far are somewhat divided. The Seventh Circuit, in an opinion that has since been vacated, applied a dual standard of review under which significant restrictions receive strict scrutiny and less onerous restrictions receive an intermediate standard of review.68 In contrast, one district court has applied strict scrutiny,69 as did the Fifth Circuit in its pre-Heller decision, United States v. Emerson.70

A. Persons Convicted of Nonviolent Felonies

Felonies have historically been significant offenses against person or property,71 but, in recent years, felonies have come to encompass many

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64 McDonald v. City of Chicago, 130 S Ct. 3020, 3047 (2010).
65 Heller, 128 S. Ct. at 2817 n.27.
66 Id. at 2798.
67 McDonald, 130 S. Ct. at 3036-37.
68 United States v. Skoien, 587 F.3d 803, 810-11, superseded by United States v. Skoien, 614 F.3d 638 (2010). The dual standard of review was premised upon a tension between Heller’s reference to the right as fundamental, and its suggesting that certain regulations were “presumptively” valid. I suggest above that “presumptively” was meant in a colloquial sense, not as creating a legal presumption. If this is correct, there is no tension.
70 United States v. Emerson, 270 F.3d 203, 260-61 (5th Cir. 2001).
71 Reviewing State criminal codes from the first half of the 20th Century can be
nonviolent regulatory offenses, including filling in wetlands on one’s own property,\(^{72}\) or taking a migratory bird’s feathers with intent to sell.\(^{73}\) We need not here treat the issue of nonviolent felonies under *Heller*, as the issue has been carefully examined elsewhere.\(^{74}\)

**B. Persons Convicted of Domestic Violence Misdemeanors**

A 1996 amendment to the Gun Control Act\(^{75}\) forbids firearms possession by anyone convicted of a domestic violence misdemeanor, which is defined as a misdemeanor that has an element of the “use or attempted use of physical force, or the threatened use of a deadly weapon” against a present or past household member.\(^{76}\)

The amendment poses one obvious issue, and several collateral ones. The obvious issue involves the constitutionality of removing or suspending a fundamental right based on conviction for a misdemeanor. To be fair, the misdemeanor does involve use of force, and thus the offender can fairly be considered more dangerous than those who commit nonviolent felonies. But one difficulty here is the lack of a fit between the federal definition and state definitions of the offenses involved. The federal definition speaks of “physical force,” which could be read as requiring something more than battery’s familiar “harmful or offensive touching” element. But state domestic violence statutes vary. Some simply define the offense as assault or battery against a household


\(^{74}\) See generally Marshall, supra note 47.


\(^{76}\) 18 U.S.C. § 921(33)(A) (2006). There are some procedural safeguards which appear nominal at best. These include right to counsel (but no right to appointed counsel) and a right to jury trial, but only if the defendant is entitled to jury trial under the law of the jurisdiction. 18 U.S.C. § 921(33)(B) (2006).
Construing the federal “use of force” element as involving something more than offensive touching might thus place the federal statute out of synch with state definitions of the misdemeanor under which the defendant was convicted.

Likewise, the *Heller* and *McDonald* holdings pose procedural issues. State domestic misdemeanor charges often do not carry the right to appointed counsel or to trial by jury, since the conviction involves no loss of civil rights, the chance of imprisonment is low, and if given at all, the term of imprisonment is generally brief. Even after the 1996 amendments to the Gun Control Act imposed a loss of gun rights, it was possible for pre-*Heller* courts to find that any deprivations were of no great import. The classification of firearm rights as fundamental rights will likely call into question these approaches.

Finally, there are issues relating to guilty pleas and pre-1996 convictions. First, there is the situation where a defendant enters a plea of guilty to the misdemeanor, without having been informed of the consequences of his firearm rights. The Supreme Court recently invalidated the guilty plea of a lawfully-admitted alien defendant because he was not advised that the plea may lead to his deportation. Given that an alien’s presence here is largely a matter of grace, *Heller* and

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77 See Ariz. Rev. Stat. Ann. § 13-3601(A) (2010) (domestic violence includes a violation of § 13-1203 if committed against a household member); id. § 13-1203 (2010) (defining assault to include knowingly or recklessly touching another person with intent to injure, insult, or provoke). The Arizona definition also includes disorderly conduct, and applies if the victim is or was in a “romantic or sexual relationship” with the defendant. Id. § 13-3601(A)(6).


79 This may be quite common. The author recalls a conversation with a chief city magistrate, months after the 1996 amendment was passed, in which the magistrate was surprised to learn of the federal restriction. City magistrates and county justices of the peace have to be conversant with state law, not with the latest changes to the United States Code.

80 Padilla v. Kentucky, 130 S. Ct. 1473 (2010). A majority of the Court ruled that failure to so advise constituted ineffective assistance of counsel. Id. at 1478. Justice Alito and Chief Justice Roberts concurred on the basis that defense counsel had not merely omitted advice on the point, but had misadvised defendant that there would be no consequences to his immigration status. Id. at 1487.

81 See Harisiades v. Shaughnessy, 342 U.S. 580, 586-87 (1952); United States ex
McDonald’s classification of the right to arms as a fundamental right, will comparably impact pleas that were not preceded by advisement as to the deprivation of such rights.

Second, application of the federal 1996 amendment to pre-1996 domestic violence misdemeanor convictions has *ex post facto* implications. The constitutional bans on *ex post facto* enactments has four components: legislation may not retroactively penalize conduct that was legal when taken, nor make conduct then illegal into a more serious offense, nor retroactively increase the penalty for such conduct, nor retroactively alter the rules of evidence applicable to trial of the offense. Application of the 1996 amendment to pre-1996 convictions might not violate the first restriction — since violation requires possession of a firearm after the amendment’s effective date — but would seemingly fall afoul of the second restriction, by retroactively increasing the punishment for the misdemeanor conviction.

Pre-*Heller* courts sidestepped this issue by simply proclaiming that the new bar to firearms possession was not a punishment, or by treating the new restriction as a “regulation of conduct which the legislature has a power to regulate” as opposed to punishment. Neither approach seems viable after *Heller* and *McDonald*. It is hard to see how a complete

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82 U.S. *Const.* art. I, §9 (federal); *id.* § 10 (state). The ban was one of the few restrictions of the original constitution that bound both federal and state governments.


85 *See, e.g.*, United States v. Hemmings, 258 F.3d 587, 594 (7th Cir. 2001); Gillespie v. City of Indianapolis, 185 F.3d 693, 706 (7th Cir. 1999).

86 United States v. Huss, 7 F.3d 1444, 1447 (9th Cir. 1993), *overruled on other grounds by* United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998).

87 *Compare* United States v. Davis, 936 F.2d 352, 356-57 (8th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992) (treating newly-enacted State restrictions on gun possession by felons as covering a previous conviction would constitute an *ex post facto* violation) with Roehl v. United States, 977 F.2d 375, 377-78 (7th Cir. 1992) (opposite result because no “right” existed of which defendant was
ban on exercise of a fundamental right can be seen as no punishment, or alternately as a simple regulation of future conduct.

C. **Persons Subject to Domestic Restraining Orders**

A 1994 amendment to the Gun Control Act forbids firearm possession by a person subject to a domestic restraining order.\footnote{18 U.S.C. § 922(g)(8) (2006).} To qualify, the domestic restraining order must:

1. have been issued after notice, hearing, and opportunity to participate;

2. forbid the person from harassing, stalking or threatening an “intimate partner,” or forbid the person from engaging in conduct that would place such a partner in reasonable fear of injury; and

3. either:

   a. make a finding that the person represents a credible threat to the other’s physical safety or

   b. explicitly prohibit the actual, threatened, or attempted use of physical force that would reasonably be expected to cause bodily injury.

This may pose greater problems than does the prohibition on those convicted of domestic violence misdemeanors. The latter prohibition at least involved past conduct, proven beyond a reasonable doubt; this prohibition requires neither. It does not even require a judicial prediction of future violence, due to the disjunctive wording of the last requirement. At bottom, the domestic restraining order can qualify if it (1) forbids a person from threatening an intimate partner and (2) explicitly prohibits use or threat of physical force against them. That is, the finding of a “credible threat” is not a requirement if the order prohibits use of force that could be expected to cause injury.
The Fifth Circuit faced this issue in *United States v. Emerson*, a pre-*Heller* ruling that accepted an individual right to arms. *Emerson* upheld the prohibition on a potentially questionable theory; the court assumed that, in issuing domestic restraining orders, Texas courts followed their standards for issuing a preliminary injunction, and thus the domestic restraining order required clear proof of a strong threat of irreparable and imminent injury. It is unclear that courts do anything of the sort; it seems more likely that a magistrate would assume there to be no disadvantage in forbidding conduct that is illegal to begin with. In practice, it seems doubtful that a court would decline such an order on the basis that an assault or harassment would not be irreparable, or that a threat existed, but it was insufficiently imminent.

*Emerson*’s result appears incorrect; the Fifth Circuit, acting at a time when a court’s mere acceptance of an individual right was striking, may have been stretching to find reasons to avoid striking down the Texas procedures. It is doubtful if firearms possession, a fundamental right, can be barred on no more than an issuance of an order against future violence – an order which, as we have seen above, does not even require a finding that future violence is likely. States that desire their restraining orders to limit firearms possession pursuant to federal law would be well advised to amend the authorizing statutes to insert more extensive procedural protections against abuse. Some possibilities that might be considered would be (1) a requirement that at least one violent incident to have occurred in the past; (2) as *Emerson* suggests, requirements for clear proof of a serious and imminent threat of future injury; and (3) speedy and meaningful review of any resulting order. Alternately, a state might retain its present, more relaxed procedures, with the reality that there is

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89 270 F.3d 203 (5th Cir. 2001).
90 Id. at 262-64.
91 Statutory developments likewise suggest that legislatures expect liberal granting of such restraining orders. Washington state permits issuance after a telephonic hearing, and service by publication. *Wash. Rev. Code Ann.* § 26.50.050 (2005). In Arizona, such an order is issued automatically upon filing of a divorce action. *Ariz. Rev. Stat. Ann.* § 25-315 (2007). As there is no hearing, this would not qualify under the federal statute, but indicates an understanding that orders enjoining the illegal do not require much support. An order with hearing may be sought under *Ariz. Rev. Stat.* § 13-3602, if the court finds the defendant “may commit” or has within the past year committed, an act of domestic violence. *Id.* § 13-3602(E).
little chance that they can be invoked to sustain a federal conviction for firearms possession.

D. Other Categories of Prohibited Persons

The Gun Control Act likewise forbids firearm possession to some fairly obscure categories of people, such as those who have received a dishonorable discharge from the military, or have renounced their U.S. citizenship, a 1960s fad used as a means of protesting the Vietnam War. Although rare, these cases do arise from time to time. A survey by the Government Accountability Office found that, over a three-year span, 117 firearm applications failed background checks because of dishonorable discharge, and 14 applications failed for renunciation of citizenship. Now that the right to arms is widely considered a fundamental right, we may wonder: is regulation of these classes of prohibited persons still viable? Do those who were dishonorably discharged from the military or those who renounced their citizenship pose a serious enough threat to society to justify infringement of the “fundamental right” to arms?

There is another issue posed by the federal “prohibited person” ban. Prohibited persons may not: (1) “ship or transport in interstate or foreign commerce” or (2) “possess in or affecting commerce” or (3) “receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” None of these seem to cover a person who received a firearm before becoming a prohibited person, and continues to possess it after. He has not transported the firearm in commerce. He received a firearm that had been so transported, but was not a prohibited person when he did so. He continues to possess after becoming a prohibited person, but the possession is not in or affecting commerce.

93 The Gun Control Act requires a computer background check prior to transfer of a firearm by a licensed dealer. A three-year list of reasons for failing the background check found 117 dishonorable discharges and 14 renunciations of citizenship, reflecting a total of 0.07 percent of rejections. Laurie E. Ekstrand, U.S. Gov’t Accounting Office, Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System 43 (July 12, 2002), available at http://www.gao.gov/new.items/d02720.pdf.
94 18 U.S.C. § 922(g).
But Scarborough v. United States\textsuperscript{95} held on exactly these facts that continuing to possess was a violation, since “in or affecting commerce” should be read with the statute’s preamble\textsuperscript{96} proclaiming that possession by felons affected commerce. This approach has several major problems. First, treating a congressional declaration that something affects commerce as conclusively settling the issue runs contra to United States v. Lopez.\textsuperscript{97} The declaration at issue is frankly one that is hard to take seriously: it also declares that firearm possession by persons who have renounced U.S. citizenship is “a burden on commerce or a threat affecting the free flow of commerce.”\textsuperscript{98}

Second, it leaves the problem of which statutory preamble applies. What is today referred to as the “Gun Control Act of 1968” is in fact an admix of three provisions adopted on two dates in 1968, and then extensively amended in 1986.

The first set of provisions was that of Title IV of the Omnibus Crime Control and Safe Streets Act,\textsuperscript{99} which applied in part to all firearms and in part to handguns only. It prohibited anyone convicted of or under indictment for a felony from shipping a firearm in commerce or from receiving a firearm that had ever been transported in commerce.\textsuperscript{100} There were other categories of persons to which licensed gun dealers could not sell, but these categories were not forbidden to receive, and even felons were not forbidden to possess. Title IV’s preamble finds that the ease with which handguns (“firearms other than a rifle or shotgun”) could be acquired by “criminals,” juveniles without parental permission, “mental defectives,” revolutionary groups, and “others whose possession of such weapons is similarly contrary to the public interest” was a factor in crime rates, and that only federal control of commerce would properly deal with

\textsuperscript{95} 431 U.S. 563 (1977).
\textsuperscript{96} To be precise, the preamble to Title VII of the Omnibus Crime Control and Safe Streets Act, 82 Stat. 197. Both the preamble and the statutory restrictions were at the time codified as 18 U.S.C. App. §1202(a). See Scarborough, 431 U.S. at 571. The fact that the preamble was codified at the time may be important, as we shall see.
\textsuperscript{97} 514 U.S. 549 (1995).
\textsuperscript{99} Id. at 225-26.
\textsuperscript{100} Id. at 230-31. I use “felony” as shorthand for the precise prohibition, which related to crimes punishable by more than a year’s imprisonment.
this.\textsuperscript{101} It does not make a finding that that receipt of firearms by those classes itself burdens commerce, only applies to handguns, and uses far more ambiguous terms than does the statute.

The second set of provisions came from Title VII of the same statute.\textsuperscript{102} This prohibited firearms possession by felons, mental incompetents, those with a dishonorable military discharge, or those who had renounced U.S. citizenship or were present here illegally.\textsuperscript{103} Its preamble made a finding that firearms receipt and possession by these classes of persons constituted “a burden on commerce or threat affecting the free flow of commerce ...”.\textsuperscript{104} For some reason, Title VII was codified as a separate appendix to 18 U.S. Code. Both its commands and its preamble became 18 U.S.C. App. §1202.

The third set of provisions came from the Gun Control Act of 1968, enacted five months after the Omnibus Act.\textsuperscript{105} It amended Title IV by substituting new (if largely identical) language, which essentially made almost all its provisions apply to all firearms. Its preamble made no finding at all with regard to commerce.\textsuperscript{106}

Finally, the Gun Control Act was heavily amended by the Firearms Owners Protection Act of 1986,\textsuperscript{107} which among other things took Title VII from its isolation in the Appendix to 18 U.S. Code and merged its provisions with the remainder of the statute relating to shipment and receipt.\textsuperscript{108} In the process, Title VII’s preamble vanished from the U.S. Code. The 1986 statute’s preamble made no findings with regard to commerce.\textsuperscript{109}

Scarborough essentially treats the preamble as defining the offense (doing X in or affecting commerce + congressional finding that doing X affects commerce = doing X is per se illegal, whether or not an effect

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\textsuperscript{101} Id. at 225. At that, it does not actually say that such possession affects commerce, but that only with federal control over commerce “can this grave problem be dealt with . . . .” Id. To treat “we ought to use our commerce power to prohibit these acts” is not quite saying “these acts affect commerce.”

\textsuperscript{102} Id. at 236.

\textsuperscript{103} 82 Stat. at 236.

\textsuperscript{104} Id.


\textsuperscript{106} Id. at 1213-14.

\textsuperscript{107} 100 Stat. 449.

\textsuperscript{108} See 18 U.S.C. §922(g).

\textsuperscript{109} Id.
\end{flushleft}
on commerce is proven at trial). Given the convoluted history of the statute, it will be hard to escape a void for vagueness challenge. First, the vagueness standard has long focused upon the face of the statute and whether that gives adequate notice to a reader of average intelligence. Given that at the time of Scarborough, Title VII’s preamble was part of U.S. Code Appendix §1202, this may have been arguable. However, after that preamble’s codification vanished in 1986, such an argument is much more difficult to maintain. To today construe the statute according to Scarborough would require the reader to consult not the face of the U.S. Code, but uncodified preambles found only in the Statutes at Large. Second, as to possessory offenses, the reader would have to assess not one, but four such preambles, not to mention locating Scarborough itself in order to know why the now-vanished preambles must be consulted. Third, as to those possessory offenses, he would have to know to refer to the preamble of Title VII – when Title VII has long ceased to exist as a separate provision in the Appendix, having been replaced by a few words added to 18 U.S.C. §922(g). If the traditional standards of void for vagueness are applied here, it is hard to see how the modern statute can escape.

E. “Semi-automatic Assault Weapons”

I place this term in quotation marks because, in firearms parlance, a semi-automatic assault weapon is a contradiction. Assault rifles were pioneered by the Germans late in World War II; the term is a translation of “sturmgewehr” (“storm rifle”). Prior to the assault rifles’ development, infantry rifles fired powerful cartridges designed for fighting at a range of approximately 600 yards. Those rifles either had to be worked by hand, or, at most, they would fire one shot and automatically load the next (“semi-automatic”). They could not fire a continuous stream of discharges (“full-automatic,” like a machine gun) because the powerful cartridges had too potent a kick or recoil.

The theory behind the assault rifle is that if a cartridge’s power is cut in half, the recoil will be reduced to where an infantryman can shoot it at full–automatic capacity; full-automatic fire at a range of 300 to 400 yards is

yards is far more useful than a much slower rate of fire at longer ranges.\textsuperscript{111} Since the entire purpose of the assault rifle was to enable full-automatic fire, it makes no sense to describe something as a semi-automatic assault rifle.

The problem of prohibiting the nonexistent was resolved by more fully defining the firearm in statutes, yet the definitions are peculiar and arbitrary, to say the least. The now-expired federal assault weapon ban was typical, and its definition had three components. The first component identified certain firearms by maker and name.\textsuperscript{112} It was thus illegal to make for civilian sale a “Colt AR-15.” But Colt could retile its product (which it did), and any company other than Colt could sell a gun called an “AR-15.” The second component listed features which were apparently judged undesirable – a pistol grip separate from the shoulder stock, a bayonet lug, a flash suppressor, etc. – and provided that a firearm might have only one of these features; any more and it would be categorized as an assault weapon.\textsuperscript{113} The third definitional component listed over 500 firearms by maker and name, and provided that none of these could be considered assault weapons, regardless of their features.\textsuperscript{114}

The rather arbitrary nature of the statute should be apparent. The statute banned a rifle firing a .223 cartridge, semi-automatically, taking a 20-round magazine, while another rifle with identical functionality was placed on the exempt list.\textsuperscript{115}

Nor can it be said that the proscribed rifles were “dangerous and unusual.” In 2008, the most recent year for which data is available, rifles of the AR-15 configuration comprised at least 22 percent of civilian rifles made in the United States.\textsuperscript{116}


\textsuperscript{113} Id. at 1998.


\textsuperscript{115} The rifles referred to are the AR-15 and the Ruger Mini-14. The main difference between them is the Ruger has a wooden stock and a more conventional rifle form.

\textsuperscript{116} E-mail from Mark Overstreet, Research Staffer, Nat’l Rifle Ass’n to David
F. Taxes and Fees

At least three forms of taxes and fees affect firearms transfer and possession. The first is the federal excise tax, commonly known as Pittman-Robertson, which imposes a 10-11 percent excise tax on sales of new firearms and on the manufacture of ammunition. The tax’s proceeds are earmarked for conservation of game species, building of shooting ranges, hunting education, and similar purposes. The second is a flat $200 tax on the civilian transfer of full-automatic firearms or short-barreled shotguns and rifles. The third is the fees imposed in some jurisdictions for issuance of a permit to purchase firearms.

In Minneapolis Star v. Minnesota Commissioner of Revenue, the Supreme Court assessed the validity of a tax on large-scale purchases of paper and ink that was plainly directed at large newspapers. In striking the tax, the Court noted that it singled out the press, and a select portion of the press at that, and thus conflicted with the First Amendment.

The Pittman-Robertson tax facially resembles the Minneapolis Star tax, but there is a critical difference. The tax on paper and ink went into Minnesota’s general fund; the only apparent purpose of the tax was to burden and impede freedom of speech. In contrast, Pittman-Robertson revenues are earmarked for purposes that expand exercise of arms-bearing rights. Moreover, while the Pittman-Robertson tax is not a generally-applicable sales tax (which Minneapolis Star at least distinguished), it

Hardy (Apr. 13, 2010, 11:02 MST) (on file with the author). Mr. Overstreet compiled a spreadsheet based on government reports of rifle production. As he counted only companies that made no rifles but those in AR-15 configuration, the percentage is likely understated. The AR-15 is very accurate and incredibly versatile, and can in moments be converted to shoot high velocity .204s suitable for small game, 6.8 mm suitable for larger game, or pistol cartridges suited for law enforcement.

121 Id. at 590-92. See also Grosjean v. American Press Co., 297 U.S. 233, 249-51 (1936) (tax on advertising receipts).
122 See 460 U.S. at 581 (“It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic
is imposed on items other than firearms and ammunition.\textsuperscript{123} Pittman-Robertston appears to fall outside the \textit{Minneapolis Star} situation.

The $200 excise tax on transfers of full-automatic firearms was undoubtedly substantial when imposed in 1934, but 70 years of inflation have reduced its impact to where it may track the actual cost of administration.\textsuperscript{124}

However, certain state permit fees may now fail to pass muster. New York City, for instance, requires a permit to purchase a firearm; the handgun application fee is $340, plus about $100 for fingerprinting, while a rifle or shotgun application costs $140 plus the fingerprint fee.\textsuperscript{125} This is in sharp contrast with New Jersey, which charges $5 for a general firearms permit plus $2 for handgun permits, and a one-time fingerprinting fee of $18-30.\textsuperscript{126} Considering that the New York Department of Justice charges law enforcement and other agencies only $50 to run the fingerprints of their job applicants,\textsuperscript{127} it is hard to understand the City’s fees as having any purpose but deterring applications.

\section*{V. Conclusion}

In 1791, and for at least a century thereafter, the individual right to arms was well-established. But then, in the first half of the 20th Century, the individual right faded from view, at least academically and judicially. \textit{Heller} and \textit{McDonald} followed three decades of research to regulations without creating constitutional problems. Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment.” (citations omitted).


again recognize the right.

The law’s future course in this arena is far from obvious. It does appear, however, that while courts will uphold justifiable regulations, statutes that were casually enacted by lawmakers while the right to arms was dormant are now vulnerable to challenge. Particularly vulnerable will be bans based on misdemeanor domestic violence convictions and on civil restraining orders; states would be well advised to rewrite their statutes governing these matters. State laws that impose high licensing fees – perhaps anything over $50-100 – will also likely be overturned. Vulnerable, but not to such a degree, will be arbitrarily written “assault weapon” and non-criminal prohibited-person statutes. Conversely, the Pittman-Robertson excise tax will probably survive.
THE SECOND AMENDMENT AS INTERPRETED BY CONGRESS AND THE COURT

Sean J. Kealy*

I. Introduction

In the last two years, the U.S. Supreme Court has finally offered a reasoned interpretation of the Second Amendment. By the slimmest of majorities in District of Columbia v. Heller1 and McDonald v. City of Chicago,2 the Court held that the Second Amendment supplies an individually-held right to bear arms; the government may place reasonable restrictions on gun ownership, but neither the federal government nor an individual state can deprive a person of their right to possess a handgun. Despite many pages of opinion, however, the majority in Heller offers an unsatisfying explanation for why the Second Amendment protects an individual’s right to bear arms. Whether the Second Amendment should be construed as an individual or collective right will probably be a continuing debate and, should the composition of the Court change in the near future, there could be another landmark gun decision with profound implications on Second Amendment jurisprudence. Meanwhile, the Heller and McDonald opinions do little, if anything, to resolve the gun debate in the United States.

This article offers a different perspective on the right to bear arms from those given in Heller. Section II analyzes Justice Scalia’s finding that an individual’s right to bear arms is derived from a received British right that was codified into the Constitution. Instead, I argue that the Amendment was a very practical solution to a defect in the original Constitution. The power-sharing relationship between the federal and state governments over the militia at the time the Constitution was signed was confusing and potentially dangerous to the security of the states. I argue that the right to bear arms was intended as an individual right and

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2 130 S. Ct. 3020 (2010).
was essential for ensuring that local, state, and federal governments could meet their obligation to provide for a common defense. This common defense was not comprised only of the military actions associated with invasions and insurrections, but also included enforcing the civil law on every level of government.

Section III criticizes the Court, not just for the *Heller* decision, but also for the one previous Supreme Court Second Amendment precedent, *Miller*, for interpreting the Second Amendment as if its role, scope, and meaning have not changed since the First Congress. Others have argued convincingly that, during Reconstruction, the Second Amendment was transformed from a political right held by voters to a civil right held by all individuals. In addition to this legal shift, during the late 19th and early 20th centuries, the needs of society changed dramatically. By the 1930s, the common defense was largely provided by a professional federal military and professional law enforcement at all levels of government. While the Supreme Court muddled Second Amendment jurisprudence by finding a federal gun law constitutional based on the preservation of the militia, the other branches of government were redefining the right to bear arms according to their own visions of what the right meant. Congress’s interpretation of the Second Amendment, in the face of a national crisis of crime and gun violence, along with pressure brought to bear by the Roosevelt Administration, set the table for a modern interpretation of the Second Amendment. This interpretation rested on a valid balance between the right to bear arms and public safety.

Finally, in Section IV, I argue that, while the *Heller* Court was correct to find the right to bear arms to be an individual right, the Court should have given both greater latitude to legislatures when drafting gun control legislation and more direction as to when a future gun law will be declared unconstitutional. This would have been in keeping with the original purpose of the Second Amendment.

II. THE SECOND AMENDMENT PROBLEM

The *Heller* majority and dissenting opinions took very different views of the nature of the Second Amendment and, in all likelihood, have not settled the debate over the meaning of the Amendment.3 Justice

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3 In fact, Professor Tushnet looks forward to the next Second Amendment case
Scalia spends several pages on the history and background of the Second Amendment, stretching from the British Bill of Rights through 20th century American cases. This approach comports with his effort to impose his brand of strict “originalism” on constitutional matters.\(^4\) Justice Scalia’s decision – while giving deference to British legal authorities, state court judges, and 19th century legal scholars in order to explain how informed people of the time understood their right to bear arms – spends almost no time discussing what the drafters of the Second Amendment sought to accomplish. Although I do not necessarily agree with Scalia’s wholesale rejection of a flexible or “living” Constitution, I will primarily rely on originalist argument below. This will not, however, be a “new originalist” argument. I reject the idea that all Americans had precisely the same understanding of the right to bear arms, precluding what Scalia seeks. In doing so, I will argue that the Second Amendment was not, as Scalia argues, a time-honored right received from English jurisprudence, but a practical fix to a defect in the Constitution. By understanding the perceived problem and the compromise agreed to by Congress and the states, we can better see the individual and state interests to be protected.

Justice Scalia considers the Second Amendment to be the manifestation of a traditional and long-held English right. Scalia asserts that the desirability of the Amendment was universally agreed to by the colonists, and that the debate was simply as to whether it needed to be

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\(^4\) *See* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (1997). To derive what the text meant, Scalia states that he gives no greater weight to those who helped draft the constitutional provision than what other “intelligent and informed people of the time” understood the constitutional provision to mean. *Id.* Scalia derides most modern constitutional interpretation which does not start with the text, but rather Supreme Court cases, causing the issue to be decided according to the logic of the cases and not the text or original understanding. *Id.* at 39. *See also* Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 Harv. L. Rev. 246, 246 (2008) (“District of Columbia v. Heller is the most explicitly and self-consciously originalist opinion in the history of the Supreme Court.”); Mark Tushnet, *Heller and the New Originalism*, 69 Ohio St. L.J. 609 (2008) (discussing the “new originalism” of Scalia’s opinion).
codified in the Constitution. For Scalia, the Second Amendment’s prefatory clause simply announces that the traditional right was codified to prevent elimination of the militia, which was a major concern of the Anti-Federalists. Scalia argues that, after rejecting the Anti-Federalists’ revisions to restrict federal use of the militia, Congress adopted “the popular and uncontroversial” amendments protecting “individual rights.” In fact, Scalia argues that self-defense and hunting may have been more important to the colonists than preserving the militia. Like the constitutions of Pennsylvania, Vermont, North Carolina, and Massachusetts, the Second Amendment protected gun rights independent from military duty. Even if the Amendment’s language was unclear, the state judiciaries and legal commentators soon held the right to be expansive and held by individuals.

In contrast, Justice Stevens argued in his Heller dissent that, while society in the 1790s valued an armed population, private ownership of firearms was never considered an individual right. As Stevens’ review of

5 *Heller*, 128 S. Ct. at 2801.

6 *Id.* at 2801. Scalia asserts, however, that the Second Amendment guarantees did not appease the Anti-Federalists. *Id.* at 2804 (citing, as an example, *Centinel, Revived, No. XXIX*, Indep. Gazetter (Philadelphia), Sept. 9, 1789, reprinted in *The Origin of the Second Amendment* 711, 712 (David E. Young ed., 2d ed. 2001)).

7 *Heller*, 128 S. Ct. at 2801.

8 *Id.* at 2802. To bolster his argument, Scalia cites the analogous arms-bearing rights in state constitutions that preceded the Second Amendment. *Id.* at 2793 n.8.

9 *Id.* at 2802-03.

10 *Id.*

11 *Id.* at 2827. *See also* Brief of Amici Curiae Jack N. Rakove et al. In Support of Petitioners at 2, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter Brief of Amici Curiae]. I cite to this brief repeatedly throughout this section of the paper. I do this because the history behind the Second Amendment has always been central to its understanding – including Justice Scalia’s opinion in *Heller*. This brief was prepared by 15 eminent Historians, all of whom have written extensively on the colonial period and the right to bear arms. I, like Justice Scalia, argue for a different reading of the Second Amendment than the Historians. Still, I do not necessarily disagree with the many historical facts that they offered to the Supreme Court. Since I do not claim to be a professional historian, and was not interested in offering a competing historical narrative, I rely heavily on their scholarship. Even with these common points of historical reference, I argue that the right was meant
the history of the Amendment shows, there was no single pre-constitutional understanding of what a person’s right to bear arms meant. Rather than protecting an established, individual right, the Amendment should be read as determining the future status of the militia. As legal historians pointed out in an amicus brief, the constitutional debate contained few references to the private ownership of firearms, indicating that it was truly a minor issue at the time. In addition, the state constitutions typically only refer to the militia, with only a few specifically stating that arms may be bore for the common defense.

Many Americans were armed, and historians believe that arms were easily obtained. If Americans felt that the Constitution threatened private access to firearms, Anti-Federalists would have persistently leveled that charge against the Constitution. Rather, the debate was always about the militia and its public purposes, not about individual rights.

Both Scalia and Stevens’s opinions are open to criticism, and neither is a satisfactory explanation of the reasoning behind the Second Amendment. First, Scalia’s claim that the Second Amendment was a

to be individually-held, whereas the Historians argue for a communal right.

12 *Heller*, 128 S. Ct. at 2831-36. Justice Stevens contends that the majority opinion “gives short shrift to the drafting history of the Second Amendment.” *Id.* at 2836.

13 *Id.* at 2831 (“When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia.”). *See also* Brief of Amici Curiae, *supra* note 11, at 24.


16 Brief of Amici Curiae, *supra* note 11, at 35. The Historians do not take a position on how well armed the Americans were at the time, but they assume that “many Americans owned firearms and expected them to remain relatively easy to obtain.” *Id.*

17 *Id.*

18 *Id.*
continuation of an understood English right is unpersuasive. The 1689 British right was vested in Parliament and not individuals, and was only reserved to certain segments of the population, namely wealthy Protestants. This understanding is held even by several of Scalia’s sources. Also, the American experience was very different from British needs. English gun regulations were intended to protect the aristocracy’s traditional privilege to hunt, an issue that American circumstances rendered unnecessary. Even more to the point, Americans on the frontier facing threats of attack from animals, law-breakers, foreign powers, and natives had to consider how to provide common defense differently from those in England. These circumstances required a nearly universally-armed population. If there was a commonly held conception of the

19 Id. at 2.
20 The 1671 Game Act restricted the poor from possessing firearms and other hunting materials such as traps. See S. Subcomm. on the Constitution, 97th Cong., The Right to Keep and Bear Arms 3 (Comm. Print 1982). The English Bill of Rights states, “That the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law.” Id. at 2 (citing Journal of the House of Commons from Dec. 26, 1688 to Oct. 26, 1693, at 29 (London, 1742) and 1 Gul. and Mar. Sess., 2, c. 2 (1689)). After adopting the Bill of Rights, Parliament reenacted the Game Act with the word “guns” omitted from the list of items forbidden to the poor. Id. at 3 (citing Joyce Malcolm, Disarmed: The Loss of the Right to Bear Arms in Restoration England 16 (1980).
21 See, e.g., District of Columbia v. Heller, 128 S. Ct. 2783, 2805-06 (2008) (citing 2 Blackstone’s Commentaries 143 (St. George Tucker ed., 1803) (“equated that right [arms right as necessary for self-defense], absent the religious and class based restrictions, with the Second Amendment.”); 3 Joseph Story, Commentaries on the Constitution of the United States § 1891 (1833) (which points out that the right was held by Protestants only and that “under various pretences the effect of this provision [in the English Bill of Rights] has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege”)).
22 Brief of Amici Curiae, supra note 11, at 12-13. In Britain, the game laws sought to preserve the aristocracy’s traditional hunting privileges. Id.
23 In fact, some colonies made provisions for providing firearms to the poor from public funds for the purposes of arming militiamen. United States v. Miller, 307 U.S. 174, 181-82 (1939) (citing 12 The Statutes at Large; Being a Collection of All the Laws of Virginia 12 (William Waller Hening ed., 1823)). See also Brief of Amici Curiae, supra note 11, at 11-12 (describing how the lack of an organized militia in Pennsylvania for 20 years led to a provision
right to arms, it would have been a truly American concept, and would have had little to do with the English right.

Second, Congress could not have simply codified a traditional right. By enumerating the right and giving a concept form with specific words, the right was redefined. By phrasing an amendment in a particular way, Congress allowed the people to understand their rights, and bound future Congresses and courts when interpreting those rights.24 If the First Congress had wished the right to be held universally, it could have reserved the right to “all persons.”25 If the Amendment was meant to simply support the readiness of the country’s military, it could have been phrased “all citizens of military age.” Rather, the First Congress chose the politically-significant phrase, “The People,” which indicates that it was a political right held by those citizens eligible to vote.26 This group is smaller than a universal definition in that it would exclude women, children, and most non-whites. This group is also significantly larger than potential militia members in that it would include white males over the age of 40. Once words were agreed upon, different people’s conceptions of the pre-existing common law right would have to change, giving way to a construction of the words that were now part of the Constitution.27

in the 1776 Constitution to require military service from every citizen to protect the community from attacks by Native Americans and the British).

24 As St. George Tucker said in his commentary on the Bill of Rights, “A bill of rights may be considered, not only as intended to give law, and assign limits to a government about to be established, but as giving information to the people. By reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn his own rights, and know when they are violated.” 1 Blackstone’s Commentaries 308 app. (St. George Tucker ed., 1803).

25 In fact, the House Committee charged with revising Madison’s draft bill of rights used the phrase “composed of the body of the people” after militia. Brief of Amici Curiae, supra note 11, at 28 (citing The Complete Bill of Rights 169-70 (Neil H. Cogan ed., Oxford University Press 1997)).


27 I also would argue that different people in the colonial era must have had a different understanding of gun ownership rights. It is hard to believe that even in the 1790s, city dwellers and farmers had the same conception of the need for firearms. In addition, those in Boston may have had a different understanding from those in rural Virginia. See comments of Patrick Henry, infra note 46 and accompanying text. See also District of Columbia v. Heller, 128 S. Ct. 2783,
If arms were so broadly held and there was little talk, except by the most frenzied Anti-Federalists, of the federal government’s power to disarm individuals, what need did the Second Amendment serve? Was it simply an easily agreed-upon sop to the Anti-Federalists, as Scalia suggests? Was it a restatement of the collective need for the militia, as Stevens claims? I instead argue that the Second Amendment was necessary to protect both the rights of states and individuals in the face of a confusing new power arrangement between the new federal and state governments.

The Constitution’s drafters not only harbored a tremendous distrust of standing armies, but also understood that the Articles of Confederation’s defense provisions were ineffective. In addition, Washington and Hamilton had complained about the effectiveness of the state-controlled militia and called for uniform training standards and membership limited to a select body of young men instead of the larger mass of adult males. Although several delegates argued that the states would never give up their traditional control over the militia, others such as Madison and General Charles Pickney claimed that it was important to have “uniformity . . . in the regulation of the Militia throughout the Union.”

2848-49 (Stevens, J., dissenting) (citing colonial era laws from Philadelphia, New York, and Boston that restricted the firing of guns within city limits to some degree). For example, Boston in 1746 had a law prohibiting the “discharge” of “any Gun or Pistol charged with Shot or Ball in the Town.” Id. (citing Act of May 28, 1746, ch. 10).

28 Heller, 128 S. Ct. at 2801.

29 Id. at 2822.

30 Brief of Amici Curiae, supra note 11, at 32-33. Under the Articles of Confederation, Congress lacked the authority to lend additional support to the Massachusetts government to put down the uprising. Id.


32 Brief of Amici Curiae, supra note 11, at 15 (citing 2 The Records of the
The Constitution expressly allowed the federal government to assume control of the militia in cases of national emergency. To ensure the militia was worth controlling, Congress would also determine the various militias’ training and weaponry. As a check on the federal government’s power over the militia, the states would choose their militia’s officers. Therefore, both levels of government would act directly on the citizens comprising the militia. Exactly how this unusual arrangement would work was unknown.

The Federalist Papers argued for uniformity in organization and that discipline was necessary to make the militia a viable alternative to a standing army. The states would be protected by their ability to name militia officers. Beyond that, the Federalists argued that this arrangement

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33 See id. at 16. Rufus King stated that the new provisions of arming the militias meant Congress could “provide for uniformity of arms, but included authority to regulate the modes of furnishing [arms], either by the militia themselves, the State Governments, or the National Treasury.” Id. (citing The Records of the Federal Convention of 1787, supra note 31, at 384-88). Madison seems to have wanted to go even further, arguing that “the only effective militia would be one ultimately controlled by Congress.” Id. at 16.

34 Id. at 31.

35 Id. The Historians claim this would be a “political determination.” Id.

36 The Federalist No. 29 (Alexander Hamilton) (“This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority . . . . If a well-regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the protection of the State is committed, ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions upon paper.”).

37 Id. (“If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a
required a certain amount of trust in their fellow citizens that the militia
would not be abused.\textsuperscript{39}

The Federalists’ arguments did not persuade everyone. Patrick
Henry declared that he was reluctant to surrender the militia, “this great
bulwark, this noble palladium of safety” and “most valuable of rights,”
to the federal government.\textsuperscript{40} The ratifying conventions produced several
multifaceted objections to the power-sharing arrangement between
federal and state governments over the militia.

First, the states and the people could either be actively disarmed
by the federal government, or passively disarmed through the willful
neglect of the militia. An armed population was the best protection for
a free people and would prevent the federal government from enforcing
oppressive laws.\textsuperscript{41} Delegates in Pennsylvania and North Carolina argued
that Congress could disarm the militia and thus put the population at risk.\textsuperscript{42}

\textsuperscript{39} Id. (“Where in the name of common-sense are our fears to end if we may not
trust our sons, our brothers, our neighbors, our fellow citizens? What shadow
of danger can there be from men who are daily mingling with the rest of their
countrymen and who participate with them in the same feelings, sentiments,
habits and interests? What reasonable cause of apprehension can be inferred
from a power in the Union to prescribe regulations for the militia, and to
command its services when necessary . . .?”).

\textsuperscript{40} The Debates in the Convention of the Commonwealth of Virginia on the
Adoption of the Federal Constitution, The Complete Bill of Rights, supra
note 25, at 197 (citing 3 Debates on the Adoption of the Federal
Lippincott 1888)) [hereinafter The Virginia Convention].

\textsuperscript{41} The Pennsylvania Convention Thursday 6 December 1787, The Complete
Bill of Rights, supra note 25, at 191 (citing 2 The Documentary History
of the Ratification of the Constitution 507, 508-09 (Merrill Jensen ed.,
Mr. Lenoir of North Carolina stated, “[Congress] can disarm the militia. If
they were armed, they would be a resource against the great oppressions. The
laws of a great empire are difficult to be executed. If the laws of the Union were
oppressive, they could not carry them into effect, if the people were possessed
of proper means of their defence.” The Complete Bill of Rights, supra note
25, at 191 (citing 4 Debates on the Adoption of the Federal Constitution
[hereinafter The North Carolina Convention].

\textsuperscript{42} The North Carolina Convention, supra note 41, at 191 (comments of Lenoir);
More subtle than disarming the people outright, the federal government could simply neglect the militia, not that the states had done such a good job themselves. Recent experience had shown the militia not to be the effective fighting force Washington wanted, and both Madison and Henry agreed that their native Virginia had been unsuccessful in arming its own militia. Still, Henry seemed to worry that the militia


43 Mason recalled a situation 40 years before when a governor of Pennsylvania suggested to the British Parliament that the best way to weaken the colonists was to disuse and neglect the militia. *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Eliot ed., 2d ed., New York 1888), reprinted in *The Complete Bill of Rights, supra* note 25, at 192-99 (Comments of Mason and Henry).

44 Brief of Amici Curiae, *supra* note 11, at 11-12 (citing Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms, 38* Rutgers L.J. 1041, 1044-46 (2007)). The Historians do offer an interesting insight into the Pennsylvania situation. *Id.* Starting in the 1750s an impasse between the proprietary governor and the assembly, combined with the influence of Quaker pacifism, effectively prevented the colonial government from maintaining a militia. *Id.* at 11. During the Indian attacks of the 1760s the residents of frontier counties petitioned the provincial government to organize the militia and provide the resources necessary to sustain it. *Id.* Pennsylvania failed to organize the militia right up to 1776 when it did not even respond to the British threat. *Id.* at 11-12. As a result, the common defense was provided by voluntary militia units, and committees arose to demand a new constitution that would coerce military service from every citizen. *Id.* at 12. The Historians claim, therefore, that the phrase “for the defense of themselves” does not refer to an individual right, but to the community’s capacity to protect itself from the threats posed by either Native Americans or the British army. *Id.*

45 Having commanded the militias during the Revolution, Washington wanted not only uniform standards of training for the various state militias, but argued that the militias could only be effective if “formed from a select body of young men, as opposed to the larger mass of adult males legally eligible for service.” Brief of Amici Curiae, *supra* note 11, at 14-15 (citing 26 *Writings of George Washington* 389-90 (John Fitzpatrick ed., 1931-1944)); Madison argued, “Have we not found, from experience, that, while the power of arming and governing the militia has been solely vested in state legislatures, they were neglected and rendered unfit for immediate service? Every state neglected too much this most essential object.” *The Virginia Convention, supra* note 40, at 195. Henry stated, “though our Assembly has, by a succession of laws for many years, endeavoured to have the militia completely armed, it is still far from being
would not be poorly armed out of maliciousness, but out of a lack of understanding. Would the members of Congress from New Hampshire know which arms the militia in Virginia needed? In fact, Virginia’s own militia law allowed different populations to be armed differently. Could or would the federal government be able to make such subtle distinctions to address local needs, or would the need for national uniformity in arms and training take precedence? In effect, the militia could be armed, but not in a way that benefited the individual, locality, or state.

Madison claimed that the power to arm the militia would be concurrent between the states and federal government. Henry disagreed. The Constitution clearly gave the power to arm to the federal government and not to the states. Even if the power was concurrent, Henry asked, would militiamen have to pay for double sets of arms at very great cost? To address this problem, Mason and Henry offered the case.”

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46 The Virginia Convention, supra note 40, at 199 (Henry stating, “If Congress are to arm us exclusively, the man of New Hampshire may vote for or against it, as well as the Virginian. The great distance and difference between the two places render it impossible that the people of that country can know or pursue what will promote our convenience.”).

47 The Virginia Militia Law allowed the militia of the western counties to arm themselves with rifles rather than muskets, “Provided, That the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements, in lieu thereof.” United States v. Miller, 307 U.S. 174, 182 (1939) (citing The Statutes At Large, Being A Collection of All the Laws of Virginia, supra note 23).

48 The Virginia Convention, supra note 40, at 199. This potential reliance on people who did not understand local needs seemed to be an important point for Henry. Id. (Henry stating that, “If you have given up your militia, and Congress shall refuse to arm them, you have lost everything. Your existence will be precarious, because you depend on others, whose interests are not affected by your infelicity.”).

49 Id. at 195 (Madison stated, “I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive.”).

50 Id. at 196-99.

51 Id. at 197; see also U.S. Const. art. I, § 8, cl. 15.

52 The Virginia Convention, supra note 40, at 198 (Henry argued, “May we not discipline and arm them, as well as Congress, if the power be concurrent? so that our militia shall have two sets of arms, double sets of regimentals, &c.; and thus,
potential amendments.\textsuperscript{53} Mason wanted a provision stating that if the federal government did not arm and train the militia, the states should be allowed to do so.\textsuperscript{54} Henry went even further, saying that Congress should not have the power to arm or discipline the militia until the states have refused or neglected to do so.\textsuperscript{55}

Second, a persistent concern was that oppressions would follow if the federal government took a militia away from its home state for lengthy periods.\textsuperscript{56} As William Findley argued before the Pennsylvania convention, “[t]he militia will be taken from home; and when the militia of one state has quelled insurrections and destroyed the liberties, the militia of the last state may, at another time, be employed in retaliation of the first.”\textsuperscript{57} Even if the citizens of other states were not abused, there were other considerations. By taking the militia to fight for the federal government, the states would lose their means of self-defense.\textsuperscript{58} Individuals would also be at risk. Long-term service could be so burdensome that people might vote to abolish the militia and establish a standing army. It also could lead to the imposition of the harsh martial law typical of standing armies, but not of militias – another reason to eliminate the militia.\textsuperscript{59} To address these issues,

at very great cost, we shall be doubly armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms &c.?\textsuperscript{53}

\textsuperscript{53} Id. at 194, 198.

\textsuperscript{54} Id. at 194 (Mason stated, “I wish that, in case the general government should neglect to arm and discipline the militia, there should be an express declaration that the state governments might arm and discipline them.”).

\textsuperscript{55} Id. at 198.

\textsuperscript{56} The Pennsylvania Convention, \textit{supra} note 41, at 191 (John Smilie stating, “[The militia] may [be] dragged from one state to any other”); The Virginia Convention, \textit{supra} note 40, at 192-94 (George Mason suggested that “[i]t would be to use the militia to a very bad purpose, if any disturbance happened in New Hampshire, to call [the militia] from Georgia,” with the potential for one state’s troops to be used to oppress the rights and liberties of another state.).

\textsuperscript{57} The Pennsylvania Convention, \textit{supra} note 41, at 192 (comments of William Findley).

\textsuperscript{58} The Virginia Convention, \textit{supra} note 40, at 192-94 (Mason commenting that taking the militia was “extremely unsafe” in that it would “take from the state legislatures what divine Providence has given to every individual – the means of self defence”).

\textsuperscript{59} \textit{The Debates in the Several State Conventions on the Adoption of the Federal Constition} (Jonathan Eliot ed., 2d ed., New York 1888), \textit{reprinted in The}
Mason proposed that the federal government could not send a state’s militia beyond the limits of an adjoining state without the consent of the appropriate state legislature. In response, Madison claimed that the idea that a state militia would be dragged across the continent was “preposterous” and that the popularly elected portion of Congress would prevent the federal government from abusing its powers.  

Third, it was noted that the Constitution did not protect conscientious objectors from military service. This was an especially important issue in states such as Pennsylvania, where a large portion of the population were Quakers who were theologically opposed to performing military service. Such a provision would be a more traditional right to protect a minority against government power.

Fourth, there was a concern that the militia would be used to replace the traditional civil law enforcement authorities. If the federal government wanted to enforce its law, it seemingly had to rely on the state militias to do so. At the time, most law enforcement was

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Complete Bill of Rights, supra note 25, at 192-94 (Comments of Mason); The Documentary History of the Ratification of the Constitution, Vol. 2 (Merrill Jensen ed., Madison, Wis., 1976-1978), reprinted in The Complete Bill of Rights, supra note 25, at 191-192 (comments of Smilie). See The Pennsylvania Convention, supra note 41, at 191-92 (Smilie worrying that federal military law would not be as “mild” as the state laws allowing “[m]ilitia men may be punished with whipping or death”); The Virginia Convention, supra note 40, at 192-94 (Mason arguing that such conditions would also harass and weaken the militia and bring about a standing army, and suggesting that the militia should not be subjected to martial law except in time of war); id. at 194 (Madison dismissing the notion that martial law would be established in peacetime by stating that the states will have control over the militia when not in service to the Union).

60 The Virginia Convention, supra note 40, at 195-96 (“Would the legislature of the state drag the militia of the eastern shore to the western frontiers, or those of the western frontiers to the eastern shore, if the local militia were sufficient to effect the intended purpose? There is something so preposterous, and so full of mischief, in the idea of dragging the militia unnecessarily from one end of the continent to the other, that I can think there can be no ground of apprehension.”).

61 The Pennsylvania Convention, supra note 41, at 192 (comments of Findley).

62 The Virginia Convention, supra note 40, at 192-200 (comments of Madison, Clay, and Henry); The Pennsylvania Convention, supra note 41, at 191-92 (Smilie arguing that the proposed federal government could not be a free one because it was to rule by power of the purse and sword rather than relying on the “confidence of the people”). This is, of course, a gross overstatement – any government needs to enforce its rule by some means beyond the unanimous
conducted by the *posse comitatus*, which was operated by the local sheriff and had a county-wide jurisdiction.\textsuperscript{63} State-wide law enforcement may have required the governor to call upon the militia. The composition of the local posse and state militia were similar, and both had the considerable benefit of allowing the community or state to respond to threats without relying on professional military personnel.\textsuperscript{64} In some ways, the militia was a subset of “the people” in that it included voters who were “able-bodied,” and excluded older voters; however, it also included people who were not yet old enough to vote. The *posse* could potentially be much larger than the pool of voters, and was certainly larger than the potential militia.

\textsuperscript{63} Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 Yale L. & Pol’y Rev. 383, 389-92 (2003). “*Posse comitatus*” means “force of the county” and referred to the common law power of a sheriff to summon able bodied persons to assist him in keeping the peace, pursuing and arresting felons and suppressing riots. Eligibility for a *posse* differed from jurisdiction to jurisdiction. The Oxford English Dictionary defines a *posse* as men over the age of 15 years exclusive of peers, clergymen, and infirm persons. 12 *Oxford English Dictionary* 171 (2d ed. 1989). Blackstone claimed the sheriff may command all the people of his county. 1 William Blackstone, *Commentaries* *86.

\textsuperscript{64} See David E. Engdahl, *Soldiers, Riots and the Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1, 26-27 (1971) (noting tremendous difference in the British and American posse, whereas military personnel were eligible to assist law enforcement in Britain, there has been a strong American tradition of severely limiting the use of the military when enforcing laws); Kealy, supra note 63, at 389.
At Virginia’s ratifying convention, Clay worried that the militia may be sent to the Mississippi, and that using the militia to enforce the laws would lead to a military government. He asked why this mode was preferable to the traditional practice of the local sheriff raising a posse comitatus to enforce the laws. Madison responded that the posse comitatus may not be sufficient to enforce the law, since it only covered a county. In such instances, the militia would be used, but “when the civil power was sufficient, this mode would never be put in practice.” Ultimately, Madison argued that this was preferable to using a standing army to enforce the law. Once again, Henry stated that Madison was too trusting of Congress and federal officers, and argued that the military power ought not to interpose until the civil power refused to act.

Under the Constitution, the states retained the police power that gave them broad and exclusive legislative authority to regulate most facets of daily life, including property, criminal law, health, and welfare. This

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65 The Virginia Convention, supra note 40, at 196.
66 Id.
67 Id.
68 Id.
69 Id. at 196-99.
70 Brief of Amici Curiae, supra note 11, at 3, 14. For example, the Pennsylvania Declaration of Rights of 1776 affirmed that “the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police
aspect of federalism makes Clay and Henry’s law enforcement-oriented objection to the new power-sharing arrangement over the militia essential to understanding the need for the Second Amendment. Although the Second Amendment mentions the militia, that was not the only entity that needed protection. As stated above, the militia and the *posse comitatus* were drawn generally from the same group of people. Armed males acting in concert with others from the county formed the *posse*; those acting under state-wide authority formed the traditional militia; those militias combined with other militias under federal authority formed an army. The armed individuals were the common building blocks for what could generally be termed the “common defense.”

Federal use of the militia to enforce laws created particular problems for three groups: the population that was not complying with the federal law, the militia men who were deployed, and the population from which the militia had been drawn. First, it may be ridiculous to think, as Smilie did, that the federal government did not need some enforcement mechanism. Still, if the federal laws are reasonable and acceptable to the large majority of people, shouldn’t the traditional posse be enough to enforce the law? Second, what would the effect on militia men be over a long period of time as they enforced the law on their fellow citizens? Third, what would happen to the communities and states from which those militia men were drawn? Since the men who made up the militia also made up a large portion of the *posse comitatus*, who would be left to provide local protection? They would be, as Mason pointed out, left without the means of self-defense at the local and state levels. This may have been the reasoning behind this draft amendment offered by some Pennsylvania Anti-Federalists: “[T]he people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game . . . .” How individuals, localities, and states would enforce the law when the militia was called away on federal duty is important for understanding the need for the Second Amendment.

The final Amendment did not expressly prevent Congress from disarming the people as some of the proposed amendments did, thus

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71 The Virginia Convention, *supra* note 40, at 192-94.
73 The Historians cite New Hampshire’s recommended 12th Amendment:
undermining an “insurrectionist” reading of the Second Amendment—allowing the right of popular resistance to tyrannical government. Nor did the final Amendment protect conscientious objectors. Still, I would argue that the spare language of the Second Amendment addressed several of the Anti-Federalists’ concerns.

“Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.” Brief of Amici Curiae, supra note 11, at 22 (citing The Complete Bill of Rights, supra note 25, at 181). The Massachusetts convention rejected a provision saying “that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms.” Id. (citing 6 The Documentary History of the Ratification of the Constitution, Ratification of the Constitution by the States: Massachusetts 1453, 1469-1471 (John P. Kaminski & Gaspare J. Saladino eds., State 2000)). The Pennsylvania anti-federalists published the following in their Dissent: “7. That the people have a right to bear arms for the defense of themselves and their own state, [sic] or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless the crimes committed, or real danger of public injury from individuals.” Id. at 23 (citing 2 The Documentary History of the Ratification of the Constitution, Ratification of the Constitution by the States: Pennsylvania 597-98 (Merrill Jensen ed., Worzalla Publishing Co. 1976)).

74 Brief of Amici Curiae, supra note 11, at 32-33. Given that the Constitution was written with Shay’s Rebellion in mind and specifically allows the militia to be called out to put down insurrections, this argument should be rejected. Even more radical Anti-Federalist language that would specifically prevent Congress from disarming citizens did not protect insurrectionists.

75 Id. at 27-28. The provision was suggested by the Maryland convention and made it into Madison’s original draft. Id. (citing The Complete Bill of Rights, supra note 25, at 181). This clause was the sole subject of debate in the House. In all likelihood, the Congress did not want to unnecessarily hamper the states or future Congresses in determining the composition of the militia. Such provisions were already found in the constitutions of Pennsylvania (Pa. Const. of 1776, ch. I, § VIII; “Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent;”) New York (N.Y. Const. of 1777, art. XL; “That all such of the Inhabitants of this State, being of the people called Quakers, as from Scruples of Conscience may be averse to the bearing of Arms, be there from excused by the Legislature;”); and New Hampshire (N.H. Const. of 1783, pt. I, art. XIII; “No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent.”).
First, the prefatory clause puts a new federal obligation in place to go along with its rights to arm and train. Rather than simply restating the republican truism that the militias were both necessary and superior to standing armies, the prefatory clause could be read to provide some protection against the Anti-Federalists’ concerns. With one phrase – “a well regulated militia” – Madison not only reaffirmed the Federalist desire for a better, federally-controlled militia, but he provided some protection to the states. The phrase could also be read to mean that, not only does Congress have the power to train and equip the militias, it now has a constitutional obligation to do so. A militia that could be systematically disarmed, neglected, armed without thought to local circumstances, or subjected to harsh martial law could not be considered “well-regulated.”

The Amendment also protects an individual’s right to arms to provide for personal protection and common defense. The strange thing about the right to bear arms is that, at the time the Bill of Rights was drafted, it would not have been considered a counter-majoritarian interest as it may be considered now. Gun ownership was common and citizens were expected to use those guns for the common defense.

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76 Brief of Amici Curiae, supra note 11, at 32-33 (the Historians point out that the people’s aversion to serving in “a well-regulated” militia outweighed the Federalist’s efforts to turn the militia into a more effective military operation).

77 Id. at 5-13. The Historians in their brief stated that although there are no statistics, in the early days of the nation firearms were expected to be readily available. By 2004, the National Firearm Survey found that only 38 percent of households and 26 percent of individuals reported owning at least one firearm. This survey was conducted by researchers from the Harvard School of Public Health to determine the number of privately-held firearms in the United States. The survey comprised the responses of 2,770 adults over the age of 18 living in the United States during the spring of 2004. L. Hepburn et al., The US Gun Stock: Results from the 2004 National Firearm Survey, 13 INJ. PREVENTION 15, 15-19 (2007), available at http://injuryprevention.bmj.com/content/13/1/15.full.

78 See James Lindgren & Justin L. Heather, Counting Guns in Early America, 43 WM. & MARY L. REV. 1777, 1780 (2002) (a review of early American probate records show a high rate of gun ownership ranging from 54-73 percent). Machiavelli and other republican theorists treated the obligation to bear arms in defense of one’s country as one of the rights and privileges that distinguished citizens from subjects. Brief of Amici Curiae, supra note 11, at 18. The Historians state in a footnote that this point merits far more development than
In fact, Congress chose to strike the only truly counter-majoritarian provision of Madison’s original Amendment – to protect conscientious objectors. 79 Firearms were widely held to protect personal property, to obtain food, and to collectively protect the community.80 Why was there little talk about specifically protecting a private right to arms?81 There was no need to talk about the right of gun ownership because it was simply assumed for the vast majority of residents. What was instead at issue was the obligation of an individual to produce and use the weapon for the common defense. Until 1789, the common defense relied upon a series of obligations starting with the individual to his locality, the locality to the county, and the county to the state. The Constitution added a new layer of obligations and gave some of the states’ traditional rights to the new federal government.

79 Compare U.S. Const. amend. II and Madison’s original proposal from June 8, 1789: “Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, . . . The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.” Congressional Register, June 8, 1789, vol. 1, p. 427, reprinted in The Complete Bill of Rights, supra note 25, at 169.

80 In fact, there were several state statutes that demanded that inhabitants of the newly organized states own, maintain, and, when required, bear a weapon for the common defense.

81 See Brief of Amici Curiae, supra note 11, at 22 (contending that few Anti-Federalist arguments for a private right to arms garnered much political support).
An individual’s right to bear arms may not have been discussed at length, but the obligation of providing for a common defense was. Given this new arrangement, the rights that needed immediate protection were those of the localities and states that would continue to rely on an armed citizenry for protection. Madison may have been protecting the Federalist’s vision of congressional authority over the organization of the militia, but at the same time, I would argue, he was addressing the serious questions that arose due to this power-shift over the militia. Would the

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82 Id. at 28-30.
federal government mandate that individuals would only be armed when in federal service? Would the weapons needed in a federal army be useful to the locality’s needs? Would only those select people eligible for militia duty be allowed arms? If so, what would happen while they were away from the locality or the state? As Mason asked, how would the state defend itself, not just from external threat, but to enforce the law if the militia was deployed elsewhere?83

The Second Amendment’s reference to two groups, “The People” and “the militia,” could cause “grammatical and analytical tension” between the Amendment’s two clauses.84 Professor Amar resolves this tension by reading the two terms as synonymous.85 As used in the Constitution, “The People” referred to voters, “the same adult male citizens who, roughly speaking, constituted the militia.”86 Scalia also seems to read the clause “the people” as synonymous with “the militia,” in that the latter was broadly composed of all “able-bodied men.”87

83 The Virginia Convention, supra note 40, at 192-94 (comments of Mason).
84 Amar, supra note 26, at 216. Amar points out that the original Amendment passed by the House read “A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the People to keep and bear arms, shall not be infringed . . . .” The Senate created the tension with what Amar terms a “stylistic” change. The Historians claim that this change moved “the people” vested with the right closer to the republican ideal of the adult male citizenry, and that Senate Federalists believed such a broad phrase would not hinder Congress in using its best judgment as to how the militia should be organized, armed, and disciplined. Brief of Amici Curiae, supra note 11, at 28, 29 (citing The Complete Bill of Rights, supra note 25, at 169-70). Some commentators claim this was sloppy editing and did not change the Amendment’s meaning. Id. at 29 (citing Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 161 (1994)).
85 Amar, supra note 26, at 51-52 (“the militia” is identical to “the people”). Amar also quotes Tench Coxe from a 1788 essay, “Who are the militia, Are they not ourselves?” Id. at 52, 216.
86 Id. at 245. Besides the Preamble to the Constitution, the phrase “The People” appears just once and clearly referred to voters: “The House of Representatives shall be . . . chosen every second Year by the People of the several States.” Id. at 49. The right to bear arms, therefore, would be similar to other rights reserved to voters such as holding office and serving on a jury. Id. at 48-49. Amar states that he does not deny that “The People” could be read more broadly, but he simply seeks to emphasize the structural and populist core of the right. Id. at 49.
87 District of Columbia v. Heller, 128 S. Ct. 2783, 2800 (2008) (Scalia writes that the Second Amendment gives Congress the power to organize an existing entity,
contend that rather than being analogous, the militia is a subset of the people, and the tension is there purposefully. By guaranteeing the right to keep and bear arms to a larger group of people than were eligible for militia service, the state would always have a segment of the population armed and available to provide for the common defense. By guaranteeing the right to the people, neither the state (with its police powers) nor the federal government (with its power over the militia) could disarm the people at the expense of the other. Furthermore, by placing the right with the individual, that person is ensured the ability to protect himself and his property even when civil law enforcement is at its weakest due to an emergency in another part of the state or on the other side of the continent – a clear concern of some Anti-Federalists.

On that last point, some could argue that protecting one’s self and property is not, strictly speaking, common defense. Still, with no organized police force, someone had to address the immediate threat of crime and deter criminal activity. An armed population does that. Even if it does not qualify as “common defense,” we must bear in mind that Congress had the opportunity to limit the scope of the Second Amendment to “keep and bear arms for the common defense” but chose not to do so.

“the militia,” which was commonly defined as including “all able-bodied men”).

88 See, e.g., supra p. 240.
89 Brief of Amici Curiae, supra note 11, at 25-26. The Historians argue that Madison worded the Bill of Rights in such a way so the states would retain their traditional police powers, including the right to regulate firearms. Id. The Historians point out that Madison himself had introduced a bill originally drafted by Jefferson, to prohibit hunters who had violated the ban on deer hunting from the “bearing of a gun [not arms]” beyond their own lands. Id. at 26 n.6 (quoting and citing 2 Papers of Jefferson 443-44 (Julian Boyd ed., 1950)).
90 As Montesquieu wrote in the Spirit of the Laws, “In the case of natural defence I have a right to kill, because my life is in respect to me what the life of my antagonist is to him . . . . With individuals the right of natural defence does not imply a necessity of attacking. Instead of attacking they need only have recourse to proper tribunals. They cannot therefore exercise this right of defence but in sudden cases, when immediate death would be the consequence of waiting for the assistance of the law.”
91 Brief of Amici Curiae, supra note 11, at 29-30 (citing The Complete Bill of Rights, supra note 25, at 174-75) (the Senate too considered and rejected this change). Some have argued, as I do, that this indicates a right to use weapons
The obligation of providing the common defense was premised upon, at its core, an individual’s right to have arms. During the 19th century and into the 20th century, the methods for providing the common defense changed dramatically. The obligation to provide for the common defense may not have dissolved completely, but all that remains today in most places is the need to protect one’s own person and household. That does not mean, however, that the core right is lost. Whatever the common law right to arms was in England or colonial America is immaterial. The Amendment, which specifically protects the gun rights of a group larger than any level of government required to provide the common defense demonstrates that there is an individual right to bear arms.

Of course, although the states would retain the ability to reasonably regulate firearms through the police powers, “[n]ot even the most paranoid Anti-Federalist imagined that the national government would have the incentive or means to interfere with this traditional form of regulation.”\(^9^2\) Given this analysis, the states could not completely disarm the people per this agreement between federal and state governments.

III. The Changing Nature of the Second Amendment

This matrix of responsibilities and rights suited the new republic. It was flexible, providing protection against many different types of threats, and avoided the specter of a liberty-destroying standing army. Still, the needs of the various states and the nation as a whole have changed dramatically over time. First, since the Civil War, the construction of “the people” has been expanded to include all people in the United States, not just the segment of the population that had the right to vote. The right has thus transformed from a political right to a civil right. Second, in the 20th century, the militia consisting of most of the adult male population for other lawful purposes. See Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 Ga. L. Rev. 1, 35 (1996). In contrast, the Historians argue that other possible reasons are more compelling – that the phrase was superfluous and redundant to the militia’s purpose, and that such a qualification could restrict the federal uses of the militia in Article I, such as the suppression of insurrections. Brief of Amici Curiae, *supra* note 11, at 30.

\(^9^2\) Brief of Amici Curiae, *supra* note 11, at 31-32. The regulation of firearms at this time may have been lax, but it did exist. *Id.* at 31. For example, states and localities regulated the private keeping of gun powder and the public carrying of weapons. *Id.*
exists on paper, but is not relied upon for defense of the state or nation. Professional military and law enforcement operations have replaced the need for calling on an armed population to provide the common defense. Greater emphasis is now placed on and individual’s right to self-protection rather than the protection of the community. This section will examine some of these changes.

As stated above, “the people” referred to a political right held by those who were eligible to vote – essentially, free, white, adult men. During Reconstruction, this changed dramatically, and arms-bearing evolved from a political right into a civil right. During Reconstruction, the southern states passed laws making it illegal for the newly-freed African Americans to exercise basic civil rights, including the right to purchase, possess, and use firearms. In addition, various militias operating in the South at this time terrorized the black population, invading homes and seizing property, including firearms. As a response, Reconstruction republicans recast the right to bear arms as a civil right. The right to bear arms was not reserved to those who had an obligation to participate in the militia to protect the state or nation, but was held by everyone for the purpose of self-protection. The “militia” was no longer associated with arms-bearing:

Creation-era arms bearing was collective, exercised in a well regulated militia embodying a republican right of the people, collectively understood. Reconstruction gun-toting was individualistic, accentuating not group rights of the citizenry but self regarding “privileges” of discrete “citizens” to individual self protection. The Creation vision was public, with the militia muster on the town square. The Reconstruction vision was private, with individual freedmen keeping guns at

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94 See Amar, supra note 26, at 258 (citing Harper’s Weekly, Jan. 13, 1866 at 3, col. 2 (“The militia of [Mississippi] have seized every gun and pistol found in the hands of the (so-called) freedmen”)).
95 Id. at 258-59.
home to ward off Klansmen and other ruffians.\textsuperscript{96}

The Reconstruction-era Congress recast the operative clause from a right of the people to an individualistic privilege of persons.\textsuperscript{97} This is evident in the Freedman’s Bureau Act of 1866, which Congress passed over the veto of President Johnson. This law stated:

the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all citizens of such State or district without respect to race or color or previous condition of slavery.\textsuperscript{98}

The same Congress adopted the 14th Amendment, which provides, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law . . . .”\textsuperscript{99} The core purpose of the 14th Amendment and the Freedman’s Bureau Act was to outlaw the Black Codes of the South and affirm the right of every citizen to self-defense.\textsuperscript{100} One of the “personal rights” the 14th Amendment was intended to protect from state infringement was the right to keep and bear arms.\textsuperscript{101} As Senator Samuel Pomeroy stated,
“Every man . . . should have the right to bear arms for the defense of himself and his family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant . . . .”102 Amar points out the threat of this period was not a federal standing army, but state encroachment on basic civil rights, and the issue focused on private violence and local lapses in protection rather than federal tyranny.103 If the Second Amendment ever stood for a collective right, the Reconstruction period interpretation, and the purpose behind the 14th Amendment, was clearly individualistic.104

The drafters of the 14th Amendment interpreted the Second Amendment differently than the Founding generation. In 1789, the Second Amendment protected the political right of keeping and bearing arms for “The People” – understood at the time to be the polity of adult, white, male voters from which the militia was drawn. The 14th Amendment treats firearms as an individually-held civil right. Amar claims that where the Second Amendment fused together arms-bearing, military service, and political representation, the 14th Amendment pulls them apart and places arms-bearing at a different level than voting or militia service.105 The drafters of the 14th Amendment consistently claimed that the Amendment and the Civil Rights Act were focused on “civil rights” and not “political rights” like voting. The right to keep and bear arms would be extended, but suffrage would not be extended to women and minors.106

IV. A 20th Century Interpretation of the Second Amendment

By the third decade of the 20th century, American society had changed dramatically from the one known by the First Congress. The

102 See Amar, supra note 26, at 265 (quoting Cong. Globe, 39th Cong., 1st Sess. 1182 (1866)).
103 Id. at 266.
104 Id. at 261-62 (citing 1 William Blackstone, Commentaries *141-44) (there was much reference during this era to Blackstone, who affirmed the right to “have arms” to protect the primary rights of personal security, personal liberty, and private property, and the ultimate individual right of “self preservation”).
105 Id. at 217-18.
106 Id. at 216-17.
nation had a very different military and law enforcement structure that, in most instances, no longer depended upon an armed citizenry. The 1930s also brought a dramatic and frighteningly dangerous new type of criminal – the powerfully armed and highly mobile gangster. Addressing this crime wave gave the President an opportunity to propose sweeping gun legislation for the first time. Congress, which had been compliant with the President on crime policy, produced a law far more limited than the President wanted. The congressional debate shows that the Congress was wary of overstepping its constitutional authority to restrict gun ownership.

Still, where should the line be drawn? There were no judicial precedents to rely on, and the representatives were very aware that they faced a threat very different from anything the Founders faced. Many reasons were offered both for protecting and severely restricting an individual’s right to keep and bear arms. Although Congress saw that it had the constitutional authority to create sweeping federal gun laws and severely restrict the availability of handguns, it refused to do so. Instead, Congress decided to address the crime crisis in the least restrictive way possible. Congressional restraint was based on the same federalism theory that inspired the Second Amendment. Even though society had changed, Congress believed that decisions affecting gun ownership should not be made at the national level, but should instead be left to the states, municipalities, and personal judgment. Congress found some vitality left in the Second Amendment: although its protections would not be as far-reaching, the core rationale for the Amendment remained, and it protected the individual gun owner from total prohibitions on gun ownership, at least by the federal government.

This law also gave the Supreme Court its first opportunity to interpret the Second Amendment in the Miller case. The Court’s Miller decision offered a muddled interpretation based on a theory of preserving the militia. In contrast, Congress offered a clear precedent based on respect for individual rights and how those rights fit into the modern world. The Heller Court would have done better to ignore the Miller decision and focus instead on Congress’s creation of the law that was the foundation of that case. This section will examine this fascinating and overlooked interpretation.
A. The National Firearms Act

From the mid 1920s through the 1930s, there was a tremendous increase in crime, with great attention paid to kidnapping, auto theft, and bank robbery, especially in the area of the mid and southwestern states, referred to as some as the “Crime Corridor.” Although bank robberies had started to subside in the early 1930s, the threat continued to grip the nation, largely due to the attention given to several high profile criminals such as Al Capone, George “Machine Gun” Kelly, Clyde Barrow, Bonnie Parker, and John Dillinger. After the sensational 1932 Lindberg baby kidnapping, there was a wave of well-publicized kidnappings.

While the federal government increased its participation in fighting crime, citizens began to arm themselves. Celebrities such as Marlene Dietrich, Norma Shearer, and Gloria Swanson hired security services to protect their children, and some Hollywood mothers were reported as arming their chauffeurs and gardeners. To address bandits, some bankers’ associations were recruiting and arming “bank guards”


108 Id. at 65, 67, 69. In the tri-state area of Kansas, Missouri, and Oklahoma at least one bank raid occurred every week during 1930. Id. at 67. Between 1920 and 1930, The New York Times reported on 43 major bank robberies in the crime corridor states of Oklahoma, Kansas, Arkansas, Missouri, and Indiana, and published editorials calling for federal action against these armed bandits. Id. at 69.

109 Id. at 136-38. By 1933, the State of Indiana had requested federal help in tracking down Dillinger and his gang, and the FBI conducted the manhunt during the spring and summer of 1934. Id. at 138.

110 Id. at 108-09 (discussing 27 major kidnappings in 1933, many of which were unsolved during the first half of 1934).

111 Id. at 109. The Roosevelt Administration responded to the threat of bank robberies and kidnappings by authorizing its Justice Department and J. Edgar Hoover’s growing Division of Investigation to “spend as much money as . . . necessary” to end the crime wave. Id. (quoting Washington Mirror, Aug. 1, 1933).

112 Id. at 108 (citing N.Y. Times, May 8, 1933; Time, July, 24, 1933).
with powerful but concealable weapons. During the 1930s, members of the public had armed themselves and, in some instances, were ready to fight bank robbers:

One hot August day in Kansas City, Kansas, a bandit walked up to a teller and ordered him to place one hand on his head and put money up on the counter with the other. The teller fired a gas gun kept in the cash drawer: subsequently, a bank vice president charged out of his office firing a pistol; and finally, the bandit and his gang were chased out of town by passing motorists, some of whom fired out their windows at the getaway car. A similarly violent defense against a stickup artist was mounted by a woman filling station attendant in Joplin Missouri. When asked for her day’s receipts by two bandits, she sprayed the triggerman with gasoline and shot him. The outlaw burst into flames and fled.

The result of the crime wave – and the public’s reaction to it – was an abnormally high homicide rate.

January of 1934 brought an all-out press from the Roosevelt Administration to fundamentally change the role the federal government would have in law enforcement.

113 Potter, supra note 107, at 70. For example, the Cook County Banker’s Association armed 3,200 deputies during the late 1920s with sawed-off shotguns and rifles. Id.

114 Id. at 72 (citing Tulsa Daily World, Aug. 14, 1930; Tulsa Daily World, Aug. 28, 1930).

115 National Firearms Act: Hearing on H.R. 9066 Before the House Comm. On Ways and Means, 73d Cong. 30 (1934) [hereinafter Hearings]. According to the Justice Department, in 1931, there were 11,160 homicides in the United States, as opposed to 287 in Great Britain for the same year. Id. at 30.

116 “Returning to home problems, we have been shocked by many notorious examples of injuries done our citizens by persons or groups who have been living off their neighbors by the use of methods either unethical or criminal. Crimes of organized banditry, cold blooded shooting, lynching and kidnapping have threatened our security. These violations of ethics and these violations of law call on the strong arm of Government for their immediate suppression; they call also on the country for an aroused public opinion.” Franklin D. Roosevelt, Former President of the United States, State of the Union Address to Congress (Jan. 3,
At a national conference on crime, Roosevelt called for greater federal crime efforts to fight “bandits” that were better equipped and organized than the law.117 This war on crime allowed Roosevelt to rally middle-class voters to support the concept of a strong federal law enforcement effort to combat this new, interstate, dangerous criminal element.118

Roosevelt soon sent his crime package to Congress. Given Roosevelt’s party’s vast majorities in Congress119 and the nation’s “panicked” mood over crime, Congress was expected to be extremely compliant with Roosevelt’s agenda for greater federal intervention on crime issues.120 On January 11, 1934, Roosevelt filed the 13 bills that became known as the Omnibus Crime Bill. They were “designed to close gaps in existing federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types.”121 By May 5, 1934, President Roosevelt had already signed the first six acts of the Omnibus Crime Bill that allowed federal agents to carry out independent, armed investigations across state lines and made the murder of a government agent a federal felony offense.122 By June 14, 1934, Congress had sent Roosevelt a total of eleven crime bills for approval.123 Four days later, Congress sent Roosevelt

117 Potter, supra note 107, at 124 (quoting President Roosevelt’s Address to the Conference on Crime, 3 PUB. PAPERS OF FRANKLIN DELANO ROOSEVELT 495 (Dec. 10, 1934)).
118 Id. at 110.
119 In 1934, the Senate had 59 Democrats to 36 Republicans (of 96 seats), and the House had 313 Democrats to just 117 Republicans and 5 members from other parties. Infoplease.com, Composition of Congress, by Political Party, 1855-2010, http://www.infoplease.com/ipa/A0774721.html (last visited Dec. 21, 2010).
120 Potter, supra note 107, at 110.
121 78 CONG. REC. 11467 (1934) (statement of Sen. Copeland).
122 Potter, supra note 107, at 137. See also Act of May 18, 1934, Pub. L. No. 73-230, 48 Stat. 780 (providing punishment for killing or assaulting federal officers).
123 See 78 CONG. REC. 11467-70 (1934). These bills included: Act of June 18, 1934, Pub. L. No. 73-569, 48 Stat. 979 (“An act to protect trade and commerce against interference by violence, threats, coercion, or intimidation”); Act of June 13, 1934, Pub. L. No. 73-324, 48 Stat. 948 (“An act to effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and
another act for his signature, the National Firearms Act (NFA),\textsuperscript{124} but this was only a partial victory for the President.

As originally conceived by the Justice Department, H.R. 9066 would have regulated a wide range of firearms, including handguns and larger capacity weapons, through the commerce and taxing powers of Congress.\textsuperscript{125} The bill provided for annual registration and taxation for the manufacturers, importers, and dealers of firearms for conducting their businesses.\textsuperscript{126} The bill further required that a tax be paid on any firearm “sold, assigned, transferred, given away, or otherwise disposed of .

\begin{itemize}
\item National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934) (prior to 1968 and 1986 amendments) (the long title was “An Act to prove for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns”).
\item H.R. 9066, 73d Cong. (1934) (as reported by the H. Comm. on Ways and Means) (defining the term “firearm” as “a pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person, a muffler or silencer therefor, or a machine gun” and the term “machine gun” as “any weapon designed to shoot automatically or semiautomatically twelve or more shots without reloading”).
\item Id. § 2. Interestingly, the amount of the tax to be paid was left blank in the original bill. Id. § 3(a).
\end{itemize}
The transfer order would have a stamp proving payment of the tax, creating a federal method of registration: anyone who wanted a firearm had to provide the IRS identifying information including name, address, fingerprints, and a photograph. Furthermore, anyone disposing of a firearm also had to fill out an IRS form, firearms not properly disposed of were subject to forfeiture, and it would be unlawful to possess firearms disposed of previously. To carry a firearm in interstate commerce required a permit with a photograph, fingerprints, and a description of the firearm; further, possessors of firearms were presumed to have transported them in interstate commerce unless the possessors had been a resident of that state for more than sixty days, or had an IRS transfer order.

The powerful House Committee on Ways and Means considered

127 Id. § 3(a).
128 Id. §§ 4(a)-(c).
129 Id. §§ 4(a)-(b).
130 Id. § 6.
131 H.R. 9066, 73d Cong. § 5 (1934).
132 Id. § 10(a). The permit had a fee that the Justice Department did not specify in the original bill. Id. § 10(c).
133 Id. § 10(d). Violators were subject to unspecified criminal penalties of imprisonment and fines. Id. § 13 (as reported by the House Comm. on Ways and Means).
134 It is hard to overstate how central the Ways and Means Committee was to the business of the House. See generally Anthony Champagne, Douglas B. Harris, James W. Riddlesperger Jr. & Garrison Nelson, The Austin/Boston Connection: Five Decades of House Democratic Leadership, 1939-89 (2009). During most of the 20th century, the Committee was the majority Democrats’ “Committee on Committees” and decided which members would be assigned to the other committees. Id. at 4. It was also a clear pathway to leadership. As future Speaker of the House and Vice President of the United States John Nance Garner wrote, “I know the Ways and Means Committee is the most important committee in the House of Representatives and always will be. It is the heart of the economic and political organization of the House of Representatives.” Id. at 45 (citing letter from John Nance Gardner to Fred M. Vinson (Nov. 13, 1931) (on file with the Wendell H. Ford Research Center and Public Policy Archives, University of Kentucky, Lexington)). The Ways and Means Committee in 1934 included future Speaker of the House John McCormack and future Chief Justice of the U.S. Supreme Court Fred Vinson. Hearings, supra note 115. The Chairman, Robert L. Doughton represented his North Carolina district for 42 years and acted as Ways and Means Chairman for
the National Firearms Act during five days of high-profile hearings in April and May of 1934. 135 Attorney General Homer Cummings led off the hearings, testifying that the NFA was an important part of the Justice Department’s overall efforts against “a very serious national emergency.”136 This emergency consisted of “predatory criminals,” such as John Dillinger, working in organized gangs on a nation-wide basis and moving rapidly from state to state.137 The situation was made possible, in part, by a “shadowy area or twilight zone between State and Federal power.” The scope of the problem was also immense: Cummings estimated that there were currently 500,000 armed criminals “warring against society” – a number higher than the Army and Navy forces combined. Cummings testified:

A sawed-off shotgun is one of the most dangerous and deadly weapons. A machine gun, of course, ought never to be in the hands of any private individual. There is not


135 Hearings, supra note 115, at 92 (statement of Assistant Att’y Gen. Joseph B. Keenan). There was a considerable amount of interest in this bill while it was before the Committee. In fact, the Committee members received so many telegrams asking them to oppose the bill, several members accused the NRA of promoting a “propaganda campaign” against the bill. This grassroots lobbying effort also caused the Justice Department to respond that they too had a tremendous amount of support, including thousands of letters from women’s organizations for the strict regulation of firearms. Id. at 92 (“We have not had any telegrams sent to this committee; we have not attempted to generate any propaganda. We have received literally thousands of letters from women’s organizations and other public spirited organizations asking that something be done about the firearms evil, and we submit, that even though it is a little trouble to have fingerprints taken, we believe it is not too great a donation to make to the general safety of the public.”).

136 Id. at 4 (statement of Att’y Gen. Homer Cummings).

137 Id. Later in his testimony, Cummings gave an example of the complexity of the problem, “Take the Urschell kidnapping case. Urschell was kidnapped in Oklahoma; he was carried into a remote section of Texas; the demand for ransom money came from Missouri, and there was already prepared a gang of confederates in Minnesota to make disposition of the ransom money. There were other groups in 3 different additional States and our representatives had to travel in 16 States in rounding up those criminals.” Id. at 18.
the slightest excuse for it, not at least in the world, and we must, if we are going to be successful in this effort to suppress crime in America, take these machine guns out of the hands of the criminal class.138

Designed and manufactured in 1921 as a military weapon, the Thompson Submachine Gun, or “Tommy Gun,” became the gangster’s weapon of choice.139 How did machine guns140 get into the hands of gangsters? Cummings blamed the four large machine gun manufacturers, but singled out the Colt Company.141 A representative of Colt in turn blamed the company that designed and commissioned the manufacture of the Tommy Gun for being “careless” in their marketing the weapon, and alleged that many submachine guns had been stolen from police departments, prisons, and dealers.142

According to Cummings, the bill would be effective in removing

138 Id. at 6 (statement of Att’y Gen. Homer Cummings).
139 Id. at 6 (statement of W.B. Ryan, President of The Auto Ordinance Co.). Colt had manufactured 15,000 of the Thompson Submachine guns for the Auto Ordinance Company in 1921. Id. at 155 (statement of Frank C. Nichols, Vice-President of Colt Patent Firearms Manufacturing Co.). Although submachine gun was not successful as a military weapon, W.B. Ryan, the President of the Auto Ordinance Company, testified that the submachine gun was being used by the US military, and many peace officers around the country. Id. at 6 (statement of W.B. Ryan, President of The Auto Ordinance Co.).
140 Hearings, supra note 115, at 151 (statement of Frank C. Nichols, Vice-President of Colt Patent Firearms Manufacturing Co.). Vice-President of Colt Firearms Frank C. Nichols drew a distinction between the machine gun and the submachine gun. A submachine gun, the preferred weapon of the underworld during the 1920s and 1930s, is a small weapon capable of being carried under a coat and capable of shooting 500 .45 caliber bullets from a drum feed. In contrast, the machine guns produced by Colt weighed 65-90 pounds, shot a high powered military cartridge and were sold exclusively to the US government or foreign governments.
141 Id. at 11 (statement of Att’y Gen. Homer Cummings) (the four manufacturers being Colt Manufacturing Co., Smith & Wesson, Harrington & Richardson, and Iver Johnson). Cummings testified that by 1934, however, there was only one manufacturer, Colt, that manufactured the type of machine gun being used by gangsters and they had a “gentleman's agreement” with the Justice Department to take “far greater care” in the distribution of machine guns.
142 Id. at 151-52 (statement of Frank C. Nichols, Vice-President of Colt Patent Firearms Manufacturing Co.).
firearms from criminals or limiting their use in several ways. First, the tax on the production of the firearms would make the weapons too expensive to obtain.\textsuperscript{143} Second, the new paperwork requirements would make it possible to trace the transfer and disposal of firearms. Third, assuming that criminals would not pay their taxes or obtain the proper paperwork, making illegal the transportation of firearms across state lines would allow federal prosecutors to charge gangsters with violations of the NFA, causing forfeitures and simplifying prosecution.\textsuperscript{144}

Cummings characterized the bill as drastic,\textsuperscript{145} but said that the Justice Department resisted calls to do even more to regulate firearms.\textsuperscript{146} These calls even came from congressmen during the hearing. Cummings

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\item \textsuperscript{143} Id. at 11 (statement of Att’y Gen. Homer Cummings). When asked to specify what the taxes would be, Cummings proposed a “reasonable” tax on manufacturers and importers of $5,000, a tax on dealers of $200, a tax on machine guns of $200 and a tax on any other firearm of $1. Since the cost of a machine gun in 1934 was estimated by the Justice Department to be about $200, this represented a 100 percent tax. Id.
\item \textsuperscript{144} Id. at 9-12 (statement of Att’y Gen. Homer Cummings) (“So if, for instance, Dillinger, or any other of those roving criminals, not having proper credentials, should carry a revolver, a pistol, a sawed-off shotgun, or machine gun, across a State line and we could demonstrate that fact, that of itself would be an offense, and the weapons would be forfeited. Therefore, when we capture one of those people, we have simply a plain question to propound to him – where is your license; where is your permit? If he cannot show it, we have got him and his weapons and we do not have to go through an elaborate trial, with all kinds of complicated questions arising.”). Cummings also detailed the criminal penalties to be a fine of $2,000 and imprisonment for not more than five years. Id. at 12.
\item \textsuperscript{145} Hearings, supra note 115, at 5 (statement of Att’y Gen. Homer Cummings).
\item \textsuperscript{146} Id. at 5-6. (“For instance, this bill does not touch in any way the owner, or possessor, or dealer in the ordinary shotgun or rifle” because “[t]he sportsman who desires to go out and shoot ducks, or the marksman who desires to go out and practice, perhaps wishing to pass from one State to another, would not like to be embarrassed, or troubled, or delayed by too much detail.”). Cummings testified that experts advised the Justice Department that the maximum length of a shotgun would be better placed at 18 or 20 inches, rather than the 16-inch minimum in the bill. Id. at 6 (statement of Att’y Gen. Homer Cummings). Another possible provision not included in the bill would have been to require a federal permit for anyone traveling across state lines with a firearm that they owned before the NFA would go into effect; which would have reached many hundreds of thousands of small firearms. Id. at 3, see also id. at 10. (statement of Att’y Gen. Homer Cummings).
\end{itemize}
stated that while he was not opposed to Congress expanding the bill,\textsuperscript{147} he recognized that “there is a great deal of hesitancy in expanding federal powers too much.”\textsuperscript{148} Regulations on sawed-off shotguns and machine guns, however, were well justified to stop the criminal gangster.\textsuperscript{149}

The Committee heard from several people and organizations opposed to the bill, including General Milton A. Reckord,\textsuperscript{150} NRA President Karl T. Frederick,\textsuperscript{151} Charles V. Imlay,\textsuperscript{152} the Izaak Walton League of America,\textsuperscript{153} and the American Legion. Reckord and Frederick, representing the NRA, argued that while some regulation of firearms may be needed,\textsuperscript{154} the registration requirements and proposed tax on dealers and manufacturers would only serve to disarm the “the honest man,” not the gangster. Opponents claimed that the proposed $200 tax would eliminate 95 percent of all firearms dealers.\textsuperscript{155} Putting this many dealers

\begin{footnotes}
\item[147] Id. at 7, 13 (statements of Rep. Frear and Rep. McClintic) (responding to Representative Frear asking why the bill did not include situations where a criminal is in possession of bullet proof vests or other such protective clothing and to Representative McClintic asking if the registration provision could be expanded to those people who already owned the targeted weapons).
\item[148] Id. at 7 (statement of Att’y Gen. Homer Cummings).
\item[149] Id. at 6-7.
\item[150] Id. at 33.
\item[151] Hearings, supra note 115, at 38. At the time of the hearing, Mr. Frederick was the President of the NRA. Id.
\item[152] Id. at 67. At the time of the hearing, Mr. Imlay was a member of the National Conference of Commissioners on Uniform Laws, who helped draft the Uniform Firearms Act and had 11 years experience working on state firearm legislation. Id. at 67-68.
\item[153] Id. at 161. The resolution – presented to the Committee by Seth Gordon – pointed out that 13 million citizens hunt and target shoot, and that the bill sought the restriction on the sale of firearms, which would “merely disarm the law-abiding citizens” and not effectively deal with the crime situation. Id. This resolution relies on a Second Amendment argument. The final line reads, “Resolved, That . . . the Izaak Walton League of America . . . go on record as being opposed to any and all antifirearms legislation that will in any way affect the right of our citizens to own and bear arms freely.” Id.
\item[154] Id. at 60 (statement of Karl T. Frederick, President of the National Rifle Association of America).
\item[155] Id. at 42-44. Frederick testified that after a $10 fee was imposed on dealers in Pennsylvania, after three or four years many of the small town dealers stopped selling guns. Id. at 44 (statement of Karl T. Frederick, President of the National Rifle Association of America). See id. at 156 (statement of Frank C. Nichols,}
out of business would deprive people in rural areas or small towns of the opportunity to obtain a firearm.\textsuperscript{156} Having fewer dealers would also force some large pistol manufacturers to stop producing handguns.\textsuperscript{157} In addition, the $5,000 tax on manufacturers, while affordable to the largest four companies, would put many small manufacturers, such as the ones that produced custom barrels for shooting competitions, out of business.\textsuperscript{158}

B.  \textit{Constitutional Questions}

Cummings was careful to point out the efforts the Justice Department took in drafting a constitutional bill several times during his testimony.\textsuperscript{159} Still, this effort was directed at finding a constitutionally permissible authority for Congress to regulate firearms. With no inherent police powers, the Justice Department felt Congress could only act when there was an issue involving taxation, mail, or interstate commerce.\textsuperscript{160}

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  \item Vice-President of Colt Patent Firearms Manufacturing Co.).
  \item \textit{Id.} at 91 (statement of Rep. Woodruff) (stating that he was from a rural district where dealers “who have a desire to supply peaceable law-abiding citizens with a means to defend themselves could not possibly pay that $200 a year”).
  \item \textit{Hearings, supra} note 115, at 157 (statement of Frank C. Nichols, Vice-President of Colt Patent Firearms Manufacturing Co.) (pointing out that Colt had been in business for nearly 100 years and how valuable Colt was to the government during World War I, but also that they could not maintain a plant to assist the government just in case of war).
  \item \textit{Id.} at 49 (testimony of Karl T. Frederick, President of the National Rifle Association of America).
  \item \textit{Id.} at 4 (statement of Att’y Gen. Homer Cummings) (“All these bills have been drafted with an eye to constitutional limitations . . . .”); \textit{id.} at 5 (“Now, we have established in our Department an organization to . . . concentrate on a program that is constitutional . . . .”); \textit{id.} at 10 (“Bearing in mind our limitations of the constitutional character, bearing in mind our limitations to extend our power beyond the immediate requirements of the problem, this is our best thought on the subject.”); \textit{id.} at 13 (when asked if the bill could include the registration of current weapons, “I am afraid it would be unconstitutional.”).
  \item \textit{Id.} at 133 (statement of Assistant Att’y Gen. Joseph B. Keenan) (testifying that although there were no Supreme Court decisions to guide the drafting process, the registration of all firearms would likely be constitutional “if it be attempted and considered to be a reasonable regulation, and a reasonable protective step taken by the law enforcement agency to collect the tax provided in the main body of the act”).
\end{itemize}
This bill worked off of established congressional authority. When Congressman Treadway asked why Congress could not simply prohibit the manufacture or possession of machine guns, Keenan testified, “I do not think we could prohibit anyone from owning them. I do not think that power resides with Congress.”

When asked how this bill “escaped” the constitutional provision “denying the privilege to the legislature to take away the right to carry arms,” Attorney General Cummings responded:

Oh, we do not attempt to escape it. We are dealing with another power, namely the power of taxation, and the regulation of interstate commerce clause. You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say “We will tax the machine gun” and when you say that “the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated” you are easily within the law.

Congress did have the power, however, to tax handguns and, in doing so, make them too expensive or too difficult to obtain for most Americans – proving the adage that the power to tax is the power to

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161 Id. at 162-63 (statement of Assistant Att’y Gen. Joseph B. Keenan) (testifying that the government expected to bring in $356,000 in annual revenue from the taxes proposed in the bill and that the registration of firearms, even those owned prior to this legislation, would be constitutional given the U.S. Supreme Court’s decision in Nigro v. United States, 276 U.S. 332 (1928), which found the provisions of the Harrison Anti-Narcotic Act constitutional). There were already tax provisions on firearms in operation, a 10 percent ad valorem tax on pistols and revolvers that produced $35,388 in 1933. Hearings, supra note 115, at 6. The bill’s provisions also tracked the Harrison Anti-Narcotic Act which the Supreme Court had already found constitutional. Id. at 163 (statement of Assistant Att’y Gen. Joseph B. Keenan).

162 Hearings, supra note 115, at 100 (statement of Assistant Att’y Gen. Joseph B. Keenan).

163 Id. at 19 (statement of Rep. Lewis).

164 Id. (statement of Att’y Gen. Homer Cummings).
destroy.\footnote{McCulloch v. Maryland, 17 U.S. 316, 431 (1819) (“That the power to tax involves the power to destroy . . . [is] not to be denied.”).} If, as I argued above, the Second Amendment was created for both personal and community protection, the Committee needed to consider whether individuals still had a legitimate right to firearms. In most places, state and local police had replaced the sheriff’s posse, and national defense had been entrusted to a small standing force that could grow through the draft during wartime. The traditional militia existed, but was starting to be reworked into the National Guard that we know today. In the face of a public safety crisis, how far did an individual right to bear arms extend?

Several witnesses pointed out the legitimate use of firearms, a fact often forgotten or ignored by people who wanted to eliminate guns.\footnote{Hearings, supra note 115, at 74 (citing Charles V. Imlay, The Capper Firearms Bill – Its Relation to the Uniform Firearms Act, Fed. Bar Ass’n Journal (March 1932)).} Firearms were used legitimately not just by law enforcement and for national defense, but also for private security for businesses such as banks, the protection of the person or property, training in the event of military necessity, and the use of pistols in sports such as target shooting and hunting.\footnote{Id. at 75-76 (quoting Karl T. Frederick, Pistol Regulation – Its Principles and History, American Rifleman, Issues of Dec.1930-July 1931).} These legitimate uses were recognized by every state and even rose to the level of constitutional guarantees.\footnote{Id. at 74 (citing Imlay, supra note 166).}

Obviously, law enforcement and the military needed to be equipped with handguns, shotguns, and even machine guns.\footnote{But see id. at 106 (Statement of J. Weston Allen, Chairman of the National Crime Commission) (stating that it may be safer to have the police not carry firearms). A resolution from the American Legion submitted at the hearing by John Thomas Taylor, representing the American Legion, recommended the passage of laws by Congress and the states to end the sale of machine guns, submachine guns and to restrict those weapons to “the organized military forces and law enforcement authorities” of the U.S. and the states. Id. at 80.} The Justice Department also conceded that vulnerable businesses like banks needed firearms, including machine guns, for protection.\footnote{Id. at 13-14 (statement of Att’y Gen. Homer Cummings) (Attorney General Cummings replying that there were other conceivable legitimate uses, such as protecting banks, when asked why Congress should permit the sale of machine guns outside of law enforcement).} Rifles were not
The Second Amendment as Interpreted by Congress and the Court

included in the original proposal to protect hunters, and the Committee did not need much convincing to protect hunting or marksmanship.171

What, then, of the need for armed citizens to play a role in national defense? Given the centrality of the militia to the Second Amendment’s prefatory clause, one would think this would have been an important topic for the Committee. In fact, there was very little testimony as to arms being necessary to support national defense. This is surprising since one main witness at the hearing, General Reckord, commanded Maryland’s militia and is considered one of the principal architects of the modern National Guard. Other than mentioning the role of NRA marksmen in training troops during World War I, there was no debate on the subject.172 No one at the time could foresee the military build-up that was to come after the attack on Pearl Harbor, but the Justice Department was apparently skeptical about the need for civilians trained in small arms for a future war.173 Perhaps General Reckord shared the Justice Department’s view, as he did not make an issue out of the need for military preparedness despite having many chances to do so.

Some of the bill’s opponents had trouble articulating why it violated the Second Amendment and claimed not to have given it much study.174 Opponents such as the NRA claimed to have never considered the

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171 Hunting and the use of firearms by “sportsmen” are only mentioned sporadically throughout the hearings. See, e.g., id. at 13 (statement of Rep. Knutson). A resolution from the Izaak Walton League of America to the Congress pointed out that 13 million citizens hunt and target shoot, and the bill’s restrictions on the sale of firearms would disarm the law abiding citizens and not effectively deal with the crime situation. Id. at 161 (statement of Seth Gordon).

172 Hearings, supra note 115, at 110 (statement of Hon. Milton A. Reckord, Adjutant Gen. of Md.). General Reckord stated, “I mention this as an indication of the value of arming and training our average reputable citizens instead of discouraging and restricting their armament and proper training.” Id.

173 Id. at 165. General Reckord stated that in a conversation with Assistant Attorney General Keenan, Keenan dismissed training people for the national defense in that “the next war would not be won by small arms,” and in the future “the individual soldier, the small arms, and the ships of the fleet would be of no tangible value.” Id.

174 Id. at 53 (statement of Karl T. Frederick, President, National Rifle Association of America and Rep. John W. McCormack, Member, House Comm. on Ways and Means). As one Committee member claimed, it was the approach the Justice Department took to address the gun issue that caught the NRA unprepared rather than “powerful evidence,” that opponents did not think the Second
The common defense aspect that I argue was so essential to the creation of the right had not entirely disappeared, either. If citizens were disarmed, they would not be able to assist law enforcement. Frederick testified that armed citizens were as necessary to the anti-crime effort as the police. Charles Imlay asked the Committee to consider that rural amendment was threatened.

175 Id. at 53 (statement of Karl T. Frederick, President, National Rifle Association of America).
176 Id. at 53-54.
178 Id. at 48 (statement of Karl T. Frederick, President, National Rifle Association of America).
179 Id. at 113-14 (statement of Hon. Milton A. Reckord, Adjutant Gen. of Md.). General Reckord stated that in 1932 in Chicago, 63 hold-up men and burglars were killed by gunfire. Of that number, 40 percent were killed by armed citizens. In 1933, 71 “thugs” were killed in Chicago, with nearly 50 percent killed by armed citizens.
180 Id. at 80 (statement of John Thomas Taylor, Rep., American Legion).
181 Id. at 43 (statement of Karl T. Frederick, President, National Rifle Association of America).
182 Id. at 52-53. In my opinion, the forces which are opposed to crime consist of two general bodies; one is the organized police and the second is the unorganized victims, the great mass of unorganized law-abiding citizens, and if you destroy
citizens were still needed to fight crime, and that the preferred weapon was now a pistol:

[W]hen you take the history of firearms and their legitimate use in history, what do you find? You find that law and order has always been enforced by the citizen body and you can go now into some of our rural sections and you can find it is still true, as it was in the early part of the Republic, that when the sheriff goes after a gangster, he can go from house to house and he can be sure there is a house holder there with a weapon. It was once a shotgun or rifle, but it is now a pistol, and the weapon is as much a part of the equipment of that household as the Bible on the mantle, but when you go into the city, and much of this legislation has come out of the city, you find a different situation. I ask you, before attempting a system of regulation like this, that you consider somebody other than the attorneys general, somebody other than the police, and consider the citizen, the one that is primarily affected.\(^{183}\)

Registration of firearms was also an important aspect of the bill and a much-debated topic during the hearings. Proponents argued that there would never be “efficient control of firearms in this country” until firearms were registered.\(^{184}\) Chairman Doughton and Representative Shallenberger agreed, saying at one point that it would be a great benefit to have every person with an “implement of death” recorded.\(^{185}\) Opponents argued against the registration requirements weighed “on the great broad principle


\(^{184}\) Id. at 103 (statement of J. Weston Allen, Chairman, National Anti-Crime Comm.).

\(^{185}\) Id. at 125 (statement of Rep. Ashton C. Shallenberger, Member, House Comm. on Ways and Means).
of personal Liberty.”

As a practical matter, comprehensive registration had been tried and discarded in several states because it caused resentment and purposeful law-breaking among its citizens. The opponents of registration found an ally in Congressman Vinson, who consistently called the registration provisions of the bill “anti-constitutional.” Vinson compared the registration requirements to Czarist Russia, where people were sent to Siberia for “trivial offenses,” rather than the actual activity the government wanted to punish. Assistant Attorney General Keenan claimed that such fears were overblown, and that, even if a law-abiding citizen did not register, he would not be in trouble so long as he did not come to the “notice of the police.”

The Justice Department had significant support on the Committee for its proposal despite the arguments that it would violate constitutional rights. Congressman Lewis argued that “certain people overstate their rights” to carry firearms and wondered “what restrictions a law-abiding citizen of Great Britain and these other countries is willing to accept in the way of duty to society?” Committee Chairman Doughton suggested

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186 Id. at 124 (statement of Hon. Milton A. Reckord, Adjutant Gen. of Md.).
187 Id. at 68 (statement of Charles V. Imlay, Rep., National Conference. on Uniform Law). The Uniform Act also rejected some of the “extreme theories” of gun regulation such as the state-wide registration of pistols in Arkansas law of 1923, which was repealed a few years later. Id. at 143-44.
188 Id. at 143-44 (statement of Fred M. Vinson, Rep., H. Comm. on Ways and Means). It should be noted that Congressman Vinson would later administer the NFA as Secretary of the Treasury and would ultimately be named the Chief Justice of the Supreme Court.
189 Hearings, supra note 115, at 120.
190 Id. at 136 (statement of Hon. Joseph B. Keenan, Assistant Att’y Gen., Dept’ of Justice). Keenan claimed there would not be “snooping squads going from house to house to see who does and who does not possess firearms.”
191 Id. at 18-19, 28 (statement of Rep. David J. Lewis, Member, H. Comm. on Ways and Means). After this hearing the Justice Department provided a memorandum outlining the British Firearms Act, 1920, 10 & 11 Geo. 5, c. 43, which stated that the British law was not only more burdensome and rigorous than the proposed HR 9066, but was more drastic than even New York’s “Sullivan Law.” The British law regulated the sale and possession of every kind of firearm and ammunition. Local police chiefs approve firearm certificates, which are valid for 3 years, cost $25 and are revocable. Britain also strictly regulated dealers, who could only sell to people with valid certificates and had to report all sales within 48 hours.
that registration was acceptable and that people should be willing to “surrender some minor privilege . . . for the general good.” Still, the NRA contended that the Bill would violate constitutional rights, and suggested that testing the law would be a difficult, drawn out, and expensive proceeding.

The Committee also dealt with a significant federalism question. If there is an individual right to possess firearms, and that right is absolute, who should regulate? States, exercising their police powers, did and continue to regulate firearms. Traditionally, states recognized the legitimacy of certain weapons and forbade concealed weapons; some states required the registration of firearms and their purchasers. This Bill would have been the first attempt by Congress to step into an area that had been exclusively a state issue, and some members of the Committee seemed anxious for a greater federal role. Opponents argued, however,

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193 *Id.* at 60 (testimony of Karl T. Frederick, President, National Rifle Association of America). Frederick stated that he had grave doubts that Congress could pass a measure that would be effective and not unnecessarily infringe on the rights of law-abiding citizens. *Id.*
194 *Id.* at 166 (testimony of Milton A. Reckord, Adjutant Gen. of Md.).
195 *Id.* at 60 (testimony of Karl T. Frederick, President, National Rifle Association of America).
196 *Id.* at 138 (testimony of Charles V. Imlay, representing the National Conference on Uniform Law). Charles Imlay, appearing on behalf of the National Conference of Commissioners on Uniform State Laws, testified state regulation of firearms had “progressed to completeness in practically all of the States” and should not be a matter of federal legislation. Part of this state oriented effort was the Uniform Firearm Act, which the National Conference of Commissioners on Uniform State Laws began to draft in 1923. The Act was to be a uniform law that might be adopted by all states and create a similar set of regulations throughout the country. The Uniform Firearm Act was adopted by Congress for the District of Columbia in 1932. Imlay, *supra* note 166, at 138.
197 *Hearings, supra* note 115, at 138.
198 *Id.* at 148-49 (testimony of Charles V. Imlay, representing the National Conference on Uniform Law). One member of the Committee made the point that state gun laws had not stopped the gangster. The Justice Department testified that some states failed to enact even basic firearm laws, pointing to Illinois’s refusal to pass an act making it unlawful to possess a machine gun without a permit. Congressman Shallenberger even suggested that greater federal involvement was the trend and that even hunting and fishing could be a
that the firearm problem was “impossible to regulate” federally.\textsuperscript{199} State laws were superior because the method of enforcement was immediate, and the level of regulation was more likely to be supported by the community.\textsuperscript{200} Furthermore, federal regulations would cause difficulty between state and federal law enforcement and could even cause states to leave the issue to the federal officers entirely.\textsuperscript{201} One opponent, Mr. Imlay, argued that federal law should be limited to the interstate transportation of weapons in violation of state laws, like the Mann Act.\textsuperscript{202}

During the hearing, it became clear that several members of the Committee, while fully supportive of limiting public access to machine guns and sawed-off shotguns, were uncomfortable making it a federal felony for a citizen to possess a pistol.\textsuperscript{203} Several members of the Committee suggested exempting gun clubs,\textsuperscript{204} or better, eliminating handguns from the scope of the bill.\textsuperscript{205} This brought considerable resistance from the subject for federal licensing. \textit{Id.} at 124-26 (testimony of Ashton C. Shallenberger, Nebraska, H. Comm. on Ways and Means).

\textsuperscript{199} \textit{Id.} at 60 (testimony of Karl T. Frederick, President, National Rifle Association of America).

\textsuperscript{200} \textit{Id.} at 139 (testimony of Charles V. Imlay, representing the National Conference on Uniform Law). If federal firearm regulations were too difficult or unpopular with “regular gun owners” it could lead to the same lawlessness recently experienced with the Volstead Act. \textit{Id.} at 140 (testimony of Charles V. Imlay, representing the National Conference on Uniform Law).

\textsuperscript{201} \textit{Id.} at 140, 146 (testimony of Charles V. Imlay, representing the National Conference on Uniform Law).

\textsuperscript{202} \textit{Id.} at 148 (testimony of Charles V. Imlay, representing the National Conference on Uniform Law). Still, another proposal before Congress, HR 9399, at the time pending before the Committee on Interstate and Foreign Commerce, that would prevent the shipment of machine guns, submachine guns, sawed off shotguns, and bullet proof vests in interstate commerce, would have the same effect. Imlay went so far as to include pistols in this regulation. \textit{Id.} at 149 (testimony of Charles V. Imlay, representing the National Conference on Uniform Law).

\textsuperscript{203} \textit{Hearings, supra} note 115, at 115 (testimony of Fred M. Vinson, Kentucky, H. Comm. On Ways and Means).

\textsuperscript{204} \textit{Id.} at 119 (testimony of James V. McClintic, Oklahoma, H. Comm. On Ways and Means). The Justice Department drafted such an exemption in a later draft. Still, the NRA’s representatives objected to such a provision, in that it would give their members rights over “all other honest citizens.” \textit{Id.}

\textsuperscript{205} \textit{Id.} at 110 (testimony of Milton A. Reckord, Adjutant Gen. of Md.). Rep. Claude Fuller stated there was resentent by law-abiding people as to over-
Justice Department. Attorney General Cummings stated that it would be a terrible mistake to pass any “half-way measures” on firearms. Assistant Attorney General Keenan argued that the gangster uses not just machine guns, but pistols and revolvers. Federal law, therefore, had to “make it expensive” to use handguns as well as machine guns, including running the risk of prosecution.

After several days of testimony, the Justice Department offered a redrafted bill that relied wholly on Congress’s taxing power. The new draft required the registration of all firearms, with the exception of .22 caliber rim fire pistols, and rifles and shotguns having barrels longer than 18 inches. Furthermore, failure to register the firearm within four months of the NFA’s passage would be a violation of the law. There was, however, no penalty for failing to register, which Congressman Vinson pointed out made it nearly impossible to test the constitutionality of the law. General Reckord called this a “subterfuge” to get weapons registered without testing the law’s constitutionality. Congressman Vinson questioned how a firearm already in someone’s possession could be registered under the taxing power, since it could not be taxed until transferred. Keenan defended the tougher registration requirements to get control of the firearms already in people’s possession, and to prosecute gangsters who obtained their weapons before the passage of the law.

regulation of pistols and asked, “[w]ould it . . . seriously injure the object and purpose of this bill if you would eliminate pistols and let us get as strong a law as possible for sawed-off shotguns and machine guns – the very thing you are trying to reach?” Id. at 22. General Reckord offered an amendment that would make the interstate transportation of any stolen firearm a felony carrying a 10-year sentence and a $10,000 fine. Id. at 110.

206 Id. at 22 (testimony of Hon. Homer S. Cummings, Att’y Gen. of the U.S.).  
207 Id. at 117-18 (testimony of Hon. Joseph B. Keenan, Assistant Att’y Gen., Dep’t of Justice). Keenan found support from some members of the Committee. “[A] thousand criminals will use pistols where one will use a machine gun.” Id. (citing id. at 120 (testimony of James V. McClintic, Oklahoma, H. Comm. On Ways and Means)).  
208 Id. at 121 (testimony of Milton A. Reckord, Adjutant Gen. of Md.).  
210 Id. at 122 (testimony of Milton A. Reckord, Adjutant Gen. of Md.).  
211 Id. at 133-34 (testimony of Fred M. Vinson, Kentucky, H. Comm. On Ways and Means).
Attorney General Cummings opened the hearing with a clear focus on the gangster and framed the bill as a method to stop the use of firearms in criminal activity. Throughout the hearing, the Justice Department refused to eliminate small weapons such as pistols and revolvers from the scope of the Bill.\textsuperscript{212} That recalcitrance, combined with Assistant Attorney General Keenan’s remarks, showed that the Justice Department intended to go beyond the gangster – it wanted to fundamentally change the way guns, including handguns, were sold and used in the United States. Federal law would be the tool to prevent potential future criminals from ever becoming familiar with firearms:

\[\text{T}h e\ \text{hardened\ criminal\ was\ not\ always\ a\ hardened\ criminal.\ \text{H}e\ \text{was\ once\ a\ youngster,\ and\ he\ bought\ or\ got\ a\ gun,\ and\ he\ learned\ how\ to\ use\ the\ gun\ at\ the\ time\ when\ he\ was\ not\ a\ hardened\ criminal.\ \text{P}robably\ the\ young\ boy\ who\ is\ now\ faced\ with\ no\ penalty\ for\ possessing\ a\ firearm,\ if\ there\ is\ a\ penalty,\ might\ think\ once\ or\ twice\ before\ he\ runs\ afoot\ of\ the\ federal\ laws.}\textsuperscript{213}\

Likewise, the Bill’s requirement that stolen weapons must be reported to police, would cause all people to be more careful of the use of firearms; “They will realize that it means something to them to have a gun, if they have to account for it.”\textsuperscript{214} To the Justice Department, there was little difference between the machine gun and the pistol – it was just a matter of which killed more effectively.\textsuperscript{215} For this reason, Keenan suggested that the tax on dealers stay at the prohibitive $200 to “have the sale of guns in the hands of as few people as possible” and allow the government to better track these weapons and “see whether they are sold to the wrong people.”\textsuperscript{216} Keenan went so far as to suggest that pistols should only be available to the government or law enforcement, but acknowledged that Congress did not have that power; however, he suggested that the states

\begin{itemize}
\item [\textsuperscript{212}] Id. at 81 (testimony of Milton A. Reckord, Adjutant Gen. of Md.).
\item [\textsuperscript{213}] Id. at 92 (testimony of Hon. Joseph B. Keenan, Assistant Att’y Gen., Dep’t of Justice).
\item [\textsuperscript{214}] Hearings, supra note 115, at 95 (testimony of Hon. Joseph B. Keenan, Assistant Att’y Gen., Dep’t of Justice).
\item [\textsuperscript{215}] Id. at 101.
\item [\textsuperscript{216}] Id.
\end{itemize}
take such a step. Finally, Assistant Attorney General Keenan admitted that this bill was just a start, and that “[i]t may take many, many years before we make real headway in the control of firearms.”

Despite the efforts of the Justice Department, the Ways and Means Committee significantly limited the scope of the bill. The unanimous report of the Ways and Means Committee refocused the bill on the gangster: “the gangster as a law violator must be deprived of his most dangerous weapon, the machine gun.” The Committee took the position that the taxing of sawed-off guns and machine guns was sufficient to achieve this goal. The Committee, however, did not include pistols and revolvers: “while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun.”

Machine gun and sawed-off shotgun importers, manufacturers, pawnbrokers, and dealers would pay steep taxes. In addition, the Bill required persons transferring these firearms to obtain a written order and pay a $200 tax. The firearms transferee had to submit fingerprints and a photograph on his registration application. Anyone in possession of one of these firearms had to register within 60 days of the Bill’s effective date, and there would be a non-conclusive presumption that anyone in possession of such a firearm came into possession of it after the effective date of the law. The Bill allowed the forfeiture of firearms transferred in violation of the Bill. The Bill made the transportation in interstate commerce of any machine gun or sawed-off shotgun without
a valid stamp-affixed order punishable by a fine of up to $2,000 or imprisonment for up to 5 years.\textsuperscript{222}

On the House floor, Chairman Doughton informed the chamber that the Committee had limited the bill to machine guns and sawed-off shotguns. This change, he assured the House membership, had removed the objections of sportsmens’ organizations, and he said that the Justice Department also supported the bill. While acknowledging the pressure from womens’ organizations for the more comprehensive bill regulating pistols and revolvers, Doughton defended the more limited bill.\textsuperscript{223} He stated that the Committee wanted to protect the “law-abiding citizen:”

\begin{quote}
[T]he ordinary, law-abiding citizen who feels that a pistol or a revolver is essential in his home for the protection of himself and his family should not be classed with criminals, racketeers, and gangsters; should not be compelled to register his firearms and have his fingerprints taken and be placed in the same class with gangsters, racketeers, and those who are known as criminals.”\textsuperscript{224}
\end{quote}

Chairman Doughton assured one member that this Bill did not interfere with the rights of states to tax dealers in firearms.\textsuperscript{225} The only Senate amendment reduced the license tax on manufacturers, wholesalers and importers from $1,000 to $500. President Roosevelt signed the Bill into law shortly thereafter, completing the Omnibus Crime Bill package. The NFA provided federal law enforcement with a valuable new tool to prosecute gangsters, but did not remake gun ownership in the United States. The NFA’s constitutionality would soon be tested in the federal courts.

\section*{C. Challenge to the NFA and Second Amendment}

The Justice Department, not the NRA, ultimately forced the courts to rule on the NFA’s constitutionality. Having seen its efforts to severely limit gun ownership largely fail before Congress, the Justice Department

\textsuperscript{222} Id. at 4.
\textsuperscript{223} 78 Cong. Rec. 11, 400 (1934).
\textsuperscript{224} Id.
\textsuperscript{225} Id.
sought to have the judiciary find that the Second Amendment did not pose a barrier to more sweeping federal gun legislation. A small-time hoodlum provided the test case they were looking for, not only to test the NFA, but also to redefine the Second Amendment. Unfortunately for the Justice Department, the result of the case was the terribly muddled decision in *United States v. Miller*.

At the heart of the *Miller* case was small-time gangster Jackson Miller, who had contributed to the crime spree of the mid 1930s. In April of 1938, the Arkansas and Oklahoma state police arrested Miller and a partner after they traveled from Oklahoma into Arkansas. Police believed the pair were “making preparation for armed robbery” and recovered an unregistered sawed-off shotgun. Miller had brought an unregistered sawed-off shotgun across state lines, and he could not prove he had paid the taxes on the weapon. The Justice Department not only indicted the men for a violation of the NFA, but also immediately saw the opportunity for a test of the NFA and the Second Amendment. After the federal district court judge refused to accept a guilty plea, the defendants demurred to the indictment, in part, challenging the constitutionality

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228 Id. at 58 (citing *Firearms Test Case Probable at Ft. Smith*, Ark. Democrat, Jan. 4, 1939, at 2; Telegram from Clinton Barry, United States Attorney for the Western District of Arkansas, to the Attorney General of the United States (Apr. 23, 1938) (National Archives and Records Administration)).
229 Id.
230 Id.
231 Id. at 59.
232 Id. at 59-60 (citing Indictment, United States v. Miller, 26 F. Supp. 1002 No. 3926 (W.D. Ark. Sept. 21, 1938)). “Sec. 11. It shall be unlawful for any person who is required to register as provided in section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce.” *Miller*, 307 U.S. at 175 n.1. The U.S. Attorney for the Western District of Arkansas Clinton R. Barry telegraphed his request to Washington asking for federal agents to investigate the case and “prove possession [of] this weapon in Oklahoma immediately before arrest in Arkansas to show transportation.” Frye, *supra* note 227, at 59.
of the NFA under the Second and Tenth Amendments. The judge, an outspoken advocate for greater gun control, quashed the indictment on the grounds that the NFA violated the Second Amendment and was an unconstitutional “attempt to usurp police power reserved to the states.”

Although Miller disappeared and did not participate in his appeal, the Justice Department had an excellent case to keep its expanded powers, and perhaps to expand them further.

In January 1939, the U.S. Attorney appealed the Miller decision directly to the U.S. Supreme Court. Without any precedent to support its position, the government’s brief offered several different arguments supporting the constitutionality of the NFA. First, the Solicitor General claimed the Second Amendment simply prohibited Congress from infringing a common law right to form a militia by the collective body of citizens; the Second Amendment, therefore, did not grant individuals the right to carry firearms. In the alternative, the Justice Department argued that the Second Amendment only guaranteed the right to bear arms “for lawful purposes,” and therefore, does not protect the “arsenal of the gangster.”

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233 Frye, supra note 227, at 59-60 (citing Demurrer to Indictment, United States v. Miller, 26 F. Supp. 1002 (W.D. Ark. 1938)).
234 Id. at 64 (before becoming a judge, Hiram Heartsill Ragon represented Arkansas in the U.S. Congress where he was an outspoken proponent of federal gun control).
235 Id. at 60 (citing Memorandum Opinion, United States v. Miller, 26 F. Supp. 1002 (W.D. Ark. 1938)).
236 Miller, 307 U.S. at 176.
237 Frye, supra note 227, at 68 (noting Miller resurfaced in April 1939 when he and some accomplices robbed an Oklahoma club while armed with shotguns. A few days later, Miller’s body was found along a creek, where he had been shot four times with a .38 caliber gun).
238 Id. at 63-65.
239 Id. at 66 n.127 (citing Brief for the United States at 8-9, United States v. Miller, 307 U.S. 174 (1939) (No. 696), 1939 WL 48353 (“The Second Amendment does not confer upon the people the right to keep and bear arms; it is one of the provisions of the Constitution which, recognizing the prior existence of a certain right, declares that it shall not be infringed by Congress. Thus the right to keep and bear arms is not a right granted by the Constitution and therefore is not dependant [sic] upon that instrument for its source.”).
The Supreme Court decision that the Justice Department hoped for did not materialize. Nearly all scholars dismiss *Miller* as “hopelessly opaque,” and both individual and collective rights theorists claim their arguments are bolstered by this opinion. Justice McReynolds, writing for the majority, found that Congress had the constitutional power to tax and regulate commerce, and such federal police involvement did not improperly interfere with the states’ police powers. This finding bolstered the Justice Department’s efforts for an even greater law enforcement role. Still, McReynolds’ treatment of the Second Amendment offered a murky view of an individual’s right to firearms. After the obligatory historical discussion, McReynolds states that it is “obvious” that the purpose

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242 *Id.* at 69.

243 *Id.* at 73-74. McReynolds accepted the Justice Department’s contention that, at least on this point, the National Firearms Act was analogous with the Harrison Narcotics Act. See Harrison Narcotics Tax Act, ch. 1, 38 Stat. 785 (1914); Revenue Act of 1918, ch. 18, 40 Stat. 1057 (1919); *Miller*, 307 U.S. at 179; see also *Nigro v. United States*, 276 U.S. 332, 351-52 (1928); *Alston v. United States*, 274 U.S. 289, 294 (1927); *Linder v. United States*, 268 U.S. 5, 17 (1925); *United States v. Doremus*, 249 U.S. 86, 94 (1919); *United States v. Jin Fuey Moy*, 241 U.S. 394, 402 (1916). The Court had recently endorsed the constitutionality of an expanded federal police effort in *Sonzinsky v. United States*. 300 U.S. 506, 513 (1937). Frye claims that by rejecting the Tenth Amendment arguments against the NFA, it highlights the “implausibility” of the Second Amendment claim, in that Miller would have to argue that the Second Amendment prohibited the taxation of NFA firearms. McReynolds found that whether or not the Second Amendment guarantees an individual right to keep and bear arms, it hardly prohibits Congress from taxing particular weapons. *Miller*, 307 U.S. at 178.

244 McReynolds wrote that “Most if not all of the States have adopted provisions touching the right to keep and bear arms.” *Miller*, 307 U.S. at 182. And he reviewed the various colonial and early state laws that codified the citizens’ obligations to participate in the militia and their obligation of citizens to provide and maintain certain equipment including firearms. For example, in Massachusetts, as of 1649, pikemen were required to be armed with “a pike, corselet, head-piece, sword, and knapsack,” while musketeers should carry a “good fixed musket,’ not under bastard musket bore, not less than three feet, nine inches, nor more than four feet three inches in length, a priming wire, scourer, and mould, a sword, rest, bandoleers, one pound of powder, twenty bullets, and two fathoms of match.” *Id.* at 180. By 1784, Massachusetts required
of the Second Amendment was to “assure the continuation and render possible the effectiveness of [the militia],” and therefore, any question arising under the Second Amendment must be decided “with that end in view.”

McReynolds concluded that the NFA did not violate the Second Amendment because the weapon involved was not suitable for militia use or that “its use could contribute to the common defense.”

McReynolds’ opinion seems to hold that the Second Amendment does not protect weapons used by criminals, and did not so much create a right but guaranteed a pre-constitutional common law right. McReynolds spends little time discussing the actual scope of the right to bear arms, but his construction of the Amendment’s terms seem to protect the private ownership of firearms, and claims that the scope depends on all able-bodied men between the ages of 16 and 40 to be part of the “militia” and included all men under the age of 60 to be on the “alarm list,” to “equip himself, and be constantly provided with a good fire arm.”

Specifically, the Second Amendment terms “keep” meant “possess” and “bear” meant “use.”
The Second Amendment as Interpreted by Congress and the Court

the differences in statutory language and the relevant state constitution provisions. Frye states that McReynolds adopted a “traditional, commonsense interpretation of the Second Amendment, assuming it guarantees an individual right to possess and use firearms, subject to reasonable regulation of time, place, and manner.” Frye concludes the Miller decision “left legislators a lot of wiggle room” to regulate, but not prohibit, firearms. Still, the Miller decision dealt a blow to the efforts of the Roosevelt Administration’s attempt to significantly restrict gun use through registration, taxation, and interstate commerce regulation. The Miller decision instead seems to hold that registration of even military-type weapons might be inconsistent with the Second Amendment.

The Miller decision provided a precedent for Heller, but not a good one. By finding an individual’s right to bear arms under the rubric of preserving the militia, McReynolds was attempting to put new wine into an old skin. He was neither taking into account how society had changed, nor was he clearly defining the right to bear arms for the 20th century. Congress, its own interpreter of the Constitution, did a far better job of sorting through the challenges facing the country and determining the scope of the right to bear arms for the modern era.

Congress could have easily given the Justice Department what it wanted, as it had on many pieces of crime legislation in the spring of 1934. Roosevelt’s popularity, the overwhelming Democratic majorities in Congress, and the nationwide crime crisis assured that he would get nearly any piece of criminal justice legislation passed into law. Amazingly, that did not happen with the NFA. The Justice Department had a vision for the future of gun ownership in America, and the federal government would be intimately involved. Rifles and long-barreled shotguns would be allowed for hunting and sporting purposes, but all other guns would be highly regulated. Through taxation and the regulation of commerce, handguns would be registered and the federal government would be aware of when and where the firearm was transferred. The new taxes or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”).

250 Frye, supra note 227, at 76.
251 Id. at 80.
252 Id. at 82.
253 Halbrook, supra note 93, at 617 (citing Miller, 307 U.S. at 178).
would make gun ownership far more expensive, and would probably have meant that only a few dealers would be left in the country. This power could have even been extended to place prohibitively high taxes on all firearms so that no one could afford to own, deal, or even manufacture a handgun. Congress could have declared, as the Roosevelt Administration seemed to want, that widespread private ownership of guns was now an anachronism and that the Second Amendment was simply a collective right held by a government-organized militia. The Ways and Means Committee and Congress did not choose this course, although they arguably had the constitutional authority to do so.

Why did Congress resist the Administration’s wishes to pass a high-profile part of its anti-crime legislative package? Many reasons were offered to the Committee to refrain from encumbering handguns: for hunting, for competitive target practice, to train people for future military duty, to help train the newly-armed federal police how to shoot, to support law enforcement, and for self-protection. The Committee’s report to the House cites only one reason to allow for an individual’s self-protection. There was no pretense by the Committee that an armed citizenry was needed either for national defense through the militia, or for civil law enforcement. Maybe the posse was still employed in rural areas, but that too was changing with the spread of larger and ever more sophisticated police departments in both urban areas and small towns. The common defense, both military and law enforcement, was now almost entirely in the hands of professionals, not an armed citizenry. Congress limited the Bill’s reach to weapons that were not useful for self-protection by the average citizen and presented a public safety threat that could not be addressed by any one locality or state, but only by the federal government. The gangster presented a pressing problem combining the use of machine guns and concealable shotguns with mobility from state to state.

In the face of ever-expanding federal powers, the NFA represents a triumph of federalism. The Committee’s actions showed that Congress would continue to rely heavily on the states to regulate firearms. The

gangster problem had to be addressed, but Congress was clearly unwilling to put into place regulations on all handguns nationally. The states were better suited – both constitutionally through the police power and by having a better understanding of local needs and mores – to decide what level of gun regulation the population wanted or needed. This seems to be in accord with the original intent of the Second Amendment. Who was responsible for the common defense? It was a shared responsibility between the federal, state, and local authorities. In reality, the federal government would only become involved if extraordinary events of national importance occurred. The primary day-to-day responsibility of common defense was left to the state and local authorities. With the NFA, Congress followed that framework: machine guns and sawed-off shotguns had become a problem that only the federal government could address. All other gun regulation should, until it became a truly national problem, be left to the states to regulate.

Did the Second Amendment still have vitality for the 20th century? What was the Second Amendment’s scope in a world where militias were no longer needed? In fashioning the NFA, Congress would take care to regulate weapons that were used by criminals and to acknowledge the right of law-abiding citizens to protect themselves with handguns, the modern and popular weapon of choice.

Congress would continue to resist the efforts of the Roosevelt Administration to register or otherwise restrict handguns. In 1940, the Justice Department proposed amending the NFA to register guns, this time not to fight gangsters, but to combat communist “subversives.”

I desire to recommend legislation to require registration of all firearms in the United States and a record of their transfers, accompanied by the imposition of a nominal tax on each transfer. Such a step would be of great importance in the interests of national defense, as it would hamper the possible accumulation of firearms on the part of subversive groups. It is also of outstanding importance in the enforcement of the criminal law . . . .

_id.at 619._
Perhaps with an eye toward the use of gun registration laws by the Nazis in Europe, Congress did not impose gun registration.\footnote{Id. at 619. The German Law on Firearms and Ammunition required firearms and ammunition acquisition permits and record keeping for all transactions. When the Nazis came to power in 1933, they had knowledge of all firearms owners. Hitler would later strictly regulate who could legally possess handguns. The Justice Department’s gun registration efforts ended once it became clear that the Nazi government in Germany had used the German laws requiring the registration of firearms to disarm portions of the population. Id.} In addition to resisting Presidential efforts for gun registration, Congress also made periodic statements in support of an individual’s right to bear arms. For example, in the Property Requisition Act of 1941, Congress included language to prevent the Administration from abridging Second Amendment rights.\footnote{H.R. Rep. No. 1120, 77th Cong., 1st Sess. 2 (1941); Halbrook, \textit{supra} note 93, at 619 (citing Property Requisition Act, ch. 445, 55 Stat. 742 (1941)). This Act authorized the President to requisition property from the private sector for fair compensation. The Committee on Military Affairs explained that it was not their intention to emulate the current destruction of personal liberties in totalitarian countries and wanted Congress to make a clear expression in support of an individual’s right to bear arms and the Act included the following language:}

\textit{Nothing contained in this Act shall be construed –}

\begin{itemize}
  \item[(1)] to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law), . . . . [or]
  \item[(2)] to impair or infringe in any manner the right of any individual to keep and bear arms . . . .
\end{itemize}

\textit{Halbrook, \textit{supra} note 93, at 624 (citing Property Requisition Act, ch. 455, 55 Stat. 742 (1941)).} \footnote{For example, Representative May stated that, “the right to bear arms means a man can keep a gun in his house and can carry it with him if he wants to; he can take it where he wants to . . . and the right to bear arms means that he can go hunting . . . and that nobody has any right, so long as he bears the arms openly and unconcealed, to interfere with him.” 87 Cong. Rec. 6778, 7098 (1941).}
reaffirm an individual’s right to bear arms.259 Finally, in reporting the Firearms Owner’s Protection Act of 1986,260 the Senate Judiciary Committee stated that the history, concept, and wording of the Second Amendment indicated that it was “an individual right of a private citizen to own and carry firearms in a peaceful manner.”261

Second Amendment scholar Stephen P. Halbrook argues that these congressional interpretations were directives to both the executive branch and to state and local governments not to infringe the right through administrative decisions, statements to the judiciary that “the right to keep arms is a fundamental, individual right, and that statutes regulating this right should be narrowly construed against the government and in favor of the people.”262 The debate surrounding the NFA demonstrated that the right could be curtailed, including the banning of entire classifications of weapons, by Congress if there was a federal need to do so. The debate also shows that there was an expectation that state and local government would take the primary role in reasonably regulating gun ownership.

V. HOW DOES THIS VISION OF THE SECOND AMENDMENT SQUARE WITH HELLER?

How does the Heller decision fit with the purpose of the Second Amendment as conceived by the First Congress and as interpreted by the congresses of the 20th and 21st centuries? In many ways, Scalia has improved upon Second Amendment jurisprudence by clearly describing the right and giving some shape to the level of protection citizens can expect. Although I have described the right as being an individually-held right to keep and

259 The Gun Control Act of 1968 amended the Federal Firearms Act of 1938 and the National Firearms Act of 1934, but was careful to state its recognition for the right of individuals to own and use firearms for lawful purposes: “it is not the purpose of this title to place any undue or unnecessary Federal Restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens.” The Gun Control Act of 1968, 18 U.S.C. § 101 (1968).
261 Halbrook, supra note 93, at 633 (citing The Right To Keep and Bear Arms: Hearing Before the S. Comm. On the Judiciary, 97th Cong., 2d Sess., 12 (1982)).
262 Id. at 641.
bear arms outside of an organized military unit, Scalia’s outcome is not necessarily the right one.

Rather than characterizing the Second Amendment as a codification of a widely-accepted common law right, Scalia should have acknowledged that the Amendment was meant to address a specific perceived defect in the Constitution regarding the common defense by the various levels of government. This common defense, encompassing both military and law enforcement aspects, ultimately relied upon a widely understood, but poorly defined, majoritarian right to own and use firearms. Since then, much has changed. The common defense is now almost exclusively provided by professionals, lessening the need for an armed citizenry. In addition, the use of firearms evolved into a counter-majoritarian right requiring protection, first by the freedmen and currently by today’s gun owners, a minority of the overall population. This different origin for the right changes the Second Amendment’s nature and scope. There should be less emphasis placed on the common law right to own guns and more emphasis placed on the federalism-based balancing of powers that the Second Amendment actually represents.

Because the “inherent right of self defense” is central to the Second Amendment, Scalia held the District of Columbia gun law unconstitutional in *Heller*. The law violated the Second Amendment because it amounted to a prohibition of an entire class of firearms that has been the preferred method of self-protection.\(^{263}\) Scalia states that “handguns are the most popular weapon of choice by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”\(^{264}\) As a result, the District had to allow Heller to register his handgun and issue him a license to carry it in the home.\(^{265}\) While Scalia may be correct that the right to bear arms is an individual right and that people have a right to protect themselves, this hard and fast rule imposed on the states and localities upends the constitutional order that the Second Amendment seeks to preserve. The Second Amendment sought to prevent decisions made in a faraway federal capitol from affecting the state or local government’s

\(^{263}\) District of Columbia v. Heller, 128 S. Ct. 2783, 2817 (2008). The District of Columbia law totally banned handgun possession in the home and required that any lawful firearm be rendered inoperable through a trigger lock or disassembling.

\(^{264}\) *Id.*

\(^{265}\) *Id.* at 2818.
ability to provide for the common defense. In the 18th century, that protection meant keeping Congress from disarming people by restricting them to militia arms that they could not use at home, and from disarming states and localities by ignoring the militia or marching the most effective fighters away from home for long periods of time. In the 21st century, the purpose is the same, but the emphasis should be on allowing states and localities to determine what is best for the modern “common defense” through gun regulations.

Congress has done a better job at holding true to the original purpose of the Second Amendment. The 1934 NFA debate shows that Congress, unlike the Supreme Court in *Miller*, was able to put aside the anachronistic militia arguments that plague Second Amendment debate. Furthermore, the NFA debate shows that Congress, in the face of pressure from the President and national interest groups, showed great restraint in regulating firearms. This restraint was not shown in refusing to ban a weapon of military usefulness – both the machine gun and sawed-off shotguns have very legitimate military uses. Likewise, the restraint was not reading the Second Amendment to prevent them from regulating – nevermind banning – a whole class of legitimately popular or useful weapons. After all, machine guns and shotguns were popular for banks and private individuals to protect themselves on an equal footing with gangsters.266 Even so, the Ways and Means Committee stated that, by taxing and regulating those weapons, they would reserve their use to law enforcement. Ultimately, Congress’ restraint was based on the federalism that is at the core of the Second Amendment. Although many members of Congress wanted more done about handguns and felt it was within their taxing powers to do so, they deferred to the states. Through their traditional police powers, the states could impose regulations better suited to the particular needs of its citizens. This precedent reflects the original purpose of the Second Amendment far better than the muddled preservation of the militia “standard” in *Miller* or the fanciful traditional common law right at the heart of *Heller*.

In the 1930s, Congress recognized the importance of handguns to

266 Indeed, Professor Tushnet points out that semi-automatic weapons are popular today and account for 15 percent of the privately held firearms in the country. Yet a legislature may have very legitimate reasons to severely restrict or even ban such weapons. Tushnet, *Permissible Gun Regulations After Heller: Speculations About Methods and Outcomes*, supra note 3, at 1440.
personal protection. The *Heller* decision, however, raises the handgun to the exalted status of something so important to the freedom of Americans that its possession must be constitutionally protected against the whims of state and local legislators. First, is a handgun the end-all of personal protection just because it is popular? Couldn’t reasonable regulation allow personal protection while creating greater societal protection by limiting traditional weapons like handguns and promoting various non-lethal weapons such as TASER guns or weapons with non-lethal bullets? Perhaps, but the answer is unlikely to emerge from Congress or the Supreme Court. The needs of the residents of a high crime, urban area serviced by a large and sophisticated police department like Washington, DC are very different from those of someone living on the shores of Lake Mead in Nevada, miles away from the nearest deputy sheriff. Keeping such important decisions at the state and local level, where “the people” have the greatest influence over the law, made sense during the time of the First Congress, and it makes sense now. 267 This is especially true in jurisdictions where the resulting regulation is seen as an “outlier.” 268

Unfortunately, *Heller* – and now *McDonald* – have limited local and state governments’ ability to provide for the common defense. This is a truly ironic use of the Second Amendment. For this reason, *Miller* may

267 The people of the early Republic understood this distinction and the need to tailor gun laws accordingly. As Justice Breyer points out in his dissent, cities like Boston, Philadelphia, and New York could place greater restrictions on gun use within urban areas than existed in the rural areas. *Heller*, 128 S. Ct. at 2848-50 (Breyer, J., dissenting).

268 Sunstein, *supra* note 4, at 260. Professor Sunstein argues that *Heller* is a minimalist decision in the tradition of *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), where an outlier statute was struck down because the Court identified a national consensus on contraception and privacy. Sunstein, *supra* note 4, at 260. Sunstein states that a strong majority of Americans support an individual right to own guns for nonmilitary purposes, and the Washington, DC law was one of the most draconian in the Nation. *Id.* at 263. In this case, there is a serious question of federalism and divergent norms. *Id.* at 265. As Professor Sunstein writes, “Should we not acknowledge the possibility (likelihood!) that [an outlier] is responding to the distinctive values and information of its own citizens and representatives, in a way that deserves respect? Today’s outlier is often tomorrow’s norm.” *Id.* I would go even further to defend the outlier in that such instances in contradiction to the wishes of a central and federal government or any broad national consensus was the very genesis of the Second Amendment.
be a superior decision. For all of its opaque references to preserving the militia, *Miller* found an individual right to bear arms, yet left great latitude to legislatures and city councils to tailor gun laws to the community’s needs. *Heller* more clearly and comprehensively describes the individual right, but gives little guidance to legislators when crafting future gun laws. Handguns must be allowed, but what about cheap unreliable handguns like “Saturday Night Specials”? In addition, what other future popular weapons will merit constitutional protection under *Heller* and *McDonald*?

How should Congress and legislatures proceed? Justice Breyer’s dissent in *Heller* takes the majority to task for not establishing a level of scrutiny for evaluating Second Amendment restrictions. Breyer suggests an interest-balancing inquiry that would weigh a statute’s burden on a protected interest that is out of proportion to the statute’s effects on other important governmental interests.\(^{269}\) Unfortunately, Scalia belittles this suggestion in that no other enumerated rights’ core protections have been subjected to such interest-balancing tests. Still, legislatures and courts alike will be balancing rights against reasonable protections for society, and need some standard of review. This issue may very well default to a rational basis standard of review, meaning few if any restrictions on representatives when drafting future gun legislation.\(^{270}\)

Scalia again returns to his new originalism and states, “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope is too broad.”\(^{271}\) The fact is that the citizens of the early republic could not conceive of a handgun, more powerful than any then-existing musket or rifle, easily concealable, and capable of being carried in public without anyone knowing the person was armed. What they did understand was that government closest to them best understood their needs and could best tailor gun laws to balance the needs of individuals with those of society. By giving blanket protection

\(^{269}\) *Heller*, 128 S. Ct. at 2817. Justice Breyer suggests that the DC ordinances at issue in *Heller* would survive such a test. Id. at 2817 n.27.

\(^{270}\) See Tushnet, *Permissible Gun Regulations After Heller: Speculations About Methods and Outcomes*, supra note 3, at 1429-31. Professor Tushnet speculates that courts will use a standard of “rational basis with bite” as the Second Amendment issue “percolate[s]” in the lower courts and the blank areas left by *Heller* are filled in.

\(^{271}\) *Heller*, 128 S. Ct. at 2821.
to handguns, the Court has imposed the will of Washington on states and municipalities. The Court has done harm to the spirit of the Second Amendment in the name of protecting it.

VI. Conclusion

Like nearly all examinations of the Second Amendment, the *Heller* decision is a battle of historical precedents. Justice Scalia calls upon cases and commentary from the British Bill of Rights and Blackstone, to 19th century judges and legal scholars. He would have been better served looking at how Congress, that often-underappreciated interpreter of the Constitution, interpreted the Second Amendment for a modern age of professional soldiers and police officers. Despite the disappearance of the militia, does the Second Amendment still have vitality? In 1934, Congress decided that it did, not by declaring that regulations were impermissible or by protecting a class of weapons, but by deferring to state and local government for nearly all of that regulation. The federal legislature would only impose its will over gun policy when it had to, and only as far as was absolutely necessary to address a problem of national scope. Short of extraordinary circumstances, the federal government would play a very limited role providing the day-to-day common defense. In creating the National Firearms Act, Congress acknowledged and followed the balance of power created by the Second Amendment. The Court should have done the same in *Heller* and *McDonald*. 
AIMING WITHOUT A SCOPE:  
HOW COURTS SCRUTINIZE GUN LAWS AFTER DISTRICT OF COLUMBIA v. HELLER

Ryan Menard

Explaining why realistic American militia power relies on an individual rights reading of the Second Amendment, a colleague recently recounted a story that he was told by one of his friends (herself a proud keeper and bearer of several arms): asked why Japan would not deploy troops on the admittedly unprepared United States mainland during World War II, Japanese Admiral Isoroku Yamamoto famously replied, “You cannot invade mainland United States. There would be a rifle behind each blade of grass.”

A nice tableau of the might of an armed America, but one revealed as likely no more than apocrypha. And while the trope of an armed and ready American citizenry is as familiar as stories of the Minutemen, United States military historians believe Japan refrained from an American landing for a very different reason: that the country’s interest in America was limited to neutralizing U.S. military power in the Pacific to clear a path to Asia.

All of this seems somehow pertinent for two reasons: first, the story illustrates the dynamic between the Second Amendment as a “collective right” reserved to militia members and the right as an individual one, which would make the “blade of grass” theory more likely. Second, it goes to show that the truth about history, and the mindsets behind its makers, can be elusive.

Two years ago, the Supreme Court breathed new life into the Second Amendment, interpreting it for the first time as protecting an individual right.

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2 Id.
individual right to possess and use firearms. Justice Antonin Scalia decided District of Columbia v. Heller by limiting the militia-centered prefatory clause (“A well regulated Militia, being necessary to the security of a free State”) to a clarification of only one purpose of the amendment; by providing a historical barrage of support (and distinguishing the dissent’s formidable research) signifying the intent for the amendment to encompass individual uses of arms; and by arguing that the amendment merely codified a pre-existing, “natural” right to use weaponry for self-protection and protection of the democratic state against foreign intruders and against tyranny.

This was a major step by the Court, which analyzed the amendment only a handful of times in its 200-year history. However, Scalia and the majority declined to take perhaps the most important step – establishing a level of review. After all, Scalia seemed to say, it has been a long day. At the very least, the Court clarified that rational basis review would be insufficient, that Justice Stevens’ suggested “interest-balancing” approach would be constitutionally inappropriate, and that:

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the

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5 Id. at 2799-2801.
6 Id. at 2789-99. Of course, historical sources are cited throughout the opinion. Since citing the entire opinion in this footnote would be unhelpful, this citation includes the Court’s reasoning through its conclusion that the Framers intended the Second Amendment to be an individual right.
7 Id. at 2797-99.
8 In fact, the Court in Heller analyzes the opinion’s consistency with Second Amendment precedent by comparing only three Supreme Court cases. See id. at 2812-16.
9 Id. at 2821.
10 See id. at 2821 (“But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . . And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”).
11 Id. at 2818 n.27.
12 Id. at 2821.

carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.\(^\text{13}\)

Whether these cryptic criteria impliedly removed strict scrutiny from the table, or whether the Court intended to establish parameters for whom the right would be enforced strictly, would be questions for the lower courts to resolve for now.

Meanwhile, the votes have started coming in. The lower courts that have applied *Heller* to gun regulations generally fall into three camps: those who swiftly apply the “exception” to uphold prohibitions for such classes as felons, those who apply strict scrutiny (or would believe it proper if the Second Amendment protected expressly “fundamental” rights), and those who have developed an intermediate scrutiny test somewhere in the middle.

Part I of this comment will analyze the *Heller* Court’s interpretation of the Second Amendment, focusing on the opinion’s characterization of the right as similar to others receiving higher protections. Part II will discuss the various ways, divided by levels of scrutiny, in which the lower courts have elected to treat gun regulations in *Heller*’s wake. Finally, Part III of this comment will suggest a basic structure of review for courts to apply, based in large part upon analogy to the First Amendment, until the Court develops its own doctrine.

I. Barrel Fever: the *Heller* Court Reloads the Second Amendment

A. The *Heller* Court’s Individual Rights Interpretation of the Second Amendment

In 2008, the Supreme Court, in *Heller*, gave new life to the Second Amendment by declaring it as protecting an individual right to own and use firearms for the protection of self, home, and country.\(^\text{14}\) While the dissent considered the *Heller* Court’s reading of the Second Amendment to be a drastic rejection of precedent,\(^\text{15}\) Justice Scalia argued

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\(^\text{13}\) *Id.* at 2816-17.

\(^\text{14}\) See *id.* at 2798-99.

\(^\text{15}\) *Id.* at 2824 (calling the individual rights reading “a dramatic upheaval in the law”).
that his conclusions were nothing new: that the Framers and generations of Americans understood the right as that which had simply gone unsaid by the Court for 200 years.16

The reasoning in Scalia’s opinion is largely historical. The text of the amendment and Court precedent largely take a back seat to this argument of “originalist” context, and seem as mere obstacles that are shown to be consistent, if not supportive, of an individual right reading. This comment will briefly17 outline Scalia’s reasoning to explain how the Court arrived at a reading of the Second Amendment as an individual right, and what characteristics that right currently shares with other constitutional principles.

1. The Second Amendment Codifies an Individual Right to “Keep and Bear Arms”

Scalia began his analysis with the operative clause of the amendment – “the right of the people to keep and bear Arms, shall not be infringed”18 – setting aside the prefatory clause’s implications of a strictly militia-related right for later.

First, Scalia established “right of the people” as a constitutional term-of-art referring to all citizens, not merely those members of groups like established militias,19 and showed that “to keep and bear arms” historically included weapons and uses not confined to military use.20 The

17 This comment is not intended to, and will not, fully outline the Heller decision, a two-year-old case which has already been briefed in meticulous detail. See, e.g., Ryan L. Card, An Opinion Without Standards: The Supreme Court’s Refusal to Adopt a Standard of Constitutional Review in District of Columbia v. Heller Will Likely Cause Headaches for Future Judicial Review of Gun Control Regulations, 23 BYU J. Pub. L. 259 (2009). While the Court’s reasoning is vital to understanding Second Amendment protections, the main focus of this comment is the application of those protections in lower courts. Therefore, the overview of the majority’s opinion will be an abbreviated one, and the dissenting opinions will necessarily be referenced only to the extent that they contribute to an understanding of the majority’s arguments and the possible scrutiny tests for Second Amendment review.
18 U.S. Const. amend. II.
19 Heller, 128 S. Ct. at 2790-91.
20 Id. at 2791-97.
only two other uses of the phrase “right of the people” in the unamended Constitution and Bill of Rights – in the First Amendment’s Assembly-and-Petition Clause and in the Fourth Amendment’s Search-and-Seizure Clause – and a similar usage in the Ninth Amendment, all connote individual rights, not “collective” rights that require membership in a certain group. The three other uses of “the people” in the Constitution refer to the exercise of governmental power – arguably a “collective” use but applied to an exercise of power, not a right. Further, all six uses of “the people” unambiguously refer to the whole political community, specifically those American people receiving constitutional protection.

This individual right to “keep and bear arms” included non-military weaponry and uses. Scalia derived this non-militia meaning from a 1773 dictionary defining “arms” as “weapons of offence, or armour of defence” (including “bows” and “arros”); a writing of the venerable William Blackstone describing an English law making it illegal for church-skipping Catholics (not military members) to “keep arms in their houses;” and nine state constitutions contemporaneous with the United States Constitution that allow citizens to “bear arms” in their own defense.
2. Text Aside, the Second Amendment Codified a “Natural” Right

In sum, the *Heller* Court decided that the text of the Second Amendment, taken in the context of its founding, indicates a guaranteed individual right to store and use weaponry in a non-militia context. However, Scalia took the argument a step further, explaining the Second Amendment protection as merely codifying what the Framers and the American people understood as preordained. Like the First and Fourth Amendments, Supreme Court precedent understood the Second Amendment to codify a pre-existing right, implicitly recognizing the existence of the right by only explaining that it “shall not be infringed.”

Scalia further explained that this pre-existing right in fact stems from the English Bill of Rights, which the Court recognized as influencing the constitutional Bill of Rights. Perhaps significantly, as explained in Part III of this comment, the Court said that this right to arms was “fundamental for English subjects.”

Colonial Americans perceived the protection of this right as necessary to prevent tyrannical prohibitions on the weapons of citizens; as the Stuarts in England took the guns from the civilians of its enemies, so George III began disarming rebellious colonial areas in the 1760s and 1770s.

3. An Individual Rights Reading is Consistent with Second Amendment History

Having declared the text and history of the Second Amendment to definitively characterize a natural, individual right – possibly “fundamental” – of civilians to keep and use weaponry, the Court next defended this characterization as consistent with past understanding of the right. Scalia cleared the first hurdle – the prefatory clause with its

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28 *Id.* at 2797 (quoting United States v. Cruikshank, 92 U.S. 542, 553 (1876)).
29 *Id.* at 2798.
30 *Id.* (emphasis added).
32 *Id.*
focus on the militia – establishing the militia as “all males physically capable of acting in concert for the common defense.” This ubiquitous class, essentially as large as the entire male colonial population, was a pre-existing force necessary to assemble at will to repel foreign enemies, refute the need for a national standing army, and resist tyranny. This founding-era understanding of the militia comports with Scalia’s individual rights reading. Although the right to own guns entailed many interests – self-defense, hunting, and defense of state – the need to protect that right arose largely from prior attempts by governments to restrain gun ownership to gut the power of militias. Scalia noted that, while “self-defense had little to do with the right’s codification; it was the central component of the right itself.”

This view is also consistent with the state constitutions passed before, immediately after, and in the decades following the passage of the Constitution. Four state constitutions passed before or immediately after the Constitution – those of Pennsylvania, Vermont, Massachusetts, and North Carolina – either explicitly or impliedly protected individual gun ownership rights. Nine more state constitutions, passed between 1789-1820, adopted similar readings: four codified a right of the people to “bear arms in defence of themselves and the State,” three passed the even more individualist “right to bear arms in defence of himself and the State,” and two provided for the “common defence” – the same usage used by Massachusetts and interpreted in 1825 dicta as providing rights beyond militia use.

Scalia also demonstrated the theory’s consistency with scholars, commentators, and state court cases beginning from after ratification of the Constitution through the 19th century. Particularly notable are quotations from William Rawle, a prominent lawyer and member of the Pennsylvania Assembly that ratified the Bill of Rights (“[T]he right of the people to keep and bear arms shall not be infringed. The prohibition is

33 Id. at 2799 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).
34 Id. at 2799-2801.
35 Id. at 2801.
36 Id.
38 Id.
39 Id. at 2803.
40 Id. at 2804-12.
general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people");\textsuperscript{41} a 19th Century Georgia court (“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 vitally necessary to the security of a free State.”);\textsuperscript{42} and a “massively popular” post-Civil War constitutional treatise (“Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms . . . . The alternative to a standing army is ‘a well-regulated militia,’ but this cannot exist unless the people are trained to bearing arms”).\textsuperscript{43}

Finally, Scalia analyzed prior Court precedent, concluding the prior Supreme Court cases did not preclude the\textit{ Heller} Court’s decision. First, the opinion in\textit{ United States v. Cruikshank}\textsuperscript{44} encouraged the theory of a pre-existing right to keep and bear arms, and impliedly adopted an individual rights theory.\textsuperscript{45} In that case, the Court said the Second Amendment protected the “bearing arms for a lawful purpose,” and framed the issue as whether the victim’s were deprived of their use of arms as citizens, not as a militia.\textsuperscript{46} \textit{Presser v. Illinois}\textsuperscript{47} likewise did not preclude an individual rights reading. That case held that a law that forbade “bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law” did not violate the Second Amendment.\textsuperscript{48} Scalia noted that the holding is not inconsistent with an individual rights reading, as “no one supporting

\begin{itemize}
\item \textsuperscript{41} Id. at 2805-06.
\item \textsuperscript{42} Id. at 2809 (quoting Nunn v. State, 1 Ga. 243, 251 (1846)).
\item \textsuperscript{43} District of Columbia v. Heller, 128 S. Ct. 2783, 2811 (2008).
\item \textsuperscript{44} 92 U.S. 542 (1875).
\item \textsuperscript{45} Heller, 128 S. Ct. at 2813.
\item \textsuperscript{46} Cruikshank, 92 U.S. at 553. In fact, the right to keep and bear arms as a militia was completely removed from the case, as the governor of the state disbanded the militia a year before the alleged deprivation of Second Amendment rights. Heller, 128 S. Ct. at 2813.
\item \textsuperscript{47} 116 U.S. 252 (1886).
\item \textsuperscript{48} Id. at 264-65.
\end{itemize}
that interpretation has contended that States may not ban such groups.”

Finally, Scalia addressed a case the dissent relied heavily upon, *United States v. Miller*. The Court in *Miller*, upholding the conviction of two men who transported an unregistered short-barreled shotgun in interstate commerce, held that the Second Amendment was not implicated because there was no evidence “tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia,” and that there was no evidence that “this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” The *Heller* dissent treated this language as holding that the Second Amendment only “protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons.” However, Scalia argued that this did not limit Second Amendment protection to keeping and bearing arms for military uses, but merely narrowed the Second Amendment to exclude from protection weapons not reasonably related to the “preservation or efficiency of a well regulated militia.” After all, “[h]ad the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen.” Therefore, the Court noted that the individual rights reading of the Second Amendment not only merely recognizes a longstanding, natural right, but that the *Heller* opinion does not conflict with Supreme Court precedent or with the varying views on the provision throughout history.

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49 *Heller*, 128 S. Ct. at 2813.

50 307 U.S. 174 (1939). Please note that Part II of this comment discusses a post-*Heller* Tennessee District Court decision, also titled *United States v. Miller*, discussed infra Part II. To avoid confusion, Part I only references the Supreme Court *Miller* case cited here. Part II only references the Tennessee District Court *Miller* case.

51 *Id.* at 178 (citing Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840)).

52 *Heller*, 128 S. Ct. at 2823.

53 *Id.* at 2814 (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)).

54 *Id.*
B. Defining the Second Amendment and its Levels of Scrutiny in the Wake of Heller

It would be unwise to attempt to analyze proper constitutionality tests under the Second Amendment merely on the textual and historical justifications of the individual rights reading outlined in the previous section. After all, the classification of the right to keep and bear arms as an individual says a lot about who receives protection, but very little about the extent of those protections. This section will attempt to define the Second Amendment in constitutional terms and analogies based solely on the text of the *Heller* opinion. Terms and analogies suggested, but not expressed, by the *Heller* opinion will be discussed in Part III.

1. Rational Basis, Interest-Balancing, and Presumptively Valid Regulations

A major source of discord among lower federal courts – and the basis for the publication of this comment – is that the *Heller* opinion is silent as to an appropriate level of scrutiny to apply to Second Amendment restrictions.\(^{55}\) In essence, Justice Scalia wrote the issue off as one not warranted after such a monumental decision: “But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.”\(^{56}\)

Still, the Court did note that two potential levels of scrutiny – rational basis and an interest-balancing approach suggested in Justice Stephen Breyer’s dissent – would not be appropriate to satisfy the Second Amendment’s protections of this right.\(^{57}\) First, in analyzing the regulations\(^{58}\) at issue in *Heller*, the Court said that, though the regulations

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55 Id. at 2821.
56 Id. (citation omitted).
57 Id. at 2817 n.27 (discussing rational basis); id. at 2821 (discussing the interest-balancing test).
58 At issue were several regulations generally prohibiting the possession of handguns. The District of Columbia prohibited carrying unregistered firearms and registering handguns. D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001). It was also illegal to carry a handgun without a license,
would fail constitutional muster under any test, rational basis scrutiny would be inappropriate.\textsuperscript{59} The rational basis test, as the Court noted, is to be used “when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws.”\textsuperscript{60} Such a law is upheld if it “bears a rational relation to some legitimate end.”\textsuperscript{61}

In rejecting the rational basis test, the Court noted that the Second Amendment exceeds this low “constitutional guarantee.”\textsuperscript{62} Instead, the Second Amendment is among those “specific, enumerated” rights – “be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms”\textsuperscript{63} – envisioned by the lauded \textit{United States v. Carolene Products Co.} footnote 4 to require a “narrower scope for operation of the presumption of constitutionality.”\textsuperscript{64} Further, the Court noted that such deferential scrutiny would render the Second Amendment useless: “If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”\textsuperscript{65}

The Court likewise rejected the “interest-balancing” approach favored by Breyer in his dissenting opinion. Breyer argued that, assuming strict scrutiny is adopted, every gun regulation would result in a subjective balancing of interests because the government’s justification of public safety will always be sufficiently “compelling” to meet the test.\textsuperscript{66} Instead, an explicit “interest-balancing inquiry” would avoid presumptions of validity (found in rational basis) or invalidity (found in strict scrutiny),

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\item which the chief of police may issue for one-year periods. \textit{Id.} §§ 22-4504(a), 22-4506. Also, residents were required to keep lawfully-owned firearms “unloaded and dissembled or bound by a trigger lock or similar device” unless they were located in places of business or being used for lawful recreational activities. \textit{Id.} § 7-2507.02.
\item \textsuperscript{59} \textit{Heller}, 128 S. Ct. at 2817-18, 2817 n.27.
\item \textsuperscript{60} \textit{Id.} at 2817 n.27.
\item \textsuperscript{61} Romer v. Evans, 517 U.S. 620, 631 (1996); \textit{see also}, e.g., \textit{Engquist v. Or. Dep't of Agric.}, 128 S. Ct. 2146, 2153-54 (2008).
\item \textsuperscript{62} \textit{Heller}, 128 S. Ct. at 2817 n.27.
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.} (quoting \textit{United States v. Carolene Prods. Co.}, 304 U.S. 144, 152 n.4 (1938)).
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.} at 2851-52 (Breyer, J., dissenting).
\end{itemize}
and would acknowledge the Second Amendment as an area “where a law significantly implicates competing constitutionally protected interests in complex ways.”67 Judges employing the test would determine “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.”68

However, Scalia swiftly dismissed Breyer’s interest-balancing test as a “freestanding” judicial evaluation that essentially robs the Second Amendment of the constitutional guarantee established by its enactment and requires judges to “decide on a case-by-case basis whether the right is really worth insisting upon.”69 Emphasizing this fluidity, the Court noted that the regulations at issue – held by the Court as constitutionally impermissible under any level of review used for enumerated constitutional rights – would be upheld by Breyer’s test. Scalia imagined what the reasoning under such a test would look like: “because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban.”70 Despite Breyer’s argument that “any attempt in theory to apply strict scrutiny to gun regulations will in practice turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other,”71 the *Heller* opinion requires a higher enumerated level of scrutiny.

Which level of scrutiny applies is unclear, and the Court admittedly declined to answer.72 However, the Court noted that the Second Amendment is “not unlimited” and does not extend to the “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”73 For example, the Court noted that a majority of the 19th-century courts upheld prohibitions on the carrying of concealed

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67 *Id.* at 2852 (citing Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).


69 *Id.* at 2821 (majority opinion).

70 *Id.*

71 *Id.* at 2852 (Breyer, J., dissenting).

72 *Id.* 2821 (majority opinion).

73 *Id.* at 2816.

weapons, and that the *Heller* opinion should not “be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”74 Whether these presumptively valid laws – which are not part of an “exhaustive” list – are so designated for their application of scrutiny or whether they represent areas or persons simply not protected by the Second Amendment is also unclear.

2. The Second Amendment May Enumerate Fundamental Rights

Although the Court may not have expressly deemed the right to keep and bear arms under the Second Amendment to be a “fundamental” right, a line of reasoning employed by the Court seems to necessitate the conclusion.

Much of the *Heller* decision based its reasoning on the perception of the Second Amendment by scholars, courts, and citizens throughout history. Specifically, the Court said that the Second Amendment was directly influenced by – and indeed may be the same “pre-existing” right as – a similar law in the English Bill of Rights which itself may be “fundamental.”

The Court said it is “historical reality that the Second Amendment was not intended to lay down a ‘novel principl[e]’ but rather codified a right ‘inherited from our English ancestors.’”75 This statement clearly referred to an earlier argument in which the Court described the individual right to arms secured by English Protestants after the Stuart Kings Charles II and James II had suppressed political enemies by disarming their people.76 This right, codified in the English Bill of Rights, “has long been understood to be the predecessor to our Second Amendment.”77 The Court then noted that this right “had become fundamental for English subjects,” and was cited by Blackstone as “one of the fundamental rights

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75 Id. at 2801-02 (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)).
76 Id. at 2798.
77 Id.
of Englishmen.”78

However, while the Court clearly considered the original English right to be “fundamental,” the Court never described the American version of the right – if the American version is even different – as “fundamental.” Neither did the Court expand on the “fundamental” English right, and whether Blackstone’s usage of the term was consistent with the meaning of the term in American constitutional jurisprudence. While the *Engstrom* court found *Heller* to declare the right to keep and bear arms to be a fundamental right, other courts have found the *Heller* opinion’s references to be mere historical exposition.79

The answer may be a significant one: courts commonly equate “fundamental” rights with the strict scrutiny test.80 However, absent an express finding, constitutional jurisprudence does not articulate a clear test to determine whether such a right is fundamental; further, even fundamental rights may be held to a lower level of scrutiny.81

78 *Id.* (citing 1 William Blackstone, *Commentaries* *136, *139-40).

79 See, e.g., *United States v. Miller*, 604 F. Supp. 2d 1162, 1170 n.10 (W.D. Tenn. 2009) (“As should be clear from the overall opinion, Justice Scalia’s references to Blackstone and the law of England was meant to show the historical context in which the Second Amendment was drafted. It was not a definitive statement that the right to bear arms is ‘fundamental,’ as that term of art has been used in American constitutional jurisprudence.”) (citation omitted). Please note that this *Miller* opinion is a Tennessee District Court case, not to be confused with the Supreme Court decision, also titled *United States v. Miller*, which is cited by the *Heller* court and referenced *supra* in Part I of this comment. All citations in Part II of this comment reference only the Tennessee District Court opinion, not the Supreme Court opinion.

80 See, e.g., *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547 (1983) (“Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race.”); *Harris v. McRae*, 448 U.S. 297, 312 (1980) (“It is well settled that . . . if a law ‘impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.’”) (citation omitted); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973) (“Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative.”).

81 Rights have been declared fundamental for being included in the Bill of Rights (though not all Bill of Right amendments are fundamental), for being incorporated through the Fourteenth Amendment, and for being “so-called preferred rights.” Even fundamental rights like the freedom of speech, freedom
3. The Second Amendment is Highly Analogous to the First Amendment

Several times throughout the *Heller* opinion, Scalia compared the Second Amendment to the First Amendment, particularly its protection of the individual right to free speech.

The Second Amendment, like the First Amendment, is one that pre-existed the Constitution. While the *Heller* opinion did not clarify how this may affect each right – for example, whether the Second Amendment is considered “fundamental” as its English counterpart was – it does indicate that historical sources are appropriate in determining the scope and justifications of valid and invalid restrictions of those rights.82

The scope, protections and limitations of the Second Amendment may find persuasive justification in First Amendment precedent. In rejecting the rational basis test as constitutionally inappropriate, the Court said: “Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech . . . or the right to keep and bear arms.”83 The Court also explained that the Second Amendment, like the First, is too important for an “interest-balancing” approach that would allow judges the discretion to weigh the significance of the right:84 The Framers already balanced the competing interests of free speech in the First Amendment – precluding, say, a judge weighing the interests of “a peaceful neo-Nazi march through Skokie” – and the Second Amendment “is no different.”85

However, the Court in the past recognized important limitations inherent in the First Amendment, as the Court must in the future recognize in the Second Amendment. The Court wrote:

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82 *Heller*, 128 S. Ct. at 2797 (“This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.”).

83 *Id.* at 2818 n.27.

84 *Id.* at 2821.

85 *Id.*
Of course the [individual] right [to keep and bear arms] was not unlimited, just as the First Amendment’s right of free speech was not . . . . Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.86

Finally, there are inevitably certain citizens, uses, and circumstances that would not receive full Second Amendment protection, or any protection at all. “The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different.”87

How these characteristics will define future Second Amendment doctrine – if they will at all – is still unclear. The next part of this comment will analyze the various tests lower courts have adopted, using some, or none, of the preceding characteristics.

II. The Firing Squads: Courts Struggle to Scrutinize Gun Restrictions After Heller

With much of the state of Second Amendment scrutiny unclear, the lower courts have inevitably faced difficult decisions as new suits began citing Heller and declaring gun regulations unconstitutional. Predictably, the courts met such challenges with mixed results: some considered regulations presumptively valid in light of the Court’s dicta about the constitutionality of certain “longstanding prohibitions;” some applied the strict scrutiny test often reserved for fundamental rights; and some adopted a form of intermediate scrutiny.88

86 Id. at 2799 (citation omitted).
87 Id. at 2821.
88 This comment will not consider the merits of the rational basis or interest-balancing tests, which Heller has precluded. See discussion supra at Part I.B.1, C.1.
This section attempts to compile these decisions and analyze their reasons in adopting the varying approaches. Of course, such an undertaking at this point in time will necessarily be incomplete: as of the date of publication, new cases deciding the issue for the first time continue to be published.

A. **Strict Scrutiny**

The highest level of constitutional protection, and one that has been adopted for Second Amendment review, is the strict scrutiny test. To survive strict scrutiny review, a regulation must be “narrowly tailored to further compelling governmental interests.”\(^{89}\) Statutes routinely fail this test, which “is not strict in theory, but fatal in fact.”\(^{90}\)

Only one lower court has adopted strict scrutiny review for Second Amendment regulations. In *United States v. Engstrum*,\(^{91}\) a Utah man was indicted under 18 U.S.C. § 922(g)(9), which prohibits possession of firearms by someone convicted of a “misdemeanor crime of domestic violence.”\(^{92}\) While the defendant did not dispute his status as such a convict, he challenged the statute as unconstitutionally infringing on his Second Amendment right to keep and bear arms.\(^{93}\)

Before analyzing the constitutionality of § 922(g)(9), the district court first acknowledged that the *Heller* Court “[u]nfortunately . . . rejected calls to specify a precise test which alleged violations of the Second Amendment were to be judged.”\(^{94}\) Concluding that the *Heller* Court deemed the right to keep and bear arms to be a fundamental right, the court in *Engstrum* adopted the strict scrutiny standard, writing:

> Although not expressly stated by the *Heller* Court, strict scrutiny appears the appropriate level of scrutiny for two reasons. First, the *Heller* Court described the right

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90 *Id.* at 326 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995)).

91 609 F. Supp. 2d 1227 (D. Utah 2009).

92 *Id.* at 1232.

93 *Id.* at 1228.

94 *Id.* at 1231.
to keep and bear arms as a fundamental right that the Second Amendment was intended to protect. The Tenth Circuit has declared that, where fundamental rights are at stake, strict scrutiny is to be applied. Second, the Heller Court categorized Second Amendment rights with other fundamental rights which are analyzed under strict scrutiny[, including the freedom of speech, guarantee against double jeopardy, and the right to counsel].

Having established strict scrutiny – under which regulations are routinely declared unconstitutional – as the applicable standard of review, the Engstrum court upheld the statute as applied to the defendant.

First, the court found that the government’s interest in protecting domestic partners and children from firearm violence by “presumptively risky” individuals to be a compelling one. Second, the court analyzed whether the statute was “narrowly tailored” by protecting “Second Amendment rights in cases where there is no prospective risk of violence.” While the statute does not “require[] a prospective risk of violence, but extend[s] to all those convicted of domestic violence misdemeanors” – perhaps by itself not enough to withstand strict scrutiny – the statute has been significantly narrowed by the Tenth Circuit. Rather than allowing mere physical contact, the Tenth Circuit requires “that the defendant have been convicted of using or attempting to use physical force or threatening to use deadly force against present and past domestic partners and children,” and that the “physical force” must entail “some degree of power or violence.” The Engstrum court held that the statute survived strict scrutiny, holding that the statute was “sufficiently narrowed” to those who “pose a prospective risk of violence to an intimate partner or child.”

Although Engstrum was the only court at the time of publication to officially adopt strict scrutiny, the dissenting opinion in another case

95 Id. at 1231.
96 Id. at 1233.
98 Id.
99 Id. at 1234-35.
100 Id. at 1235.

vehemently argued in favor of a strict scrutiny standard of review. In *State v. Sieyes*, a 17-year-old was convicted under a state law prohibiting the possession of firearms by a child under 18 years of age, and challenged the law as an unconstitutional restraint of the Second Amendment and similar state constitutional protections. The majority declined to adopt a level of scrutiny, instead following *Heller*’s strategy of “look[ing] to the Second Amendment’s original meaning, the traditional understanding of the right, and the burden imposed on children by upholding the statute.” Since the defendant offered no authority supporting a historical justification for gun possession by minors, the court flatly denied the constitutional claim, deciding to “keep our powder dry on this [level of review] issue for another day.”

The dissent, however, emphasized that strict scrutiny is the appropriate test considering “the fundamental nature of the right to keep and bear arms throughout our nation’s history and our legacy of extending that right to young people.”

First, the dissent considered the Second Amendment to protect fundamental rights. The majority, in discussing incorporation of the Second Amendment, said: “Gun ownership is an inexorable birthright of American tradition. ‘Americans who participated in the Revolution of 1776 and adopted the Bill of Rights held the individual right to have and use arms against tyranny to be fundamental.’” The dissent also held the right to keep and bear arms to be a fundamental right, though acknowledging that some post-*Heller* decisions did not agree.

101 *Sieyes*, 225 P.3d 995 (Wash. 2010).
102 The Washington Supreme Court analyzed the Second Amendment after determining that it applies to the states through the doctrine of incorporation. *Id.* at 998-1003.
103 *Sieyes*, 225 P.3d at 997-98.
104 *Id.* at 1005.
105 *Id.*
106 *Id.* at 1006 (Johnson, J., concurring and dissenting in part).
107 *Id.* at 999. The majority focused on the “fundamental” nature of Second Amendment rights because the first factor in determining incorporation demands “historical analysis of the right to bear arms, with special attention to fundamental rights ‘deeply rooted in this Nation’s history and tradition.’” *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).
108 *Id.* at 1009 (Johnson, J., concurring and dissenting in part).
Second, in addition to noting the applicability of strict scrutiny to fundamental rights, the dissent undertook a historical analysis of the right of minors to keep and bear arms to satisfy the majority’s need to “look to the Second Amendment’s original meaning, the traditional understanding of the right, and the burden imposed on children by upholding the statute.”\textsuperscript{110} Specifically, the dissent maintained that the fundamental right to keep and bear arms was applied to children younger than the age of 18 throughout the history of American warfare.\textsuperscript{111} Before the passage of the Constitution and Bill of Rights, for example, the Journals of the Continental Congress identified 16-year-olds as ideal soldiers for the Continental Army to recruit;\textsuperscript{112} 500,000 minors served in the Civil War (about 65 receiving the Congressional Medal of Honor);\textsuperscript{113} and current law allows 17-year-olds, “to take up arms and enlist” in military branches with parental consent.\textsuperscript{114} The dissent said: “What were these teenagers fighting for? I remind the court that, among other things, they fought for the right to bear arms, a right that unquestionably extended in its fullest form to those adolescents who took up arms to defend it\textsuperscript{115} . . . . If a soldier is old enough to fight for the nation, he is old enough to enjoy the fundamental right to keep and bear arms. Accordingly, strict scrutiny must apply to statutes limiting this right.”\textsuperscript{116} These two opinions illustrate what other opinions declining to apply strict scrutiny also imply: if the Second Amendment protects fundamental rights, strict scrutiny may indeed be the appropriate test.\textsuperscript{117} Of course, whether the \textit{Heller} Court deemed these rights to be fundamental is debatable,\textsuperscript{118} and some scholars have argued that even

\begin{itemize}
\item \textsuperscript{110} Id. at 1006 (quoting majority opinion at 1005).
\item \textsuperscript{111} Id. at 1006-08 (Johnson, J., dissenting).
\item \textsuperscript{112} Id. at 1006.
\item \textsuperscript{113} Id. at 1007.
\item \textsuperscript{114} Id. (Johnson, J., concurring and dissenting in part).
\item \textsuperscript{115} State v. Sieyes, 225 P.3d 995, 1007 (Wash. 2010) (Johnson, J., dissenting).
\item \textsuperscript{116} Id.
\item \textsuperscript{117} However, some courts held that strict scrutiny was inapplicable because the \textit{Heller} decision did not protect fundamental rights. See, e.g., United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010); United States v. Yanez-Vasquez, No. 09-40056-01-SAC, 2010 WL 411112, at *5 (D. Kan. Jan. 28, 2010); People v. Tietjen, No. C059369, 2010 WL 339014, at *2-3 (Cal. Ct. App. Jan. 29, 2010).
\item \textsuperscript{118} See Sieyes, 225 P.3d at 1008 n.8 (Johnson, J., concurring and dissenting in part).
\end{itemize}
fundamental rights are not necessarily subject to strict scrutiny review in the Court’s confusing jurisprudence.\textsuperscript{119}

That is not to say it is necessarily an all-or-nothing question, or that the right must be declared “fundamental” to ever warrant strict scrutiny. The Seventh Circuit, in \textit{United States v. Skoien}(I),\textsuperscript{120} analyzed the same statute upheld in \textit{Sieyes} under intermediate review,\textsuperscript{121} although \textit{Skoien}(I) was later vacated to be reheard by the Seventh Circuit en banc. The \textit{Skoien}(I) court had indicated that some infringements of the Second Amendment necessarily require strict scrutiny review, a conclusion the court reached without finding that \textit{Heller} declared the right to bear arms fundamental. Quoting the \textit{Heller} Court’s swift invalidation of a statute “banning from the home the most preferred firearm in the nation to keep and use for protection of one’s home and family” as unconstitutional “[u]nder any . . . standard[ ] of scrutiny,”\textsuperscript{122} the Seventh Circuit said: “this language suggests, at a minimum, that gun laws that severely restrict the core Second Amendment right identified in \textit{Heller} – that of ‘law-abiding, responsible citizens to use arms in defense of hearth and home’[’] – should receive exacting scrutiny.”\textsuperscript{123} The court later reiterated that some, but not all, Second Amendment restrictions should be held to strict scrutiny: “Laws that restrict the right to bear arms are subject to meaningful review, but unless they severely burden the core Second Amendment right of armed defense, strict scrutiny is unwarranted.”\textsuperscript{124}

Although this decision was vacated – the Seventh Circuit, sitting en banc, instead avoided the question of appropriate review in \textit{Skoien}(II)\textsuperscript{125} – the Fourth Circuit has suggested that the \textit{Skoien}(I) analysis may be the proper approach. In \textit{United States v. Chester},\textsuperscript{126} the Fourth

\begin{itemize}
  \item \textsuperscript{119} See, e.g., \textit{Winkler}, \textit{supra} note 81, at 726-31.
  \item \textsuperscript{120} \textit{United States v. Skoien I}, 587 F.3d 803 (7th Cir. 2009), \textit{vacated} and \textit{superceded} by \textit{United States v. Skoien II}, 614 F.3d 638 (7th Cir. 2010). I refer to the first Seventh Circuit case as “\textit{Skoien I}” and the rehearing en banc as “\textit{Skoien II}” for ease of reading; the reports do not use these designations.
  \item \textsuperscript{123} \textit{Skoien I}, 587 F.3d at 811.
  \item \textsuperscript{124} \textit{Id.} at 812.
  \item \textsuperscript{125} 614 F.3d 638 (7th Cir. 2010).
  \item \textsuperscript{126} 367 Fed. Appx. 392 (4th Cir. 2010). Adding to the confusion, \textit{Chester}, an
Circuit remanded the appeal of a defendant charged with misdemeanant possession of a firearm, with instructions to the district court to develop a record and select an appropriate level of scrutiny.127 While declining to decide a level of scrutiny for the defendant, the court said, “we agree in part with the Seventh Circuit’s approach to this unchartered realm of Second Amendment jurisprudence” and adopted the Skoien(I) approach— and its potential for exacting review.128 However, the Chester court suggested that strict scrutiny may be unwarranted on the facts, as the defendant – a misdemeanant – was not “law-abiding,” and therefore was “at least one step ‘removed from the core constitutional right.’”129

B. Intermediate Scrutiny

As of the date of publication, the majority of courts to analyze gun regulations have adopted a form of intermediate scrutiny.130 Generally, intermediate scrutiny is somewhere between the rational basis and


127 Chester, 367 Fed. Appx. at 399.
128 Id. at 398 (quoting Skoien I, 587 F.3d at 812) (noting that the Skoien I court considered strict scrutiny but applied intermediate scrutiny because the “core right was reserved as a right for ‘law-abiding, responsible citizens’ to use arms for their ‘natural right of armed defense’”).
129 Id. at 398 (citing Skoien I, 587 F.3d at 812).
130 See, e.g., United States v. Pettengill, 682 F. Supp. 2d 49, 55 (D. Me. 2010). Excluding, of course, the many courts that declined to adopt a level of review. See, e.g., United States v. Fincher, 538 F.3d 868, 874 (8th Cir. 2008) (holding possession of machine guns not protected by the Second Amendment because “not in common use by law-abiding citizens for lawful purposes”); Peruta v. County of San Diego, 678 F. Supp. 2d 1046, 1055 (S.D. Cal. 2010) (holding the government failed its burden under either test).
strict scrutiny tests; however, courts sometimes vary the application of intermediate review depending on the nature of the right involved. For example, certain invidious classifications, such as gender, may warrant a more thorough form of intermediate scrutiny.  

1. Standard Intermediate Scrutiny

Where courts decide not to vary the level of intermediate review, a standard version of the test is adopted. Subject to this standard test, a restriction will be upheld if it is “substantially related to an important government objective.” In its analysis, courts first consider whether the policy objective of the regulation is “important,” then whether the regulation is “substantially related” to that end. As with strict scrutiny, the government bears the burden in establishing the constitutionality of a regulation.

*United States v. Miller* typifies the decisions by post-*Heller* courts to adopt the standard intermediate scrutiny test. In that case, the Tennessee District Court analyzed § 922(g), the same statute upheld under strict scrutiny in *Engstrum*. Acknowledging the *Heller* Court’s refusal to adopt an applicable level of review, the court in *Miller* arrived at intermediate scrutiny by process of elimination: “assuming that the majority did not fashion a new standard or abandon the ‘level of scrutiny’ framework altogether.”

This decision necessitated the same finding as in *Engstrum* and *Sieyes*: whether or not the right to keep and bear arms as described in *Heller*

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133 See supra Part II.A.
135 Miller, 604 F. Supp. 2d at 1170.
136 Id. at 1171.
137 Id. at 1170.
138 Id.
was fundamental.\textsuperscript{140} However, unlike the court in *Engstrum*, the *Miller* court did not find in *Heller* an express determination that the right is, or is not, fundamental.\textsuperscript{141} Noting that several circuit courts prior to *Heller* held either that Court precedent did not establish a fundamental right\textsuperscript{142} or that the right was simply not fundamental,\textsuperscript{143} the *Miller* court arrived at intermediate scrutiny.\textsuperscript{144} Other courts have arrived at intermediate scrutiny from different lines of reasoning. For example, the Third Circuit likened a ban of handguns with obliterated serial numbers to a “time, place, and manner” speech regulation,\textsuperscript{145} as a non-severe regulation of the “manner” of gun possession and not of possession of the “class” of firearm.\textsuperscript{146}

\textsuperscript{140} *Id.* at 1169-70 (noting that the “distinction appears to turn on whether the challenged law: (1) burdens a right that is considered “fundamental” or (2) burdens a suspect or quasi-suspect classification”).

\textsuperscript{141} *Id.* at 1170.

\textsuperscript{142} See, e.g., Olympic Arms v. Buckles, 301 F.3d 384, 388-89 (6th Cir. 2002); United States v. Hancock, 231 F.3d 557, 565 (9th Cir. 2000).

\textsuperscript{143} See, e.g., Gillespie v. City of Indianapolis, 185 F.3d 693, 709 (7th Cir. 1999); United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984); United States v. Synnes, 438 F.2d 764, 771 n.9 (8th Cir. 1971).

\textsuperscript{144} *Miller*, 604 F. Supp. 2d at 1171.

\textsuperscript{145} In the context of free speech, regulations can be seen in one of two ways: those that target speech based on the particular expression conveyed and those that target speech without reference to the content of the message. Restrictions suppressing speech in public forums based on the expression’s message are considered “content-based,” which are generally analyzed under strict scrutiny. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (citing Carey v. Brown, 447 U.S. 455, 461 (1980)). However, even-handed restrictions that regulate speech regardless of its message or content are considered “content-neutral,” and are upheld under an intermediate scrutiny standard if they serve “a significant governmental interest, and leave[s] ample alternative channels for communication.” Consol. Edison Co. v. Pub. Serv. Comm’n, 447 U.S. 530, 535-36 (1980). These content-neutral regulations often regulate the “time, place, and manner” of speech; a classic example is a law proscribing the times, places, and manners in which parades may be held, without consideration of the message conveyed by each parade. See, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941).

\textsuperscript{146} United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010). However, the Third Circuit did not expressly apply the “ample alternative channels” test generally applied to content-neutral time, place, and manner regulations; the court instead seemingly forged its own. Ironically, for a more coherent and
Of course, upholding the statute under intermediate scrutiny proved an easy task for the *Miller* court. First, the court held the governmental interest in curbing the “easy availability of firearms . . . to those persons who pose a threat to community peace”\(^{147}\) to be part of the interest in preventing crime, the importance of which “cannot be doubted.” Second, the *Miller* court noted that prohibiting gun possession by felons is substantially related to this interest, as Congress found felons to be more predisposed to commit crime than non-felons.\(^{148}\) And while the *Miller* court implied that strict scrutiny might dictate a different outcome due to the failure to distinguish between violent and non-violent felonies, “intermediate scrutiny, by definition, permits Congress to paint with a broader brush.”\(^{149}\)

2. Other Intermediate Scrutiny Formulations

Courts have historically manifested a variety of intermediate scrutiny incarnations that vary with the right assessed, but many Second Amendment cases have been less than clear as to which, if any, of the tests is to be uniformly adopted. Some courts have either applied standard intermediate scrutiny without deciding whether it is generally the correct test to apply,\(^{150}\) or have selected intermediate scrutiny as the appropriate test, without choosing a specific formulation.\(^{151}\)

Indeed, among the Courts of Appeal, the preferred approach seems to be to settle on a vague notion of intermediate scrutiny, even at the cost of clarity found in the overruled lower court’s original decision. The

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\(^{148}\) Id. at 1172.

\(^{149}\) Id.

\(^{150}\) See, e.g., United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (“[W]e can examine [defendant’s] claim using the intermediate scrutiny framework without determining that it would be the precise test applicable to all challenges to gun restrictions”).

\(^{151}\) *Marzzarella*, 614 F.3d at 97-98 (articulating several formulations and declining to choose one).
Marzzarella case from the Third Circuit is illustrative. The lower court likened a regulation to a “time, place, and manner” speech regulation, and adapted that rule’s test to gun regulations: whether the “regulation is narrowly tailored and leaves open ample opportunity for law-abiding citizens to own and possess guns within the parameters recognized by Heller.” In its own review of the case, the Third Circuit, having found the First Amendment a good reference point in deciding on intermediate scrutiny, struggled to articulate the proper test:

In the First Amendment speech context, intermediate scrutiny is articulated in several different forms. See Turner Broad. Sys. (requiring the regulation serve “an important or substantial” interest and not “burden substantially more speech than is necessary” to further that interest; Bd. of Trs. of State Univ. of N.Y. v. Fox (requiring a “substantial” governmental goal and a “reasonable fit” between the regulation and that objective); Ward (applying the time, place, and manner standard which asks whether the regulation is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication); Cent. Hudson, (requiring the regulation directly advance a substantial interest and be no more extensive than necessary to serve the interest).

Although any of these tests could be adapted to the Second Amendment context, the Third Circuit instead seemed to invent its own formulation, derived from the common elements of these tests; the court noted that each required: “the asserted governmental end to be more than just legitimate, either ‘significant,’ ‘substantial,’ or ‘important;’” “the fit between the challenged regulation and the asserted objective [to] be reasonable, not perfect;” and that the “regulation need not be the least restrictive means of serving the interest, but may not burden more speech than is reasonably necessary.” The Third Circuit found that these requirements were

152 Marzzarella, 595 F. Supp. 2d at 606.
153 Marzzarella, 614 F.3d at 97-98 (citations omitted).
154 Id. (citations omitted).
met.\textsuperscript{155} It is unclear, however, whether the court was simply pointing out that the law would survive any of the tests, or whether it meant to adopt this as a new formulation. If the latter, the court also did not indicate how its formulation differs from the standard intermediate test, if it does at all.

The Third Circuit’s requirement that the fit be “reasonable, not perfect,” hints that its test (if a new test at all) may be less stringent than standard intermediate scrutiny review. This “reasonable fit” language comes from one of the least restrictive intermediate tests. Applied to certain commercial forms of speech, the test requires that there be a “‘reasonable fit’ between an important governmental end and the regulatory means chosen to by the government to serve that end.”\textsuperscript{156} This governmental end must be “substantial, and the cost to be carefully calculated.”\textsuperscript{157} The “reasonable fit” “represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served,’” but courts must also consider “the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires.”\textsuperscript{158} As with the standard intermediate scrutiny test, the burden is on the government, which in this level of scrutiny is to establish the “reasonable fit.”\textsuperscript{159}

While the Third Circuit seemingly adopted this approach, at least in part, other courts may also be applying it. Before vacating its decision, the Seventh Circuit had adopted this approach for review of at least some Second Amendment restrictions in \textit{United States v. Skoien(I)};\textsuperscript{160} although the Seventh Circuit later vacated the decision advancing this approach, it is worth discussing, as it may have application in courts that found \textit{Skoien(I)} persuasive, such as the Fourth Circuit.\textsuperscript{161} In \textit{Skoien(I)}, the Seventh Circuit indicated that, although the \textit{Heller} opinion did

\begin{itemize}
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Skoien} I, 587 F.3d at 814 (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).
\item \textsuperscript{157} \textit{Fox}, 492 U.S. at 480.
\item \textsuperscript{158} \textit{Id.} at 480-81 (citation omitted).
\item \textsuperscript{159} \textit{Id.} at 480.
\item \textsuperscript{160} \textit{Skoien} I, 587 F.3d at 814.
\item \textsuperscript{161} See \textit{United States v. Chester}, 367 Fed. Appx. 392, at 397 (4th Cir. 2010) (“We agree in part with the Seventh Circuit’s approach to this unchartered realm of Second Amendment jurisprudence”).
\end{itemize}
not expressly find the right to be fundamental, strict scrutiny may “at a minimum” apply to the core Second Amendment right for armed self-defense of “law-abiding, responsible citizens.”\textsuperscript{162} However, recognizing that the \textit{Heller} opinion seems to deny strict scrutiny review for other types of non-core rights,\textsuperscript{163} and expressly precluded rational basis review,\textsuperscript{164} the \textit{Skoien}(I) court – like those courts described in part II.B.1 – landed on intermediate scrutiny\textsuperscript{165} in reviewing § 922(g)(9).\textsuperscript{166}

However, the Seventh Circuit did not end its analysis at this process of elimination conclusion. First noting that intermediate scrutiny has been applied in a more rigorous manner to regulations with gender-based classifications,\textsuperscript{167} the court then explained that the level of review may also applied less severely, specifically in the context of the First Amendment right to free speech.\textsuperscript{168}

In selecting the “reasonable fit” approach spelled out in \textit{Fox}, the \textit{Skoien}(I) court looked to the First Amendment for its model. Free speech rights tend “to fluctuate with the character and degree of the challenged law’s burden on the right and sometimes also with the specific iteration of the right.”\textsuperscript{169} As example, the Seventh Circuit turned to regulations of the speech and association rights of voters, candidates and parties during elections – severe burdens are subject to strict scrutiny, while lesser burdens must “only be reasonable, politically neutral, and justified by an important regulatory interest.”\textsuperscript{170} In the commercial-speech context, the intermediate standard is adapted to reflect the “subordinate position” that commercial speech occupies “in the scale of First Amendment values.”\textsuperscript{171} Finally, the Supreme Court’s speech-forum doctrine mandates

\textsuperscript{162} \textit{Skoien}, 587 F.3d at 811.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.} at 810.
\textsuperscript{165} \textit{Id.} at 812.
\textsuperscript{166} This statute, which prohibits possession of firearms by domestic violence misdemeanants, was also examined in \textit{Engstrum}, \textit{supra} Part II.A.
\textsuperscript{167} \textit{Skoien}, 587 F.3d at 812-13 (citing United States v. Virginia, 518 U.S. 515, 533 (1996)).
\textsuperscript{168} \textit{Id.} at 813.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.} (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008)).
\textsuperscript{171} \textit{Id.} (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989)).
strict scrutiny in public or designated public forums, and a reasonableness standard in nonpublic forums.\textsuperscript{172}

After describing the various nuances of First Amendment doctrine, the Seventh Circuit selected the \textit{Fox} commercial speech test (and seemingly incorporated “burden” analysis from election law): “What this means more specifically is that for gun laws that do not severely burden the core Second Amendment right of self-defense there need only be a ‘reasonable fit’ between an important governmental end and the regulatory means chosen by the government to serve that end.”\textsuperscript{173} The court compared the justifications behind using this varying standard to Second Amendment review:

Adapting this doctrine to the Second Amendment context makes sense. The Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden on Second Amendment rights, and individual assertions of the right will come in many forms. A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.\textsuperscript{174}

However, once finding that this level of scrutiny applies, the Seventh Circuit remanded the case to develop a record to use in deciding of the issue. Complicating the issue is that the defendant Skoien, who was charged with violating § 922(g)(9) after a hunting rifle was found in his truck, challenged the statute as violating his right to possess arms for hunting.\textsuperscript{175} Therefore, the court requested a record indicating whether the government has satisfied its burden of proving a reasonable fit between the

\begin{footnotesize}
\textsuperscript{172} Id. (citing Choose Life Ill., Inc. v. White, 547 F.3d 853, 864 (7th Cir. 2008)).

\textsuperscript{173} United States v. Skoien I, 587 F.3d 803, 814 (7th Cir. 2009), \textit{vacated and superceded} by U.S. v. Skoien II, 614 F.3d 638 (7th Cir. 2010).

\textsuperscript{174} Id. at 813-14.

\textsuperscript{175} Id. at 805.
\end{footnotesize}
prohibition of guns for hunting to the already accepted end of preventing gun violence. Had Skoien keyed his constitutional challenge to the “core right of self-defense,” strict scrutiny may have applied.

III. Lock, Stock, and Two Levels of Scrutiny (or more): A Suggested Approach

In his dissenting opinion in *Heller*, Justice Breyer argued that the nature of gun laws precludes any meaningful application of strict scrutiny, suggesting that the always-compelling governmental interest of public safety will necessarily result in an interest-balancing, regardless of what the Court would call it. Others have suggested that even the distinction between strict scrutiny and intermediate scrutiny would amount to a mere matter of syntax in which no laws would be struck down. Scholar Adam Winkler writes:

An intermediate level of review, however, would likely lead to only marginally different results than either strict scrutiny or even the reasonable regulation standard. First, the governmental ends prong of the analysis would not change: public safety is already a compelling government interest sufficient to satisfy even strict scrutiny and thus would easily satisfy intermediate scrutiny. Second, with regard to means, there may be little distinction in practice between “narrow tailoring” and something like “substantial relationship.” The fit is never going to be very precise in gun control, and courts will need to accept a large measure of overinclusiveness and underinclusiveness no matter what formal standard is applied. No law of any sort will make the public perfectly safe, and any gun

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176 Id. at 816.
177 Id. at 805.
178 Again, it is worth stressing that the preceding analysis of *Skoien* I is no longer good law in the Seventh Circuit, as the decision was vacated, but may be valid in the Fourth Circuit. Additionally, the theory of *Skoien* I was not criticized by the *Skoien* II court or held legally untenable in any way.
control measure could go further to make people more safe from harm from guns.\(^{180}\)

However, lower court decisions already indicate that the difference may indeed be significant. Noting the overinclusiveness of § 922(g)’s lumping together of violent and non-violent felons, the Tennessee District Court upheld the statute because intermediate scrutiny “permits Congress to paint with a broader brush”\(^{181}\) – after all, invalidating the statute for prohibiting “some legitimate conduct” would “blur the line between strict and intermediate scrutiny.”\(^{182}\) The Seventh Circuit too emphasized the distinction between the tests as they pertain to overinclusive gun laws: “Intermediate scrutiny tolerates laws that are somewhat overinclusive. . . . We note that § 922(g)(9) is overinclusive on several fronts.”\(^{183}\)

On the other hand, the only court to apply strict scrutiny upheld the challenged statute: The Utah District Court found 922(g)(9) – which prohibits gun possession by domestic violence misdemenants – narrowly tailored to the compelling governmental interest in preventing gun violence by only targeting those convicted of using physical force with “some degree of power or violence.”\(^{184}\)

Particularly striking is the disparity in which tests are used and how courts arrived at them. The vacated Seventh Circuit opinion in \textit{Skoien}(I) and superceded lower court decision in \textit{Marzzarella} arrived at different intermediate scrutiny tests – \textit{Skoien}(I) required a “reasonable fit” between the means and important governmental end,\(^{185}\) while \textit{Marzzarella} adopted an “alternative channels” requirement\(^{186}\) – by analogizing the various First Amendment tests. The Seventh Circuit in \textit{Skoien}(I) applied a commercial speech test for reasons it never specifically articulates – perhaps because hunting, like commercial speech, occupies a “subordinate position” in the “scale” of Second Amendment values,\(^{187}\) or maybe that laws prohibiting gun possession by domestic violence

\(^{180}\) Winkler, \textit{supra} note 81, at 731.
\(^{182}\) \textit{Id.} at 1172 n.14.
\(^{183}\) \textit{Skoien} I, 587 F.3d at 815.
\(^{185}\) \textit{Skoien} I, 587 F.3d at 814.
\(^{187}\) \textit{Skoien} I, 587 F.3d at 813.
misdemeanants “do not severely burden the core Second Amendment right of self-defense.”\textsuperscript{188} The Pennsylvania District Court in Marzzarella arrived at the test used for content-neutral time, place or manner speech regulations because the law prohibiting arms without serial numbers is unlike content-based speech regulations – neither targets specific uses (content of speech, or type of arm) or users (speakers, or possessors).\textsuperscript{189}

Both of these preceding cases are no longer “good law” in their circuits – Skoien(I) was vacated and superseded by Skoien(II), and the Third Circuit affirmed the lower Marzzarella opinions using a different standard of review – but that is not to say that either court erred in selecting a test. It would be consistent with First Amendment doctrine – itself referenced in Heller – to analyze a particular regulation differently depending on whether it targets specific uses or users, or whether the gun right affected comports with a hierarchy of values. However, courts should establish a “plan” before adopting piecemeal tests; otherwise, courts could paint themselves into corners: By analogizing the serial-number requirement to a content-neutral regulation, has the Third Circuit committed to analyzing a ban of certain classes of guns under content-based, strict scrutiny review? Having possibly adopted the “reasonable fit” intermediate scrutiny test of Skoien(I), must the Fourth Circuit adopt strict scrutiny when the right to self-protection is affected?

First Amendment doctrine seems particularly analogous to Second Amendment review, but courts should adopt a logical structure of analysis. I suggest the following design, culled from language in Heller and from First Amendment doctrine: First, as some types of speech do not receive First Amendment protection, some categories of users and uses should be outside Second Amendment protection. Second, the core right identified in Heller should generally receive strict scrutiny review, with insignificant burdens upheld if reasonable. Finally, less valuable Second Amendment rights should receive the “reasonable fit” intermediate scrutiny test adopted in Skoien(I) and possibly alive in the Fourth Circuit.

\textsuperscript{188} Id. at 814.
\textsuperscript{189} Marzzarella, 595 F. Supp. 2d at 606.
The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech . . . .” Of course, this is not wholly accurate, as certain types of speech are considered outside of this protection. The Court has noted that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem.” Such “classes of speech” include obscenity and, more immediately, “fighting words” — “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” The Court noted that such “fighting words” do not receive constitutional protection because they “are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

One reading of Heller is to interpret its language of the presumptive validity of prohibitions of gun possession by felons and the mentally ill as actually excluding those classes of people from Second Amendment protection, just as the First Amendment excludes from protection speech that inflicts injury or incites a breach of the peace. The Court in Heller indicated that such exceptions may exist. Just before discussing the presumptively valid laws, the Court wrote: “Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” The Court also seemed to indicate that this type of limitation is actually an exclusion from protection by noting that one such “limitation” is the exclusion from protection of guns not “in common use at the time”

190 U.S. Const. amend. I.
192 See id.
194 Id. at 572.
196 Id. at 2816.
for self-defense purposes.\footnote{Id. at 2815 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).} It would be a fair reading to conclude that felons and the mentally ill – described while describing the limitations of Second Amendment protection – fall outside the scope of the right. Indeed, the circuit courts of appeal to consider the constitutionality of such regulations have treated them as if outside Second Amendment protection by quoting the *Heller* language about presumptive validity as determinative.\footnote{See United States v. Khami, 362 Fed. Appx. 501, 507 (6th Cir. 2010); United States v. Battle, 347 Fed. Appx. 478, 480 (11th Cir. 2009); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009); United States v. Smith, 329 Fed. Appx. 109, 110-11 (9th Cir. 2009) (“The Supreme Court expressly excluded felons from its holding that the Second Amendment confers a federal individual right to keep and bear arms”); United States v. Stuckey, 317 Fed. Appx. 48, 50 (2d Cir. 2009); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009); United States v. Brunson, 292 Fed. Appx. 259, 261 (4th Cir. 2008); United States v. Irish, 285 Fed. Appx. 326, 327 (8th Cir. 2008) (“[T]he Second Amendment does not bar laws prohibiting felons from possessing firearms”).}

It is entirely possible that the *Heller* Court envisioned a lower level of scrutiny, not preclusion from protection, for such laws – the list of which, the Court notes, is not exhaustive\footnote{*Heller*, 128 S. Ct. at 2816-17.} – but courts in the meanwhile should consider such uses outside the scope of the Second Amendment. However, until the Court establishes which classes of uses and users fall outside Second Amendment protection, such classes not specifically mentioned in *Heller* – gun possession by domestic violence misdemeanants, for example – should not be considered unprotected by analogy, as such speculation forecloses vindication of possible protected rights.

**B. The Core Right of Lawful Citizens to Bear Arms in the Home for Self-protection Should be Protected with Strict Scrutiny Review**

Laws restricting rights not necessarily outside Second Amendment protection should obviously be subject to some level of scrutiny. Gun laws implicate different types of rights with different burdens. For example, the core right to self-defense in the home expressed in *Heller* seems to be

a different right to self-defense in the street.\textsuperscript{200} Similarly, the outright ban on loaded weapons in the home in \textit{Heller} seems a much more significant burden to the core right of self-defense in the home than, say, an even-handed, non-discretionary licensing requirement.

It seems the right approach, at least for now, is to assemble a hierarchy of values within which more valuable rights receive higher protection. How high this highest protection must be is surely a controversial issue, but I believe that the core right identified in \textit{Heller} – that of law-abiding citizens to keep and bear arms in the home for protection of self and country – warrants strict scrutiny review.

While the \textit{Heller} Court never expressly deems this core Second Amendment right to be a “fundamental” one – if the distinction really matters – the values and policies expressed in the opinion indicate that the particular right is one of vital importance, not unlike the First Amendment right to core political speech.

In adopting strict scrutiny for core political speech, the Court has noted that the First Amendment right to speech was chiefly codified “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” in which “oppressive officers are shamed or intimidated, into more honourable [sic] and just modes of conducting affairs.”\textsuperscript{201} Just this year, the Court affirmed that the First Amendment was “[p]remised on mistrust of governmental power.” As Justice Brandeis once wrote:

\begin{quote}
Those who won our independence…believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that
\end{quote}

\textsuperscript{200} See \textit{id.} at 2816 (“For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”).

\textsuperscript{201} \textit{Roth v. United States}, 354 U.S. 476, 484 (quoting 1 \textit{Journals of the Continental Congress} 108 (1774)).
this should be a fundamental principle of the American government. . . . Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.  

As the *Heller* decision explained, the Second Amendment too was designed to protect a multitude of rights, but was codified chiefly to prevent disarming of the local militias – a tactic the English monarchy had used to suppress political dissidents. In America, the local militias, protected by the Second Amendment, were tasked with protecting the country not only from outside invaders, but also from the American government itself.

These parallels justify considering the basic core right described in *Heller* as one deserving of the same degree of protection as core political speech protected by the First Amendment. Still, there are many valuable laws that invariably impact the core Second Amendment right – licensing and registration requirements, for example, affect the ability of a homeowner to possess a gun. Such necessary laws must surely receive lower levels of scrutiny.

Of course, even the *Heller* opinion described the Second Amendment rights as “not unlimited.” Similarly, not all regulation of core political speech is held to strict scrutiny – perhaps most analogously, election laws that impose “reasonable, nondiscriminatory restrictions” on the rights to speech and assembly – very likely core political speech – are valid as insignificant constitutional burdens. The Court has said:

> It is beyond cavil that “voting is of the most fundamental significance under our constitutional structure.” . . . Common sense, as well as constitutional law, compels the conclusion that government must play an

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203 *Heller*, 128 S. Ct. at 2798.
204 *Id.* at 2801-02 (“Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”).
205 *Id.* at 2799.
active role in structuring elections; “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”

Election laws will invariably impose some burden upon individual voters.207

This seems to me the best mechanism to ensure that the core Second Amendment rights are protected sufficiently, while still allowing reasonable licensing and registration laws that prevent the chaos inherent in handing out guns blindly to all who apply.208

C. Less Valuable Second Amendment Rights Should be Subject to the “Reasonable Fit” Intermediate Review Adopted by the Seventh Circuit

Chief among the implications of Heller is the necessarily hierarchical structure of Second Amendment rights – including the presumed validity of laws prohibiting possession of guns by felons and the mentally ill,209 the exclusion from protection of arms not “in common use at the time,”210 and the oft-upheld prohibitions on concealed weapons.211 And while the Heller Court indicated that the core Second Amendment right described in the case should receive a high level of review, it remained relatively silent on the remaining rights.

Until the Court clarifies the status of the rights other than the core right of lawful citizens to self-protection of the home, it would be rash

207 Id. at 433 (citations omitted).
208 It is worth noting that Burdick was among the cases cited in Justice Breyer’s dissent in Heller as evidence that the Court has, contrary to Scalia’s assertions, applied interest-balancing tests to important rights. Heller, 128 S. Ct. at 2852. I believe, however, that the Burdick test would not wholly reduce the core Second Amendment right to a mere interest-balancing assessment. In Burdick, “severe” restrictions are still subject to strict scrutiny review, while insignificant restrictions must be “reasonable” and “nondiscriminatory.” Burdick, 504 U.S. at 433-34.
209 Heller, 128 S. Ct. at 2816-17.
210 Id. at 2817.
211 Id. at 2816.
to prescribe a particularly stringent level of review. Instead, the *Skoien*(I) court was wise to treat non-core Second Amendment protections the same way as commercial speech, a less valuable facet of First Amendment protection.

The Court distinguishes commercial speech as a less valuable right than noncommercial speech. Although commercial speech has obvious value – including the economic interest of the speaker and the interest of society in making decisions with as much information as possible\textsuperscript{212} – the Court assumes a “‘common-sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”\textsuperscript{213} Indeed, allowing parity between commercial and noncommercial speech “could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.”\textsuperscript{214}

Likewise, there is a common-sense distinction between the possession of guns in the home for self-defense, and, for example, possession of concealed weapons in public. While the government is unlikely to regulate private, constitutionally-protected conduct in one’s home, concerns of public safety necessitates regulation of hazardous behavior outside of the home. If the core Second Amendment protection is analogous to the right of core political speech, then less valuable gun rights are akin to less valuable commercial speech rights. Therefore, the “reasonable fit” application of intermediate scrutiny, outlined in *Fox* and adopted in *Skoien*(I), should be sufficient to safeguard non-core Second Amendment rights until the Court considers them worthy of higher scrutiny.

These various recommendations, while consistent with *Heller*, could easily be rendered irrelevant should the Court further develop its Second Amendment doctrine. Until then, however, courts would be remiss to consider the validity of gun laws without considering the consequences on its own meanwhile doctrine. I believe this structure should accomplish a suitable give-and-take between the important right outlined in *Heller* and the need to preserve order, consistency, and public safety.

\textsuperscript{213} Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 455-56 (1978).
\textsuperscript{214} *Id.* at 456.
IV. Conclusion

If *Heller* is a sea-change in Second Amendment doctrine, then the courts have proven to be ships lost at sea, struggling to apply what is sure to become a complex doctrine to urgent cases challenging gun laws as unconstitutional. In the wake of *Heller*, decisions by these lower courts depict inconsistency, confusion, and hesitation.

The need for a level of review is clear from the variations adopted by courts – swift dismissal of suits, strict scrutiny, intermediate scrutiny, and less stringent forms of intermediate scrutiny – and from comments indicating that the level of scrutiny could make the difference between upholding and invalidating gun regulations.

Until the Court develops its Second Amendment, it is imperative that lower courts adopt tests that are consistent with the *Heller* opinion, that cater to both the important right of self-protection of the home and to the grave concerns of public safety, and that allow for the circuit courts to develop logical and consistent doctrines in the meanwhile.
“Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”1

The Second Amendment has been perhaps the most unsettled area of constitutional law in the 21st century. The Supreme Court’s decision in District of Columbia v. Heller,2 followed soon after by McDonald v. City of Chicago,3 was the first step in a two-step process that greatly expanded the scope of the Second Amendment. Heller clarified exactly what rights the Second Amendment protects, contributing two distinct conclusions to the ever-changing jurisprudence in the field. Firstly, Heller held that the Second Amendment right is an individual right held by each citizen of the United States rather than a collective group or militia.5 Secondly, Heller made clear that the Second Amendment does not provide unlimited protection, identifying four categories of “presumptively lawful” gun restrictions that fall outside the Second Amendment protection; prohibitions on the possession of firearms for the mentally-ill and convicted felons, laws imposing qualifications for the commercial sale of firearms, and laws banning firearms in “sensitive
places” such as schools and government buildings.6

The second major change to Second Amendment jurisprudence came in McDonald in 2010, when the Supreme Court defined the scope of the Second Amendment by deciding whether the Second Amendment was applicable to states.7 The Supreme Court had intentionally dodged the question in Heller, explicitly referring to incorporation as a “question not presented in this case.”8 Ultimately, in McDonald, the Court held that the Second Amendment was deeply rooted in American legal tradition and is incorporated by the Fourteenth Amendment to apply to states, as well as federal governments.9

In two short years, the Second Amendment has taken the forefront of American legal debates. The full impact of McDonald is yet to be seen. Among the most important questions not yet answered is to what extent this expanded Second Amendment right will affect long-term prohibitions enacted for public safety, most notably, anti-gun statutes enacted to protect the school zone.

This comment does not provide a comprehensive overview of Second Amendment jurisprudence nor of school safety statutes. Rather, this comment provides a snapshot of how three recent Supreme Court decisions – United States v. Lopez, District of Columbia v. Heller, and McDonald v. City of Chicago – will affect federal and state attempts to regulate gun possession in the school zone. Part I will explore the significance of the presumptively lawful exception. Part I will place the specific exception for laws banning weapons in sensitive places in the context of both its historical roots and the modern trend of school violence, which has revealed a need for such regulation. Part II will analyze how the presumptively lawful exception has been received by federal courts since Heller was decided in 2008, focusing primarily on the abundant challenges to felon-in-possession laws as indicative of courts’ interpretation of the other presumptively lawful categories. Part II will also discuss how states reacted to Heller-based challenges prior to McDonald and predict how states and federal courts will handle future challenges falling within the exception.

6 Id. at 2816-17.
7 I will discuss this topic in more depth in Part III.
8 Heller, 128 S. Ct. at 2813 n.23.
9 McDonald, 130 S. Ct. at 3036, 3050.
Part III will survey the incorporation of the Second Amendment and address what impact, if any, *Lopez* will have on laws falling within the presumptively lawful exception moving forward. Finally, Part IV will provide an overview of gun-regulation challenges brought in state courts prior to *McDonald*, predicting that the frequently-cited doctrine of void-for-vagueness will give way to constitutional challenges based on the Second Amendment in the future. This comment will situate gun-free school legislation within the larger body of anti-gun laws and predict how such statutes will fare under the continually expanding definition of the Second Amendment.

II. The “Presumptively Lawful” Exception

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹⁰

In *Heller*, Justice Scalia was careful not to overstate the scope of the Second Amendment. Although the above quote appears only as dicta, the “presumptively lawful” exception provides great insight into how the future of Second Amendment jurisprudence will unfold. The inclusion of this comprehensive exception suggests that gun-free school laws in particular will not be in jeopardy despite an individual right to bear arms. Along with statutes regulating weapons in sensitive areas, such as schools and courthouses, the Supreme Court declared that regulatory laws restricting the possession of guns for felons and mentally-ill, as well as those that regulate the commercial sale of arms would not be in doubt after *Heller*.¹¹ Footnote 26 of Scalia’s opinion further explains that these four areas are merely exemplary. Read together, the text of the exception and the corresponding footnote illustrate the proposition that the right

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¹⁰ *Heller*, 128 S. Ct. at 2816-17.
¹¹ See id.
to bear arms is not unlimited. Nevertheless, the Court did not present any underlying rationale that unites these four legal categories, outside of its characterization of such laws as “presumptively lawful regulatory measures.” However, a close analysis of American legal tradition indicates laws regulating guns in historically sensitive areas are as firmly rooted in American culture as the individual right to bear arms for self-defense.

A. Historical Significance

Courts often cite the entirety of the “presumptively lawful” exception when seeking to express the limitations in *Heller*, but the Supreme Court implied that each individual exception has a unique, historical significance. In its entirety, *Heller* represents the judiciary’s deference to historical tradition in applying the Constitution to modern laws. For many, the *Heller* decision marks a triumph of originalism, interpreting the Second Amendment in a manner consistent with those who ratified it. Writing for the majority, Justice Scalia methodically refers back to the early Federalist era to interpret the term “arms” in accordance with its common 18th century meaning of a weapon used for general, non-military use. The Court’s originalist construction is not quite as clear when applied to the four classes of regulatory laws that are presumed to be beyond the core right protected by the Second Amendment. In fact, aside from laws that ban the possession of guns in sensitive places, the remaining three categories of “presumptively lawful” regulations – prohibitions on guns possessed by felons and the mentally-ill, as well as commercial regulations of firearms – fail to find any legitimacy by harping back to the founding era.


13 Scholars have offered different interpretations of the historical tradition from both the eighteenth and nineteenth centuries in order to reaffirm or break down the Court’s originalist analysis in *Heller*. See generally David Thomas Konig, *Arms and the Man: What Did the Right to “Keep” Arms Mean in the Early Republic?*, 25 Law & Hist. Rev. 177 (2007) (providing one perspective on how Scalia and the Supreme Court misinterpreted the history of popular sentiment regarding the right to individually possess weapons).


15 *Heller*, 128 S. Ct. at 2791.

16 For example, the emergence of felon disarmament laws significantly postdates
B. Presumptively Lawful Exception

Of the four categorical exceptions presumed to be lawful, statutes banning guns in “sensitive places” are the most deeply rooted in American tradition. Of the four categorical exceptions presumed to be lawful, statutes banning guns in “sensitive places” are the most deeply rooted in American tradition. Of the four categorical exceptions presumed to be lawful, statutes banning guns in “sensitive places” are the most deeply rooted in American tradition. Of the four categorical exceptions presumed to be lawful, statutes banning guns in “sensitive places” are the most deeply rooted in American tradition. Restrictions in prominent public areas were well in existence at the time of ratification as laws prohibiting firearm possession in the courts were enacted as early as the first half of the 14th century. As state governments developed in the 19th century, states such as Missouri, Georgia, and Alabama banned the carrying of firearms in other public places, including places used for worship, courts of justice, or educational facilities. In the modern era, the federal government has taken a particular interest in restricting the right to carry a weapon in the school zone. Most notably, Congress enacted the Gun-Free Schools Act of 1990

the passing of the Second Amendment and thus it cannot be argued that the framers of the Constitution heeded any existing trends of disarming felons. Larson, supra note 12, at 1374. In the same vein, the originalist argument that the exception prohibiting individuals with mental illness from carrying firearms is founded in eighteenth century legal tradition is tenuous at best. Id. at 1378. A prohibition on the delivery of a pistol to a person of “unsound mind” marks the beginning of legislation focused specifically on individuals with mental illness, a wave of legislation that first arose in the twentieth century – almost two centuries after the Constitution was ratified. Id. at 1376-77 (citing Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Fortieth Annual Conference 563, 565 (1930)).

Turning now to the regulation on the sale of firearms, the final presumptively valid class of gun laws, support in historical tradition is also lacking. The absence of federal regulation of commercial firearm sale prior to 1927, the final presumptively valid class of gun laws, suggests that an originalist argument for the regulation of commercial firearms is also difficult to make. See id. at 1379 (citing Act of Feb. 8, 1927, ch. 76, 44 Stat. 1059, 1059-60 (1927) (codified as amended at 18 U.S.C. § 1715 (2000))).

17 See Larson, supra note 12, at 1378.
19 See Mo. Rev. Stat. § 1274 (1879) (repealed 1981) (prohibiting carrying of dangerous weapons in churches and places used for literary or educational purposes); Owen v. State, 31 Ala. 387 (Ala. 1858) (upholding conviction under Alabama law for carrying a concealed weapon in a room full of people); Hill v. Georgia, 53 Ga. 473 (Ga. 1874) (upholding conviction under Georgia law for carrying a firearm to a court of justice).
20 See United States v. Campbell, 12 F.3d 147, 148 (8th Cir. 1994) (“Clearly, the
(“GFSZA”) and a successor statute that banned any possession of a gun within 1,000 feet of a school.\textsuperscript{21} The Supreme Court, in \textit{United States v. Lopez}, invalidated the original statute on the grounds that the regulation exceeded the scope of the Commerce Clause.\textsuperscript{22} After reenacting the statute with language that restricts its application to guns moving across state lines,\textsuperscript{23} the GFSZA remains in full force today.\textsuperscript{24}

\section*{C. Statistical Need for School Safety}

Frightening statistics justify an increased concern for the safety of schoolchildren and the resulting need for school regulation in the 21st century.\textsuperscript{25} Over 100 school-aged children are slain by guns each month.\textsuperscript{26} On a single day in 1999, the presence of guns in an educational facility resulted in a terrible tragedy, as two high-school students killed twelve of their fellow classmates and one teacher at Columbine High School in Colorado.\textsuperscript{27} Statistics indicate the threat of gun violence in schools exists in both suburban and urban areas. In 1993, one-third of urban school districts in the United States reported a shooting or knifing on school property.\textsuperscript{28} The need for gun regulation in the school zone is clear. The Supreme Court’s declaration that the individual right to bear arms does

\begin{itemize}
\item \textsuperscript{22} 514 U.S. 549, 567 (1995).
\item \textsuperscript{23} See 18 U.S.C. § 922(q)(1)(B), (C), (G), (I), (2)(A), (3)(A) (2008) (containing new language restricting the law’s application to a person with a “firearm that has moved in or that otherwise affects interstate or foreign commerce”).
\item \textsuperscript{24} See U.S. v. Nieves-Castano, 480 F.3d 597, 603-04 (1st Cir. 2007).
\item \textsuperscript{25} \textit{But see} David B. Kopel, \textit{Pretend “Gun-Free” Zones: A Deadly Legal Fiction}, 42 CONN. L. REV. 515 (2009) (proposing an alternative view that concealed weapons would promote gun safety in schools).
\item \textsuperscript{27} \textit{Id.} at 282 (citing Kevin Fagan et al., \textit{School Littered With Bombs}, S.F CHRON., Apr. 22, 1999, at A1).
\item \textsuperscript{28} \textit{Id.} at 283 (citing Elizabeth Shogren, \textit{More Violence Seen in Schools Than 5 Years Ago}, L.A. TIMES, Jan. 6, 1994, at 17).
\end{itemize}
not extend to school property reinforces the notion that schools are a sacred place of learning and must be afforded extra protection.

III. Interpretation of the Presumptively Lawful Exception

A. Recent Federal Interpretation

Nowhere in the text of *Heller* does the Supreme Court suggest the Second Amendment guarantee of the individual right to bear arms is unlimited. Scalia expressly states that the class of gun laws outlined in the “presumptively lawful” exception are not “cast in doubt” by invalidating the District of Columbia ban on handgun possession in the home. Just as all courts recognize that the First Amendment does not protect all speech, the Second Amendment does not protect the right to bear arms in any and all confrontations. At least one lower court has read this language in *Heller* as a preemptive answer to inevitable litigation that will be brought under the Second Amendment.

Recent history has shown that *Heller* raised more questions than it answered. At first glance, the language of presumed validity effectively limits the breadth of cases in which appellants can claim they have an individual right to bear arms. However, in reality, *Heller* opened the floodgates for those convicted of gun possession offenses to take the matter to court. To date, felon-in-possession statutes have been the most heavily litigated of the four categories of laws that are presumptively upheld. To stop a slew of challenges in the wake of *Heller*, federal courts have most often cited to the “presumptively lawful” language to affirm convictions and reject challenges to federal statutes banning a felon from legally possessing a firearm.

The first case to test the unsettled federal jurisprudence was *U.S.*

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32 For examples, see infra note 33.
33 E.g., United States v. Cooper, 351 Fed. Appx. 814, 817 (4th Cir. 2009); United States v. McCane, 573 F.3d 1039, 1047 (10th Cir. 2009); United States v. Anderson, 559 F.3d 348, 352 n.6 (5th Cir. 2009).
In *Bledsoe*, the plaintiff challenged the validity of a Texas law that banned all federally licensed dealers from selling handguns to individuals under the age of 21. Holding that the individual right to bear arms recognized in *Heller* did not automatically nullify all federal statutes regulating the possession of handguns, the district court gave great weight to the language of the “presumptively lawful” exception.

Two aspects of the *Bledsoe* court’s analysis are of particular importance. First, it was careful to define the scope of the statute – prohibiting individuals under the age of 21 from possessing firearms – in its application of the Second Amendment right. This rationale suggests that the explicit mention of limits upon the Second Amendment shall not be interpreted as a blanket approval for all gun-regulation statutes, considering this statute merely as one protecting teenagers from purchasing a firearm. Secondly, in reaching its conclusion, the court did not overstep its bounds and pass judgment on related behavior that was not at issue in the case. It can be inferred from the court’s reasoning that had the petitioner been over 21 her actions would have been lawful. The mere fact that the language relied upon in this case was Supreme Court dicta in no way diminished the impact of the text. Federal courts are bound by the words of the Supreme Court, including dicta, that are explicit, recent, and not weakened by subsequent statements. The “presumptively lawful” exception has been perhaps the only conclusion drawn in *Heller* that lower courts have been able to apply with great certainty.

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36 *Id.* at *3*. The Western District of Texas declined to find a federal law prohibiting persons under 21 years of age to purchase a handgun from a federally licensed firearm dealer unconstitutional, and denied the plaintiff’s motion to dismiss the superseding indictment. *Id.* at *7*.
37 *Id.* at *3*.
38 *Id.* at *2-3*.
39 See United States v. Serawop, 505 F.3d 1112, 1122 (10th Cir. 2007) (holding that lower courts are bound by the Supreme Court’s dicta “almost as firmly as by the Court’s outright holdings”) (quotation omitted).
40 A vast majority of case law interpreting *Heller* has been done by federal courts, as *McDonald v. City of Chicago* – applying the Second Amendment and its jurisprudence to the state – was decided very recently.
41 See, *e.g.*, United States v. Bledsoe, No. SA-08-CR-13(2)-XR, 2008 WL
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Bledsoe exemplifies how federal courts can and should apply the “presumptively valid” exception. Since 2008, federal district courts have drawn on the underlying theory that the Second Amendment is not limitless and upheld laws that ban possession of a firearm by juveniles, individuals convicted of a crime of domestic violence, individuals convicted of stalking a partner or child, and those individuals subject to a domestic order.

B. State Court Interpretation

Until recently, state courts have had little use for Heller’s presumptively lawful exception or any Second Amendment jurisprudence. Prior to the Supreme Court’s recent decision in McDonald v. City of Chicago, there was serious doubt as to whether the Second Amendment jurisprudence was binding on state courts. Nevertheless, the few state courts faced with Heller-related litigation followed the path taken in Bledsoe, foreshadowing the incorporation of the Second Amendment jurisprudence. As felons convicted under federal statutes rushed to the courthouse to assert their individual right to possess a gun, several felons originally convicted in state court brought constitutional challenges to various state statutes that prohibited felons from lawfully possessing handguns as violations of the Second Amendment. Not surprisingly,
these appeals were met with little success.

Two factors are essential to understanding the state court rejections during this time period. Firstly, for the first two years of the *Heller* aftermath, most judges and commentators alike surmised that, despite anticipating a change in the jurisprudence, the Second Amendment had not yet been incorporated by the Fourteenth Amendment to apply to states.\footnote{See, e.g., Commonwealth v. Runyan, 456 Mass. 230, 233 (2010) (“Based on current Federal law, however, we cannot say that the Second Amendment applies to the states, either through the Fourteenth Amendment’s guarantee of substantive due process or otherwise.”); Derek P. Langhauser, *Gun Regulation on Campus: Understanding Heller and Preparing for Subsequent Litigation and Legislation*, 36 J.C. & U.L. 63, 93 (2009) (acknowledging that *Heller* explicitly held that the Second Amendment was limited only to federal courts); Jonathon D. Marshall, *Symposium: District of Columbia v. Heller: Introduction*, 59 SYRACUSE LAW REV. 165, 167 (2008) (noting opinion of Richard Epstein that *Heller* should not be incorporated by Second Amendment).} Secondly, the plain language of *Heller* preemptively answered this question by clearly stating that the individual right to bear arms did not apply to felons.\footnote{See supra notes 29-33 and accompanying text.} Attempts to overturn convictions based on the invalidity of local felon-in-possession statutes fall clearly within valid exception carved out by the Supreme Court in *Heller*.\footnote{Whitaker, 2009 WL 5174085, at *8 (internal citations omitted) (“Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.”); see also People v. Marsh, No. A120542, 2009 WL 389723, at *3-4 (Cal. Ct. App. Feb. 18, 2009).} Hence, the notion that Second Amendment rights are not absolute pre-dated *McDonald*.\footnote{See State v. Richard, 298 S.W.3d 529, 532 (Mo. 2009).} Mirroring their federal counterparts, state courts have upheld additional categorical bans on gun possession for intoxicated persons and permitted county-wide bans on assault weapons.\footnote{See id. The Court cites to *Heller* as an example of the limitations of the Second Amendment. The Court also discusses the reasonableness of police power in enacting a statute that bars the possession of firearms by intoxicated persons in upholding the validity of the Missouri statute. *Id.*; see also State v. Morris, No. 2008-T-0110, 2009 WL 3807159, at *12 (Ohio Ct. App. Nov. 13, 2009) (discussing a statute prohibiting persons convicted of any offense involving illegal possession or persons under indictment for such an offense from owning a firearm).}
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statutes is clearly a need to maintain some degree of safety and order. The vigilance displayed by lower courts and state courts in the wake of *Heller* tend to suggest that both federal and state courts will uphold the other categories of presumptively lawful laws with such vigor. Though *Heller* makes clear that statutes may be valid if meant to protect the public possession of a handgun by felons, the mentally-ill, and persons in sensitive areas and those that regulate the purchase of handguns, Congress must still face the practical limitations in creating such statutes. As discussed below, the federal courts must check the power of Congress to enact such laws.

IV. Possible Hurdles: How *Lopez* and *Heller* Affect The Regulation of Guns in Schools

The spirit of *Heller* will inevitably influence federal lawmakers as the decision presents yet another legal authority in a decade-long attempt to effectuate gun control in and around schools. The Supreme Court placed a limit on federal gun regulations in *United States v. Lopez*. *Lopez* is frequently noted by scholars for placing a restriction on the Commerce Clause changing Congress's power to enact laws since the New Deal legislation. It has also been asserted that *Lopez* did not severely alter the federal landscape. The Supreme Court discussed two wholly distinct aspects of federalism in *Lopez* and *Heller* – Congress's power under the Commerce Clause and incorporation into the Fourteenth Amendment, respectively; but both landmark decisions establish important precedent of which the federal courts must be wary. Prior to the Supreme Court deciding *McDonald*, the pressing issue after *Heller* was what effect the

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53 See Larson, *supra* note 12, at 1372 (claiming that all four “exceptions” have practically been “decided in favor of constitutionality”).
55 See *id.* at 567.
56 Kopel, *supra* note 25, at 519 (citing United States v. Lopez, 514 U.S. 549, 549 (1995)) (the law struck down in *Lopez* was itself “superfluous”).
57 514 U.S. at 579.
59 Supreme Court precedent must be followed under stare decisis. The Supreme Court has alluded to the preclusive effects of its decision in *Lopez*. See *Lopez*, 514 U.S. at 581-82 (individual states have several alternative methods through which they can deter students from carrying weapons on school premises).
new jurisprudence would have on state regulation of handguns. Now that the Second Amendment has been incorporated into the Fourteenth Amendment, and is therefore applicable to the states, the issue must be framed as how will the declaration of an individual right to bear arms articulated in *Heller* change enforcement of state regulations.

A. *Does Lopez Matter? How the Lopez Decision Affects School Gun Regulation Today*

In reality, *Lopez*’s bark may have been bigger than its bite. In *Lopez*, the Court declared that Congressional regulation of guns within 1,000 feet of a school zone was unlawful because such guns had no meaningful connection to interstate commerce. 60 In response, Congress re-enacted the statute the following year to grant jurisdiction over all guns which had been moved interstate during its manufacture or use.61 One commentator suggests that *Lopez* failed to present even the most minimal of hurdles to federal lawmakers since the re-enacted statutory language applied to the vast majority of guns in the United States. 62 In fact, federal attempts to increase school safety may have been futile considering that a majority of states and school districts imposed their own bans on guns in the school zone.63

The insignificance of *Lopez* is exemplified by a post-*Heller* challenge in the U.S. Virgin Islands in *U.S. v. Lewis*. 64 Recognized as an unincorporated United States territory, the Virgin Islands follow federal law and operate a federal district court, yet retain an independent Bill of Rights that provides for a degree of autonomy similar to the fifty states.65

60 Kopel, *supra* note 25.
63 *Id.*
65 The Virgin Islands are subject to Congress’ authority to make rules and regulations under Article IV, Section 3 of the Constitution. U.S. Const. art. IV, § 3; see United States v. Hyde, 37 F.3d 116, 121 (3d Cir. 1994). In 1954, Congress passed the Revised Organic Act (“ROA”), which extended a greater degree of economic and political autonomy to the people of the Virgin Islands. See *Virgo Corp. v. Paiewonsky*, 384 F.2d 569, 576 (3d Cir. 1967). To give the territory the full power of self-determination, all laws enacted under the ROA are deemed local, territorial laws and not laws of the United States. *Harris v.
In *Lewis*, the District Court of the Virgin Islands dismissed the petitioner’s challenge that the GFSZA violated the Second Amendment.\(^{66}\) Whether the statute regulated guns affecting interstate commerce was not a focus of the court.\(^{67}\) The concerns raised by the Supreme Court in *Lopez* have failed to have a long-term impact on federal gun regulation in the field.

### B. The Debate Settled: Second Amendment Incorporation

To understand exactly how *Heller* will affect the future of gun regulation, it is essential to understand to what extent the individual right to bear arms will limit federal and state governments. Although Supreme Court decisions constitute the “supreme law of the land,”\(^{68}\) the United States’ deep commitment to federalism has granted the states a certain degree of autonomy that allows state governments to enact their own laws and maintain their own supreme court to define the scope of such laws.\(^{69}\) Within the federal sphere, the Bill of Rights assures that American

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67 See id.

68 The Supremacy Clause, U.S. Const. art. VI, cl. 2, states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

69 See *Printz* v. United States, 521 U.S. 898, 928 (1997) (compelling states to administer federal law infringes on a state’s independence and autonomy).
citizens enjoy basic freedoms and are afforded necessary protections from the federal government.70 States, in turn, are not mandated to guarantee substantive due process by following the United States Bill of Rights unless a particular amendment has been deemed incorporated by the Fourteenth Amendment to apply to the states.71 Many states have their own bill of rights reflecting the values set forth in their respective state constitutions.72

The *Lopez* decision analyzed a federal grant of power to enact laws under the Commerce Clause. The Commerce Clause73 allows Congress to regulate activities affecting commerce that crosses state borders, and seeks to prevent inconsistent regulation arising from the statutory regime of a single state’s interference with activity in another jurisdiction.74 The United States’ commitment to maintaining dual legal spheres has sparked inevitable debates regarding the appropriate roles of federal and state governments, as well as allowed state judiciaries to undertake an independent analysis of tumultuous areas of law, such as the right to possess firearms.75 For over a century, federal jurisprudence interpreting

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70 Adamson v. California, 332 U.S. 46, 51 (1947) (there was an “unquestioned premise” that the Bill of Rights protects individual rights against the federal government); see Fresno Rifle & Pistol Club, Inc. v Van De Kamp, 965 F. 2d 723, 730 (9th Cir. 1992) (Bill of Rights never fully incorporated, but can be asserted against the federal government).

71 Nordyke v. King, 563 F.3d 439, 449 (9th Cir. 2009), vacated on other grounds by Nordyke v. King, 611 F.3d 1015 (9th Cir. 2010).

72 In many states, state constitutions guaranteed individual rights against the state that had no federal equivalent. See Faretta v. California, 422 U.S. 806, 831 (1975).

73 See U.S. Const. art. I, § 8, cl. 3 (“[The Congress shall have power] To [sic] regulate Commerce with foreign nations, and among Several States, and with the Indian tribes”).


75 Prior to the Supreme Court’s decisions in *Heller* and *McDonald*, state courts were frequently presented with challenges to state statutes that limited the right to possess a firearm. Such challenges mostly relied upon the language of the relevant state constitution, language that greatly reflects that text of the Second Amendment to the U.S. Constitution. See, e.g., Miss. Const. of 1945, art. 1, § 23. Free to create their own interpretations, state courts retained the power to decide these cases based on the rationale of their choosing. See, e.g., People v. Swint, 572 N.W.2d 666, 671 (Mich. Ct. App. 1997) (right to bear arms under Michigan constitution is subject to reasonable exercise of police power for health, safety, and welfare of Michigan citizens); City of Cape Girardeau v.
the Second Amendment to the United States Constitution provided no guidance to state courts because the Second Amendment language specifically mentioned a “well-regulated militia,” a phrase not found in many state constitutions, and the Supreme Court had consistently held the Second Amendment was not applicable to states through the Fourteenth Amendment. However, *McDonald v. Chicago*, mandated that state governments be bound by the same limitations as federal government. Decided in 2008, *Heller* expressly withheld any decision on the issue of the Second Amendment’s applicability to states. By affirming prior precedent rejecting the incorporation of the Second Amendment through the Privileges and Immunities Clause of the Fourteenth Amendment, the Court ultimately left the issue of incorporation through the Due Process Clause of the Fourteenth Amendment open for future adjudication. Over the course of the twentieth century, the Supreme Court repeatedly cited the 19th century Supreme Court decision, *U.S. v. Cruikshank*, which opined that the Second Amendment only restricted the powers of the national government. However, critics of this rationale have been quick to point out that *Cruikshank* was decided under the Privileges or

Joyce, 884 S.W.2d 33, 34-35 (Mo. Ct. App. 1994) (declaring an ordinance prohibiting the open carrying of firearms “readily capable of lethal use” to be consistent with the Missouri constitution and upholding public safety); Commonwealth v. Ray, 272 A.2d 275, 278-79 (Pa. Super. Ct. 1970) (state legislature had authority to pass ordinance restricting the carrying and transfer of weapons in public place because it incorporated the right to defend oneself embodied in the Pennsylvania constitution).

76 *Swint*, 572 N.W.2d at 669.


79 *Id.* at 2813 n.23 (discussing the Court’s decisions in *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875), as affirming that the Second Amendment applies only to the federal government.).


81 See, e.g., *Miller*, 153 U.S. at 538; *Presser*, 116 U.S. at 266; *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005); Fresno Rifle & Pistol Club, Inc. v. *Van De Kamp*, 965 F.2d 723, 729-30 (9th Cir. 1992); *Thomas v. Members of the City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984).
Immunity Clause and prior to the development of the incorporation doctrine.82

Footnote 23 of the Heller decision walked a tight line between reaffirming Cruikshank’s validity and explicitly stating that incorporation was “a question not presented by this case.”83 Ultimately, the Supreme Court left the incorporation issue open. Despite the Supreme Court’s guidance in Heller, the Ninth Circuit found the individual right to bear arms applies to state and local governments in Nordyke v. King.84 However, the vast majority of state courts and lower federal courts continued to view the Second Amendment right to bear arms as inapplicable to states after Heller.85 The Ninth Circuit based its incorporation analysis in Nordyke on the originalist methodology followed by Scalia in Heller, rather than the explicit language of the opinion itself, ultimately finding the Second Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment.86 The Ninth Circuit relied on scholarly commentary revealing the existence of a right to bear arms from Blackstone through the Civil War era to ultimately conclude the Second Amendment right is one deeply rooted in the history of the Republic.87

The Supreme Court was finally forced to decide the issue in McDonald v. City of Chicago.88 The petitioners, four Chicago residents,

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82 Levy, supra note 80, at 209.
83 See Heller, 128 S. Ct. at 2813 n.23.
84 563 F.3d 439, 457 (9th Cir. 2009).
86 The Ninth Circuit distinguished Supreme Court and Ninth Circuit precedent in Cruikshank, Presser, and Fresno Rifle as rejecting the Second Amendment’s incorporation through the Privileges or Immunities Clause of the Fourteenth Amendment and not expressly rejecting its incorporation through the Due Process Clause. Nordyke v. King, 563 F.3d 439, 448 (9th Cir. 2008). Rather, looking to the rationale behind incorporation through substantive due process, the Ninth Circuit said it was compelled to determine whether the individual right to bear arms was “deeply rooted in this Nation’s history and tradition.” Id. at 450.
87 Id. at 451-56.
88 130 S. Ct. 3020 (2010).
challenged the validity of a city ordinance that effectively banned the possession of handguns for almost all private citizens residing within the city.\textsuperscript{89} Petitioners asserted two theories that the ordinance violates the Second Amendment, which in turn applies to states: that the right to bear arms is within “privileges or immunities of citizens of the United States,” or in the alternative, that the Second Amendment right to bear arms is incorporated by the Due Process Clause of the Fourteenth Amendment.\textsuperscript{90} Finding no reason to overturn a century of well-settled precedent, the Court rejected the first theory and affirmed the validity of \textit{Cruikshank}, \textit{Presser}, \textit{Miller}, holding the right to bear arms did not fall within the “privileges or immunities” of United States citizens.\textsuperscript{91} As legal scholars anticipated,\textsuperscript{92} the Supreme Court held this line of cases did not preclude the Court from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment binding upon the states.\textsuperscript{93} After a stringent analysis of the Congressional intent in passing the Fourteenth Amendment after the Civil War, and a thorough analysis of state constitutions at the time of ratification, the Court held the right to bear arms was among those fundamental rights necessary to our system of ordered liberty.\textsuperscript{94} The debate was finally settled, and \textit{Heller} is now binding on federal courts and state courts alike.

C. \textit{McDonald’s Effect on the Presumptively Lawful Exception}

With the Second Amendment’s applicability finally settled, the state legislative and judiciary branches are forced to comply with the Second Amendment and its jurisprudence for the first time in American history. The constitutionality of gun laws, specifically restrictions on the right to carry guns within school zones, has been under attack in state courts for

\begin{itemize}
  \item \textsuperscript{89} \textit{Id.} at 2035-37. The municipal ordinance requires the registration of private handguns, and the corresponding municipal code prohibits the registration of most handguns. Nearby city of Oak Park maintained a similar restriction on lawfully possessing handguns. \textit{See} Oak Park, Ill., Municipal Code § 27-1-1 (2009); \textit{id.} § 27-2-1 (2007).
  \item \textsuperscript{90} \textit{McDonald}, 130 S. Ct. at 3028 (internal citations omitted).
  \item \textsuperscript{91} \textit{Id.} at 3030-31 (internal citations omitted).
  \item \textsuperscript{92} \textit{See supra} note 83.
  \item \textsuperscript{93} \textit{McDonald}, 130 S. Ct. at 3031.
  \item \textsuperscript{94} \textit{Id.} at 3041-42.
\end{itemize}
the past few decades.\textsuperscript{95} Resistance of gun regulation is not unique in this regard. Americans have a longstanding tradition of challenging laws on the basis of First Amendment rights.\textsuperscript{96} In much the same way, Americans have resisted restrictions imposed by state governments on their right to possess a weapon as violations of their individual liberty.\textsuperscript{97}

This section will provide an overview of how state statutes regulating weapons in the school zone were challenged before \textit{McDonald} and how judicial analysis is likely to change with the application of the Second Amendment to states.\textsuperscript{98} Prior to \textit{McDonald}, petitioners had to rely on state constitutions or common law doctrines to bring a meritorious challenge of an anti-gun regulation. Moving forward, petitioners in state court will also have the option of challenging local statutes and regulations as in violation of the Second Amendment to the United States Constitution.

V. State Response to Gun-control Regulation: Challenges Before and After \textit{McDonald}

A. Pre-\textit{McDonald}: Void–for–Vagueness Challenges

An overview of case law from states across the country reveals that the most common method by which citizens have challenged possession of a weapon in a school zone, to date, is the common law “void–for–vagueness doctrine.”\textsuperscript{99} Vagueness challenges under the Second Amendment take a

\begin{enumerate}
\item \textsuperscript{95} Discussed \textit{infra} Part IV.A.
\item \textsuperscript{96} See, e.g., Doe v. Mortham, 708 So.2d 929, 930 (Fla. 1998) (challenging validity of statute banning anonymous political advocacy); Commonwealth v. Bohmer, 372 N.E.2d 1381, 1386 (Mass. 1978) (challenging school disturbance statute as in violation of the First Amendment); WRG Enterprises, Inc. v. Cromwell, 758 S.W.2d 214, 215 (Tenn. 1988) (states must justify any restraint on speech meets a compelling state interest).
\item \textsuperscript{97} This statement generally refers to challenges to felon-in-possession statutes, see \textit{supra} Part II.B, as well as allegations that gun-regulation statutes are overbroad, see \textit{infra} Part IV.A.
\item \textsuperscript{98} To provide a broad view the types of challenges brought to laws regulating weapons in the school zone, this section will consider handguns as well as other weapons that have some utility beyond potential for violence. Examples include pocket knives and switch blades.
\item \textsuperscript{99} See \textit{infra} notes 110-19.
\end{enumerate}
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different form than those brought under the First Amendment. Void–for–vagueness challenges brought pursuant to the Second Amendment cannot challenge a statute or ordinance at large but must be applied to the facts of the case at hand.\textsuperscript{100} As articulated in \textit{Kolender v. Lawson}, the void-for-vagueness doctrine requires that a penal statute define a criminal offense with sufficient specificity such that people of ordinary intelligence can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.\textsuperscript{101}

In the 21st century, challenges that statutory language is unlawfully vague have been a popular form by which to challenge statutes that restrict the right to bear arms – whether it be on the grounds that both a person of reasonable intelligence could not deduce what conduct is prohibited\textsuperscript{102} or that the language as written does not provide law enforcement officials with a definite standard by which to enforce the statute’s purpose.\textsuperscript{103} A state-by-state analysis of such challenges suggests that challenges to gun laws in state court have taken a fairly consistent form prior to \textit{McDonald}.

1. Underlying Intent of State Laws Upheld

By addressing the vagueness of local laws and statutes, state courts often discuss, and ultimately defer to, the legislative intent underlying the enactment of that particular regulatory law. Where public safety is the primary reason for restricting weapons within the school zone, the underlying purpose of the statute becomes relevant to the vagueness analysis and precludes the court from making a decision based purely on an arbitrary and intangible common law doctrine.

Prior to the Supreme Court drawing attention to the issue in \textit{Lopez}, the Illinois Supreme Court upheld a statute banning weapons on school property, excepting only those persons who received the written

\textsuperscript{100} See United States v. Mazurie, 419 U.S. 544, 550 (1975).
\textsuperscript{101} Kolender v. Lawson, 461 U.S. 352, 357 (1983). In \textit{Kolender}, the Supreme Court held a California statute requiring persons loitering on the street to provide “credible and reliable” information to police officers invalid for failing to clearly define a standard for “credible and reliable.”
\textsuperscript{102} See, \textit{e.g.}, People v. Tapia, 29 Cal. Rprt. 3d 158, 168-69 (Cal. Ct. App. 2005).
\textsuperscript{103} See, \textit{e.g.}, People v. Izzo, 745 N.E.2d 548 (Ill. 2001).
permission of the chief security officer of the premises. The court drew a line between statutes written with gross ambiguities and those that impose a duty to acquire information on the part of the citizen bound by the particular law, opining that the latter was not unconstitutionally vague. For example, in People v. Izzo, the court held that an offender’s actual knowledge of the statute’s content is immaterial. Rather, private citizens are required to take some initiative and inquire as to the title of the specific individual who may lawfully grant permission to carry a weapon within a school zone.

In doing so, the Izzo court set a relatively low threshold of constitutionality. The presumption behind Izzo and similar decisions is that a statute is not unconstitutionally vague unless there is no set of possible circumstances under which it could be valid. In handling vagueness challenges, the court will determine how “practical” it is for a challenging party to abide by the statutory restrictions. But practicality is not an abstract determination of how easy or difficult performing the required behavior would be for the individual citizen. Ultimately the court’s assessment of what is “reasonable” or “practical” is juxtaposed with the underlying purpose of the law – safety of school children. Oftentimes, what the court deems “practical” is the very set of actions that is necessary to keep children and teachers in school safe.

In 2005, a year after the Supreme Court decided Lopez, the California Court of Appeals decided People v. Tapia, upholding a state statute modeled after the GFSZRA. In Tapia, the court vehemently defended the state’s ban on possessing a firearm within 1,000 feet of a school. In relying on the legislative history of the invalided act, the court continued its commitment to the underlying purpose of the federal statute – protecting school children from the ever more frequent gun-

104 Id. at 550.
105 Id. at 552 (noting that actual knowledge “does not render the law impossibly vague or bar its enforcement against him”).
106 Id.
107 Id. at 551.
108 See id. at 552 (“the legislature may reasonably employ language sufficiently broad to encompass the varying circumstances without offending due process.”).
109 Id. at 552.
111 Cal. Penal Code § 626.9.
related violence.\textsuperscript{112} Just as in \textit{Izzo}, the court set the constitutional threshold relatively low. To be valid, a statute must be written with “reasonable specificity,”\textsuperscript{113} and invoke substantially more than a few ambiguities to be invalid on its face.\textsuperscript{114} Accordingly, the court held that the language of the statute was not unconstitutionally vague.\textsuperscript{115} The court opined that a person must consider the sensible and obvious interpretation, the interpretation that effectuates the purpose of the legislators.\textsuperscript{116} While vagueness challenges can be brought in conjunction with challenges grounded in other areas of substantive law, the court did not focus on the relevant property rights issues in \textit{Tapia}. The protection of schoolchildren far-outweighed any property rights a private citizen may have had.

In other jurisdictions where individual rights to self-defense are deeply entrenched in the local culture, state courts have articulated an elevated threshold for vagueness. In conservative gun jurisdictions, such as Florida,\textsuperscript{117} state courts have effectuated legislative intent to uphold an individual’s right to carry a weapon for utility and self-defense by invalidating regulatory laws as vague. Florida law allows the carrying of only those weapons that fit within a list of articulated exceptions. One such exception was an exception permitting the carrying of a “common pocket knife.”\textsuperscript{118} In \textit{L.B. v. State}, a minor challenged the validity of the statute on the grounds that the statute was too vague for courts to properly determine the scope of instruments that the statute seeks to protect.\textsuperscript{119} The purpose of the statute is not the same as that in \textit{Izzo} and

\begin{itemize}
  \item \textsuperscript{112} \textit{Tapia}, 129 Cal. Rptr. 3d at 166-67.
  \item \textsuperscript{113} \textit{Id.} at 1167 (citing People \textit{ex rel} Gallo v. Acuna, 929 P.2d 596, 612-13 (1997)).
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} In doing so, the court looked to authorities such as the common English Dictionary and commonsensical distinctions between notions of public and private. \textit{See id.} at 1163.
  \item \textsuperscript{118} \textit{Fla. Stat. Ann.} § 790.001 (West 2006).
  \item \textsuperscript{119} \textit{L.B. v. State}, 681 So.2d 1179, 1180 (1996) \textit{rev’d} 700 So.2d 370, 375-76 (1997). The Supreme Court of Florida ultimately reversed the decision of the appellate court and held that the legislature clearly intended all “pocket knives” to an exception to the statute’s definition of a prohibited weapon. This reversal represents another example of courts giving deference to the legislative intent when deciding the merits of a gun challenge.
\end{itemize}
Tapia. Here, the Florida statute appears to protect the general custom of carrying knives and weapons for “useful purposes” unrelated to criminal activity. Past litigation demonstrated that few knives fit within the definition of “common pocketknife” and thus few defendants were able to assert their right to use a weapon under the state statute.\(^{120}\) In response, the court ultimately applied a heightened test for vagueness and held that the statute lacked specificity to be uniformly applied by law enforcement. The court made use of the “definite standards” standard articulated in Kolender to justify its invalidation of the statute, evidencing the underlying belief held by the Florida judiciary and legislature that individuals have the right to carry otherwise dangerous weapons for “useful purposes.”\(^{121}\) The aforementioned cases exemplify the flexibility of the vagueness doctrine and just how the Kolender test can be relaxed or heightened in order to effectuate the underlying legislative intent.

B. **State Interpretation of Heller’s Presumptively Lawful Exception**

Moving forward, state courts will be faced with the same challenge of upholding the limited scope of the individual right to bear arms. As discussed in Part II, federal courts have applied the dicta of the presumptively lawful exception with the same force as a federal statute.\(^{122}\) Now it is the states’ turn. While citizens have yet to challenge the gun-free school zone laws in either federal court or state court, challenges to felon-in-possession laws provide guidance as to how state courts will interpret the exception moving forward.

In the short time since McDonald, states have recognized that Heller does not automatically invalidate all classes of existing firearm regulation. State statutes banning the carrying of concealed weapons\(^{123}\) and banning the aggravated use of a weapon outside the home\(^{124}\) are among the first state statutes to be contested in light of the Second Amendment’s applicability to the states. Analogous to the felon-in-

\(^{120}\) *L.B.*, 700 So.2d at 376.

\(^{121}\) *Id.*; see Kolender v. Lawson, 461 U.S. 352, 361 (1983).

\(^{122}\) See, e.g., *supra* note 33.

\(^{123}\) See *infra* note 133.

\(^{124}\) See *infra* note 130.
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possession challenges brought in federal court after *Heller*\(^{125}\) these initial challenges to state statutes function as test cases of how state courts will apply Second Amendment jurisprudence. In *State v. Knight*\(^{126}\), the Kansas Court of Appeals upheld a Kansas statute that criminalized the possession of a concealed weapon as constitutional.\(^{127}\) In response to the petitioner’s argument that the statute violated the Second Amendment, as defined by *Heller*, Kansas urged that the holding of *Heller* should be applied narrowly, and should only invalidate “absolute prohibitions of handguns held and used for self-defense in the home.”\(^{128}\) The Court of Appeals clarified that “[t]he Supreme Court’s decision turned solely on the issue of handgun possession in the home,” and is not an unlimited right.\(^{129}\) Similarly, in *People v. Dawson*,\(^{130}\) the Appellate Court of Illinois rejected the assertion that statutes prohibiting the aggravated unlawful use of a weapon (“AUUW statutes”) violated the individual right to bear arms. In so doing, the court repeated the assurances made by the Supreme Court in *Heller*\(^{131}\) and *McDonald*\(^{132}\) that laws regulating the commercial sale of firearms, banning firearm possession in sensitive places, and possession of a firearm by felons or the mentally-ill remain valid.\(^{133}\) The court also relied heavily on Scalia’s concurrence in *McDonald*, declaring “the scope of the [Second Amendment] right is defined in part by traditional restrictions of the right.”\(^{134}\) The initial stages of state court adjudication of the Second Amendment illustrate an analysis wholly consistent with its federal court counterparts. It is likely that attempts to invalidate a local statute based on a violation of the Second Amendment may replace the common law void-for-vagueness doctrine.

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125 See discussion supra Part II.
129 *Id.*
131 128 S. Ct. at 2816-17.
134 *Id.*
VI. Conclusion

The ever-changing landscape of the Second Amendment has forced American judiciaries and legislators to reevaluate the text of the Second Amendment and its place in American jurisprudence. Currently, the Second Amendment guarantees an individual the right to bear arms for self-defense, excluding felons and the mentally ill, and vitiates any right to bear arms in sensitive places. In its recent decisions, the Supreme Court has given special attention to the fact that the American government has long recognized an individual right to bear arms. But the Court has stopped short of acknowledging that such heightened restrictions on the right to bear arms in sensitive places are also firmly rooted in American tradition in and of themselves. From the time of ratification to modern attempts to thwart school violence, federal and state governments have protected educational institutions as a sacred place of learning.

Do these deep-seeded roots ensure that schools will be beyond the reach of expanding Second Amendment rights? All signs indicate that increased protections of schools and other sensitive places will not dissipate in the face of an individual right to bear arms. Federal courts and now state courts bound to follow federal Second Amendment jurisprudence under *McDonald* have interpreted the entirety of the presumptively lawful exception as an explicit ban on extending individual rights to bear arms into the four specified areas of law. While statutes specifically banning the possession of firearms in sensitive places have not been litigated since Scalia first articulated this exception in 2008, felon-in-possession statutes can be and must be viewed as a litmus test for how the four exemplary categories will remain unaffected by the redefining of the Second Amendment.

Post-*McDonald* challenges to gun control statutes brought in state court can be used in the same manner. In the first few months since *McDonald* has been decided, state courts have cited the presumptively lawful exception as a means of expressing the fundamental limits of the Second Amendment right to bear arms. It may be inferred from such test cases that any challenge to a law regulating the right to bear arms in the school zone will be rejected on account of the language of *Heller*, if not the history of the exception itself.
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