

THE RIGHT TO DEFENSIVE ARMS AFTER *DISTRICT OF COLUMBIA V. HELLER*

*Michael P. O'Shea**

I.	INTRODUCTION: CIVIC AND PERSONAL PURPOSES FOR PRIVATE ARMS.....	350
II.	HOW <i>UNITED STATES V. MILLER</i> SHAPED THE MODERN SECOND AMENDMENT DEBATE	352
	A. <i>What Happened in Miller</i>	352
	B. <i>Interpreting Miller's Militia "End In View"</i>	354
	1. <i>Weak Miller</i>	354
	2. <i>Intermediate Miller</i>	355
	3. <i>Strong Miller</i>	358
III.	THE END OF THE "END IN VIEW"? <i>HELLER'S</i> REVISION OF <i>MILLER</i> ... 362	
	A. <i>Justice Kennedy, Professor Lund, and the English Right to Arms</i>	363
	B. <i>Revising Miller: Defensive Arms for Personal Purposes</i>	366
	C. <i>Heller, Tradition, and Modern Originalism</i>	370
	D. <i>Summary</i>	372
IV.	<i>HELLER'S</i> IMPLICATIONS FOR THE FUTURE OF THE RIGHT TO ARMS.....	373
	A. <i>Advantages</i>	373
	1. <i>Popular Support</i>	373
	2. <i>The Likelihood of Incorporation</i>	374
	3. <i>Protection of Common Defensive Weaponry</i>	376
	4. <i>Protection of the Right to Carry Arms</i>	377
	B. <i>Disadvantages</i>	379
	1. <i>Insufficient Attention to Civic Purposes?</i>	379
	2. <i>Loss of Pro-Right Arguments Based on Civic Purposes</i>	380
V.	CONSTITUTIONAL CONSTRUCTION AND THE RIGHT TO DEFENSIVE ARMS.....	380
	A. <i>"Common Use" and the Problem of New Weapons: The Lever-Action Rifle</i>	381

* Assistant Professor, Oklahoma City University School of Law. B.A., 1995, Harvard; M.A. (Philosophy), 1998, University of Pittsburgh; J.D., 2001, Harvard. I thank David Hardy for providing useful comments on an earlier draft. I am also indebted to the students of the Firearms Law and Policy seminar that I taught at Oklahoma City University in the spring of 2008 for their help in developing the ideas about *Miller* and *Heller* that are reflected herein.

B.	<i>The Circularity Problem</i>	384
C.	<i>The “Revealed Judgment” Approach</i>	386
1.	Looking to the Revealed Judgment of the People	386
2.	Looking to the Revealed Judgment of the Government: Ordinary Police Arms	391

I. INTRODUCTION: CIVIC AND PERSONAL PURPOSES FOR PRIVATE ARMS

At the heart of the debate about the meaning of the Second Amendment,¹ which culminated last Term in the landmark Supreme Court decision of *District of Columbia v. Heller*,² there are two linked questions: What purposes does the constitutional “right of the people to keep and bear arms” serve, and how does the right further those purposes? Personally kept firearms can serve a range of legitimate purposes. Some are primarily *civic* in nature, such as deterring tyrannical acts by the government,³ protecting against invasion or internal disorder,⁴ and promoting military readiness through individual practice with firearms.⁵ To the extent the right to arms serves these purposes, the chief beneficiary is the people at large, the civic community. Other legitimate purposes for arms are more private and personal in nature, such as hunting⁶ and partici-

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

² 128 S.Ct. 2783 (2008) (holding that the Second Amendment protects an individual right to keep common firearms for self-defense and invalidating the District of Columbia’s bans against handgun possession and against rendering firearms functional for the purpose of self-defense in the home); see D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02 (2001).

³ See, e.g., *Heller*, 128 S.Ct. at 2801 (“[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”); *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (“[T]he simple truth—born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people.”); *Aymette v. State*, 21 Tenn. 154, 158 (1840) (holding that the right to bear arms was intended to enable the citizenry to “keep in awe those who are in power [...]. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority.”).

⁴ See, e.g., *Heller*, 128 S.Ct. at 2800 (noting that an armed popular militia “is useful in repelling invasions and suppressing insurrections”); *United States v. Miller*, 307 U.S. 174, 179 (1939) (concluding that the founding-era militia “comprised all males physically capable of acting in concert for the common defense,” and that its members “were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”); *Aymette*, 21 Tenn. at 158 (holding that right to bear arms was intended to enable citizenry to “maintain the supremacy of the laws and the constitution”).

⁵ See *Heller*, 128 S.Ct. at 2862 (Breyer, J., dissenting) (acknowledging that restrictive gun control legislation “might interfere with training in the use of weapons, training useful for military purposes”).

⁶ See *id.* at 2801 (opinion of the Court) (suggesting that most Americans in the founding era valued the right to arms more for hunting than for preserving the militia); *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff’d sub nom.* *District of Columbia v. Heller*, 128

pating in shooting sports.⁷ Finally, at the heart of *Heller* is the purpose of self-defense against criminal violence, which Justice Antonin Scalia's opinion for the Court⁸ ringingly endorses as "the core lawful purpose" served by the Second Amendment right to arms.⁹ Self-defense is best conceived of as a primarily personal purpose, but one that also has a significant civic importance. One of the main criminological claims advanced and supported by pro-rights gun policy scholarship is that the presence of an armed, peaceable citizenry deters several types of violent crime—particularly so-called "hot" or "home invasion" burglaries.¹⁰ Thus, while the benefit of acts of armed self-defense redounds most directly to the individual defender, the keeping of guns for defense can also contribute to the civic purpose of crime reduction.

All of these civic and personal purposes played a role in the *Heller* litigation, but they do not feature equally, or in the same ways, in the doctrine generated by the Supreme Court's opinion. Understanding the different ways that these purposes are acknowledged in the Court's reasoning is the clearest method of understanding *Heller* as constitutional doctrine. Accordingly, Parts II and III of this Article explicate the right to defensive arms recognized in *Heller* by tracing how *Heller* refined and altered the sketchy Second Amendment framework bequeathed by *United States v. Miller* to adopt a broad individual right to arms focused upon personal defense. Part IV discusses the pros and cons of this conception of the Second Amendment and its implications for future issues such as incorporation and concealed-carry reform. Finally, Part V considers at length one of the most important adjudicative problems likely to arise under *Heller*: how to determine which types of novel or current "arms" are protected by the Second Amendment. I argue that, in order to promote clarity and avoid circularity or obvious errors of omission, courts should rely as much as possible upon verifiable, external sources of evidence on this matter, especially the revealed judgments of citizens and police departments about which arms are worth obtaining today for defense.

S.Ct. 2783 (2008) (concluding that the Second Amendment right "was premised on the private use of arms for activities such as hunting and self-defense").

⁷ See *Heller*, 128 S.Ct. at 2822 (Stevens, J., dissenting) (noting use of personal firearms "for sporting activities"); cf. *id.* at 2861 (Breyer, J., dissenting) (considering the effects of gun regulation on "sporting purposes," such as "hunting and marksmanship").

⁸ Justice Scalia's opinion was joined in full by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito. Justices John Paul Stevens and Stephen Breyer each penned dissenting opinions in *Heller*, and both dissents were joined in full by Justices Stevens, Breyer, David Souter, and Ruth Bader Ginsburg.

⁹ *Heller*, 128 S.Ct. at 2818; see *id.* at 2821 ("[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

¹⁰ See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 138-41, 182-84 (Aldine de Gruyter 1991); David B. Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345 (2001).

II. HOW *UNITED STATES V. MILLER* SHAPED THE MODERN SECOND AMENDMENT DEBATE

A. *What Happened in Miller*

The *Heller* litigation naturally focused attention on the Supreme Court's main previous decision on the constitutional right to arms, *United States v. Miller*,¹¹ which was handed down seventy years ago. The *Heller* opinion denigrates *Miller* in several places,¹² and it is true that *Heller*, with its far more extensive analysis of the meaning of the right to arms, supersedes *Miller* as the leading Second Amendment precedent. However, it is useful to begin by examining *Miller* in some detail, for three reasons. First, as I will discuss, prior Second Amendment jurisprudence was dominated by different competing interpretations of this enigmatic 1939 case. Second, the dissenting Justices in *Heller* invoked *Miller* as support for their views of the Second Amendment.¹³ Third, many of the significant features of the right to arms recognized in *Heller* can be understood best through a comparison with *Miller*.

Miller's story has been well told elsewhere, particularly in an eye-opening article by Brian Frye.¹⁴ In brief, Jack Miller, a small-time Oklahoma criminal who served as a lookout and getaway driver for a bank robbery gang,¹⁵ was prosecuted for transporting an unregistered sawed-off shotgun across state lines in violation of the National Firearms Act of 1934.¹⁶ The federal district court dismissed the indictment against Miller in a summary three-paragraph order on the ground that the National Firearms Act violated Miller's Second Amendment right to arms.¹⁷ The federal government appealed this order to the

¹¹ 307 U.S. 174 (1939).

¹² See, e.g., *Heller*, 128 S.Ct. at 2814 (concluding that *Miller* "did not even purport to be a thorough examination of the Second Amendment"); *id.* at 2815 n.24 (describing *Miller* as "a virtually unreasoned case").

¹³ See *id.* at 2822-24, 2845-46 (Stevens, J., dissenting); *id.* at 2848, 2861 (Breyer, J., dissenting).

¹⁴ Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48 (2008) (cited in *Heller*, 128 S.Ct. at 2814).

¹⁵ *Id.* at 52-53.

¹⁶ *Miller*, 307 U.S. at 178; Frye, *supra* note 14 at 58.

¹⁷ *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1939), *rev'd*, 307 U.S. 174 (1939). Frye presents provocative evidence that District Judge Ragon's ruling in *Miller* did not reflect his true views, and instead may have been a judicial head-fake intended to prompt a reversal by the Supreme Court, thereby creating a precedent for the constitutionality of federal gun control. See Frye, *supra* note 14 at 63-65 (discussing Ragon's "vocal advoca[cy] of federal gun control," and his rejection of Second Amendment objections to gun control measures, during his tenure as a member of the U.S. House of Representatives, prior to his appointment to the bench by President Franklin D. Roosevelt). Frye contends that Judge Ragon "probably colluded with the government to create the ideal [Second Amendment] test case" in *Miller*, by sustaining the defendants' constitutional claim in an unreasoned memorandum opinion that "begg[ed] for an appeal." *Id.* at 63.

Supreme Court, arguing that the Second Amendment protected only a collective right to arms, rather than an individual one; or, alternatively, that the Amendment did not protect weapons such as Miller's sawed-off shotgun.¹⁸ On appeal, Miller famously presented no arguments to the Supreme Court. His counsel failed to appear for the oral argument and did not file an appellate brief on Miller's behalf.¹⁹

The Supreme Court reversed the lower court's order in a brief opinion by Justice McReynolds. Commentators have generally regarded *Miller* as an opaque and open-ended opinion that left a great deal of ambiguity concerning the nature of its holding and its conception of the Second Amendment right.²⁰ Despite its deficiencies, however, *Miller* did reach two significant conclusions about the Second Amendment. First, it declared that the right to arms recognized in the Second Amendment's operative clause should be "interpreted and applied" in a way that acknowledges the civic purposes suggested by the prefatory clause's reference to the militia.²¹ The Court stated that judicial applications of the Second Amendment should keep this "end"—i.e., the militia purpose—"in view."²² Second, in conformity with this conception of the Second Amendment, *Miller* held that an individual's possession of a particular kind of firearm is not constitutionally protected, unless that possession has "some reasonable relationship to the preservation or efficiency of a well regulated militia."²³

Applying these principles, the Court found a lack of evidence that Miller's possession of a sawed-off shotgun bore a reasonable relationship to the militia purpose. It pointed out that there was no evidence in the record that a sawed-off shotgun was "part of the ordinary military equipment" or that "its use could contribute to the common defense."²⁴ Therefore, the Court could not uphold Miller's constitutional challenge to the indictment. It remanded the case for further proceedings—which, in Miller's case, never occurred, because Miller had turned up in Oklahoma, shot dead, shortly after the oral argument in his

¹⁸ *Id.* at 66.

¹⁹ *Miller*, 307 U.S. at 175.; Frye, *supra* note 14 at 66-67.

²⁰ See, e.g., Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 499-500 (1995) (describing *Miller* as "not very clear" and "offer[ing] only a modicum of help" in understanding the right to arms); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 558 (1991) (characterizing *Miller* as providing "a dearth of judicial instruction" on the Second Amendment).

²¹ *Miller*, 307 U.S. at 178.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

case—perhaps as payback for testifying in earlier trials against his former confederates.²⁵

B. Interpreting Miller’s Militia “End In View”

Miller provided a bare-bones structure to Second Amendment doctrine by holding that judicial applications of the federal right to arms must be informed (in some “reasonable” fashion) by the militia purpose that *Miller* understood as the Amendment’s “end”. Put another way, the fairest reading of *Miller* was that the prefatory clause’s concern for the militia should influence Second Amendment doctrine at the *retail* level—the level of specific rules used to decide legal claims under the Second Amendment. It appears that the “reasonable relationship” requirement that *Miller* adopted was intended to accomplish this goal.

Unfortunately, this doctrinal framework was still radically open-ended. In particular, the requirement of a “reasonable relationship” between arms possession and the militia could be understood in several sharply different ways. That is precisely what happened. For the seven decades between *Miller* and *Heller*, the debate about the Second Amendment’s legal meaning was mainly structured by the sharply different conclusions that participants drew from *Miller*’s admonition to keep the militia purpose “in view” when applying the amendment.

We can divide the possible interpretations of *Miller*’s “end in view” language—and thus (while *Miller* remained authoritative) of the Second Amendment right—into three categories. The names supplied for these categories are mine.²⁶

1. Weak *Miller*

Under this view, the right to arms “protects only a right to possess and use firearms in connection with service in a state-organized militia.”²⁷ Only possession within these narrow bounds has, in *Miller*’s words, a “reasonable relationship” to the preservation of a well-regulated militia. Thus, courts can best give effect to the “end in view” language in *Miller* by confining the right to arms to such circumstances. This is done either by denying individuals standing

²⁵ Frye, *supra* note 14 at 68-69. After remand from the Supreme Court, *Miller*’s codefendant Frank Layton entered a guilty plea to the NFA charge. *Id.* at 69.

²⁶ Brannon Denning has suggested a similar division of possible readings. See Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 971 (1996) (concluding that “there are basically three interpretations of *Miller*,” which turn on the nature of the connection between the operative clause and the militia purpose).

²⁷ *District of Columbia v. Heller*, 128 S.Ct. 2738, 2828 (2008) (Stevens, J., dissenting).

to invoke the right at all,²⁸ or, in a more recent version, by treating the right as assertable by individuals, but in a way that is limited in scope to individuals who seek to participate actively in organized militia service. The latter version of Weak *Miller*, sometimes called the “sophisticated collective rights view,” was adopted by many lower federal courts between *Miller* and *Heller*.²⁹ This view was also the District of Columbia’s main litigating position in *Heller*³⁰ and was accepted by Justice Stevens in his *Heller* dissent.³¹

2. Intermediate *Miller*

Under this view, the right to keep and bear arms—which, after all, the Constitution defines as a “right of the people,” not of government—is a right vested in individuals, and extends to them whether or not they currently participate in a state-regulated military organization, or indeed whether or not their state currently maintains such an organization. However, the *purpose* for which individuals are constitutionally entitled to keep their own arms is wholly or primarily limited by the civic purpose mentioned in the prefatory clause. While such keeping has, in *Miller*’s words, a “reasonable relationship” to a militia, the use of firearms for personal defense may not. Thus, this view holds that courts can best give effect to the “end in view” language in *Miller* by upholding gun regulations as long as they leave the people in possession of arms useful for preparing for militia service—even if those regulations severely restrict private

²⁸ See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1066 (9th Cir. 2003) (holding that individual citizens “lack standing” to challenge gun restrictions because the Second Amendment merely “protects the people’s right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use,” and citing *Miller* as consistent with this position).

²⁹ E.g., *United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992); cf. *United States v. Emerson*, 270 F.3d 203, 218-221 (5th Cir. 2001) (distinguishing “sophisticated collective rights” view from traditional collective rights view).

³⁰ See Brief for Petitioner at 12, *District of Columbia v. Heller*, No. 07-290 (U.S. Jan. 4, 2008), available at <http://www.gurapossessky.com/news/parker/documents/PetitionersbriefinD.C.v.Heller.pdf> (arguing that the Second Amendment “has an exclusively military purpose” and “protects the keeping and bearing of arms only in service of a well-regulated militia.”) (capitalization omitted).

³¹ *Heller*, 128 S.Ct. at 2823 (Stevens, J., dissenting) (concluding that the Second Amendment “protects the right to keep and bear arms for certain military purposes, but [...] does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons”) (citing *Miller* for this proposition); *id.* at 2827 (suggesting that the Second Amendment right does not “encompass use or ownership of weapons outside the context of service in a well-regulated militia”); *id.* at 2847 (denying that the Second Amendment in any way “limit[s] the tools available to elected officials wishing to regulate civilian uses of weapons”).

self-defense with firearms, as did the District of Columbia's pre-*Heller* gun laws.³²

This position has attracted few adherents,³³ despite being at least as faithful to the *Miller* opinion and the text of the Second Amendment as is the Weak *Miller* view. Scholars who have claimed to transcend the usual "dichotom[ies]" in the Second Amendment debate and emphasized the civic purposes of the right to arms,³⁴ thus making them natural candidates to embrace Intermediate *Miller*, have nevertheless shied away from a natural implication of their stance: that courts should engage in meaningful Second Amendment scrutiny of *some* gun restrictions, although (on this view) perhaps not the limits on private self-defense exemplified by the D.C. statutes challenged in *Heller*.³⁵

³² E.g., D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001) (prohibiting private handgun ownership); 7-2507.02 (2001) (prohibiting armed self-defense in the home).

³³ One recent historical analysis suggests that, by the time of the founding, Americans had evolved a distinctive understanding that they were entitled by right to keep personal firearms. Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139 (2007) (cited in *District of Columbia v. Heller*, 128 S.Ct. 2783, 2848-49 (Breyer, J., dissenting)). This understanding, Professor Churchill argues, arose out of the colonial experience of participation in organized militias, and reflected a break from (not, as the *Heller* majority suggests, a continuity with) the English experience of arms regulation. *Id.* at 143. However, as the early American understanding of the right to keep arms developed, it extended beyond those engaged in militia service, and encompassed all members of the body politic. *Id.* at 148, 155-61. At the same time, Churchill argues, this right to keep arms co-existed with extensive regulation of the *bearing* and use of arms, particularly outside of the home. *Id.* at 161-65; *cf.* *Aymette v. State*, 21 Tenn. 154 (1840) (applying the Second Amendment and the Tennessee Constitution to uphold a ban on concealed weapons; defining the right to "keep" arms as an "unqualified" individual right, but the right to "bear" arms as qualified by the civic purpose of furthering the common defense).

Churchill's reading of the sources suggests a right to arms that would provide forceful protections against the banning or confiscation of common firearms in private hands. *See* Churchill, *supra* at 161 (criticizing Saul Cornell and other "civic rights" authors for understating the reluctance of early colonial and state governments to interfere with the private keeping of firearms). At the same time, while Churchill's reading is not incompatible with a right to possess arms that gives significant weight to self-defense, it tends to emphasize the discretion of founding-era governments to regulate the *uses* of arms. Churchill's claim that the American right to possess arms was in many respects discontinuous with the English experience is in tension with the *Heller* majority's efforts to draw upon English authority to support the conclusion that personal defense lies at the core of the Second Amendment right to arms. *See infra* notes 63 to 81 and accompanying text. For all of these reasons, Churchill's article deserves to be classified as a leading example of the interpretation I call Intermediate *Miller*.

³⁴ *See, e.g.*, Saul Cornell and Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 490-91 (2005) ("Rather than fitting into a simple dichotomy, it now appears that Second Amendment scholarship is arrayed across a considerable spectrum, from an expansive individual right to a narrow collective right of the states to maintain their militias [...]. The most interesting and exciting new developments . . . have occurred in the middle of this vast spectrum.").

³⁵ *Cf. id.* at 527 (arguing for only "rigorous rational basis review" of gun restrictions; stating that "there is really no need to invent new legal justifications for protecting the rights of firearms owners."); *id.* at 527 n.261 (contending generally that "aggressive judicial enforcement of an individual right [to arms] is superfluous").

Nonetheless, the District of Columbia offered Intermediate *Miller* as a fallback position in the *Heller* oral argument.³⁶

Justice Stephen Breyer's questions during that oral argument suggested sympathy with the Intermediate *Miller* interpretation.³⁷ In the end, Justice Breyer chose to join in full the dissenting opinion of Justice Stevens, which embraced Weak *Miller*.³⁸ But Justice Breyer also penned a separate dissent that assumed *arguendo* the validity of the Intermediate *Miller* view, under which the "first and primary objective" of the individual right to arms is "the furthering of a well-regulated militia," but this interest may still impose limits on firearms regulation even when the local government does not currently maintain an organized citizen militia.³⁹ Justice Breyer also proclaimed himself willing to assume *arguendo* that the right to arms includes an interest in promoting individual self-defense⁴⁰ as a secondary (or tertiary⁴¹) objective. However, Justice Breyer's dissent concluded that even under this somewhat more rights-protective conception, the challenged D.C. laws should survive constitutional scrutiny. The ban on possession of handguns, he claimed, "burdens the Amendment's [...] primary objective" of militia training "hardly at all," since D.C. residents remained free to possess "weapons other than handguns, such as rifles and shotguns"⁴²—a claim that turns out to require severe qualification.⁴³

³⁶ The District's counsel argued in the alternative that, since "there is a militia relatedness aspect of the Second Amendment, [...] Heller's *proposed use* of a handgun [sc. self-defense] has no connection of any kind to the preservation or efficiency of a militia and therefore the case is over." Transcript of Oral Argument at 11-12, *Heller*, 128 S.Ct. 2783 (No. 07-290), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf (emphasis added).

³⁷ See, e.g., *id.* at 50-51 (Breyer, J.) (asking counsel to assume that "there is an individual [Second Amendment] right, but the purpose of that right is to maintain a citizen army, call it a militia, that that's the basic purpose. So [that purpose] informs what's reasonable and what isn't reasonable"; therefore, a handgun ban may be constitutional).

³⁸ See *Heller*, 128 S.Ct. at 2822-47 (Stevens, J., dissenting); *supra* notes 27-31 and accompanying text (arguing that Justice Stevens's dissent adopts Weak *Miller*).

³⁹ *Heller*, 128 S.Ct. at 2861-62 (Breyer, J., dissenting) (arguing that "the present case has nothing to do with *actual* military service," since the District of Columbia "has [not] called up its citizenry to serve in a militia," but acknowledging that the challenged D.C. gun bans might still "interfere with training in the use of weapons, training useful for military purposes.").

⁴⁰ *Id.* at 2863.

⁴¹ Justice Breyer listed self-defense last among the interests potentially served by the right to arms, placing it after not only the preservation of a well-regulated militia, but also "the use of firearms for sporting purposes" such as hunting and target shooting. *Id.*

⁴² *Id.* at 2862 (stressing that the "only weapons that cannot be registered" in the District of Columbia are "sawed-off shotguns, machine guns, short-barreled rifles, and pistols not registered before 1976.").

⁴³ Justice Breyer's argument on this point contains a significant error, which becomes evident upon a close reading of the language of the D.C. Code as it stood when *Heller* was decided. His suggestion that District of Columbia residents were free to own rifles and shotguns appropriate for militia training and familiarization was factually mistaken. Justice Breyer stated that District law prohibits "machine guns" while permitting rifles and shotguns. *Id.* (citing D.C. Code §§ 7-

3. Strong *Miller*

Under this view, the Constitution broadly recognizes an individual constitutional right to “keep and bear arms,” not only for militia purposes, but also for other traditionally legitimate purposes, such as private self-defense. However, under this view, not all types of personal weapons qualify as protected “arms.” Only those arms whose characteristics give them a “reasonable relationship” to militia activity are protected by the Second Amendment. *Miller* supplies the test for this protection. Under Strong *Miller*, a court considering a Second Amendment claim to possess or use a given firearm would ask, *inter alia*, whether the weapon is “part of the ordinary military equipment” and is “of the kind in common use at the [present] time.”⁴⁴ David Hardy has termed this conception of the Second Amendment the “hybrid view” because it combines a

2502.01, 7-2502.02(a)). But he did not cite or discuss the District’s statutory provision defining the term “machine gun,” D.C. Code § 7-2501.01(10)(B). This provision employed a bizarrely overinclusive definition that encompasses, *inter alia*, any *semi*-automatic (i.e., self-loading, firing one shot at a time) rifle or shotgun that contains, or can accept, a magazine holding 12 rounds or more. See *id.* (defining as a “machine gun” “any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot . . . [s]emiautomatically, more than 12 shots without manual reloading”). Since one of the principal purposes of describing a firearm as semi-automatic is precisely to *distinguish* it from a machine gun, which is a fully automatic or burst-fire weapon, the District’s definition was as contrary to ordinary language as would be a criminal statute that defined married men above six feet in height as “bachelors.” The effect of this provision is to prohibit, under the spurious notion that they are “machine guns,” a wide swath of ordinary rifles. The banned rifles include the millions of common, inexpensive self-loading .22 rimfire rifles sold for decades by Marlin and Ruger, as well as virtually all modern rifles of military pattern adopted since the 1950s, including the detachable magazine-fed rifles that are most valuable for military familiarization and training today. See Posting of Mike O’Shea to Concurring Opinions, http://www.concurringopinions.com/archives/2008/07/machine_guns_th.html (Jul. 10, 2008, 05:20 EST).

The error matters because Justice Breyer’s argument for the constitutionality of D.C.’s ban on handguns turns on the availability of adequate alternatives in the form of rifles and shotguns. *Cf. Heller*, 128 S.Ct. at 2862 (Breyer, J., dissenting) (discussing *amicus curiae* brief of retired U.S. generals that specified “rifles, pistols, and shotguns” as the main classes of militarily useful small arms). Thus, his argument was seriously undermined, even on its own terms, by the profound restrictions that the District actually also imposed on common *rifles* through its misleading statutory definition of “machine gun.”

At the time this article went to publication, the D.C. City Council (under pressure from the U.S. Congress, see *infra* note 175), had passed temporary emergency legislation that eliminates the anomalous language from the District’s definition of “machine gun,” and replaces it with a narrower, ordinary language definition that mirrors the one employed by federal law. The effect of this temporary legislation is to remove many of the prohibitions on ownership of modern rifles described above. Firearms Registration Emergency Amendment Act of 2008, D.C. Legis. Act 17-651 (Jan. 6, 2009) (expiring ninety days after enactment).

⁴⁴ *Miller*, 307 U.S. at 178-79.

genuinely meaningful individual right with limits suggested by the militia purpose.⁴⁵

Some proponents of Strong *Miller* have understood *Miller*'s mention of weapons in "common use" to refer to whether weapons are commonly used by *military organizations* at the present time.⁴⁶ This version of Strong *Miller* (call it Very Strong *Miller*) makes current military utility both a necessary and a sufficient test for the constitutional protection of a hand-carried weapon.⁴⁷ Others, however, have understood *Miller* to impose a requirement that covered weapons be not only appropriate for military use, but also "in common use" by *private citizens* at the present time. This interpretation stresses *Miller*'s observation that founding-era militiamen were traditionally expected to appear "bearing arms supplied by themselves,"⁴⁸ and thus the kind that private citizens would likely possess. Justice Antonin Scalia expressed sympathy for the latter, two-step version of Strong *Miller* in the *Heller* oral argument⁴⁹—though as we will see, neither version was ultimately adopted in Scalia's opinion for the Court in *Heller*.

Under Strong *Miller*, courts could best give effect to the "end in view" language in *Miller* by holding that the Second Amendment protects possession of common firearms that have militia utility, such as modern rifles, shotguns, and many types of handguns, but not of weapons that lack such utility—the category to which the *Miller* Court assigned *Miller*'s sawed-off shotgun, rendering it constitutionally unprotected.

Strong *Miller* was the litigating position of the plaintiffs in *Heller*,⁵⁰ and was adopted by the Fifth and D.C. Circuits⁵¹ in the decade preceding the *Heller*

⁴⁵ See David T. Hardy, 15 WM. & MARY. BILL RTS. J. 1237, 1237 (2007) (reviewing SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGIN OF GUN CONTROL IN AMERICA* (2006)).

⁴⁶ E.g., Michael I. Garcia, Comment, *The "Assault Weapons" Ban, the Second Amendment, and the Security of a Free State*, 6 REGENT U. L. REV. 261, 282 (1995) ("The primary weapons of [...] modern light infantry are rifles— semiautomatic and automatic— and handguns."); *id.* at 285 n.138 ("Since the main part of the [popular] Militia was to function as a light infantry, it should have the weapons of a light infantry.").

⁴⁷ Pennsylvanian Tench Coxe, a prominent Federalist and official in the Washington and Adams administrations, provided supporters of Very Strong *Miller* with their slogan in a 1788 pamphlet in support of constitutional ratification: "Who are these militia? Are they not our selves? [...] Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are *the birthright of an American*." Tench Coxe, *A Pennsylvanian III*, PENNSYLVANIA GAZETTE, February 20, 1788, reprinted in *THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787-1792* 276 (David E. Young ed., Golden Oak Books 1995) (1991). Coxe, a prolific founding-era writer on the significance of the right to arms, is conspicuous by his absence in *Heller*, where he is nowhere cited or discussed by any Justice.

⁴⁸ *Miller*, 307 U.S. at 179.

⁴⁹ See Transcript of Oral Argument at 47, *supra* note 36 (suggesting that machine guns are not protected by *Miller*'s test, because a weapon is "an 'arm' in the specialized sense that the [*Miller*] opinion referred to it" if it "is the type of a weapon that was used in militia, and [...] it is nowadays commonly held.").

litigation. Nor was this construction of the right to arms a post-*Miller* innovation: it was shared by a number of influential nineteenth-century state court decisions.⁵² This view has also been a commonly-held understanding of *Miller* among grassroots, non-lawyer gun rights supporters.⁵³

Strong *Miller* is a plausible interpretation of the Second Amendment right to arms. It is the reason why gun rights proponents were correct in maintaining that *Miller* did not settle the issue of whether the Second Amendment protects an individual right to possess firearms for self-defense.⁵⁴ Strong *Miller*, and its state court predecessors, sketched one way to define a broad, individual Second Amendment right that nevertheless displayed a plain connection to the militia purpose referred to in the amendment's preface. By demonstrating this connection on its face, Strong *Miller* was well positioned to defeat criticism that

⁵⁰ Brief of Respondent at 43, *District of Columbia v. Heller*, No. 07-290 (U.S. Feb. 4, 2008), available at <http://www.gurapossessky.com/news/parker/documents/07-0290bs.pdf> (last accessed August 13, 2008) ("The test for whether a particular weapon is or is not within the Second Amendment's protection was established in *Miller*.").

⁵¹ *Parker v. District of Columbia*, 478 F.3d 370, 390 (D.C. Cir. 2007), *aff'd sub nom*; *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) ("[I]nterpreting 'Arms' in light of the Second Amendment's militia purpose makes sense because 'Arms' is an open-ended term that appears but once in the Constitution and Bill of Rights. But *Miller* does not command that we limit perfectly sensible constitutional text such as 'the right of the people' in a manner inconsistent with other constitutional provisions."); *accord* *United States v. Emerson*, 270 F.3d 203, 227 n.22 (5th Cir. 2001).

⁵² The clearest example is a case repeatedly invoked by the *Heller* Court, *Andrews v. State*, 50 Tenn. 165 (1871), cited in *Heller*, 128 S.Ct. at 2806, 2809, 2818. In *Andrews*, the Tennessee Supreme Court recognized a broad state constitutional right to keep arms for "all the ordinary purposes for which arms are adapted," but limited the class of protected "arms" to "the usual arms of the citizen of the country, [...] the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State." 50 Tenn. at 177-79. It defined this class to include military-type handguns ("repeaters") but not all handguns. *Id.* at 179, 186-87, *accord* *Fife v. State*, 31 Ark. 455, 461-62 (1876). For a fuller analysis of nineteenth-century case law and its development of a "civilized warfare test" for the weapons covered by the right to arms, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1416-21, 1424-25, 1432-33 (1998).

⁵³ See, e.g., *Who the Hell is Jim Zumbo?*, Posting at View from the Porch, Feb. 18, 2007, 10:02 a.m., <http://booksbikesboomsticks.blogspot.com/2007/02/boomsticks-who-hell-is-jim-zumbo.html> ("An argument could be made (and has been, by the Supreme Court in the *Miller* decision) that [unlike military-pattern semi-automatic rifles] [...] hunting guns are not Constitutionally protected at all, except those that meet the requirements for militia service.").

⁵⁴ See, e.g., Brannon P. Denning and Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, 65 LAW & CONTEMP. PROBS. 113, 114 (2002) ("What *Miller* plainly does not do is deny that an individual's right to keep and bear arms is protected by the Second Amendment—the holding ascribed to it by most federal courts since 1939."); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1238 (1994) ("[W]ere the Second Amendment [to be] taken . . . [to protect a personal right to arms], . . . the scope of the right that is protected [...] would still remain to be defined."); *id.* at 1238 n.8 ("For example, with respect to the kind of 'Arms' one may have. Perhaps these include all arms as may be useful (though not exclusively so) as an incident of service in a militia—and indeed, this would make sense of the introductory portion of the amendment as well.") (citing *Miller*, 307 U.S. at 178).

the individual-rights view of the Second Amendment improperly ignores its prefatory clause, or gives insufficient weight to *Miller*—criticisms that were urged by the dissenting Justices in *Heller* and other critics of the Court’s decision.⁵⁵ Further, as I will discuss in Part IV, because Strong *Miller* pays attention to the weapons that *governments* deem appropriate to issue to their own servants, it would have enabled courts to avoid a problem of circularity that an unadorned “common use by private citizens” criterion presents.

The most forceful objections to Strong *Miller* have been couched in pragmatic and prudential terms, rather than those of legal interpretation. Virtually all standard infantry rifles issued today, including the U.S. military’s M4 carbine and M16 rifle, can fire fully automatically or in multi-shot “burst fire” modes,⁵⁶ and so are classified as machine guns under federal law. In *Miller*’s words, then, a machine gun is “ordinary military equipment” for the individual soldier, if anything is. Thus, the strongest version of Strong *Miller* would have implied that the federal government’s ban on the private possession of machine guns made after 1986⁵⁷ violated the Second Amendment.

This was strong medicine to swallow for most lawyers, judges, and academics. In the decades between *Miller* and *Heller*, jurists often expressed alarm at the prospect that the scope of covered “arms” would include machine guns if *Miller*’s emphasis on “ordinary military equipment” were combined with a meaningful individual right.⁵⁸ The prospect that the federal post-1986 machine

⁵⁵ *Heller*, 128 S.Ct. at 2826 (Stevens, J., dissenting) (criticizing the Court for “tr[ying] to denigrate the importance of [the prefatory] clause of the Amendment by beginning its analysis with the Amendment’s operative provision”); Erwin Chemerinsky, *The Heller Decision: Conservative Activism and Its Aftermath*, Cato Unbound (July 25, 2008), available at

<http://www.cato-unbound.org/2008/07/25/erwin-chemerinsky/the-heller-decision-conservative-activism-and-its-aftermath/> (“Justice Scalia could find an individual right to have guns only by effectively ignoring the first half of the Second Amendment.”).

⁵⁶ See Colt Defense Weapons Systems, M4 5.56mm Carbine Specifications, http://www.colt.com/mil/m4_2.asp; M16A4 5.56mm Rifle Specifications, http://www.colt.com/mil/M16_2.asp (listing fully automatic and burst fire versions of each weapon) (both last visited Nov. 23, 2008).

⁵⁷ 18 U.S.C. § 922(o) (2000). Somewhat in excess of 100,000 legally transferable machine guns remain in circulation. See Proposed Legislation to Modify the 1968 Gun Control Act: Hearings Before the House Judiciary Committee, 99th Cong., 1165 (1987) (testimony of Stephen E. Higgins, Director, U.S. Bureau of Alcohol, Tobacco, and Firearms) (estimating around 118,000 registered machine guns in BATF’s files). This fixed pool consists of the weapons that were properly registered pursuant to the National Firearms Act of 1934, 26 U.S.C. § 5801 *et seq.*, prior to the effective date of the ban provision, 18 U.S.C. § 922(o), on May 19, 1986. Prices currently begin at \$3,000 and range up to \$25,000 or more for rare or high-quality weapons.

⁵⁸ See, e.g., *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (expressing fear that, under an individual rights reading of *Miller*, “Congress would be prevented by the Second Amendment from regulating the possession or use by private persons . . . of distinctly military arms, such as machine guns [or] trench mortars It seems to us unlikely that the framers of the Amendment intended any such result”). The expressions of this danger have sometimes taken intellectually unserious forms. Cf. *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976)

gun ban would be jeopardized appears to have been a major motivation for the Solicitor General's filing of an ambivalent brief for the United States as *amicus curiae* in *Heller*. The Solicitor General's brief endorsed a broad individual right to arms, yet also asked the Court to adopt a standard of review so deferential that the United States did not even concede the invalidity of D.C.'s flat bans of handguns and the defensive use of guns in the home.⁵⁹ Instead, the brief asked the Supreme Court to reverse the D.C. Circuit's opinion invalidating the bans, and remand for further proceedings.⁶⁰ The brief of the United States repeatedly invoked a potential legal threat to the post-1986 machine gun prohibition as a reason to dilute the Second Amendment standard of review.⁶¹

Mr. Heller's counsel carefully litigated the case so as to avoid forcing the Supreme Court to make a choice between preserving the machine gun ban and recognizing an individual Second Amendment right with a meaningful standard of review. Instead, Heller urged the alternative form of Strong *Miller*, under which weapons must qualify as *both* militia-useful *and* in common use by peaceable citizens in order to qualify as protected "arms." This supplied a basis for upholding sweeping restrictions on machine guns, without diluting the protection extended to firearms that do meet the "common use" test.⁶²

III. THE END OF THE "END IN VIEW"? *HELLER'S* REVISION OF *MILLER*

Justice Scalia's opinion for the Court in *Heller* deals with many of the complications inherited from *Miller* by dissolving them. *Heller* does not exactly adhere to any of the aforementioned approaches to the Second Amendment, though it is closest to Strong *Miller*. *Heller* departs from *Miller*, not in its affirmation of an individual right to arms that includes self-defense, but in its re-

(arguing that if a strict version of Strong *Miller* "was inconceivable in 1942 [when *Cases* was decided], it is completely irrational in this time of nuclear weapons").

⁵⁹ See Brief for the United States as *Amicus Curiae* at 9, 32, District of Columbia v. Heller, No. 07-290 (U.S. Feb. 4, 2008) available at <http://www.gurapossessky.com/news/parker/documents/07-290tsacUnitedStates.pdf> (last accessed Nov. 25, 2008).

⁶⁰ *Id.* at 32.

⁶¹ *Id.* at 2, 9 (expressing fear that Court of Appeals' analysis "could cast doubt on the constitutionality of existing federal legislation prohibiting the possession of certain firearms, including machineguns," which could be avoided through a "more flexible" standard of scrutiny), 21-22, 24-25.

⁶² Brief of Respondent at 51-52, District of Columbia v. Heller, No. 07-290, available at <http://www.gurapossessky.com/news/parker/documents/07-0290bs.pdf> (last accessed August 13, 2008) (arguing that even though machineguns clearly have militia utility, "the [*Miller*] Court could nonetheless have held that machineguns fall outside the scope of the Second Amendment's protection as they were not 'in common use at the time' such that civilians could be expected to have possessed them for ordinary lawful purposes." (quoting *Miller*, 307 U.S. at 179)); Transcript of Oral Argument, *supra* note 36, at 59 (Alan Gura, counsel for respondent) (conceding that machine guns could be excluded from the category of Second Amendment "arms" because they are "not appropriate for civilian use.").

fusal of *Miller's* means of conceiving the linkage between the right to arms and the militia purpose in the Second Amendment's preface.

A. *Justice Kennedy, Professor Lund, and the English Right to Arms*

Signs of a switch in the Supreme Court's view of the relationship of the Second Amendment's two clauses became evident as the *Heller* litigation progressed. One of the case's most dramatic moments occurred at oral argument, when swing Justice Anthony Kennedy expressed a willingness to rethink *Miller's* treatment of the civic purposes of the Second Amendment. Justice Kennedy suggested a conception of the Second Amendment that would "delink" its affirmation of a right to keep and bear arms from its affirmation of the militia,⁶³ and thereby move private purposes such as personal defense closer to the core of the right to arms.⁶⁴ Justice Kennedy hinted that he would look to the English right to arms as an exemplar in applying the Second Amendment, instead of the activities of militiamen in the American revolutionary era.⁶⁵

Many of these remarks echoed a provocative *amicus curiae* brief filed by Professor Nelson Lund on behalf of the Second Amendment Foundation.⁶⁶ Lund's brief argued that the Court should reject *Miller's* stress on the militia and adopt a theory of the Second Amendment founded on the natural right of self-defense.⁶⁷ Lund contended that the Amendment's prefatory clause simply reflects the "limited and indirect—though real—relationship between a well regulated militia and the . . . right to arms" by assuring that the people from whom a traditional militia would be drawn could not be disarmed by the federal government.⁶⁸ The brief argued that private self-defense should properly be consid-

⁶³ Transcript of Oral Argument, *supra* note 36, at 5-6 (Kennedy, J.) (proposing an interpretation that "confirms the two clauses and in effect delinks them. [...] [S]o in effect the amendment says we reaffirm the right to have a militia, we've established it, but in addition, there is a right to bear arms.").

⁶⁴ *Id.* at 8 (suggesting that the Second Amendment right to arms "had . . . to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears . . . and things like that"); *id.* at 30 ("*Miller* . . . is just insufficient . . . to describe the interests that must have been foremost in the framers' minds when they were concerned about guns being taken away from the people who needed them for their defense.").

⁶⁵ *See id.* at 16 (Kennedy, J.) ("[T]here's no question that the English struggled with how to work this [sc. the proper scope of gun regulation under the right to arms] Do you think the Second Amendment is more restrictive or more expansive of the right than the English Bill of Rights in 1689?"); *cf. id.* at 13 ("[I]n my view . . . [the Second Amendment says] there's a general right to bear arms quite without reference to the militia either way.").

⁶⁶ Brief of Second Amendment Foundation as Amicus Curiae Supporting Respondent, District of Columbia v. Heller (No. 07-290), available at 2008 WL 383529 (Feb. 4, 2008) [hereinafter "Lund Brief"].

⁶⁷ *Id.* at ** 31-40. Professor Lund presents arguments similar to the brief's in 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 (2008).

⁶⁸ Lund Brief, *supra* note 66, at *22.

ered part of the core of the constitutional right to arms, citing classical liberal theorists admired by the Framers, such as Locke and Montesquieu, who treated self-defense as a foundational individual right.⁶⁹ Finally, the brief discussed the commentaries of Blackstone, who identified the English right to arms as an “auxiliary right” that serves to preserve the fundamental right of self-defense.⁷⁰ Lund concluded that “[i]n the twenty-first century, the most salient purpose of the Second Amendment is to protect the people’s ability to defend themselves against violent criminals.”⁷¹

In *Heller*, the Kennedy-Lund view of the Second Amendment has prevailed. This forces the Court to rethink *Miller*. Recall that *Miller* held that the Amendment must be not only “interpreted,” but also “*applied*” with the militia “end in view.”⁷² *Heller* rejects the “*applied*” part of *Miller*’s requirement. Instead, *Heller* reasons that a culture that protects gun ownership for personal purposes, such as self-defense and sporting use, will naturally tend to produce a population that is skilled and familiar with firearms, and in which personal gun ownership is widespread. These traits, in turn, enhance the ability of the people to function as a popular militia of the kind contemplated in the preface of the Second Amendment. *That* is the connection between the Second Amendment’s preface and its operative clause, *Heller* concludes. No further degree of connection is required.⁷³

While Professor Lund had emphasized first principles of liberal theory in arguing for a right to arms centered on self-defense, the *Heller* Court chooses instead to justify that conclusion by emphasizing the continuity of the Second Amendment’s operative clause with the English right to arms. Indeed, one of the *Heller* Court’s central criticisms of *Miller* is the 1939 opinion’s failure to discuss the English right to arms.⁷⁴ The 1689 English Bill of Rights provided

⁶⁹ *Id.* at ** 34-35.

⁷⁰ *Id.* at **36, 38-39.

⁷¹ *Id.* at *39.

⁷² *Miller*, 307 U.S. at 178.

⁷³ *See Heller*, 128 S. Ct. at 2817:

[T]he conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. . . . But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

⁷⁴ *Heller*, 128 S.Ct. at 2814 (stating that *Miller* “did not even purport to be a thorough examination of the Second Amendment”); *id.* at 2815 (asserting that “the [*Miller*] opinion [...] discusses none of the history of the Second Amendment.”). Justice Stevens correctly points out in dissent that *Miller* did discuss the founding-era understanding of the militia, *id.* at 2845-46 (Stevens, J., dissenting); *see Miller*, 307 U.S. at 178-79. Thus, the relevant “history of the Second Amendment” whose absence from *Miller* the *Heller* Court criticizes must be the history of the precedes-

that “the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.”⁷⁵ *Heller* stresses that this “was clearly an individual right, having nothing whatever to do with service in a militia.”⁷⁶ The Court also emphasizes Blackstone’s eighteenth-century discussion of the English right in his influential *Commentaries*. Invoking Lockean philosophical ideas, Blackstone connected “the right of having and using arms for self-preservation and defence” with “the natural right of resistance and self-preservation.”⁷⁷ The resulting conception of the right to arms, the Court argues, was “an individual right protecting against both public and private violence.”⁷⁸

Having presented evidence that the historic English right was not tied to the concept of a militia, but rather served a range of personal purposes, the Court then argues that the Second Amendment’s operative clause guarantees *that* kind of right—not one qualified by *Miller*’s pervasive militia focus:

[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it shall not be infringed. As we said in *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed”⁷⁹

This emphasis on a pre-existing right—arguably reflected in the syntax of the Second Amendment, which refers to “the right to keep and bear arms”—is important to *Heller*’s rejection of the dissenters’ argument that the Second Amendment only protects participation in an organized militia. The English

sor English right to arms, and the Founding generation’s understanding of the English right’s nature and importance.

⁷⁵ 1 W. & M., c. 2, § 7 in 3 Eng. Stat. at Large 441 (1689).

⁷⁶ *Heller*, 128 S.Ct. at 2798; *see also id.* (emphasizing that the right to arms “was secured to [Englishmen] as individuals, according to ‘libertarian political principles,’ not as members of a fighting force” (quoting LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS 1689* 283 (1981)).

⁷⁷ *Id.* (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE COMMON LAW OF ENGLAND* 140 (1765)).

⁷⁸ *Id.* at 2798-99. As the reference to “public” as well as “private violence” suggests (not to mention Blackstone’s quoted reference to the “natural right of resistance”), the right that emerges from the *Heller* Court’s discussion of the English right is grounded primarily in personal purposes for arms such as individual self-defense, but also reflects civic purposes, such as resistance to tyranny. *Cf. id.* at 2798 (noting that one of the evils that motivated the recognition of the English right to arms was the Stuart kings’ use of “select militias loyal to them to suppress political dissidents, in part by disarming their opponents” (citing, *inter alia*, JOYCE MALCOLM, *TO KEEP AND BEAR ARMS* 31-53 (1994)).

⁷⁹ *Id.* at 2797-98.

right to personal arms (and, in Blackstone's account, the underpinning natural right to self-defense⁸⁰) provides an obvious source to explain the general nature of the pre-existing right guaranteed by the Second Amendment. In dissent, Justice Stevens argues that the requirement to participate in a state militia "was also a pre-existing right," though he provides no evidence for this claim.⁸¹

B. *Revising Miller: Defensive Arms for Personal Purposes*

Heller's human rights-centered conception of the Second Amendment right to arms naturally entails a rejection of Weak and Intermediate *Miller*, which condition the right on a more or less narrow understanding of the militia purpose. But *Heller* also rejects Strong *Miller*, with its militia criterion for what counts as covered "arms." At first blush the incompatibility is easy to overlook. *Heller* rightly glosses *Miller* as "stand[ing] . . . for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of

⁸⁰ For an analysis of *Heller's* reliance on sources that characterize the right to arms as a corollary of a natural or inherent right of self-defense, see David B. Kopel, *The Natural Right to Self-Defense: Heller's Lesson for the World*, 59 SYRACUSE L. REV. 235 (2008).

⁸¹ *Heller*, 128 S.Ct. at 2831 (Stevens, J., dissenting); cf. *id.* at 2798 n.16 (calling Justice Stevens's claim that organized militia service was a pre-existing right "wholly unsupported"). Dennis Henigan, author of the *amicus curiae* brief of the Brady Center to Prevent Gun Violence in the *Heller* litigation, has taken up the gauntlet, attempting to substantiate Justice Stevens's argument in a Cato Institute debate with David Kopel and others. Henigan notes that some state constitutional provisions preceding the Second Amendment's ratification referred to "a right" of the people to bear arms (rather than "the right"), in some cases describing it as a right for "the defense of themselves and the state," and other times purely for "the common defense." Compare Dennis A. Henigan, *Does the Second Amendment Issue Turn on the Word "The"?*, The Conversation, CATO UNBOUND (July 22, 2008), <http://www.cato-unbound.org/2008/07/22/dennis-henigan/does-the-second-amendment-issue-turn-on-the-word-the/> (last visited Feb. 9, 2009) with David Kopel, *More on the "The" and Pre-Existing Rights*, The Conversation, CATO UNBOUND (July 22, 2008), <http://www.cato-unbound.org/2008/07/22/david-kopel/more-on-the-the-and-pre-existing-rights/> (last visited Feb. 9, 2009).

Alternatively, if Robert Churchill is right that Americans by the time of the founding had developed their own, distinctive understanding of the right to keep arms, grounded in the colonial militia experience, yet transcending it, then this would arguably offer a different potential candidate (besides the Blackstonian right to arms for self-defense) to fill the role of "the right" recognized by the Second Amendment. See generally Churchill, *supra* note 33. However, this still would not justify the result Justice Stevens sought to reach in his *Heller* dissent. Stevens voted to uphold all of the challenged District of Columbia statutory provisions as constitutional. Cf. *Heller*, 128 S.Ct. at 2847 (Stevens, J., dissenting) (denying that Second Amendment limits, in any way, "the tools available to elected officials wishing to regulate civilian uses of weapons" or "the contours of acceptable gun control policy"). Even under Churchill's conception of the original understanding of the right to arms (the one I have dubbed Intermediate *Miller*), there are still real Second Amendment limitations on government's ability to prohibit the private ownership of common firearms. See *supra* notes 32-43 and accompanying text. While the District of Columbia's ban on rendering firearms functional in the home might conceivably be defended on this view, the District's complete ban on handguns (coupled with a simultaneous ban on a huge number of common rifles) would still be difficult to defend against invalidation.

weapons[,]” and agrees with that proposition.⁸² However, that was not all that *Miller* said about such a test. *Miller* also noted that there was no evidence that the sawed-off shotgun was “ordinary military equipment” or that “its use could contribute to the common defense.”⁸³

Heller rejects such a “military equipment” test as either a necessary or a sufficient condition for Second Amendment protection. Instead, joining a minority tradition of nineteenth- and twentieth-century state courts,⁸⁴ *Heller* holds that all hand-carried weapons are presumptively “arms” covered by the Second Amendment: “any thing that a man wears for his defence, or take into his hands, or useth . . . to cast at or strike another.”⁸⁵ Broadly encompassing “weapons of offence, or armour of defence,”⁸⁶ the category of Second Amendment arms includes “weapons that were not specifically designed for military use and were not employed in a military capacity.”⁸⁷

The converse is also true. *Heller* rejects the strongest version of Strong *Miller*, under which the fact that a hand-carried weapon is in common use by military organizations is sufficient to place it within the coverage of the Second Amendment. *Heller* describes such a criterion as “startling” in its implications, “since it would mean that the National Firearms Act’s restrictions on machine-guns . . . might be unconstitutional,”⁸⁸ a prospect which the *Heller* Court regarded as obviously unacceptable.⁸⁹

⁸² *Heller*, 128 S.Ct. at 2814.

⁸³ *Miller*, 307 U.S. at 178.

⁸⁴ See, e.g., *Nunn v. State*, 1 Ga. 243, 251 (1846) (holding that the Second Amendment protects the “right of the whole people . . . to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*”); *Andrews v. State*, 50 Tenn. 165, 193-97 (1871) (Nelson, J., dissenting) (arguing that the right to carry arms for self-defense should not be limited to militia-useful weapons); *State v. Kessler*, 614 P.2d 94, 100 (1980) (interpreting “arms” to “include the hand-carried weapons commonly used by individuals for personal defense”; holding that the possession of a billy club is protected by the Oregon Constitution).

⁸⁵ *Heller*, 128 S.Ct. at 2791 (quoting 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1771)).

⁸⁶ *Id.* (quoting 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 107 (4th ed. 1773)). Note the Court’s express approval of a definition of “arms” that includes not merely weapons, but also “armour of defence.” This suggests that the Constitution would be violated by a federal statute banning private citizens from acquiring modern ballistic body armor, which is routinely worn for defensive purposes by police officers. See Kopel, *supra* note 52 at 1534 (making the same argument under *Miller*). The legal issues raised by such a ban would be similar to the ones raised by the handgun ban in *Heller*: a prohibition of the most common form of a major category of defensive arms—in this case, the category of armor. See *Heller*, 128 S.Ct. at 2818 (invalidating D.C.’s prohibition of handguns).

⁸⁷ *Heller*, 128 S.Ct. at 2791.

⁸⁸ *Id.* at 2815.

⁸⁹ The Court reiterates the point later in its opinion, acknowledging in dictum that under its view, “M-16 rifles and the like . . . may be banned.” *Id.* at 2817. As discussed above, the Court’s apparent decision to exclude machine guns altogether from the category of Second Amendment “arms” should come as no surprise to observers. See *supra* text accompanying notes 54-59 (discussing the role played by the “machine gun specter” in the *Heller* litigation).

In place of such tests, *Heller* “read[s] *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”⁹⁰ The Court adopts *Miller*’s reference to weapons “in common use at the time,” and incorporates this requirement into the Second Amendment test. It justifies the “common use” limitation by describing it as a gloss on a “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”⁹¹ In sum, under

Still, for the sake of clarity, it is worth distinguishing between “the National Firearms Act’s restrictions on machineguns,” which date back to 1934, and 18 U.S.C. § 922(o), which is the ban on private possession of machineguns that were not registered prior to the statute’s effective date of May 19, 1986. A court applying a Strong *Miller* approach to the Second Amendment might indeed compare § 922(o), a flat ban, to the NFA’s extensive regulatory requirements, which include fingerprinting, a background check, a \$200 transfer tax, and approval by local law enforcement before a machine gun can be transferred to a private purchaser. *See generally* 26 U.S.C. § 5801 *et seq.* (National Firearms Act); 26 C.F.R. § 179.1 *et seq.* (implementing regulations).

Indeed, one reason a court applying the Strong *Miller* view might give for invalidating § 922(o) is that crimes committed with machine guns properly registered under the National Firearms Act were already extraordinarily rare prior to the enactment of § 922(o), as the Director of the Bureau of Alcohol, Tobacco, and Firearms repeatedly admitted to Congress at the time. *See* Testimony of Stephen E. Higgins, *Armor Piercing Ammunition and the Criminal Misuse and Availability of Machineguns and Silencers*, Serial No. 153, Hearings before the Subcomm. on Crime, Judiciary Committee, House of Representatives, 98th Cong., 2d Sess. at 116-17 (1986) (stating that “it is very, very rare that it would be a [NFA-] registered machinegun” that would be used in a violent crime); *id.* at 208 (“Registered machineguns which are involved in crimes are so minimal as to be not considered a law enforcement problem.”); STEPHEN P. HALBROOK, *FIREARMS LAW DESKBOOK* § 5:8 at 366-67 (2007 ed.). This would seem to demonstrate that § 922(o) is not a narrowly tailored response to the government’s interest in crime prevention, since “mere” NFA regulation of machine guns is an obvious, significantly less restrictive, and adequate alternative. *Cf. Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (under strict constitutional scrutiny, government must “emplo[y] narrowly tailored measures that further compelling governmental interests”) (internal quotation marks omitted); *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (under intermediate constitutional scrutiny, government cannot use regulatory means that are “substantially broader than necessary to achieve the government’s interest”).

Thus, the Solicitor General’s call for a highly deferential standard of review in his *Heller amicus* brief was explicable. If machine guns were Second Amendment “arms” (as *Miller* arguably suggested), and the Amendment entails that regulations of covered “arms” must receive meaningful scrutiny for narrow tailoring, then § 922(o) would indeed face invalidation. If one further assumes that the Supreme Court would *reject* any interpretation of the Amendment that threatened to produce that result, then gun rights proponents should view the *Heller* Court’s apparent decision to exclude machine guns altogether from the Second Amendment as the least bad realistic outcome. The Court’s choice leaves open the prospect of applying genuinely demanding scrutiny to federal laws and regulations that do infringe on the possession and use of covered “arms.”

⁹⁰ *Heller*, 128 S.Ct. at 2815-16.

⁹¹ *Id.* at 2817 (quoting, *inter alia*, 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 148-49 (1769)). Two features of this reference are interesting. First, Blackstone referred to “dangerous or unusual” weapons. *See* 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, 148 (1769). The *Heller* Court’s choice of the conjunctive rather than the disjunctive appears intended to narrow the class of weapons excluded by this limitation: weapons must be *both* dangerous *and* unusual to fall outside of the Second Amendment’s protection. Second, the English law referred to by Blackstone prohibited only the “carrying” of such dangerous

Heller, the “arms” covered by the Second Amendment include all hand-held weapons in common use at the present time for self-defense and other legitimate purposes, but do not include weapons that are not commonly possessed for lawful purposes.⁹²

What purposes count as lawful? *Heller* conceives the Second Amendment right to arms as focused mainly upon personal purposes, particularly the personal purpose (which also has civic aspects⁹³) of individual defense against criminal violence. The Court acknowledges that “the [Second Amendment] right was codified [] to prevent elimination of the militia[,]” in order to assuage “the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia.”⁹⁴ But although the *political* reasons given for amending the new Constitution to expressly recognize the right to arms may have been largely civic in nature, *what* was codified, the Court argues, was a previously existing, “ancient right” whose “central component”⁹⁵ and “core lawful purpose [was] self-defense”⁹⁶—especially, but not exclusively, the “defense of hearth and home.”⁹⁷

The *Heller* Court has little occasion to discuss other legitimate personal purposes for firearms, such as hunting and target shooting, since the District of Columbia prohibitions challenged in the case so directly implicate the core purpose of self-defense. However, with respect to hunting arms, the Court does list both “self-defense and hunting” as primary purposes for which founding-era Americans valued the right to arms.⁹⁸ Moreover, the central concept that organizes *Heller*’s entire discussion of the Second Amendment is “the right to possess and carry arms in case of confrontation.”⁹⁹ It is not far-fetched to argue that this right should extend to at least some “confrontations” with nonhuman animals. As for target shooting: since the Second Amendment protects the ability to keep and use arms for self-defense, this also seems to entail the right to practice regularly with one’s arms (subject to ordinary safety regulations) so as to be able to defend oneself effectively.¹⁰⁰

weapons, not the possession of them. *Id.* Thus the tradition acknowledged by Blackstone gives only equivocal support to the *Heller* Court’s notion that a corresponding class of “dangerous and unusual” weapons should be excluded from the Second Amendment’s reach.

⁹² See *Heller*, 128 S.Ct. at 2791-92, 2815-17.

⁹³ See *supra* text accompanying notes 3-10.

⁹⁴ *Heller*, 128 S.Ct. at 2801.

⁹⁵ *Id.* (emphasis removed).

⁹⁶ *Id.* at 2818.

⁹⁷ *Id.* at 2821.

⁹⁸ *Id.* at 2801.

⁹⁹ *Id.* at 2797.

¹⁰⁰ See *Andrews v. State*, 50 Tenn. 165, 178 (1871) (concluding that although the Tennessee right to keep arms was motivated by civic purposes, it is an individual right to arms that entails “the right to practice their use, in order to attain to . . . efficiency” with them).

C. *Heller, Tradition, and Modern Originalism*

We may end this discussion by noting a modest irony in *Heller*'s handling of the history of the right to arms. The litigation was marked from beginning to end by a deep, often technical focus on originalist interpretation. Justice Scalia's opinion for the Court applies an "original public meaning" approach to the constitutional text—a variant of originalism that has become orthodox among most conservative and libertarian jurists.¹⁰¹ Vasan Kesavan and Michael Stokes Paulsen summarize this method as follows:

[W]hen we use the term "originalism," it is not in reference to a theory of "original intent" or "original understanding." Rather, it is in reference to the original, non-idiosyncratic meaning of words and phrases in the Constitution: how the words and phrases, and structure (and sometimes even the punctuation marks!) would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and in the political and linguistic community within which they were adopted. It is important to note that on this theory the statements of Framers are no less and no more important than statements of Ratifiers; it is what the text means that counts, not what any particular body or group intended, expected, or understood.¹⁰²

Justice Scalia proceeds clause by clause and sometimes word by word through the text of the Second Amendment,¹⁰³ considering evidence of the generally understood meaning of each element of the text at the time of ratification, then harmonizing the components into a coherent whole. Justice Stevens's dissent uses an approach closer to the "original intent" form of originalism. While Stevens does present evidence of public meaning in opposition to the Court's interpretations,¹⁰⁴ he also criticizes the Court for "giv[ing] short shrift to the

¹⁰¹ See Randy Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (*Heller* "is the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court.").

¹⁰² Vasan Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) (footnotes omitted). In addition to a careful *precis* of the original public meaning approach, Kesavan and Paulsen's article also includes a valuable brief history of the development of modern originalism. See *id.* at 1127-48.

¹⁰³ See, e.g., *Heller*, 128 S.Ct. at 2791-97 (analyzing "keep and bear arms" as a semantic unit within the Second Amendment's operative clause, then breaking that analysis down still further with individual analyses of "keep," "bear," and "arms").

¹⁰⁴ See, e.g., *id.* at 2827-30 (Stevens, J., dissenting) (gathering examples of military uses of "bear arms" from the founding period, and military regulations concerning the "keep[ing]" of arms by militiamen).

drafting history of the Second Amendment”¹⁰⁵ and slighting the framers’ concern to preserve organized state militias as a counterweight to a distrusted standing army.¹⁰⁶ Justice Scalia’s response, in essence, is that the dissenters have misidentified the *means* by which the framers chose to address that concern. The means they chose, Scalia argues, was not the creation of additional structural protections for the organized militia; it was instead the recognition of a “right of the people to keep and bear arms.” This language had a recognizable public meaning, rooted in the English right to arms and Blackstone, and it was strongly concerned with the keeping of private arms for self-defense. That, says Scalia, is the public meaning the Court should enforce.¹⁰⁷

Both Scalia’s and Stevens’s approaches are originalist because they focus attention upon one particular temporal context, the *context of enactment*, in interpreting the Second Amendment’s meaning. One important difference between the two is that unlike an intent-based approach, Scalia’s public meaning-based approach allows the interpreter to consider evidence of usage in periods before and after the context of enactment, since these too can be probative evidence of original public meaning.¹⁰⁸ Indeed, major portions of Justice Scalia’s *Heller* opinion are taken up with consideration of pre-enactment English sources and—especially—of post-enactment, nineteenth-century American sources that confirm *Heller*’s construction of the right to arms.¹⁰⁹ But for the adherent of originalism in its contemporary, relatively technical forms, these other periods are ultimately relevant only as indirect evidence of meaning at the time of enactment, which remains the dispositive slice of time in determining the text’s enforceable meaning.

The irony, then, is that despite this self-conscious modern originalism, the *Heller* opinion is at least equally effective if it is viewed instead as an example of an older, less formalized type of historical inquiry into legal meaning. This older approach is Burkean: it allows *tradition*, the aggregated perspectives

¹⁰⁵ *Id.* at 2836; *see id.* at 2831-36 (discussing drafting history).

¹⁰⁶ *Id.* at 2836 (“The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States’ militias as the means by which to guard against that danger.”).

¹⁰⁷ Justice Scalia thus chides Justice Breyer for using the founding-era concern for standing armies to downplay the importance of personal self-defense to the Second Amendment right. He reasons that concerns about a federal standing army may explain the political fact of “the right’s codification,” but clarifies that the motives for codification cannot alter the substance of “the right itself.” *Id.* at 2801.

¹⁰⁸ *See id.* at 2805 (approving “the examination of a variety of legal and other sources to determine the *public understanding* of a legal text in the period after its enactment or ratification”); Kesavan and Paulsen, *supra* note 102 at 1164-80 (discussing the originalist use of post-enactment sources as “second-best sources” of original public meaning); *id.* at 1148-49 n.128 (discussing the originalist use of pre-enactment sources as “second-best sources” of original public meaning).

¹⁰⁹ *See Heller*, 128 S.Ct. at 2798-99 (discussing the seventeenth century English right to arms; Blackstone’s *Commentaries*); *id.* at 2804-09 (discussing antebellum nineteenth-century sources); *id.* at 2809-12 (discussing post-Civil War nineteenth-century sources).

of successive periods of time, to claim weight in settling the meaning of the text.¹¹⁰ In the parts of their respective opinions dealing narrowly with the late eighteenth-century American context of the Second Amendment's enactment, Justice Stevens roughly matches Justice Scalia's scholarship and argumentation. The seventeenth-century English evidence, though somewhat limited, favors the majority more clearly. But when the focus shifts to the nineteenth century, the body of case law¹¹¹ and constitutional commentary¹¹² mustered by the Court dramatically outweighs the evidence for Justice Stevens's position.¹¹³

It could be said, loosely but not unfairly, that *Heller* recognizes a nineteenth-century right to arms. This does not suggest that *Heller*'s understanding is incompatible with evidence of the late eighteenth-century understanding of the right; rather, it means that the conception of the right to arms adopted in *Heller* finds its clearest and most typical expressions in sources from the century that followed the American founding. A typical state supreme court justice circa 1870 would likely have found *Heller*'s individual, personal purpose-centered conception of the right to arms to be unexceptionable.¹¹⁴ A typical federal circuit or district court judge circa 1970 might well have had the same reaction to Justice Stevens's narrow, civic-focused interpretation of the right.¹¹⁵

D. Summary

To summarize, *Heller*'s conception of the right to arms involves a shift away from *Miller*'s holding that the *civic* purposes of gun ownership, as re-

¹¹⁰ For one modern manifesto in support of this interpretive approach, see Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

¹¹¹ Important nineteenth-century decisions recognizing an individual right to defensive arms in state and/or federal constitutions, and cited by the Court in *Heller*, include *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C. Pa. 1833) (Baldwin, J.), cited in *Heller*, 128 S.Ct. at 2808; *Bliss v. Commonwealth*, 12 Ky. 90 (1822), cited, 128 S.Ct. at 2794 n.9; *Nunn v. State*, 1 Ga. 243 (1846), cited, 128 S.Ct. at 2794 n.9, 2809; *State v. Chandler*, 5 La. Ann. 489 (1850), cited, 128 S.Ct. at 2794 n.9, 2809; and *Andrews v. State*, 50 Tenn. 165 (1871), cited, 128 S.Ct. at 2794 n.9, 2806, 2809. See Kopel, *supra* note 52 at 1415-33 (showing that the dominant state judicial understanding of the right to arms in nineteenth-century America viewed it as an individual right that protected arms for self-defense and was not conditioned on militia service).

¹¹² See *Heller*, 128 S.Ct. at 2805-07 (discussing the views of antebellum nineteenth-century commentators such as St. George Tucker, Joseph Story, and William Rawle); *id.* at 2811-12 (discussing post-Civil War commentators such as Thomas Cooley, James Kent, and others).

¹¹³ Indeed, Justice Stevens's treatment of the nineteenth-century evidence is almost totally reactive, limited to suggesting ambiguities in the views of some commentators cited by the Court and downplaying the relevance of post-enactment sources in general to originalist inquiry. See *id.* at 2839-42 (Stevens, J., dissenting).

¹¹⁴ See generally Kopel, *supra* note 52.

¹¹⁵ See Denning, *supra* note 26 at 999 (contending that most post-New Deal lower federal court decisions in the twentieth century "avoid[ed] construing the Second Amendment to contain anything resembling a right under which an individual might make a colorable claim.").

flected in the traditional functions of the militia, must be reflected in Second Amendment doctrine at the retail level, the level of crafting decision rules for specific situations. Drawing on the English right to arms, and heavily bolstered by nineteenth-century sources, *Heller* substitutes a Second Amendment right that is structured mainly by the *personal* purposes of gun ownership, such as self-defense. The Second Amendment's connection to the civic purposes of the right to arms is not abandoned, but it is understood to operate mainly at the wholesale level: a people with a vigorous, legitimate gun culture, whose members keep and use their own private arms, will be better able to act as a popular militia, whether such action occurs in the capacity of an organized or an unorganized militia.

Having explicated *Heller's* reasoning and its departures from *Miller*, it is appropriate to begin thinking about the potential consequences of this shift for the gun rights debate and firearms policy in general.

IV. *HELLER'S* IMPLICATIONS FOR THE FUTURE OF THE RIGHT TO ARMS

A. *Advantages*¹¹⁶

1. Popular Support

Heller's personal purpose-centered approach to the Second Amendment corresponds to a concrete, practical reason that countless Americans—particularly handgun owners—find for keeping firearms today.¹¹⁷ By adopting such an approach, the Court acknowledged the broad popular support enjoyed by the right to armed self-defense of life and limb, as reflected in state constitutions¹¹⁸ and in numerous state legislative developments of recent decades.¹¹⁹

¹¹⁶ For the sake of organization, I classify as “advantages” of *Heller's* approach not only relatively uncontroversial strengths such as popular support, but also aspects of that approach that are likely to lead to greater protection of individuals' right to arms. My classification of “disadvantages” follows similar lines. Readers will, of course, supply their own normative evaluations here.

¹¹⁷ One opinion survey found that sixty-five percent of Americans who own handguns acquired them wholly or partially for self-protection. National Opinion Research Center, National Gun Policy Survey (1998), *cited by* ANDREW J. MCCLURG, DAVID B. KOPEL, AND BRANNON W. DENNING, *GUN CONTROL & GUN RIGHTS: A READER AND GUIDE* 1-2 (2002)

¹¹⁸ See Nicholas J. Johnson, *A Second Amendment Moment?: The Constitutional Politics of Gun Control*, 71 *BROOK. L. REV.* 715, 735-45 (2005) (detailing the ways that “seventeen states . . . have amended their constitutions to enshrine an individual right to arms in language beyond cavil” since the beginning of the twentieth century).

¹¹⁹ I have in mind particularly the dramatic growth of “shall issue” concealed carry statutes, which allow all adults who pass a criminal background check and meet specified training requirements to acquire permits to carry a concealed handgun for self-defense. See *id.* at 747-53 (noting that as of 2005, 35 states recognized either shall issue concealed carry or, in two cases, the more permissive “Vermont-style” carry under which no license is required to carry a lawfully possessed handgun). Since Professor Johnson's article was published, Kansas and Nebraska have also adopted shall issue statutes, bringing the total number of “right to carry” states to thirty-

2. The Likelihood of Incorporation

Heller's conception of the right to arms also fits naturally with the view of that right held by many of the framers of the Fourteenth Amendment. Accordingly, *Heller* supports the conclusion that the Second Amendment should be deemed to be incorporated by the Fourteenth Amendment, rendering its protections applicable against state and local governments as well as the federal government. Many Reconstruction Republicans stressed the importance of the right to arms as a right of American citizenship that could not be infringed by the states.¹²⁰ They sought not to empower militias, but to empower African-American freedmen and their supporters in the South to resist terrorism and oppression at the hands of resurgent forces of the white supremacy movement.¹²¹ The 1868 conception of the right to arms "move[d] Blackstone to the center" and "emphasized the personal right of all free citizens—white and black, male and female, northern and southern, visitor and resident—to own guns for self-protection."¹²² While Professor Amar, in these last-quoted remarks, was actually describing the context of the Fourteenth Amendment's ratification, one could easily use the same words to summarize the view of the Second Amendment adopted by the Supreme Court in *Heller*. The litigants in *Heller* limited their discussion, somewhat artificially, to sources from the Framing era, rather than Reconstruction,¹²³ but the right that has emerged from the case has close affinities with the Reconstructors' vision of the right to arms.

Indeed, although *Heller* does not decide the issue of incorporation,¹²⁴ the opinion gives careful and sympathetic attention to the context surrounding the enactment of the Fourteenth Amendment and early civil rights legislation after the Civil War.¹²⁵ The Court states that it considers these late nineteenth-century sources simply in order to further its originalist inquiry by shedding indirect light, from a post-enactment perspective, on "the origins and continuing

seven. Posting of David Kopel to the Volokh Conspiracy, <http://volokh.com/posts/1143873304.shtml> (Apr. 1, 2006, 24:35 CST). Johnson and Kopel also count three states with liberally administered discretionary permit schemes as "shall issue." *Id.*

¹²⁰ MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 35, 61-64 (1986).

¹²¹ See, e.g., AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 390-91 (2005).

¹²² AKHIL REED AMAR, THE BILL OF RIGHTS 262 (1998).

¹²³ *Heller*'s lawyers had obvious incentives to avoid complicating the case with the additional issue of incorporation. The District of Columbia may also be happy to leave out the Fourteenth Amendment and its surrounding history because the nineteenth-century conception of the right to arms is so unfavorable to the merits of the District's case. The Fourteenth Amendment context was discussed in some of the *amicus curiae* briefing, principally in the brief of the Institute for Justice. See generally Brief of the Institute for Justice as *Amicus Curiae* in Support of Respondent, District of Columbia v. *Heller* (No. 07-290), available at 2008 WL 383529 (Feb. 11, 2008).

¹²⁴ *Heller*, 128 S.Ct. at 2813 n.23 (stating that the issue is "not presented by this case").

¹²⁵ *Id.* at 2809-11.

significance of the [Second] Amendment.”¹²⁶ In doing so, however, the Court discusses Reconstruction-era opposition to the disarmament of freedmen, opposition which often took the form of claims that disarmament violated the Second Amendment right to defensive arms.¹²⁷ The Court notes, almost nonchalantly, that some members of the Congress that ratified the Fourteenth Amendment believed that it would require the states to protect every citizen’s “right to bear arms for the defense of himself and family and his homestead.”¹²⁸ Much of this discussion is so obviously pertinent to the issue of incorporation that it appears tailor-made to be invoked in a future opinion incorporating the right to arms against the states.

Even without this portion of the opinion, *Heller*’s Blackstonian, human rights-centered conception of the Second Amendment would be difficult to avoid incorporating. After all, under the Fourteenth Amendment “selective incorporation” framework developed in the mid-20th century, a right that (1) is expressly included in the Bill of Rights,¹²⁹ (2) derives from an English predecessor,¹³⁰ (3) is widely protected by state constitutions,¹³¹ and (4) “continues to receive strong support” today,¹³² is likely to be held sufficiently fundamental to require incorporation via the Due Process Clause of the Fourteenth Amendment. The right to arms satisfies every one of these factors, and, as previously discussed, can claim a strong grounding in the original meaning of the Fourteenth Amendment.¹³³ The most plausible textual argument against Second Amend-

¹²⁶ *Id.* at 2810. The Court acknowledges that “[s]ince th[e]se discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.” *Id.*

¹²⁷ *See id.* at 2810 (citing Congressional reports and other materials from the late 1860s supporting the view that “all men, without distinction of color, have the right to keep and bear arms to defend their homes, families, or themselves.”); Freedmen’s Bureau Act, § 14, 14 STAT. 176-77 (July 16, 1866) (providing that “the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery”).

¹²⁸ *Id.* at 2811 (quoting Senator Samuel Pomeroy, CONG. GLOBE, 39th Cong., 1st Sess., 1182 (1866)).

¹²⁹ *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (recognizing that, in deciding how the Fourteenth Amendment limits the states, the Supreme Court “has looked increasingly to the Bill of Rights for guidance[.]” incorporating “many of . . . the first eight Amendments”).

¹³⁰ *Id.* at 149-50 n.14 (emphasizing that incorporation depends on whether a guarantee “is necessary to an *Anglo-American* regime of ordered liberty”) (emphasis added); *id.* at 151-52 (citing Blackstone for the importance of the jury trial right at English law).

¹³¹ *Id.* at 153.

¹³² *Id.* at 154.

¹³³ Compare Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Due Process and Privileges or Immunities Clauses*, 72 MO. L. REV. 1, 51, 56-71 (2007) (arguing that the right to arms easily satisfies the due process selective incorporation criteria of *Duncan*) with David A. Lieber, Comment, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment From the Court’s Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079 (2005) (arguing that the right to arms should not be incorporated under *Duncan*).

ment incorporation would contend that the 1791 right to arms was a federalism-inspired provision, specifically concerned with protecting state militias in order to deter the newly created federal government from descending into tyranny.¹³⁴ But *Heller's* reading of the Amendment, stressing personal purposes and the inherent right of self-defense, weakens its link to a federal-state balance of power, and thereby removes this objection to incorporation. If all this were somehow not enough to justify Second Amendment incorporation, one may add the fact that the states themselves have urged it. The *Heller amicus* briefing afforded the extraordinary spectacle of thirty-one current attorneys general publicly calling for an individual right to arms to be incorporated against their states.¹³⁵

3. Protection of Common Defensive Weaponry

From a gun rights supporter's point of view, *Heller's* private-rights conception has further advantages, since it extends constitutional protection to firearms that do not satisfy the "militia utility" test of *Strong Miller*, yet are still highly valued by Americans, such as sporting shotguns, or small handguns that are useful for licensed concealed carry (as distinct from the full-sized "service"

Lieber acknowledges that the right to arms for self-defense has English antecedents, is recognized by the great majority of state constitutions, and enjoys wide popular support. *Id.* at 1093, 1117-22. These concessions impair the persuasiveness of his thesis that courts should deem the right to arms to fail *Duncan's* selective incorporation test. In addition, Lieber nowhere addresses the Reconstruction-era evidence suggesting that the Fourteenth Amendment's original meaning included an individual right to arms.

¹³⁴ See *Nordyke v. King*, 319 F.3d 1185, 1193 n. 3 (9th Cir. 2003) (Gould, J., concurring) ("To the extent that the Second Amendment was aimed at maintaining an armed citizenry and local power as a check against the possibility of federal tyranny, that purpose is not directly applicable to the states, and a Second Amendment restraint on the states in this sense is not implicit to the concept of ordered liberty.").

The Second Amendment's reference to the "security of a free state" might also be taken to reflect a narrow focus on federal-state relations, and thus to resist incorporation. However, recent scholarship rebuts this view, suggesting, after a review of historic sources, that the original public meaning of "a free state" in the Second Amendment is simply "a nondespotic country." Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1, 27 (2007), cited in *Heller*, 128 S.Ct. at 2800. This meaning creates no special obstacle to incorporation.

¹³⁵ Brief of Texas et al. (Thirty-One States) as *Amici Curiae* in Support of Respondent, *District of Columbia v. Heller* (No. 07-290), available at 2008 WL 383529 (Feb. 4, 2008), at 23 n.6 ("[T]he right to keep and bear arms is fundamental and so is properly subject to incorporation").

This does not necessarily mean that incorporation must take place "jot for jot," with state and local gun laws being subject to precisely the same limitations as federal statutes or regulations that presume to fix gun policy for the entire nation. Nor does it exclude a different type of federalism argument, which stresses that national regulation is particularly inappropriate for divisive cultural issues such as gun control. I consider an argument of this sort, and the support it lends to a "partial incorporation" approach to the right to arms, under which courts should apply strict scrutiny to national gun restrictions, in Michael P. O'Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201 (2008).

pistols that are most likely to meet Strong *Miller's* criteria). In fact, after *Heller*, it appears indisputable that the “arms” protected by the Second Amendment include common defensive weapons other than firearms, such as knives and pepper spray.¹³⁶

4. Protection of the Right to Carry Arms

In addition, *Heller* provides potent arguments that the Second Amendment protects a meaningful right to *carry* arms regularly for defense—a right whose exercise can be regulated, but not denied, by the government. It is true that this aspect of the Second Amendment right to arms was not fully explored in *Heller*. The content of the challenged D.C. laws focused on the keeping and use of arms in the home, not carrying arms abroad, so the Court’s legal analysis displays a similar emphasis. But the central passages in *Heller* that characterize the right to arms strongly suggest that the right extends beyond the home.

First, the Court glossed the Second Amendment’s right to “bear arms” provision by adapting a reading that Justice Ruth Bader Ginsburg had proposed in a 1998 statutory interpretation case: to bear arms is to “wear, bear, or carry [them] . . . upon the person or in the clothing or a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.”¹³⁷ Once one replaces this passage’s morally ambiguous reference to “offensive or defensive action” with a strictly defensive attitude, then Justice Ginsburg’s language reads like a literal description of the practice of lawful concealed carry, as engaged in by millions of Americans in the forty-eight states that authorize the carrying of concealed handguns by qualified citizens.¹³⁸ Similarly, the Court sums up its extensive analysis of the Second Amendment’s operative clause with the intriguing statement that the Second Amendment “guarantee[s] the individual the right to *possess and carry weapons in case of confrontation*.”¹³⁹ Again, this description of the right to bear arms

¹³⁶ See *supra* text accompanying notes 82 to 87 (discussing *Heller's* extension of Second Amendment protection to a wide range of personal weapons usable for defense).

¹³⁷ *Heller*, 128 S.Ct. at 2793 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting) (quoting BLACK’S LAW DICTIONARY 214 (6th ed. 1998))).

¹³⁸ In addition to the roughly three dozen states with “shall issue” carry laws that require issuance of a permit to all citizens meeting specified requirements, all of the remaining states (except Illinois and Wisconsin) have discretionary permit schemes that allow local officials to issue carry permits to individuals. See *supra* note 115 (discussing current concealed carry laws).

¹³⁹ *Heller*, 128 S.Ct. at 2797 (emphasis added). Justice Scalia’s reference to the concept of “confrontation” in the italicized passage is exceedingly suggestive. As the dissenters point out, this way of expressing the scope of the Second Amendment right is original to the *Heller* opinion. Cf. *id.* at 2828 (Stevens, J., dissenting) (“No party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth.”).

It is tempting to conclude that Justice Scalia is subtly connecting the Second Amendment right with another major part of his constitutional legacy, which involves a different constitutional guarantee that also ensures that Americans will retain the resources for effective “confrontation” in defense of their lives and liberty—namely, the Confrontation Clause of the Sixth Amendment,

reads like a near-idiomatic description of what countless lawful concealed carriers do with their defensive weapons each day.

It is true that the Court elsewhere observes that most nineteenth-century courts held that “prohibitions on carrying concealed weapons were lawful” under the state and/or federal constitutions.¹⁴⁰ But the context of this statement is crucial: Far from negating constitutional protection for weapons carrying, the nineteenth-century decisions that the Court relies upon in this passage presume that the right to “bear arms” *does* require government to allow peaceable citizens to carry defensive weapons in some manner. As the Court itself points out (indicating that it was quite aware of the limited nature of the approval of concealed carry bans in the cases it chose to cite), the working assumption of these courts was that government may regulate the right to carry arms—by requiring, for example, that arms be carried openly, in a visible belt holster, rather than concealed. However, government may not *destroy* the right through regulation by prohibiting both open and concealed carry.¹⁴¹

Thus, the most natural reading of *Heller*’s discussion of weapons carrying is that the Second Amendment right to “bear arms” does include an individual right to carry weapons for defense outside of the home, which is subject to the same, limited types of permissible regulation reflected in the nineteenth-century cases. Government may regulate the right by prohibiting a particular

which protects a defendant’s right to face-to-face cross-examination of witnesses in criminal trials. *See* U.S. CONST. amend. vi (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”). The Supreme Court’s understanding of this provision has been almost completely revised in the last five years, in a series of originalist opinions that were all authored by Justice Scalia. *See Crawford v. Washington*, 541 U.S. 36 (2004) (holding that the Confrontation Clause categorically bars the use of unconfessed testimonial hearsay by the government in criminal trials), *overruling* *Ohio v. Roberts*, 448 U.S. 56 (1980); *Davis v. Washington*, 547 U.S. 813 (2006) (applying *Crawford* to exclude a statement to police investigators but admit a statement to a 911 emergency operator; holding that the Confrontation Clause does not extend to “nontestimonial” statements); *Giles v. California*, 128 S.Ct. 2678 (2008) (holding that a defendant cannot forfeit, through his wrongdoing, his Confrontation Clause right to cross-examine a witness, unless the defendant intended to render the witness unavailable to testify at trial).

In a future article, I hope to shed light on the intellectual connections between Sixth Amendment confrontation under *Crawford* and Second Amendment confrontation under *Heller*.

¹⁴⁰ *Heller*, 128 S.Ct. at 2816 (citing *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850); *Nunn v. State*, 1 Ga. 243, 251 (1846)).

¹⁴¹ *Heller*, 128 S.Ct. at 2818; *see* *State v. Reid*, 1 Ala. 612, 616-17 (1840) (holding that a regulation of carrying arms is invalid if it “amounts to a destruction of the right,” or renders the carried arms useless for self-defense); *Chandler*, 5 La. Ann. at 490 (concluding that Second Amendment grants the right “to carry arms . . . in full open view, which places men upon an equality,” and “is calculated to incite men to a manly and noble defense of themselves, if necessary,” but that concealed carry can be banned) (internal quotation marks omitted); *Nunn*, 1 Ga. at 251 (invalidating ban on open carry as violative of the Second Amendment; upholding a ban on concealed carry); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 187 (1871) (holding that, as applied to handguns with militia utility, a complete ban on both open and concealed carry of handguns would violate Second Amendment and state constitution); *Kopel*, *supra* note 52 at 1409-35.

mode of carry (and by prohibiting carry in “sensitive places such as schools and government buildings,”¹⁴²) but it cannot ban concealed carry unless it recognizes reasonably broad open carry rights, or vice versa. If the Second Amendment is incorporated against the states (as many observers expect), then the practical effect of these limitations is fairly easy to predict. The nineteenth century tended to view open carry of weapons as more socially acceptable than concealed carry, but the reverse is true in the urbanized twenty-first century. Faced with the alternatives of either adopting a “shall issue” concealed carry permit system like the great majority of American states, or having to recognize a meaningful right to carry weapons *openly*, even gun-restrictive “holdout” jurisdictions are likely to choose the concealed carry approach. Thus, while it is technically accurate to say that the Second Amendment leaves governments with the option of prohibiting concealed carry, nevertheless, a possible medium-term consequence of *Heller* (assuming the Second Amendment is incorporated) is the nationalization of permit-based, shall-issue concealed carry.

B. *Disadvantages*

1. Insufficient Attention to Civic Purposes?

On the other hand, *Heller*'s personal rights-centered conception also has identifiable disadvantages. The first has to do with interpretive fidelity. There is some force to the dissenters' criticism that *Heller* gives insufficient weight to the civic purposes of the Second Amendment. These purposes are not only expressly asserted in the Amendment's prefatory clause, but were the most discussed aspect of arms ownership in the Framing era.¹⁴³ It is worth being clear on the point: There are powerful originalist and textualist arguments for adopting a conception of the Second Amendment right to arms that *includes* personal purposes such as self-defense, and the *Heller* Court showcases these arguments. Indeed, there is evidence that 18th century jurists and political thinkers viewed private self-defense against crime and public self-defense against tyranny as inseparable: as two sides of the same coin, reflecting the same liberal principles.¹⁴⁴ But a conception that exclusively, or near-exclusively, privileges personal purposes for arms ownership is thereby more vulnerable to originalist and textualist criticism, for neglecting the civic purposes that the Framing generation

¹⁴² *Heller*, 128 S.Ct. at 2817.

¹⁴³ See, e.g., THE FEDERALIST No. 46 (James Madison) (Bantam Classic, 1982) (emphasizing the ability of Americans to resist overreaching by the federal government through both the state-administered militia system and their privately owned arms); see also THE DECLARATION OF INDEPENDENCE (U.S. 1776) (emphasizing the natural right to alter or abolish despotic governments).

¹⁴⁴ See Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87 (1992).

believed that citizen arms could serve.¹⁴⁵ A *Heller* opinion that (counterfactually) had endorsed the Strong *Miller* interpretation of the Second Amendment, in which the scope of covered “arms” is directly influenced by the civic purposes mentioned in the prefatory clause, could have deflected such criticism with ease.

2. Loss of Pro-Right Arguments Based on Civic Purposes

For related reasons, a decision downplaying *Miller* and the militia purpose removes some resources for a constitutional challenge to controversial legislative measures such as a renewal of the expired federal “assault weapons” ban.¹⁴⁶ Many of the self-loading firearms formerly covered by the ban would have a uniquely powerful claim to Second Amendment protection under the Strong *Miller* approach. As less destructive, semi-automatic versions of common light military weapons, with similar appearance and controls, they are precisely the arms one would want citizens to own and practice with in order to function as an effective militia.¹⁴⁷ Nevertheless, the impact of this shift should not be overstated. Potent arguments remain for protecting many of these arms under *Heller*’s defense-centered Second Amendment, as I discuss next.

V. CONSTITUTIONAL CONSTRUCTION AND THE RIGHT TO DEFENSIVE ARMS

Loosening the connection between civic purposes and the constitutional right to arms creates two potential puzzles for the courts that must police the boundaries of the right recognized in *Heller*.

The first is the question of objective standards. Once it is acknowledged that Americans have a right to keep firearms for self-defense, how does one determine which firearms are protected? Technological evolution adds to the perplexity here. At one extreme, someone might argue that the right to arms for defense is adequately respected as long as Americans can still possess *some* weapons that give their possessor a significant advantage in self-protection

¹⁴⁵ See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 199 (2008) (“The [*Heller*] majority insists that the Second Amendment doesn’t protect weapons that are most useful in military service, even if it means that the right to [keep and] bear arms can no longer be exercised for the republican purpose of preventing tyranny that the text specifies”) (internal quotation marks omitted).

¹⁴⁶ Chapter XI, Subchapter A of the Violent Crime Control and Law Enforcement Act of 1994 (formerly codified at 18 U.S.C. §§ 921(a)(30), 922(v), (w)) banned the manufacture, for sale to private citizens, of defined “semiautomatic assault weapons” and large capacity magazines. The ban expired by its terms in 2004. At the same time, there are continuing efforts in Congress to reenact a similar law. See, e.g., Assault Weapons Ban Reauthorization Act of 2008, H.R. 6257, 110th Cong. (2008), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.06257>: (last accessed Nov. 26, 2008).

¹⁴⁷ This argument is uncompromisingly presented in Garcia, *supra* note 46.

compared to an unarmed person. Under this view, sweeping regulation of common firearms might be constitutional. After all, even a single-shot rifle or an obsolete, single-action revolver confers a meaningful advantage over the state of weaponlessness. Most dispassionate observers would probably agree that if a constitutional right to defensive firearms is to be recognized at all, then it must protect more than the weapons of the mid-nineteenth century. How much is enough?

To the *Heller* Court's credit, its approval (in a modified form) of *Miller*'s "common use" criterion for Second Amendment arms responds to the problem of objective standards, as I discuss below. But this leads to a second difficulty: since restrictive firearms legislation influences which firearms will be found "in common use" by law-abiding private citizens, a constitutional rule that uses the presence or absence of particular arms in common use as a gauge of the constitutionality of firearms legislation runs a serious risk of harmful circularity. Constitutional theorists will recognize these as problems of constitutional *construction*, of the sort analyzed in recent years by Randy Barnett and Keith Whittington.¹⁴⁸

A. *"Common Use" and the Problem of New Weapons: The Lever-Action Rifle*

Consider the Henry rifle.¹⁴⁹ Developed on the eve of the U.S. Civil War, Benjamin Tyler Henry's lever-action rifle was one of the first successful repeating rifles to use self-contained metallic cartridge ammunition. It was a startling weapon: At a time when most infantry troops were issued single-shot, muzzle loading rifles and muskets, the Henry's tubular magazine held a full fifteen cartridges of intermediate-powered .44 rimfire ammunition. The Henry rifle, and its similar contemporary, the .56 Spencer lever-action rifle, represented an enormous increase in personal firepower: the user could fire the rifle, then immediately eject the spent casing and chamber another round, by merely working the lever assembly that was conveniently attached to the rifle's trigger guard.¹⁵⁰ More than ten thousand Henrys were produced during the war. With

¹⁴⁸ Barnett suggests that "when the abstract terms of the Constitution do not directly resolve a particular dispute, some construction (as opposed to interpretation) of constitutional meaning is needed. . . . [C]onstrutions operate 'where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules.'" RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 123 (2004) (quoting KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 5 (1999)).

¹⁴⁹ The following historical discussion draws heavily upon R.L. WILSON, *WINCHESTER: AN AMERICAN LEGEND: THE OFFICIAL HISTORY OF WINCHESTER FIREARMS AND AMMUNITION FROM 1849 TO THE PRESENT* 10-39 (2005).

¹⁵⁰ U.S. NATIONAL PARK SERVICE, *MANUAL FOR THE HANDLING AND FIRING OF THE HENRY REPEATING RIFLE IN INTERPRETIVE DEMONSTRATIONS* 3, available at <http://www.nps.gov/stri/upload/Henry%20Manual%20of%20Arms.pdf> (last visited Oct. 18, 2008).

the arrival of peace, the Henry entered production (after a few design improvements) as the Winchester 1866 rifle.¹⁵¹

Lever-action repeating rifles became widely popular in the course of the late nineteenth century for self-defense, hunting, and law enforcement. The 1890s saw another technical innovation: the introduction of modern smokeless gunpowder, which enabled the development of rifle ammunition with much greater velocity and penetration than previous cartridges, which had used black powder as a propellant.¹⁵² In the 1890s, gunmakers Winchester and Marlin introduced compact lever-action repeating rifles chambered for a smokeless cartridge (the .30 WCF or .30-30 Winchester) that dwarfed the power of the original Henry rifle's ammunition.¹⁵³ Winchester's Model 94 and Marlin's Model 1893 (later revised as the Model 36 and Model 336) went on to become mainstays of the American gun culture. By the time the Winchester Model 94 ceased production in 2006, more than six million rifles had been sold.¹⁵⁴ Marlin's .30-30 lever rifle remains in production to this day, with over four million sold.¹⁵⁵

What light do the introduction and eventual ubiquity of the lever-action repeating rifle shed on the right to defensive arms recognized in *Heller*? The first thing to note is that these rifles unquestionably fall within the core of Second Amendment protection under *Heller*. Given the choice, Americans have opted to acquire them in staggering numbers that place them among the most common American firearms of any kind. They are widely kept for self-defense, hunting, and recreation. They are, in short, quintessential "weapons typically possessed by law-abiding citizens for lawful purposes," as Justice Scalia expressed the contours of the Second Amendment's protection in *Heller*.¹⁵⁶

The second thing to note is that, despite their old-fashioned, walnut-stocked appearance,¹⁵⁷ the Winchester and Marlin guns are competent, functional arms. When introduced, they represented major improvements in firepower and/or ballistic effectiveness. Suppose, counterfactually, that a nineteenth-century Congress had sought to ban private citizens from possessing

¹⁵¹ WILSON, *supra* note 149 at 11-14, 22.

¹⁵² *Id.* at 96-99.

¹⁵³ See FRANK C. BARNES, CARTRIDGES OF THE WORLD 56, 485 (Stan Skinner ed., 11th ed. 2006) (discussing the .30-30 Winchester and .44 Henry cartridges and the rifles chambered for them).

¹⁵⁴ Stephen Hunter, *Out With a Bang: The Loss of the Classic Winchester is Loaded with Symbolism*, WASH. POST, Jan. 20, 2006, at C1.

¹⁵⁵ See Carolee A. Boyles, *SHOT Show 2005: The Shooting, Hunting, Outdoor Trade Show and Conference*, SHOOTING INDUSTRY January 2005 (noting Marlin Firearms Co.'s commemoration of its manufacture of the four millionth Model 336 rifle).

¹⁵⁶ *Heller*, 128 S.Ct. 2783, 2816 (2008).

¹⁵⁷ Lever-action rifles are widely used in the self-consciously nostalgic sport of Cowboy Action Shooting, in which participants wear Western clothing and shoot cowboy-themed target courses using firearms of late nineteenth-century design. See generally ABIGAIL A. KOHN, SHOOTERS: MYTHS AND REALITIES OF AMERICA'S GUN CULTURES 48-53 (2004) (describing the sport and its participants).

them.¹⁵⁸ And suppose *Heller* was on the books at the time. If late nineteenth-century American judges had shared the attitudes of many twentieth-century federal judges, it is not hard to imagine them using a grudging application of *Heller* to uphold these bans against a Second Amendment challenge. The resulting opinions would remark with alarm at the high ammunition capacity and rapid firepower of the new Henry rifles, and their rise to prominence on the military battlefield. Surely, they might reason, these new weapons of war qualify as “dangerous and unusual,” and therefore (arguably) fall outside of the protection of the Second Amendment, as construed in *Heller*.¹⁵⁹ After all, the rifles are certainly “dangerous”: all firearms are so; besides, these rifles include technical innovations that increase their effectiveness. And at the time our hypothetical courts are adjudicating this Second Amendment claim, the rifles are indeed “unusual” in private hands, since they have not long been in production.

Such decisions would allow legislative bans on repeating rifles to remain in force, and would therefore stifle the growth of any legitimate culture of private ownership of these arms. We might expect a culture to emerge in which Winchester rifles were found solely in the hands of “armed criminals and armed police.”¹⁶⁰

This result should be considered a *reductio ad absurdum*. However *Heller*’s “in common use” criterion is to be applied in the future, it cannot properly be applied in the simplistic fashion imagined above. All new firearms are rare in private hands (“unusual”) at some point, simply because they are new. Yet, new firearms, too, are presumptively protected by the Second Amendment. *Heller* is explicit on this point:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 35-36 (2001), the Second Amendment ex-

¹⁵⁸ The hypothetical is doubly counterfactual, of course, since the enumerated legislative powers of the federal government were not then understood to authorize it to enact police-power legislation of the sort imagined. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *United States v. Lopez*, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring).

¹⁵⁹ Cf. *Heller*, 128 S.Ct. at 2817 (holding that Second Amendment protection is limited to weapons “in common use at the time,” and that this limitation derives from “the historical tradition of prohibiting the carrying of dangerous and unusual weapons”) (internal quotation marks omitted).

¹⁶⁰ David B. Kopel, Paul Gallant & Joanne D. Eisen, 2 J.L. ECON & POL’Y 417, 424 (2006) (reviewing JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE (2002) (describing the culture that emerged in Great Britain after decades of increasingly restrictive gun legislation and regulation virtually eliminated the legitimate gun culture)).

tends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.¹⁶¹

The cases cited by the Court in this passage deal with internet communications (*Reno*), and an infrared thermal imaging device (*Kyllo*). The Court's chosen illustrations thus do more than just detach the Second Amendment from the flintlock era; they suggest that individual armed Americans are ordinarily entitled to claim the full benefit of contemporary technological innovations in defensive weaponry.

B. The Circularity Problem

An unduly mechanical application of "common use" as a criterion of Second Amendment protection makes the criterion circular. Compare the "common use" criterion with the subjective prong of the "reasonable expectation of privacy" criterion used to evaluate intrusions under the Fourth Amendment.¹⁶²

If the Second Amendment's "common use" criterion is applied in a way that focuses exclusively on private citizens, it incurs a structural flaw similar to (and in some respects worse than) the one that impairs the Fourth Amendment "reasonable expectation of privacy" criterion. Both criteria look to attitudes expressed in citizens' conduct (the appropriateness of acquiring a particular type of arm; the belief that a particular location is private) to determine the validity of laws impinging on that conduct. But the very existence, at a given time, of positive laws that authorize the government to interfere with the conduct in question (statutes banning private possession of that type of arm; court decisions declining to find a reasonable expectation of privacy in a particular location) will naturally deter individuals from expressing the relevant attitudes (owning the statutorily prohibited arms; holding a subjective expectation that such a location is private). Yet the law was supposed to be based (in whole or part) on the attitudes expressed, not the other way around.¹⁶³ The characteristic flaw of such a circular criterion for protecting a constitutional right is *under-protectiveness*.

¹⁶¹ *Heller*, 128 S.Ct. at 2791-92.

¹⁶² The "reasonable expectation of privacy" criterion is generally traced to Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967): "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

¹⁶³ See Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 60-61 (2001) (criticizing *Katz*'s "reasonable expectation of privacy" test as circular because "someone can have a reasonable expectation of privacy in an area if and only if the Court has held that a search in that area is reasonable"). Likewise, arms can be "typically possessed by law-abiding citizens for lawful purposes" if and only if those arms are not prohibited and their possession criminally punished by the government—or if courts are willing to scrutinize, and potentially invalidate, legislative

It might be responded that the approach to *Heller* criticized here stops short of self-contradiction, because it only excludes those new arms that legislatures act swiftly to prohibit. If the legislature allows the new arms to proliferate in private possession until they reach the critical mass of being “commonly owned,” the arms will then become protected by the Second Amendment. The problem with this approach is simply that it makes the ability to possess contemporary defensive arms contingent upon the good faith of the legislature. Yet the very premise of the Second Amendment is that free peoples are in danger of being wrongfully deprived of arms by legislatures—attempts that typically arise from political motivations, but are carried out under different pretexts such as safety or the regulation of sporting use.¹⁶⁴

A better reading of *Heller*'s adaptation of *Miller*'s “common use” criterion concludes that the Court wishes to distinguish a limited class of arms that is only appropriate for use on military battlefields, where the social compact is completely suspended, from the broader class of arms that are amenable to being commonly kept within civil society.¹⁶⁵ To return to the hypothetical above: the flourishing of the lever-action rifle demonstrates that such rifles are, and were, from their earliest introduction, weapons appropriate for common ownership by peaceable citizens. Given the chance, Americans chose to acquire them by the millions, integrating them into the national life. They are, and were, entitled to Second Amendment protection, regardless of what legislatures might have done at the time of their introduction.

This problem illustrates an important strength of the strictest version of the Strong *Miller* interpretation—what I jokingly dubbed “Very Strong *Miller*” in an earlier section. For all its arguably radical implications, the Very Strong *Miller* view had the advantage of coherence. It filled an analytical gap by supplying a test for covered “arms,” rooted in part in the civic purposes of the Second Amendment, that is *external* (and therefore easy for courts to administer consistently), and also defeats the circularity problem, by looking beyond current positive laws restricting individual citizens, to ask which arms the government deems appropriate to issue routinely to those subject to its orders and control—specifically, under this view, the members of the standing military forces. Thus, Very Strong *Miller* is not subject to the self-contradictory result in which a broad ban on private firearms paradoxically becomes the warrant of its own constitutionality, by preventing the banned arms from having any chance to

gun bans even when they are applied to new, technologically advanced firearms that have not yet had the requisite chance to become common.

¹⁶⁴ *Accord Heller*, 128 S.Ct. at 2798 (arguing that the Stuart Kings’ use of “select militias loyal to them to suppress political dissidents, in part by disarming their opponents,” and the manipulation of seventeenth-century game acts to implement “general disarmaments of [disloyal] regions” led the English to “be extremely wary of concentrated military forces run by the state and to be jealous of their arms”).

¹⁶⁵ *Cf. id.* at 2815 (rejecting a reading of *Miller* that would hold that “only those weapons useful in warfare are protected” by the Second Amendment).

enter “common use.” If *Miller* is to be de-emphasized, then it is desirable to find a replacement test for covered “arms” that is also defined externally, in terms of verifiable facts rather than judicial preconceptions about firearms, while also avoiding the circularity problem.¹⁶⁶ External, non-circular standards are doubly desirable if one shares the view, held by some scholars, that the lower federal courts have historically shown an unjustified hostility to Second Amendment claims, above and beyond the limits suggested by the Supreme Court’s scanty pre-*Heller* jurisprudence.¹⁶⁷ In the remainder of this Article, I set forth a two-part test that meets these requirements. It focuses upon the revealed judgments of both *private individuals* and of *governments* (specifically, police departments) in choosing arms for personal defense.

C. The “Revealed Judgment” Approach

1. Looking to the Revealed Judgment of the People

One important source of external guidance about the scope of the right to arms for self-defense is simply the revealed judgment of contemporary Americans about which firearms they should acquire for defense. De-emphasizing the militia tie (the second step of Strong *Miller*) offers no reason for ignoring the value of Strong *Miller*’s *first* step—looking at what firearms are in common use at the present time.

That hundreds of thousands, indeed millions of individuals choose a particular means of participating in constitutionally protected conduct is powerful *prima facie* evidence that the chosen means is itself deserving of protection. In other constitutional contexts, wide deference is given to individuals’ chosen means for exercising a constitutional right—even if most judges and other elites might find the people’s choice as unseemly and ill-adapted as, say, the decision to engage in political protest by wearing a jacket that reads “Fuck the Draft.”¹⁶⁸

¹⁶⁶ Some of the District of Columbia’s *amici* in *Heller* recognized the difficulty of asking courts to administer constitutional limits in this area. See Brief of Law Professors Erwin Chemerinsky and Adam Winkler as Amici Curiae Supporting Petitioner at 10-12, *District of Columbia v. Heller* 128 S.Ct. 2783 (2008) (No. 07-290), 2008 WL 157186 (arguing that gun regulation is “a difficult and technical matter best left to legislatures”), but failed to give sufficient consideration to the possibility that external sources of guidance may permit a more confident decision.

¹⁶⁷ See, e.g., Denning, *supra* note 26 at 971 (claiming that lower federal court decisions from 1939 until the mid-1990s took such a consistently restrictive view of the Supreme Court’s ambiguous decision in *Miller* that they disclose “a collective judicial assumption . . . that the Framers could not have *really* meant that individuals should have a judicially-enforceable right to keep and bear arms.”).

¹⁶⁸ See *Cohen v. California*, 403 U.S. 15, 24 (1971) (concluding that the freedom of speech protects offensive displays like Cohen’s jacket; stressing that the First Amendment “put[s] the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”). Notice, too, that the Second Amendment criteria I am proposing call for considerably less judicial tolerance of eccentric or outlying conduct than the First Amendment

Applying this criterion leads to the conclusion that modern semi-automatic handguns and rifles are constitutionally protected against legislative prohibition. First, consider handguns. The typical American handgun today is a detachable magazine-fed, semi-automatic centerfire pistol. About 800,000 new semi-automatic pistols are manufactured for sale in the United States in an average year.¹⁶⁹ Roughly a fifth of these are .22 rimfire target pistols. The rest are chambered for centerfire cartridges, such as the .45 and 9mm rounds, that are preferred for defense. Pistols outsell revolvers by a margin of two or three to one in a typical year,¹⁷⁰ and also lead in sales for personal defense.¹⁷¹ Since such pistols have been commercially available for more than a century,¹⁷² the total U.S. stock of privately owned semi-automatic handguns must easily reach the tens of millions.

In *Heller's* immediate aftermath, the District of Columbia responded to the invalidation of its ban on handguns by digging in its heels, adopting a new statutory regime that prohibited all semiautomatic pistols and allowed only revolvers to be registered.¹⁷³ Dick Heller and his lawyers swiftly filed a new law-

standards advanced in *Cohen*. While *Cohen* lets a single protestor decide which means of verbal expression are appropriate for him, my test stresses the revealed judgment of *the arms-keeping public at large* about which arms are appropriate for their defense. Such a social consensus is more likely to be reasonable than the isolated judgment of one or two individuals.

¹⁶⁹ The production statistics in this paragraph are derived from the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) Annual Firearms Manufacturing and Export Reports for the years 1998 to 2006, available at <http://www.atf.gov/firearms/stats/index.htm> (last accessed Feb. 9, 2009). BATFE generally classifies as a “pistol” any handgun that is not a revolver, i.e., that does not use a revolving cylinder to hold its ammunition. See 27 C.F.R. § 479.11 (2003) (defining “pistol” and “revolver”). The vast majority of pistols are semi-automatics, but a few specialty types of handguns are classified as “pistols” although they are not semi-automatics. These are principally large, single-shot hunting pistols and small derringers firing one or two shots. Therefore, to estimate the semi-automatic pistol production figures, I subtracted the entire annual handgun output of the principal American manufacturer of single-shot pistols, Thompson/Center Arms Co. I subtracted a further 6,000 handguns a year to approximate the annual output of derringers, which are made by a variety of small companies such as Bond Arms and American Derringer. Finally, to arrive at *domestic* semi-automatic pistol production figures, I further subtracted the number of pistols listed each year by BATFE as “exported.”

¹⁷⁰ Between 1998 and 2006, the ratio of semi-automatic handguns to revolvers dipped below 2:1 only once, in 2001, when 626,836 semi-automatics and 320,143 revolvers were produced. (About 32,000 of each type were exported.) BUREAU OF ALCOHOL TOBACCO AND FIREARMS, ANNUAL FIREARMS MANUFACTURING AND EXPORT REPORT 2 (2001), available at <http://www.atf.gov/firearms/stats/afmer/afmer2001.pdf> (last accessed Feb. 9, 2009).

¹⁷¹ See Massad Ayoob, *Blue Chips: Handguns Equal Solid Sales*, SHOOTING INDUSTRY, Dec. 2003 (“Most dealers report semi-auto pistols outsell revolvers for defensive needs.”).

¹⁷² One of the first popular semiautomatic pistols in America was the Colt Model 1903 Pocket Hammerless, named for the year of its introduction. BARNES, *supra* note 153 at 289.

¹⁷³ Firearms Control Emergency Amendment Act of 2008, D.C. Act 17-422, 55 D.C. Reg. 8237 (July 16, 2008), available at http://mpdc.dc.gov/mpdc/lib/mpdc/info/pdf/firearmscont_emact_071608.pdf (last accessed Nov. 26, 2008). This act failed to lift the ban on semiautomatic firearms imposed by the District’s sweeping and idiosyncratic definition of “machine gun,” § 7-2501.01(10)(B). See *supra* note 43 (discussing the effects of the District’s “machine gun” provi-

suit to enjoin these restrictions.¹⁷⁴ In September 2008, a bipartisan majority of the House of Representatives approved a bill to overturn this ban through legislation, using Congress's supervisory power over the District.¹⁷⁵ Even as the House of Representatives deliberated the bill, the District of Columbia City Council retreated from its position and enacted emergency legislation permitting semiautomatic pistols to be registered, and allowing them to be kept in operable condition in the home.¹⁷⁶ Congress's effort is a salutary attempt to bring the District of Columbia's firearms laws closer to compliance with the constitutional standards announced by the Supreme Court. There is no doubt, under *Heller*'s criteria, that the semiautomatic pistol is "typically possessed by law-abiding citizens for lawful purposes,"¹⁷⁷ is "in common use,"¹⁷⁸ and is among "the most preferred firearm[s] in the nation to 'keep' and use for protection of one's home and family,"¹⁷⁹ rendering it a type of arm within the core of the Second Amendment's protection. Under *Heller*, a return of the District's ban on the ubiquitous self-loading pistol would merit judicial invalidation as a violation of the Second Amendment.

Magazine-fed, self-loading rifles—the Henry rifles of today—are also widely owned by private citizens today for legitimate purposes. The growth in popularity of the AR-15¹⁸⁰ and similar carbines (i.e., compact rifles) for self-defense,¹⁸¹ hunting,¹⁸² and target shooting¹⁸³ has attracted national media atten-

sion); Paul Duggan, *Having Toppled D.C. Ban, Man Registers Revolver*, WASH. POST, July 19, 2008, at B1.

¹⁷⁴ See Complaint, *Heller v. District of Columbia*, No. 1:08-CV-01289-RMU (D.D.C. July 28, 2008), available at <http://www.washingtoncitypaper.com/blogs/citydesk/wp-content/uploads/2008/07/0728heller.pdf> (last accessed Oct. 18, 2008).

¹⁷⁵ 110th Cong., 2d Sess., H.R. 6842, Second Amendment Enforcement Act, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:hr6842> (last accessed Nov. 25, 2008).

¹⁷⁶ Second Firearms Control Emergency Amendment Act of 2008, D.C. Act 17-502, 55 D.C. Reg. 9904 (Sept. 16, 2008), available at <http://newsroom.dc.gov/show.aspx?agency=os§ion=37&release=14959&year=2008&file=file.aspx%2frelease%2f14959%2f3%2520%2520DC%2520Acts.pdf> (expiring ninety days after enactment).

¹⁷⁷ *Heller*, 128 S.Ct. at 2816.

¹⁷⁸ *Id.* at 2815.

¹⁷⁹ *Id.* at 2818 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).

¹⁸⁰ This term is used generally to refer to the semiautomatic rifles and carbines that share the external appearance and most of the controls of the U.S. M16 and M4 military weapons, but are mechanically incapable of firing automatically. See *Staples v. United States*, 511 U.S. 600, 603 (1994).

¹⁸¹ Television host and shooting sports advocate Michael Bane writes that AR-15s "are increasingly seen as an important part of not just the law-enforcement battery, but the civilian self-defense arsenal as well." Michael Bane, *The World's Most Versatile Rifle*, OUTDOOR LIFE (July 2, 2007), available at <http://www.outdoorlife.com/article.jsp?ID=21010945> (last visited Oct. 18, 2008).

¹⁸² AR-15 rifles are now mainstream equipment for so-called "varmint" hunters, who must make rapid, long-range shots on small targets such as prairie dogs and coyotes. See, e.g., Greg

tion.¹⁸⁴ Retailers report vigorous sales of ammunition in the calibers used by such carbines.¹⁸⁵ Major manufacturers produce carbine ammunition aimed specifically at the private self-defense market.¹⁸⁶

These rifles usually come equipped with standard, detachable magazines holding twenty to thirty rounds.¹⁸⁷ They are often equipped with electronic optical sights that project an illuminated target reticle within the sight window, to be used by the shooter. Their modern features, much like those of the Henry rifle in its time, may appear startling to those unfamiliar with firearms or the American gun culture. But that cannot change the fact that the arms are indeed “in common use” at this time for a broad range of legitimate purposes. While exact numbers are hard to come by, it seems likely that the number of AR-15s and similar rifles in private hands in America today exceeds the one million mark.¹⁸⁸ These arms, too, should be deemed constitutionally protected against federal prohibition or restrictions that would cripple their effectiveness.

Rodriguez, *ARs Rock: What Makes the Best Varmint Rifle? Try An AR*, RIFLE SHOOTER May/June 2008, at 52 (“[A]ccuracy, combined with the . . . fast follow-up shot and reasonable price, [are] why I have come to rely almost exclusively on AR-15s for varmint hunting”); *Accurate AR-15 Rifles: Buy the Fulton Armory, Rock River Guns*, GUN TESTS, vol. 20, no. 6, June 2008, at 3 (reviewing “AR-15 varmint/predator rifle[s]” made by four different companies; noting that articles covering varmint rifles of this type were “one of the most popular requests” received).

¹⁸³ Andrew Park, *A Hot-Selling Weapon, an Inviting Target*, N.Y. TIMES, June 3, 2007 (AR-15s have “bec[o]me standard issue for target shooters” in high power rifle competitions).

¹⁸⁴ See *id.* (reporting that AR-15 type carbines, formerly subject to significant federal restrictions under the 1994-2004 “assault weapons” ban, have become “guns of choice for many hunters, target shooters and would-be home defenders”).

¹⁸⁵ One of the nation’s largest online ammunition retailers, Midway USA, regularly lists the six most popular rifle ammunition calibers sold on its web site. This list always includes .223 Remington (used by AR-15 carbines) and 7.62x39 Russian (used by the SKS and other semi-automatic carbines of eastern bloc origin). See http://www.midwayusa.com/browse/BrowseCategories.aspx?tabId=3&categoryId=690&categoryString=653*** (last visited Feb. 9, 2009).

¹⁸⁶ Nebraska-based Hornady Manufacturing, Inc., an established maker of sporting ammunition, now sells a TAP-FPD (“For Personal Defense”) line of .223 Remington caliber ammunition for semiautomatic carbines, an offshoot of the company’s popular TAP (Tactical Application Police) line of defensive ammunition for law enforcement. See Press Release, Hornady Manufacturing, Inc., TAP for Personal Defense, available at <http://www.hornady.com/story.php?s=149> (press release) (last visited Nov. 26, 2008).

¹⁸⁷ New production of such standard capacity magazines for sale to private citizens was temporarily prohibited during the ten-year effective period of the federal “assault weapons ban,” Chapter XI, Subchapter A of the Violent Crime Control and Law Enforcement Act of 1994, formerly codified at 18 U.S.C. §§ 921(a)(30), 922(v), (w). See *supra* note 146. Even during the ban, however, at least 25 million pre-1994 standard capacity magazines remained in commercial circulation. Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* 61-67 (2004). Millions more have been manufactured since the lapse of the federal ban in 2004; indeed, most new centerfire pistols and AR-15 type rifles are sold today with factory-made full capacity magazines.

¹⁸⁸ It is currently difficult to calculate with precision the number of AR-15s and similar modern, detachable magazine-fed semiautomatic rifles and carbines sold each year in America. The BATFE’s Annual Firearms Manufacturing and Export Reports do not break down rifle production

Indeed, it may surprise some to learn that the United States Supreme Court has already considered a case raising the question of whether an AR-15 should be viewed as an ordinary firearm of law-abiding private citizens. So it has, and in the 1994 decision in *Staples v. United States*,¹⁸⁹ the Court strongly suggested that the answer to this question is yes. Staples owned a self-loading AR-15 rifle that included parts from a fully automatic M-16. When his gun proved capable of fully automatic fire, he was prosecuted and convicted for possession of an unregistered machinegun in violation of the National Firearms Act.¹⁹⁰ The Supreme Court reversed his conviction, holding that Staples's jury had been incorrectly instructed on the *mens rea* requirement for a violation of the National Firearms Act. Justice Clarence Thomas's majority opinion interpreted the statute to require specific proof that the defendant knew that the gun he possessed would fire fully automatically—not merely that it was a gun of some kind.¹⁹¹

In order to hold that the traditional *mens rea* requirement was applicable, the Court had to distinguish prior cases holding that certain criminal statutes, which address so-called “public welfare offenses,” do not require a showing of *mens rea* because they regulate “dangerous device[s] of a character that places [their owner] in responsible relation to a public danger” and “alert[s] him] to the probability of strict regulation.”¹⁹² The Court declined to classify common firearms—including Staples's semiautomatic rifle—as “dangerous devices” in this unique sense. The Court justified this decision by stressing the

by type or caliber as they do with handguns. However, most of the companies that manufacture and sell AR-15 pattern rifles (such as Bushmaster, Colt, Rock River Arms, DPMS, Stag Arms) sell few rifles of other types. It is therefore possible to estimate AR production by adding up the rifle production figures for these companies. This yields an estimate of slightly over 100,000 rifles per year. Adding other common types of domestically produced, military-pattern self-loading rifles (such as the M1A) yields a total annual production of around 120,000 rifles in this category. Cf. BUREAU OF ALCOHOL TOBACCO AND FIREARMS, ANNUAL FIREARMS MANUFACTURING AND EXPORT REPORT YEAR 2006, available at <http://www.atf.gov/firearms/stats/afmer/afmer2006.pdf> (last accessed Feb. 9, 2009). This estimate is in line with earlier figures computed by Professor Christopher Koper in a report submitted to the U.S. Department of Justice. Koper estimated that between 1990 and 2001, production of AR-15 rifles fluctuated between 40,000 and 120,000 units per year. Koper, *supra* note 187 at 36.

In the weeks following the 2008 presidential and Congressional elections, sales in these types of modern firearms accelerated dramatically, due evidently to fears that the Democratic-controlled Congress and President Barack Obama would be likely to pursue new legal restrictions on their ownership. See, e.g., Kirk Johnson, *On Concerns Over Gun Control, Gun Sales Are Up*, N.Y. TIMES, Nov. 6, 2008, available at http://www.nytimes.com/2008/11/07/us/07_guns.html; *Gun Sales Surge After Obama's Election*, <http://www.cnn.com/2008/CRIME/11/11/obama.gun.sales/> (Nov. 11, 2008). Thus, if anything, the pre-2008 figures above are likely to understate the current level of demand for such firearms.

¹⁸⁹ 511 U.S. 600 (1994).

¹⁹⁰ *Id.* at 603-04.

¹⁹¹ *Id.* at 619.

¹⁹² *Id.* at 607.

“long tradition of widespread lawful gun ownership by private individuals in this country.”¹⁹³ It expressed concern about interpretations of the *mens rea* requirement that would potentially subject “every owner of a semiautomatic rifle or handgun” to strict criminal liability if the owner’s gun turned out to be capable of firing automatically in a particular instance.¹⁹⁴

Such reasoning means that *Staples* can be read quite naturally as a “shadow Second Amendment” case, reflecting the Justices’ concerns about harsh regulation of modern self-loading firearms, without openly acknowledging an individual right to arms during the long silence between *Miller* and *Heller*. *Staples* rests on a conclusion that a semi-automatic rifle, including a modern, detachable magazine-fed arm like an AR-15, is still a part of the ordinary firearms tradition in America, and should not be subject to highly restrictive regulations that would be inappropriate for other firearms.¹⁹⁵ Again, *Staples* characterizes the AR-15 as *not* constituting an unusually “dangerous device” betokening “a public danger.” From this, it is not much of a leap—if indeed it is a leap at all—to the conclusion that such a rifle is not a “dangerous and unusual weapon” under *Heller*.¹⁹⁶ This, combined with its common possession by law-abiding Americans today, entails that this class of weapon is constitutionally protected against future prohibition by the federal government.

2. Looking to the Revealed Judgment of the Government: Ordinary Police Arms

Another external source of evidence about the scope of the right to defensive arms lies in the revealed judgment of American local and state governments about this question. This judgment is most reliably expressed, not in the public statements of governments, nor in the restrictions they may seek to impose upon citizens who do not work for the government, but in the defensive equipment that they choose to issue to their own agents: ordinary patrol officers in police departments. Moreover, since even restrictive governments typically exempt law enforcement from firearms prohibitions, paying attention to which arms make up standard police equipment today provides a crucial tool for breaking out of the circularity problem sketched above.

In a major article authored ten years ago, David Kopel suggested that Second Amendment jurisprudence under *Miller* might do well to “chang[e] the focus from the military to the police” as a criterion for the right to arms. Kopel suggested that such an approach could be reconciled with *Miller*’s emphasis on

¹⁹³ *Id.* at 610.

¹⁹⁴ *Id.* at 612 n. 6.

¹⁹⁵ *Cf. id.* at 603 (describing the AR-15 as “the *civilian* version of the military’s M-16 rifle”) (emphasis added); *Carter v. United States*, 530 U.S. 255, 269 (2000) (describing *Staples*’s holding as intended “to avoid criminalizing the innocent activity of gun ownership”).

¹⁹⁶ *See Heller*, 128 S.Ct. at 2817 (suggesting that the Second Amendment protects weapons “in common use at the time” but not certain “dangerous and unusual weapons”).

the militia due to the militia-like “internal order functions” performed by modern police.¹⁹⁷ In truth, police functions lie along a spectrum. They range from militia-type functions, such as suppressing riots, to routine functions such as apprehending and defending against individual criminals in personal-scale confrontations that resemble acts of self-defense by armed private citizens. Thus, for different reasons, police equipment is relevant evidence under both a *Miller* militia-centered right to arms and a private purpose-centered right to arms of the Kennedy-Lund type. It may be that a *Miller*-type test would give most relevance to the equipment used by specialized police units such as SWAT teams, but a court applying a private purpose-centered right to arms would more logically turn to evidence of the equipment issued to ordinary patrol officers today. Because police officers are subject to government control, the government has full, appropriate incentives to ensure that they are adequately equipped to protect themselves in personal-scale confrontations. For this reason, paying attention to police equipment serves as a corrective—in some cases a necessary corrective—to the problem of circularity (and thereby potential underinclusiveness) that attends the use of the “common use” test to determine the scope of the category of constitutionally protected arms at a given time.

This police criterion implies a right to defensive arms of similar scope to the one suggested by the people’s revealed judgment, as discussed in the previous subsection. Thus, it reinforces the conclusions reached in that subsection. As Kopel notes, under the police criterion, “quality handguns,” including self-loading pistols, “would lie at the core” of such a Second Amendment, as would the “ordinary shotguns and rifles” routinely carried in patrol cars.¹⁹⁸ Semi-automatic pistols are overwhelmingly chosen in preference to revolvers as police sidearms today.¹⁹⁹ What is less widely known is that the “ordinary rifles” issued to patrol officers are often modern semi-automatic carbines like the AR-15. Dubbed “patrol rifles” in this context, the carbines serve the same function in 2008 that a pump-action shotgun in the trunk might have served a generation ago.²⁰⁰ Carbines are becoming common equipment for patrol officers even in

¹⁹⁷ Kopel, *supra* note 52, at 1534.

¹⁹⁸ *Id.*

¹⁹⁹ See Raymond W. Kelly, *The Police Department’s 9-Millimeter Revolution*, N.Y. TIMES, Feb. 15, 1999, at A17 (observing that “[m]ost . . . major police departments” in America “had already switched to semi-automati[c]” handguns by 1993).

²⁰⁰ See PATRICK SWEENEY, MODERN LAW ENFORCEMENT WEAPONS AND TACTICS 181-82 (3d ed. 2004) (discussing the use of modern magazine-fed carbines as “patrol rifles” for “line officers,” i.e., ordinary patrol officers; noting that “the AR[-15] is the embodiment of the modern patrol rifle”); Jeff Chudwin, *Tactical Ops: the long guns, Why police patrol rifles make sense*, LAW OFFICER, Sep. 19, 2005, available at <http://www.policeone.com/writers/columnists/lom/articles/134810-Tactical-Ops-The-long-guns> (last accessed Oct. 18, 2008) (urging more police departments to adopt “patrol rifle programs” that equip ordinary officers with self-loading AR-15 carbines in their vehicles); Diane Nicholl & Dave Kopel, *Police Show Legitimacy of Semi-Automatics*, available at <http://www.davekopel.com/2A/OpEds/Police-Show-Legitimacy.htm> (June 18, 1998) (noting that Denver Police Department equips officers with AR-15 carbines).

smaller towns and on university campuses.²⁰¹ Thus, the police criterion, too, strongly suggests that these firearms are entitled to protection under a Second Amendment right that focuses on arms for defense.

Technology progresses in the field of defensive firearms, as it does in other fields of commerce in a market society. Many of the most common arms and ammunition owned by private citizens today descend from earlier military developments.²⁰² Gun control advocates have argued that modern semiautomatic carbines constitute “assault weapons” or “weapons of war” whose presence in American life is cause for alarm. Yet it is difficult to accept extreme characterizations of these firearms when they have become literally as common as police cars in many parts of the country—indeed, far more so, given the hundreds of thousands, or millions, of such firearms in the possession of private citizens. By drawing on external evidence in the form of the revealed judgment of the people about which arms to acquire, supplemented by evidence of the revealed judgment of the government in equipping police officers, courts can decide right-to-arms cases on a principled basis, and give substance to the right to keep and bear arms for self-defense, even in the absence of the guidance many scholars once urged them to derive from the militia purpose, *Miller’s* “end in view.”

²⁰¹ For example, the Police Department of North College Hill, Ohio, a working-class Cincinnati suburb of about 10,000, issues AR-15 carbines to patrol officers. See NCHPD.org, Equipment Used by Members of the North College Hill Police Department, <http://www.nchpd.org/equipment.html> (last visited Oct. 18, 2008). The same is true of the campus police at the University of Texas at Austin. See University of Texas at Austin Police Department Policy A-13, available at http://www.utwatch.org/security/utpd_manual.pdf (effective Dec. 1, 2002) (last accessed Oct 18, 2008) (identifying Glock 23 self-loading pistol and Bushmaster AR-15 carbine, with high-capacity magazine loaded with 28 rounds, as standard equipment for campus patrol officers). I thank Robert Duncan for his assistance with these sources.

²⁰² Examples could be multiplied. Two of the most popular 20th century hunting cartridges, the .308 Winchester and .30-06 Springfield, began life as military rifle cartridges. FRANK C. BARNES, CARTRIDGES OF THE WORLD 61-62 (11th ed. 2006). The ubiquitous Smith and Wesson six-shot .38 Special double action revolver, now regarded as a rather old-fashioned or even obsolete handgun, entered life in 1902 as the “Military and Police Model.” *Id.* at 298.