

## Gun-Shy Originalism: The Second Amendment's Original Purpose in *District of Columbia v. Heller*

*"[I]f circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens."*<sup>1</sup>

*"I hasten to confess that in a crunch I may prove a faint-hearted originalist."*<sup>2</sup>

### I. INTRODUCTION

In *District of Columbia v. Heller*,<sup>3</sup> the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for self-defense.<sup>4</sup> In doing so, the Court settled the long-debated question of whether the Second Amendment applies outside the context of state-organized military institutions.<sup>5</sup> The National Rifle Association heralded the decision as a major victory for gun owners across America.<sup>6</sup> Others saw *Heller* differently, with

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1. THE FEDERALIST NO. 29, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1999). The Second Amendment provides: "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. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 865 (1989).

3. 554 U.S. 570 (2008).

4. *See id.* at 592 (holding Second Amendment protects individual right "to possess and carry weapons in case of confrontation").

5. *See id.* at 584-90 (rejecting argument that Second Amendment applies only in military context). *See generally* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (discussing academic and political debate about Second Amendment's meaning); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) (chronicling twentieth century political debate over Second Amendment). As Sanford Levinson explained, prior to *Heller*, despite its political prominence, the Second Amendment has historically been an academic backwater. *See Levinson, supra*, at 639-40 (noting Second Amendment given little scholarly attention relative to other areas).

6. *Supreme Court Declares that the Second Amendment Guarantees an Individual Right to Keep and Bear Arms*, NATIONAL RIFLE ASSOCIATION-INSTITUTE FOR LEGISLATIVE ACTION (June 26, 2008), <http://www.nraila.org/heller> [hereinafter *NRA Story*] (reporting on *Heller* decision). Reacting to *Heller*, National Rifle Association (NRA) Executive Vice President Wayne LaPierre said:

This is a great moment in American history. It vindicates individual Americans all over this country who have always known that this is their freedom worth protecting. . . . Our founding fathers wrote and intended the Second Amendment to be an individual right. The Supreme Court has now acknowledged it. The Second Amendment as an individual right now becomes a real permanent part of American Constitutional law.

one scholar arguing that the decision likely demands little change to the nation's existing gun laws.<sup>7</sup>

Despite its landmark decision that the Second Amendment protects an individual right, the *Heller* Court failed to protect the full scope of that right, as read by the Court itself. A strong theme throughout the decision is that the Second Amendment's original purpose was to protect Americans' ability, if the need arose, to resist the tyranny of their federal government.<sup>8</sup> *Heller's* holding, however, is limited to the Second Amendment's protection of a right to self-defense, and the Court indicated that it would allow limitations on the types of firearms protected by Amendment, even though such limitations would render its original purpose unachievable.<sup>9</sup> Moreover, the Court avoided setting the standard of review for Second Amendment violations, further allowing for infringement of its original purpose.<sup>10</sup>

This Note examines the conflict between *Heller's* reading of the Second Amendment's original purpose, on the one hand, and its holding about self-defense and dicta on the Amendment's limitations, on the other. Part II.A outlines the Supreme Court's pre-*Heller* Second Amendment cases.<sup>11</sup> Part II.B examines *Heller*, focusing on its holding, as well as its interpretation of the Second Amendment's purposes and its dicta on the Amendment's limitations.<sup>12</sup> Part II.C introduces the federal machine gun ban, a law that is presumably

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*Id.* Chris Cox, Executive Director of the NRA's Institute for Legislative Action, further commented that, "[a]nti-gun politicians can no longer deny that the Second Amendment guarantees a fundamental right. . . . All law-abiding Americans have a fundamental, God-given right to defend themselves in their homes. Washington, D.C. must now respect that right." *Id.* One scholar, however, has argued that *Heller* represents a compromise between the two sides in the political debate on gun control. See Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1575 (2009) (arguing *Heller* "denied victory to both extremes in the gun debate").

7. See Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 383 (2009) (discussing *Heller's* likely effect on existing gun laws).

8. See *infra* notes 51-55 and accompanying text (discussing *Heller's* explanation of Second Amendment's origins). For the purposes of brevity, this Note will refer to the Second Amendment's purpose of enabling Americans, if needed, to resist the tyranny of the federal government as the Amendment's "original purpose." See Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 337 (2009) (referring to Second Amendment's "original purpose").

9. See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (holding Second Amendment protects individual right "to possess and carry weapons in case of confrontation"); *id.* at 626-28 (discussing limitations on Second Amendment right). Because the Court framed the issue as whether the Second Amendment's purposes include protecting a right to self-defense, "confrontation" is best read as armed confrontation between private citizens. See *id.* at 628-29 (holding District of Columbia's handgun ban unconstitutional because it frustrates armed self-defense); see also Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 368-69 (2009) (arguing *Heller* mainly focused upon "personal purpose" of self-defense).

10. See *Heller*, 554 U.S. at 628-29 (concluding District of Columbia handgun ban unconstitutional under any standards of review previously applied by Court); see also *id.* at 628 n.27 (discussing proper standard of review for Second Amendment violations).

11. See *infra* Part II.A (tracing Supreme Court's pre-*Heller* Second Amendment cases).

12. See *infra* Part II.B (discussing *Heller* decision).

constitutional under *Heller*.<sup>13</sup> Part III.A argues that the limitation that *Heller* allows on the types of firearms that citizens may lawfully possess fundamentally frustrates the Court's own reading of the Second Amendment's original purpose.<sup>14</sup> Part III.B highlights the Court's use of circular reasoning to support this specific restriction on the Second Amendment.<sup>15</sup> Part III.C argues that the Second Amendment, as a fundamental right, should enjoy the protection of strict scrutiny.<sup>16</sup> It then applies this standard to the federal machine gun ban, concluding that the law would be unconstitutional as the Court has previously applied that standard.<sup>17</sup> Part III.D argues that in implementing *Heller*, federal courts seeking to render a truly originalist interpretation of the Second Amendment would rely on the *Heller* Court's broad reading of the Amendment's purposes rather than its dicta on the Amendment's limitations.<sup>18</sup>

## II. HISTORY

### A. Pre-Heller Second Amendment Cases

Though the Second Amendment has sparked passionate political debate in recent history, the Supreme Court's Second Amendment jurisprudence was limited to only four cases before *Heller*.<sup>19</sup> The Court alluded to the Second Amendment in *Dred Scott v. Sandford*,<sup>20</sup> where it explained that black slaves did not possess the rights of American citizens, such as the right "to keep and carry arms *wherever they went*."<sup>21</sup> Twenty years later in *United States v. Cruikshank*,<sup>22</sup> the Court held that the Second Amendment limits only the power of the federal government, and does not protect the right to keep and bear arms against infringement by other citizens.<sup>23</sup> Next, in *Presser v. Illinois*,<sup>24</sup> the Court

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13. See *infra* Part II.C (introducing federal machine ban).

14. See *infra* Part III.A (arguing conflict exists between *Heller*'s reading of Second Amendment's purposes and its limitations on Amendment); see also O'Shea, *supra* note 9, at 384-86 (explaining "circularity" of Court's reasoning).

15. See *infra* Part III.B (explaining *Heller* Court's flawed justification of limitation on types of firearms Americans may own).

16. See *infra* Part III.C (addressing proper standard of review for Second Amendment violations).

17. See *infra* Part III.C (applying strict scrutiny to federal machine gun ban).

18. See *infra* Part III.D (discussing how federal courts should implement *Heller*).

19. See *infra* notes 20-34 and accompanying text (discussing pre-*Heller* Second Amendment cases). See generally Levinson, *supra* note 5 (describing political debate surrounding scope of Second Amendment right).

20. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

21. *Id.* at 417 (emphasis added). Allen Rostron has noted what he perceives as the intentional absence of *Dred Scott* in *Heller*'s discussion of Second Amendment precedent. See Rostron, *supra* note 7, at 391. Although the debate over whether the Second Amendment protects an individual right is beyond the scope of this Note, as Rostron explains, gun rights advocates have used *Dred Scott*'s brief mention of the Second Amendment to support the argument that it protects an individual right. See *id.* at 391-92.

22. 92 U.S. 542 (1875).

23. See *id.* at 553-54 (explaining Second Amendment only restricts power of national government).

examined whether an Illinois law banning armed military parade and drill by civilians was constitutional under the Second Amendment.<sup>25</sup> The Court upheld the law, in part based on its earlier holding that the Second Amendment does not apply to the states, but also because the law did not actually infringe on citizens' ability to exercise their Second Amendment right.<sup>26</sup>

The Court's most important pre-*Heller* decision came in *United States v. Miller*.<sup>27</sup> *Miller* considered a Second Amendment challenge to a provision of the National Firearms Act banning the transport of an unregistered short-barrel shotgun in interstate commerce.<sup>28</sup> Upholding the law, the Court rejected the argument that short-barreled shotguns were among the *types* of arms that the Second Amendment protects.<sup>29</sup> As the *Miller* Court explained:

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*Cruikshank* involved defendants charged under the Enforcement Act of 1870 with conspiring to threaten black citizens with the intent to interfere with their rights and privileges under the federal constitution, including that of "bearing arms for a lawful purpose." *Id.* at 543, 553. The Court held that the law was outside the scope of Congress's power—at least if its constitutional basis was protection of citizens' Second Amendment right—because the Second Amendment restricts only state action and "adds nothing to the rights of one citizen as against other." *Id.* at 554.

24. 116 U.S. 252 (1886).

25. *See id.* at 253.

26. *See id.* at 264-65 (upholding Illinois law on two grounds). After holding in *Heller* that the Second Amendment protects an individual right, the Court went on to hold in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), that the Second Amendment applies against state and municipal governments under the Due Process Clause of the Fourteenth Amendment. *See id.* at 3042; *see also* David Savage with Kristen Schorsch, *Supreme Court to Hear Challenge to Chicago Gun Law* (Sept. 30, 2009), CHI. BREAKING NEWS CTR., <http://www.chicagobreakingnews.com/2009/09/supreme-court-may-decide-on-hearing-chicago-gun-cases.html> (discussing background of *McDonald* case).

27. 307 U.S. 174 (1939).

28. *See id.* at 175 (stating indictment).

29. *See id.* at 178 (rejecting Second Amendment protects right to possess short-barreled shotgun). The *Miller* Court's brief Second Amendment interpretation emphasized the Amendment's purpose of ensuring the effectiveness of state militias and focused on what types of firearms the Amendment protects. *See id.* at 178-79 (analyzing Second Amendment's origins and scope). The Court used various language to describe the types of firearms protected by the Amendment, including those having "some reasonable relationship to the preservation or efficiency of a well regulated militia," "ordinary military equipment," those that militiamen could be expected to furnish for themselves, and those "of the kind in common use at the time." *Id.* As Michael O'Shea explains, *Miller*'s analysis of the types of firearms protected by the Second Amendment is open to three interpretations: what he terms "weak *Miller*," "intermediate *Miller*," and "strong *Miller*." *See* O'Shea, *supra* note 9, at 355-62. Under "Weak *Miller*," the Second Amendment applies only in the context of service in a state-organized militia. *Id.* at 355. "Intermediate *Miller*," on the other hand, protects an individual right to keep and bear arms, but only for purposes bearing a "reasonable relationship" to militia service. *Id.* at 356. Finally, "strong *Miller*" protects an individual right to keep and bear arms, "not only for militia purposes, but also for other traditionally legitimate purposes, such as private self-defense." *Id.* at 358. Under this interpretation, however, the Second Amendment protects only arms with a "reasonable relationship" to militia service. *Id.* O'Shea argues that "strong *Miller*" influenced the *Heller* Court, but that it "revised" *Miller* in holding that the Second Amendment protects an individual right to self-defense, while rejecting that it protects certain types of arms, like machine guns, that clearly bear a "reasonable relationship" to militia service. *Id.* at 366-68. The *Heller* Court read *Miller* as "stand[ing] only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008). O'Shea argues that the *Heller* Court tailored its interpretation of *Miller* so as to exclude certain arms, like machine guns, from Second Amendment protection. *See* O'Shea, *supra* note 9, at 367.

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.<sup>30</sup>

In its review of Second Amendment precedent, the *Heller* Court read *Miller* as holding that the Second Amendment does not protect weapons “not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”<sup>31</sup>

Although *Heller* considered Second Amendment precedent, the Court noted that its prior cases failed to give a full interpretation of the Amendment.<sup>32</sup> Only *Miller* undertook a substantive discussion of the Second Amendment, and the *Miller* Court confined its analysis to an incomplete examination of the types of firearms protected by the Amendment.<sup>33</sup> Questions concerning the basic nature of the Second Amendment right, such as who holds it and for what purposes, were left unanswered before *Heller*.<sup>34</sup>

#### B. District of Columbia v. Heller

In *Heller*, the Supreme Court examined whether two District of Columbia gun laws violated the Second Amendment.<sup>35</sup> The first banned the possession of handguns.<sup>36</sup> The second required any lawfully possessed firearm to be kept “unloaded and disassembled or bound by a trigger lock or similar device,”

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30. *Miller*, 307 U.S. at 178.

31. *Heller*, 554 U.S. at 625.

32. *See id.* at 625-26 (stating pre-*Heller* cases failed to fully interpret Second Amendment).

33. *See id.* at 623-24 (explaining *Miller*'s limited precedential value); *supra* notes 27- 31 and accompanying text (discussing *Miller*'s Second Amendment analysis). As noted by the *Heller* Court, *Miller*'s precedential value is limited by the fact that the defendants in the case neither filed a brief with the Court nor appeared at oral argument, and because even the government's brief provided only a cursory analysis of the Second Amendment. *Heller*, 554 U.S. at 623-24. Despite the *Heller* Court's criticism of *Miller*, O'Shea argues that the earlier decision still influenced the majority's Second Amendment reading. *See* O'Shea, *supra* note 9, at 367-69. As O'Shea explains, the *Heller* Court ultimately “revised” *Miller* to stand for a proposition that allowed the Court to hold that the Second Amendment protects an individual right, but does not protect certain types of weapons, like sawed-off shotguns or machine guns. *Id.*

34. *See Heller*, 554 U.S. at 625-26 (stating Court's precedent left unresolved questions regarding nature of Second Amendment right).

35. *See* District of Columbia v. Heller, 554 U.S. 570, 574-75 (2008) (discussing District of Columbia gun laws). The handgun ban provided, in relevant part, that “[a] registration certificate shall not be issued for a . . . [p]istol not validly registered . . . prior to September 24, 1976.” D.C. CODE § 7-2502.02(a)(4) (2001), *invalidated by* District of Columbia v. Heller, 554 U.S. 570 (2008); *see also* D.C. CODE § 7-2501.01(12) (2001) (defining pistol as “any firearm originally designed to be fired by use of a single hand”); D.C. CODE § 7-2507.02 (2001) (setting firearm storage requirements), *declared unconstitutional by* District of Columbia v. Heller, 554 U.S. 570 (2008).

36. *See Heller*, 554 U.S. at 574 (outlining challenged District of Columbia handgun ban).

unless located in a place of business or when used for lawful recreational purposes.<sup>37</sup> The Court, in an opinion authored by Justice Antonin Scalia, first gave a full interpretation of the Second Amendment rooted in the Amendment's text and history.<sup>38</sup> Starting with a textual analysis, the Court divided the Second Amendment into two parts: the prefatory clause, which states that, "[a] well regulated Militia, being necessary to the security of a free State," and the operative clause, which states that, "the right of the people to keep and bear Arms, shall not be infringed."<sup>39</sup> The Court explained that the prefatory clause neither limits nor expands the scope of the operative clause.<sup>40</sup> Rather, the prefatory clause states the Second Amendment's purpose, while the operative clause contains the substance of its right.<sup>41</sup> As such, the Court concluded that the operative clause controls the Amendment's meaning, which must be interpreted consistently with the prefatory clause.<sup>42</sup>

Having thus outlined the Second Amendment's structure, the Court then addressed the Amendment's scope as a right of "the people."<sup>43</sup> The Court defined "the people" in light of the phrase's meaning elsewhere in the

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37. *See id.* at 575 (explaining District of Columbia gun storage provision). After officials denied District of Columbia resident Dick Heller the registration certificate that would have been required to lawfully keep a handgun in his home, Heller sued in federal district court, arguing that both laws violated the Second Amendment by infringing on citizens' ability to keep and use firearms in the home for self-defense. *See id.* at 575-76. The district court dismissed his claim, but the Court of Appeals for the District of Columbia reversed, holding that the Second Amendment protects an individual's right to keep and use firearms for personal defense, and that the city's laws were unconstitutional insofar as they deprived citizens of the ability to exercise that right within the home. *See id.*

38. *See id.* at 576-600 (interpreting Second Amendment right). Justice Scalia's opinion is an example of the originalist method of constitutional interpretation. *See Siegel, supra* note 5, at 191 (explaining many see *Heller* as originalist opinion). Originalism means interpreting constitutional text as it would have been understood at the time of its adoption. *See Scalia, supra* note 2, at 851-52 (discussing example of originalist method of constitutional interpretation). Originalism thus involves interpreting a constitutional provision based on "textual and historical evidence." *Id.* at 862. Without mounting an extensive defense of originalism, this Note assumes that it is the right approach to constitutional interpretation because, as Justice Scalia has argued, it protects constitutional liberties and restrains judges from inserting their own values into the law. *See id.* at 862-63 (discussing purpose of constitutional rights and originalism's limitation on judge's personal beliefs). As such, this Note further assumes that constitutional rights, by virtue of their constitutional status, should be interpreted in an originalist fashion, without regard to any potential policy implications. *See id.* at 862-64 (endorsing originalism as preferred method of constitutional interpretation). Moreover, this Note is meant as a critique of *Heller*, as *originalism*, not as a comment on the complex policy questions arising from an originalist Second Amendment interpretation, such as the wisdom of any particular restriction on gun ownership or use. But the respondent in *Heller* appropriately recognized that the remedy for any disagreeable policy implications of an originalist construction of the Second Amendment must necessarily come from a constitutional amendment. *See* Brief for Respondent at 62, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) [hereinafter Respondent's Brief].

39. *See Heller*, 554 U.S. at 577 (2008) (discussing Second Amendment's textual structure).

40. *See id.* at 577-78 (describing relationship between prefatory and operative clauses).

41. *See* District of Columbia v. *Heller*, 554 U.S. 570, 577-78 (2008) (explaining grammatical purposes of prefatory and operative clauses).

42. *See id.* (stating structure of Second Amendment interpretation).

43. *See id.* at 579 (initiating textual analysis of Second Amendment).

Constitution.<sup>44</sup> It explained that in the context of the First, Fourth, and Ninth Amendments, “the people” refers to individuals rather than a group, and that in other parts of the Constitution “the term unambiguously refers to all members of the political community, not an unspecified subset.”<sup>45</sup> The Court reasoned that the use of “the people” throughout the Constitution created the “strong presumption” that the Amendment protects an *individual* right held by all Americans, not just the members of a state-organized military body.<sup>46</sup>

The Court next interpreted the phrase “keep and bear arms.”<sup>47</sup> Using definitions from dictionaries contemporaneous with the Second Amendment’s drafting, the Court read the words “to keep arms” as synonymous with “to have weapons,” explaining that, at the time of the Second Amendment’s writing, “[k]eep arms was simply a common way of referring to possessing arms, for militiamen *and everyone else*.”<sup>48</sup> Drawing on similar sources, the Court determined that “bear” in the first instance means “carry,” but explained that when used along with “arms,” the word means to carry for a particular purpose: armed confrontation with other persons.<sup>49</sup> Based on this textual analysis, the Court confirmed its interpretation that the Second Amendment protects an individual right to own and carry firearms for personal defense.<sup>50</sup>

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44. See *id.* at 579-81 (engaging in cross-textual analysis of Second Amendment).

45. See *Heller*, 554 U.S. at 579-81 (interpreting “the people” in light of other parts of Constitution). Specifically, the Court explained that the term “the people” is used in the First Amendment’s Assembly-and-Petition Clause, the Fourth Amendment’s Search-and-Seizure Clause, and the Ninth Amendment, all of which protect individual rights. *Id.* at 579. It further noted that both the Preamble and Section Two of Article One of the Constitution, as well as the Tenth Amendment, use the term to describe all Americans. *Id.* at 579-80.

46. See *id.* at 581. *But see id.* at 644-46 (Stevens, J., dissenting) (arguing Second Amendment applies only in organized military context).

47. See *District of Columbia v. Heller*, 554 U.S. 570, 581-91 (2008) (interpreting right “to keep and bear arms”).

48. *Id.* at 583 (internal quotation marks omitted). The Court cited the 1773 edition of Samuel Johnson’s *Dictionary of the English Language*, which, the Court explained, defined “keep” as “[t]o retain, not to lose” and “[t]o have in custody,” and Noah Webster’s *American Dictionary of the English Language*, which defined the word as “[t]o hold; to retain in one’s power or possession.” *Id.* at 582.

49. *Heller*, 554 U.S. at 584-85. The majority’s analysis disregarded the Second Amendment’s legislative history, reasoning that it would not be helpful in interpreting its meaning. See *id.* at 603. Justice Stevens argued in his dissent that neither the Second Amendment’s text nor its legislative history suggests the Amendment’s purpose was to give constitutional protection to an individual right to self-defense. See *id.* at 636-37 (Stevens, J., dissenting) (arguing Second Amendment’s legislative history contradicts majority’s holding Amendment protects right of self-defense). Justice Stevens read the Second Amendment’s legislative history as revealing “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.” *Id.* at 661. According to Justice Stevens, the Second Amendment’s drafters meant to secure the effectiveness of state militias by ensuring that Congress could not disarm them. *Id.* He thus interpreted the Second Amendment to protect “a right to use and possess arms in conjunction with service in a well-regulated militia.” *Id.* at 651. See generally David T. Hardy, *Ducking the Bullet: District of Columbia v. Heller and the Stevens Dissent*, 2010 CARDOZO L. REV. DE NOVO 61 (discussing Stevens’s *Heller* dissent).

50. See *Heller*, 554 U.S. at 584-90 (rejecting Second Amendment application only in organized military setting). Citing the commentary of William Blackstone, the Court coupled its textual analysis with an examination of the Second Amendment’s historical roots, explaining that the English right to keep and bear arms that influenced the Second Amendment’s drafters was in part premised on a belief in an inherent right to

The Court, however, did not read self-defense as the Second Amendment's sole purpose.<sup>51</sup> Rather, the Court repeatedly stated or implied that the Second Amendment's original purpose was to enable Americans to resist the potentially tyrannical power of the federal government by armed force.<sup>52</sup> Engaging in a history-driven analysis, the Court explained that political oppression of English Protestants under Catholic monarchs, which included their general disarmament, "caused Englishmen to be extremely wary of concentrated military forces *run by the state* and to be jealous of their arms."<sup>53</sup> As a result of such suspicions, the Court continued, the right to keep and bear arms "had become [by the time of America's founding] fundamental for English subjects" and was "understood to be an individual right protecting against both *public* and private violence."<sup>54</sup> The Court emphasized that preventing the then newly formed federal government from taking away Americans' political and civil rights "by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution."<sup>55</sup>

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self-defense. *See id.* at 582 (discussing Blackstone's view of English right to keep and bear arms). The Court supplemented its primary textual and historical Second Amendment analysis with an examination of three other sources on the Amendment's meaning: contemporaneous state constitutional provisions analogous to the Second Amendment, post-ratification commentary on the Second Amendment, and Second Amendment precedent. *See id.* at 600-26 (finding support for holding outside of Second Amendment's text and history). The Court reasoned that the fact nine states adopted constitutional amendments similar to the Second Amendment between 1789 and 1820, seven of which "unequivocally protected an individual citizen's right to [keep and bear arms for] self-defense is strong evidence that that is how the founding generation conceived of the right." *Id.* at 603. The Court's examination of post-ratification commentary focused on 19th century sources, such as Supreme Court Justice Joseph Story's *Commentaries on the Constitution of the United States*, as well as state case law and legislation. *See id.* at 605-619 (discussing 19th century interpretations of Second Amendment). The Court explained that the great number of these sources supported its holding. *Id.* at 605. Finally, the Court concluded that its prior Second Amendment cases failed to provide a full reading of the Second Amendment right, but did not contradict its interpretation. *Id.* at 625-26.

51. *See id.* at 591-95 (discussing Second Amendment's purposes).

52. *See id.* at 592-95 (explaining enabling resistance to federal government's potential tyranny as central to Second Amendment's purpose). As Reva Siegel explains, the majority opinion arguably deemphasized the Second Amendment's "republican purposes," whereas the dissenting opinions highlighted these purposes. *See* Siegel, *supra* note 5, at 196 (discussing divergence between majority and dissenting opinions about Second Amendment's purposes). Nevertheless, the majority's reading of the Second Amendment clearly recognizes the Amendment's purpose of enabling citizens, if needed, to resist tyranny. *See infra* notes 53-55 and accompanying text (highlighting majority's discussion of Second Amendment's original purpose).

53. *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008) (emphasis added).

54. *Id.* at 594 (emphasis added).

55. *Id.* at 599; *see also* John Zulkey, Note, *The Obsolete Second Amendment: How Advances in Arms Technology Have Made the Prefatory Clause Incompatible with Public Policy*, 2010 U. ILL. J.L. TECH. & POL'Y 213, 214-15 (arguing policy concerns make Second Amendment's original purpose obsolete). Justice Stevens objected to the Court's reading of the Second Amendment's historical roots on two grounds. *See Heller* 554 U.S. at 664-65 (Stevens, J., dissenting). First, he argued that the Second Amendment, unlike the right to keep and bear arms that was codified in the English Bill of Rights of 1689, contains express language that confines its scope to "a narrow, militia-related purpose." *Id.* at 664. Second, he rejected the influence of England's political experience on the American colonists' conception of the right to keep and bear arms. *See id.* at 664-65. The Framers' concern over the power of the federal government cited by the Court continues for

Having explained the nature of the Second Amendment right, the Court next turned to the prefatory clause.<sup>56</sup> The Court read the prefatory clause as announcing the Second Amendment's original purpose as securing the existence of an armed citizenry that could, if needed, resist the oppression of the federal government.<sup>57</sup> But the Court did not read the prefatory clause as limiting the scope of the Second Amendment to that purpose alone, explaining that citizens also valued the use of firearms for other reasons, notably self-defense and hunting.<sup>58</sup> The Court thus concluded that its interpretation of the Second Amendment as protecting an individual right to keep and bear arms for self-defense fits with its reading of the Second Amendment's purpose as stated in the prefatory clause.<sup>59</sup>

The *Heller* Court ended its analysis by emphasizing the limitations on the Second Amendment.<sup>60</sup> Explaining that the Second Amendment, like other constitutional rights, is not absolute, the Court referenced a series of presumptively constitutional restrictions on where and by whom firearms may be kept and carried:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>61</sup>

Building on its holding in *Miller*, the Court also presumptively limited the types of firearms that the Second Amendment protects to those “in common use at the [present] time” and excluded from protection “dangerous and unusual weapons.”<sup>62</sup> Viewed from a proper historical perspective, the Court said, the Second Amendment protects only the right to keep and carry “the sorts of lawful weapons that . . . [citizens possess] at home.”<sup>63</sup> Based on this reading,

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many Americans today.

See Paul Steinhauser, *CNN Poll: Majority Think Government Poses Threat to Citizens' Rights*, CNN POLITICS, Feb. 26, 2010, <http://www.cnn.com/2010/POLITICS/02/26/citizens.rights.poll/index.html> (citing poll showing majority of Americans believe federal government threatens their freedoms and rights).

56. See *Heller*, 554 U.S. at 596-98 (interpreting prefatory clause).

57. See *id.* at 599 (explaining function of prefatory clause).

58. See *id.* (noting Second Amendment has multiple purposes).

59. See *District of Columbia v. Heller*, 554 U.S. 570, 598-600 (2008) (analyzing whether Court's Second Amendment reading consistent with prefatory clause).

60. See *id.* at 626-28 (emphasizing limitations on Second Amendment right).

61. *Id.* at 626-27.

62. *Id.* at 627.

63. *Heller*, 554 U.S. at 627; see also O'Shea, *supra* note 9, at 368-69 (summarizing *Heller*'s limitation on types of arms protected by Second Amendment); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 268 (2008) (emphasizing narrowness of *Heller*'s holding). Michael O'Shea

the Court implied that the Second Amendment does not bar restrictions on the ownership of military weaponry, such as machine guns.<sup>64</sup> While the Court acknowledged that this limitation may hinder the Second Amendment's original purpose, it reasoned that, "the fact that modern developments have limited the degree of fit between . . . [the purpose of the Amendment] and the protected right cannot change our interpretation of the right."<sup>65</sup>

Applying its Second Amendment reading to the two challenged gun restrictions, the Court held that both were unconstitutional.<sup>66</sup> As to the handgun ban, the Court reasoned that because of the handgun's popularity and effectiveness as a self-defense weapon, the total ban on its use infringed on the right of self-defense protected by the Second Amendment.<sup>67</sup> And as to the firearm storage provision, the Court similarly concluded that it failed to pass constitutional muster by rendering firearms effectively inoperable in the home and, as such, useless for self-defense.<sup>68</sup> The Court did not, however, set forth the standard of review for Second Amendment violations, though it did reject the deferential rational basis test as the proper standard.<sup>69</sup> The Court stated that under any standard previously used to review the infringement of enumerated constitutional rights, the challenged gun restrictions would be unconstitutional.<sup>70</sup>

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argues that, "[u]nder *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." O'Shea, *supra* note 9, at 368-69.

64. See *Heller*, 554 U.S. at 624-25 (discussing types of arms protected by Second Amendment). The Court specifically said that it would be a "startling reading of [its] opinion" to hold the federal machine gun ban unconstitutional. *Id.* at 624; see also Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1362-67 (2009) (discussing *Heller*'s presumptive limitation on possession of "dangerous and unusual weapons"); Rostron, *supra* note 7, at 388-91 (analyzing *Heller*'s view of military weapons).

65. *District of Columbia v. Heller*, 554 U.S. 570, 627-28 (2008). As one author has explained, the possession of automatic weapons like machine guns would be central to modern citizens' ability to defend against the power of governments with armed force. See 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) (discussing weapons used by modern military forces).

66. See *Heller*, 554 U.S. at 628-30 (applying Second Amendment to District of Columbia gun laws).

67. See *id.* at 628-29 (explaining handgun ban's effect on self-defense).

68. See *id.* at 630 (holding firearm storage law unconstitutional under Second Amendment).

69. See *id.* at 628 n.27 (discussing standard of review for Second Amendment questions); see also Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1454-75 (2009) (analyzing possible standards of review for Second Amendment violations).

70. *Heller*, 554 U.S. at 628-29. One scholar notes that the Bush Administration's brief urged the Court to remand the case for further consideration of the proper standard of review for Second Amendment violations, a position that some have argued was designed to ensure the validity of the federal machine gun ban. See Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1255-56 (2009).

*C. The Federal Machine Gun Ban and Post-Heller Review*

In *Heller*'s wake, legal scholars began to discuss the decision's possible impact on existing federal and state gun-control laws, including those limiting the ability to own machine guns.<sup>71</sup> The federal version of such laws, the Firearms Owners' Protection Act (FOPA), bans civilian possession of a machine gun not lawfully possessed before May 19, 1986—the date the law took effect.<sup>72</sup> Scholars agree that the federal machine gun law is safe under *Heller*'s Second Amendment reading.<sup>73</sup> Relying on *Heller*, all federal courts of appeals that have faced the question have rejected Second Amendment challenges to the federal machine gun ban.<sup>74</sup> In *United States v. Fincher*,<sup>75</sup> the Eighth Circuit held that, under *Heller*, the Second Amendment does not protect machine guns because they “fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.”<sup>76</sup> In *Hamblen v. United States*,<sup>77</sup> the Sixth Circuit likewise upheld the federal machine gun ban against a Second Amendment challenge, reasoning that the *Heller* Court rejected that its reading of the Second Amendment would call the law into

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71. See Rostron, *supra* note 7, at 383 (discussing *Heller*'s impact on existing gun restrictions). Based on its statements about limitations on the Second Amendment, Allen Rostron argues that most existing restrictions on gun ownership and use are constitutional under *Heller*. See *id.* (arguing *Heller* demands no significant change in existing gun laws).

72. 18 U.S.C. § 922(o)(1)-(2) (2006). Under the National Firearms Act—whose definition FOPA adopts—a machine gun means “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.” 26 U.S.C. § 5845(b) (2006). New Jersey Representative William J. Hughes added the federal machine gun ban as an amendment to FOPA. See David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 625 (1987). As Hardy tells, the amendment “was raised with only minutes left in the time allotted [for debate] under the rule” and was “passed on a rather irregular voice vote.” *Id.* President Ronald Reagan signed FOPA into law on May 19, 1986. *Id.* at 585. An example of a state machine gun ban is Massachusetts', which bars individuals, save for select law enforcement personnel and firearms collectors, from receiving a license to possess or carry a machine gun. See MASS. GEN. LAWS ch. 140, § 131(o) (2008).

73. See Denning & Reynolds, *supra* note 70, at 1255-57 (discussing *Heller*'s impact on federal machine gun ban); Greene, *supra* note 8, at 337 (describing relationship between *Heller*'s dicta on machine gun laws and originalism); Winkler, *supra* note 6, at 1555-56 (noting lack of success in post-*Heller* challenges to gun control laws).

74. See Eugene Volokh, *District Court Upholds Ban on Machine Gun Possession*, THE VOLOKH CONSPIRACY (Dec. 9, 2008, 11:06 AM), <http://volokh.com/posts/1228842374.shtml> (reporting on post-*Heller* decisions considering the federal machine gun ban).

75. 538 F.3d 868 (8th Cir. 2008). In *Fincher*, the defendant possessed certain firearms, including a machine gun, as the founding-member of a militia in Washington County, Arkansas. *Id.* at 871. At trial, the defendant sought to argue, but was not permitted to do so, that the Second Amendment protected his right to own the firearms because they were “reasonably related to a well regulated militia.” *Id.*

76. *Id.* at 874.

77. 591 F.3d 471 (6th Cir. 2009). In *Hamblen*, the defendant was a member of the Tennessee State Guard who believed that the State Guard did not have the proper resources to fulfill its duties. *Id.* at 472. On his own initiative, he bought parts and used his metalworking skills to make nine machine guns. *Id.* He attempted to legalize his possession of the weapons by acquiring a federal firearms license, but never registered the weapons as required by law and failed to pay the necessary taxes. *Id.*

question.<sup>78</sup> Finally, in *United States v. Gilbert*,<sup>79</sup> the Ninth Circuit affirmed a jury instruction expressly stating that the Second Amendment does not protect the right to possess a machine gun.<sup>80</sup> Like *Heller*, none of these decisions required the court to speak definitively on the proper standard of review for Second Amendment violations, leaving the issue open.<sup>81</sup>

### III. ANALYSIS: *HELLER*'S PRESUMPTIVE LIMITATION ON THE TYPES OF FIREARMS THAT THE SECOND AMENDMENT PROTECTS FRUSTRATES THE AMENDMENT'S ORIGINAL PURPOSE, AS READ BY THE COURT

For years the major political question surrounding the Second Amendment was whether it protects an individual right akin to others enshrined in the Bill of Rights.<sup>82</sup> As discussed above, *Heller*, in ostensibly originalist fashion,

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78. See *id.* at 474 (explaining *Heller* does not protect right to own machine gun). In rejecting the defendant's argument, the court cited the *Heller* Court's statement that it would be "startling" to read its Second Amendment interpretation as protecting the right to own a machine gun. *Id.*

79. 286 F. App'x 383 (9th Cir. 2008). In *Gilbert*, the defendant was charged with, among other crimes, unlawful possession of a machine gun. *Id.* at 385. At trial, the judge refused the defendant's request for a jury instruction that, under *Heller*, the Second Amendment protected his possession of a machine gun for personal use. *Id.*

80. See *id.* at 386 (analyzing jury instruction under *Heller*). In affirming the jury instruction, the Ninth Circuit explained that, "[u]nder *Heller*, individuals still do not have the right to possess machine guns." *Id.* Unlike their federal counterparts, Massachusetts courts—at least prior to the Supreme Court's decision in *McDonald v. City of Chicago*—have avoided substantive questions about *Heller*'s impact on certain Massachusetts gun laws. See *Commonwealth v. Depina*, 922 N.E.2d 778, 789-90 (Mass. 2010) (rejecting defendant's challenge to Massachusetts handgun restriction because Second Amendment does not apply to states). *McDonald*'s impact on current Massachusetts gun laws, and those of other states, has yet to be fully seen. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010) (holding Second Amendment applies against state and municipal governments).

81. See *Hamblen*, 591 F.3d at 474 (affirming conviction under *Heller* without referencing standard of review); *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (affirming conviction without mentioning standard of review); *Gilbert*, 286 F. App'x at 386 (upholding jury instruction under *Heller* without mentioning standard of review for Second Amendment). The Supreme Court has used three standards to review the constitutionality of legislation and policies: rational basis, intermediate scrutiny, and strict scrutiny. The Court has generally applied the lowest level of review, rational basis, to economic legislation. See *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955) (applying rational basis test to Oklahoma statute governing eye care business). The rational basis test requires that legislation be "rationally related" to a legitimate governmental purpose. See *id.* at 491 (upholding Oklahoma law with "rational relation" to protection of optometry from commercialism). The Court has applied intermediate scrutiny to sex-based discrimination. See *United States v. Virginia*, 518 U.S. 515, 531-34 (1996) (applying intermediate scrutiny to single-sex education policy). Intermediate scrutiny requires that a law or policy be substantially related to an important governmental interest. *Id.* at 533. The Court has applied strict scrutiny to race-based discrimination or violations of fundamental rights. See *Grutter v. Bollinger*, 539 U.S. 306, 327-344 (2003) (applying strict scrutiny to university's affirmative action program); *Washington v. Glucksberg*, 521 U.S. 702, 721, 728 (1997) (stating strict scrutiny applies to fundamental rights but right to die not among such rights). To pass strict scrutiny, a law or policy must be "narrowly-tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). To satisfy this prong of strict scrutiny, the Court has required legislators or policymakers to engage in "serious, good faith consideration of workable [and less restrictive] . . . alternatives." *Grutter*, 539 U.S. at 339-40.

82. See generally Levinson, *supra* note 5 (discussing debate over scope of Second Amendment right); Siegel, *supra* note 5 (outlining political controversy over Second Amendment).

decisively decided that it does.<sup>83</sup> Despite the *Heller* Court's attempt at a history-driven Second Amendment interpretation, however, *Heller* is a lesson in judicial moderation, not originalism.<sup>84</sup> The Court ultimately shied away from protecting the full vision of an armed citizenry that is true to its own reading of the Second Amendment's original purpose, instead siding with the segment of American society that views that vision as archaic, extreme, and dangerous.<sup>85</sup> As a result, *Heller* suffers from an analytical incoherence caused by the meeting of judicial philosophy and political reality.<sup>86</sup>

#### A. *Heller's Gun-Shy Originalism*

The Second Amendment's original purpose, as read by the *Heller* Court, was to enable Americans, if needed, to resist the tyranny of the federal government by armed force.<sup>87</sup> The Court repeatedly referenced this purpose, most directly when it said:

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right . . . . But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was

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83. See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (interpreting Second Amendment as protecting individual right); *id.* at 584 (interpreting “keep and bear arms” in light of its 18th century meaning); see also *supra* notes 38-59 and accompanying text (describing Court's interpretation of Second Amendment). As Reva Siegel notes, some observers viewed *Heller* as an example of originalism, while others saw it as conforming essentially to current popular conceptions of gun rights. Siegel, *supra* note 5, at 191-192; see also Winkler, *supra* note 6, at 1576 (arguing *Heller* agrees with “political center on guns”). Siegel aptly describes the reaction by the two sides of the Second Amendment political debate, explaining that *Heller's* holding “was long awaited by many, long feared by others.” Siegel, *supra* note 5, at 191; see also *NRA Story*, *supra* note 6 (praising *Heller* decision).

84. See Greene, *supra* note 8, at 337 (arguing *Heller* retreated from full implication of originalist Second Amendment reading); Winkler, *supra* note 6, at 1566 (calling *Heller's* originalism a “façade”); see also Sunstein, *supra* note 63, at 268 (noting narrowness of *Heller* decision). Cass Sunstein specifically points to *Heller's* statements about limitations on the Second Amendment in arguing that the Court, in important ways, rendered a restrained interpretation of the Amendment. Sunstein, *supra* note 63, at 268-69.

85. See *Heller*, 554 U.S. at 628-29 (emphasizing limitations on Second Amendment right); see also Rostron, *supra* note 7, at 383 (discussing likely impact of *Heller* on existing gun laws); Siegel, *supra* note 5, at 243-44 (arguing *Heller's* Second Amendment interpretation influenced by current political views); *supra* notes 51-55, 60-65 and accompanying text (discussing Court's reading of Second Amendment's original purpose and limitations). As Allen Rostron explains, “Justice Scalia's opinion for the majority in *Heller* ultimately backs away from the most drastic implications of its reasoning and instead steers toward a more moderate approach under which virtually all existing gun laws should be upheld.” Rostron, *supra* note 7, at 383.

86. See Siegel, *supra* note 5, at 243-45 (arguing *Heller's* Second Amendment interpretation influenced by current political views); see also Winkler, *supra* note 6, at 1567 (arguing *Heller's* Second Amendment limitations offered “without any reasoning or explanation”).

87. See *supra* notes 51-55 and accompanying text (discussing Court's statements about Second Amendment's original purpose).

codified in a written Constitution.<sup>88</sup>

Though the Court's reasoning recognizes this historical purpose of the Second Amendment, its holding does not, for *Heller's* Second Amendment is a right primarily about self-defense, not resisting tyranny.<sup>89</sup> Moreover, the *Heller* Court's presumptive limitation on the types of firearms that the Second Amendment protects would frustrate the Court's own reading of the Amendment's original purpose by creating a disparity between the firearms that citizens may legally own, and those possessed by the federal government.<sup>90</sup> By apparently preserving the constitutionality of laws, like the federal machine gun ban, that deprive citizens of entire categories of firearms, the Court effectively ensures that the federal government will enjoy the very monopoly of armed force against which the Second Amendment guards.<sup>91</sup> Such laws deny citizens firearms that they would find most useful if compelled to defend their liberty against the federal government.<sup>92</sup> The Court essentially conceded this point when it said, "the fact that modern developments have limited the degree of fit between . . . [the original purpose of the Second Amendment] and the protected right cannot change our interpretation of the right."<sup>93</sup> This concession, which rejects that citizens have a right to possess whatever firearms are in the federal arsenal, disavows the Second Amendment's original purpose, as viewed by the

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88. *Heller*, 554 U.S. at 599; see also O'Shea, *supra* note 9, at 350 (explaining *Heller* recognized Second Amendment's purposes to include "detering tyrannical acts by government"); Siegel, *supra* note 5, at 196-97 (arguing *Heller* majority marginalizes Second Amendment's traditional "republican" purpose).

89. See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (holding Second Amendment protects right to keep and bear arms for "confrontation"); see also O'Shea, *supra* note 9, at 369 (arguing *Heller's* holding "mainly focused" on personal defense purpose of Second Amendment); Siegel, *supra* note 5, at 194 (explaining *Heller* influenced by late 20th century popular focus on Second Amendment's role in self-defense). In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Court confirmed that *Heller's* Second Amendment is primarily about self-defense. See *id.* at 3036 (framing discussion of *Heller* in light of its protection of "basic right" of self-defense).

90. See Siegel, *supra* note 5, at 199-200 (discussing relationship between *Heller's* limitations dicta and original purpose of Second Amendment); see also *supra* notes 60-65 and accompanying text (explaining *Heller's* discussion of limitations on Second Amendment right). As Reva Siegel writes, "[m]ore remarkably, the restriction the majority adopts renders the right the Second Amendment protects useless for its textually enumerated military purpose—a point the majority goes out of its way to emphasize." Siegel, *supra* note 5, at 199.

91. See *Heller*, 554 U.S. at 624-25 (implicitly rejecting argument that Second Amendment protects right to own machine gun); see also 18 U.S.C. § 922(o)(1)-(2)(A) (2006) (banning civilian possession of machine guns). The federal machine gun ban secures the federal government's ability to use machine guns for law enforcement purposes, but bars civilians from possessing them. *Id.*

92. See Garcia, *supra* note 65, at 282-83 (discussing weapons used by modern military forces). As Michael Garcia explains, "[t]he primary weapons of a modern light infantry are rifles—semiautomatic and automatic—and handguns." *Id.* at 282 (emphasis added). "[S]ince a domestic tyrant would have similar weapons at his disposal in his standing army," Garcia argues, "these weapons should belong to members of the Militia." *Id.* at 283. Recent public opinion polls suggest that concern over the power of the federal government is not absent in contemporary America. See Steinhauer, *supra* note 55 (discussing poll showing majority of Americans believe federal government threatens freedoms and rights).

93. *Heller*, 554 U.S. at 627-28.

Court itself.<sup>94</sup>

### B. *Heller's Flawed Reasoning*

The *Heller* Court supported its presumptive restriction on the types of firearms that the Second Amendment protects with a circular argument.<sup>95</sup> As explained above, the Court held that the Second Amendment protects only a certain range of firearms, namely those in “common use at the [present] time”—a standard that military weapons like machine guns do not meet.<sup>96</sup> The problem with this conclusion is that firearms like machine guns are not in “common use” because their possession is currently banned by federal law.<sup>97</sup> In other words, the Court reaches the strange result of excluding machine guns, among other types of firearms, from the Second Amendment’s protection because Congress, the very body whose power the Amendment seeks to restrain, has outlawed them.<sup>98</sup>

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94. See Siegel, *supra* note 5, at 200 (concluding Court views “republican understandings of the [Second Amendment] antiquated”); Zulkey, *supra* note 55, at 235 (arguing originalist interpretation of prefatory clause irreconcilable with practical public policy). As Reva Siegel argues, “[t]he majority imposes restrictions on the kinds of weapons protected by the Second Amendment that the majority concedes would disable exercise of the right for the amendment’s textually enunciated purposes.” Siegel, *supra* note 5, at 200. Siegel questions how a purportedly originalist opinion could “exclude from [the Second Amendment’s] protection the kinds of weapons necessary to resist tyranny—the republican purpose the text of the Second Amendment discusses and, on the majority’s own account, ‘the purpose for which the right was codified.’” *Id.* The *Heller* Court in fact stated that it would be “startling” if courts were to use its Second Amendment reading to protect machine gun possession. *Heller*, 554 U.S. at 624. Moreover, one may argue that, if followed to its logical end, an originalist interpretation of the Second Amendment would lead to the unreasonable result that Americans have the right to own *all* weaponry possessed by the federal government, from firearms to nuclear bombs. See Greene, *supra* note 8, at 337 (discussing implications of originalist reading of Second Amendment). As Jamal Greene argues,

If the original purpose behind the Second Amendment was to ensure the effectiveness of the militia, keeping the Amendment fresh would seem to support a right to keep and bear hand grenades and anti-tank missiles, or at the very least an M16 assault rifle, which is standard issue in the United States military.

*Id.* While this point would be fair if “arms,” as used in the Second Amendment, meant all forms of weaponry, it fails because, as the *Heller* Court’s analysis implied, the Second Amendment protects just firearms. See *Heller*, 554 U.S. at 622-23 (confining discussion of “arms” protected by Second Amendment to consideration of certain firearms).

95. See *District of Columbia v. Heller*, 554 U.S. 570, 626-28 (2008) (explaining limitation on types of firearms protected by Second Amendment); see also O’Shea, *supra* note 9, at 384 (noting problems with Court’s reasoning supporting limitation on types of firearms protected by Second Amendment).

96. *Heller*, 554 U.S. at 627; see also Winkler, *supra* note 6, at 1560-61 (arguing machine guns rare because federal law has banned them for past 75 years); *supra* notes 62-65 and accompanying text (discussing Court’s reasoning for limitation on types of firearms covered by Second Amendment).

97. See O’Shea, *supra* note 9, at 384-86 (explaining “circularity” of Court’s reasoning).

98. See *id.* at 385 (arguing *Heller* makes “ability to possess contemporary defensive arms contingent upon the good faith of the legislature”); see also Lund *supra*, note 64, at 1364-67 (criticizing *Heller*’s originalist justification for limiting types of firearms protected by Second Amendment).

### C. *The Second Amendment and Strict Scrutiny*

The *Heller* Court's failure to set a strong standard of review for Second Amendment violations further weakens the constitutional protection of the Amendment's original purpose, as read by the Court.<sup>99</sup> As the respondent in *Heller* argued, the proper standard of review for Second Amendment violations is strict scrutiny because the right to keep and bear arms is a fundamental right.<sup>100</sup> The Court's history-driven analysis shows that the Second Amendment, like other fundamental rights recognized by the Court, is "deeply rooted in this Nation's history and tradition."<sup>101</sup> Tracing the Second Amendment's origins from the colonial period to America's founding, the Court emphasized the historical prominence of the right to keep and bear arms, explaining that the Founding Fathers considered it among the few rights important enough to write down in the Constitution.<sup>102</sup> Because its established fundamental rights jurisprudence affords rights with such historical pedigree strict scrutiny, the Court should weigh Second Amendment violations under that standard.<sup>103</sup>

The federal machine gun ban could not withstand strict scrutiny, at least as the Court has previously applied it.<sup>104</sup> Although the governmental interest in preventing machine gun-related violence is unquestionably compelling, the total ban on machine gun possession fundamentally frustrates the Court's own understanding of the Second Amendment's original purpose.<sup>105</sup> Just as *Heller* recognizes a nexus between handguns and the Second Amendment right to self-defense, machine guns are connected with the Court's own reading of the Second Amendment's purpose of enabling Americans, if needed, to resist the tyranny of the federal government.<sup>106</sup> As the respondent in *Heller* noted, the

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99. See *supra* notes 69-70 and accompanying text (discussing Court's avoidance of standard of review issue).

100. See Respondent's Brief, *supra* note 38, at 55-57 (explaining Second Amendment as fundamental right); see also, Lund, *supra* note 64, at 1376 (arguing Second Amendment demands same constitutional protection as First Amendment).

101. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)) (defining fundamental rights); see also *supra* notes 51-55 and accompanying text (discussing Court's explanation of Second Amendment's origins). The Court itself invoked this language when describing the Second Amendment right in *McDonald v. City of Chicago*. See 130 S. Ct. 3020, 3036-42 (2010) (tracing Second Amendment's history).

102. See *supra* notes 51-55 and accompanying text (discussing Court's explanation of Second Amendment's origins).

103. See *supra* note 81 (describing scope of strict scrutiny).

104. See *supra* note 81 (explaining strict scrutiny).

105. See *supra* notes 51-55 and accompanying text (describing *Heller*'s discussion of Second Amendment's original purpose); notes 90-94 and accompanying text (explaining how *Heller*'s limitation on types of firearms Second Amendment protects frustrates Amendment's original purpose).

106. See *Garcia*, *supra* note 65, at 282 (discussing weapons used by modern military forces); see also *supra* notes 66-68 and accompanying text (explaining *Heller*'s invalidation of District of Columbia gun restrictions). As Michael O'Shea explains, under a plausible reading of the Court's limited Second Amendment interpretation in *Miller*, the Second Amendment protects "ordinary military equipment." O'Shea,

Second Amendment's drafters were aware of the potential for violence arising from the widespread ownership of firearms, but still chose to secure Americans' ability to own and use them.<sup>107</sup> Finally, because the legislative history of the federal machine gun ban reveals that Congress enacted it without discussing any less restrictive means of preventing machine gun-related violence, the law is not "narrowly-tailored" within the meaning of strict scrutiny.<sup>108</sup>

*D. Whose Second Amendment: Heller's or the Founders'?*

The conflict between *Heller's* reading of the Second Amendment's original purpose and its dicta about the Second Amendment's limitations presents lower federal courts with a judicial fix: whose Second Amendment should they enforce, the *Heller* Court's or the Founding Fathers'?<sup>109</sup> As a triumvirate of courts of appeals has indicated by upholding the federal machine gun ban after *Heller*, one of *Heller's* consequences will likely be the reinforcement of laws that deprive citizens of entire categories of firearms.<sup>110</sup> And as some scholars have noted, the *Heller* Court went out of its way to reject that machine guns are among the types of firearms that the Second Amendment protects.<sup>111</sup> In doing

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*supra* note 9, at 358; *see also, supra* note 29 (discussing *Miller's* analysis of types of firearms protected by Second Amendment). Under such a reading, O'Shea argues that the federal machine gun ban would be unconstitutional because "[v]irtually all standard infantry rifles issued today . . . can fire fully automatically." O'Shea, *supra* note 9, at 361. But, as he notes, the respondent in *Heller* purposely did not rely on this reading of *Miller* "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." *Id.* at 362.

107. *See* Respondent's Brief, *supra* note 38, at 61 (noting Founding Fathers' awareness of firearm-related violence); *see also* THE FEDERALIST NO. 29, *supra* note 1 (stating Second Amendment's rationale).

108. *See supra* note 81 (discussing strict scrutiny). As previously noted, David Hardy explains that the federal machine gun ban was added to FOPA with only minutes left in the allotted time for debate, essentially foreclosing the chance for any such debate to actually occur. *See* Hardy, *supra* note 72, at 625. Discussing the consequences of analyzing Second Amendment violations using strict scrutiny, Eugene Volokh explains that the Court could require "some substantial scientific proof to show that a law will indeed substantially reduce crime and injury (and that other alternatives . . . won't do the job)." Volokh, *supra* note 69, at 1467. Another approach, Volokh continues, would be to "require [that the law be based on] a logically plausible theory of danger reduction that many people reasonably believe." *Id.* at 1468. A final approach, Volokh offers, would be for courts to "rely on their own common sense judgments of when a particular law will likely reduce danger." *Id.* at 1469. From an originalist viewpoint, Volokh errs in suggesting that the constitutionality of gun control laws should depend on whether they can or do reduce violence because, as the respondent in *Heller* noted, acceptance of gun-related violence can reasonably be read into the Second Amendment. *See* Respondent's Brief, *supra* note 38, at 61-62 (suggesting Founding Fathers aware of firearm-related violence). Under an originalist approach, the Court would scrutinize gun control laws based on whether, and to what extent, they interfered with the Second Amendment right, given its purposes. *See* District of Columbia v. Heller, 554 U.S. 570, 628-30 (2008) (analyzing District of Columbia gun restrictions in light of their effect on self-defense).

109. *See supra* notes 51-55, 60-65 and accompanying text (describing *Heller's* statements on Second Amendment's original purpose and limitations).

110. *See supra* notes 74-81 and accompanying text (highlighting post-*Heller* cases involving federal machine gun ban).

111. *See* Denning & Reynolds, *supra* note 70, at 1256-57 (discussing *Heller's* dicta on machine guns);

so, the Court strayed from the originalist path on which it had tread—or professed to—when interpreting the purposes of the Second Amendment.<sup>112</sup> A truly originalist reading of the Second Amendment—based on *Heller*'s own textual and history-driven interpretation of the Amendment's purposes—would have held that citizens have the right to own a machine gun, even if that result may seem extreme.<sup>113</sup> Because *Heller* presumptively limited the types of firearms that Americans may lawfully own only in dicta, federal courts implementing the decision could apply the Court's interpretation of the Second Amendment's original purpose.<sup>114</sup> Adjudicating the flood of Second Amendment cases that are sure to arise in *Heller*'s wake, federal courts serious about originalism would protect the full scope of the Second Amendment right, as read by the *Heller* Court itself.<sup>115</sup> Under such an approach, laws banning entire categories of firearms, such as the federal machine gun ban, could not stand.<sup>116</sup>

#### IV. CONCLUSION

As Justice Scalia said in defense of the Court's seemingly originalist reading

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Greene, *supra* note 8, at 337 (arguing Court consciously avoided protecting machine guns); Winkler, *supra* note 6, at 1555-56 (discussing lack of success of Second Amendment challenge to existing gun laws).

112. See Greene, *supra* note 8, at 337 (noting Court's departure from originalist principles regarding protection of machine guns). Jamal Greene notes the contradiction in the Court's refusal to give constitutional protection to machine guns. *Id.* He argues that the issue of machine guns "has always been a tricky subject for many Second Amendment original-ists" because an originalist reading of the Second Amendment would seemingly compel the conclusion that laws banning machine guns are unconstitutional. *Id.* Justice Scalia has in fact stated that he "may prove a faint-hearted originalist" when faced with the possibly hard policy implications of an originalist interpretation on a constitutional provision. Scalia *supra*, note 2, at 864; see also *id.* at 861-62 (discussing potentially difficult policy implications of originalism).

113. See *supra* notes 51-55 and accompanying text (discussing *Heller*'s reading of Second Amendment's original purpose).

114. See Winkler, *supra* note 6, at 1567 (explaining federal courts' options in implementing *Heller*'s Second Amendment limitations).

115. See Respondent's Brief, *supra* note 38, at 62 (asserting originalist interpretation of Second Amendment). At least one scholar anticipated that some federal courts might reach this result, explaining their position aptly:

One might imagine that at least some lower courts, inspired by *Heller*'s originalist façade, would have looked to the original understanding of the Second Amendment to decide the constitutionality of [existing gun laws, like the federal machine gun ban]. . . . In our hierarchical judiciary, lower courts are supposed to follow Supreme Court decisions. One might expect, however, that at least a few of the lower courts would have engaged in some substantive analysis of whether . . . [*Heller*'s presumptive limitations on the Second Amendment] are consistent with the underlying right to keep and bear arms. After all, the laundry list is offered up in the *Heller* opinion without any reasoning or explanation. Moreover, none of the [limitations] were formally at issue in *Heller*. . . . The laundry list was, in a first-year law student's favorite word, dicta.

Winkler, *supra* note 6, at 1566-67.

116. See *supra* notes 104-108 and accompanying text (analyzing federal machine gun ban under strict scrutiny).

of the Second Amendment in *Heller*, “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”<sup>117</sup> These words, however, do not square with other things the Court said. While the Court’s analysis shows that the Second Amendment’s drafters saw its core purpose as enabling an armed American citizenry, if needed, to resist the potential tyranny of the federal government, its holding is silent on this purpose. Instead the Court focused on the right of self-defense protected by the Amendment. More importantly, the Court’s limitation, in dicta, on the types of firearms that the Second Amendment protects would fundamentally frustrate its own reading of the Second Amendment’s original purpose. Finally, the Court’s failure to address the standard of review question left the Second Amendment without the constitutional protection of strict scrutiny that it deserves as a fundamental right, and further weakened the Court’s own reading of an originalist Second Amendment.

*Heller*’s failure to protect the full scope of an originalist Second Amendment right—as read by the Court—will likely lead many federal courts implementing the decision to continue to uphold laws, like the federal machine gun ban, that deprive Americans of entire categories of firearms. Another, perhaps more originalist, approach would be to enforce *Heller*’s reading of the Second Amendment’s original purpose, but not its dicta on the Amendment’s limitations. Doing so, along with affording the Second Amendment the protection of strict scrutiny, would mean the end of the federal machine gun ban and other such laws.

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117. *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).