Introduction
The Gun Debate and the Constitution

On the morning of December 14, 2012, Adam Lanza shot his way through a glass panel in front of Sandy Hook Elementary School in Newtown, Connecticut. Entering the building, he worked his way from room to room, methodically killing twenty young children and six adults with more than 150 shots from a Bushmaster semiautomatic rifle. The massacre ended, as it had begun, with a gunshot, as Lanza – standing in the middle of a classroom – placed a handgun to his head and pulled the trigger.¹

The immediate reaction to Sandy Hook was horror. During a televised address that afternoon, President Barack Obama paused twice to wipe away tears, and later said that visiting Newtown was the “toughest day of my presidency.”² National Rifle Association Executive Vice President Wayne LaPierre held a press conference a week later, saying that the organization’s “4 million mothers, fathers, sons and daughters join the nation in ... outrage, grief and earnest prayer for the families of Newtown, Connecticut.”³

Congressional leaders soon drafted legislation designed to help keep guns away from people like Lanza. The most notable proposal would have expanded existing federal background checks to cover most commercial sales of firearms, including gun shows and online sales. It was known as the Manchin-Toomey Amendment, after its sponsors, Senator Joe Manchin (a Democrat from West Virginia) and Senator Pat Toomey (a Republican from Pennsylvania).⁴ The idea was broadly popular. Polls

indicated that more than 90 percent of Americans favored “universal” background checks, including 74 percent of NRA members – an almost unimaginable degree of support for any legislative proposal, let alone one involving guns. It seemed, for the first time in decades, that Democrats and Republicans would find common ground on a major gun law.

But not everyone supported the proposal. After a meeting with Vice President Joe Biden to discuss possible regulations, NRA leaders expressed “disappoint[ment] with how little [the] meeting had to do with keeping our children safe and how much it had to do with an agenda to attack the Second Amendment.” The NRA’s fundamental position was that “the only thing that stops a bad guy with a gun is a good guy with a gun.” The way to prevent another Sandy Hook, the NRA argued, was not to further limit guns, but to ensure that they were in the proper hands – to emphasize gun rights, rather than gun regulation. “[A]bsolute protection” would mean putting “armed police officers in every single school in this nation.”

That suggestion was widely derided by others. Despite strong public support for the background check requirement, the Senate rejected the Manchin-Toomey Amendment. Why? Lobbying groups like the NRA are certainly a part of the explanation. But how were those groups able to sink legislation that seemed to have so much going for it? What accounts for the strong opposition to otherwise popular regulations such as expanded background checks?

According to a Gallup poll, the most common reason for opposition to the Manchin-Toomey Amendment was not that background checks would be ineffective, but that they would violate the Second Amendment or the “right to own

1 Scott Clement, 90 Percent of Americans Want Expanded Background Checks on Guns. Why Isn’t This a Political Slam Dunk?, WASH. POST (Apr. 3, 2013), www.washingtonpost.com/blogs/the-fix/wp/2013/04/03/90-percent-of-americans-want-expanded-background-checks-on-guns-why-isthissapolitical-slam-dunk, archived at http://perma.cc/X8E3-KM68 (“Nine in 10 Americans support expanding background checks on gun purchases.”). After the Senate vote, 65 percent of Americans believed the Senate should have passed the provision to expand background checks. Frank Newport, Americans Wanted Background Checks to Pass Senate, GALLUP (Apr. 19, 2013), www.gallup.com/poll/162983/americans-wanted-gun-background-checks-pass-senate.aspx, archived at http://perma.cc/Y3S9-DNXS (showing that only “29% agree with the Senate’s failure to pass the measure”).
Congressional rejection of universal background checks—an overwhelmingly popular proposal floated at a time of extraordinary national attention—speaks volumes about the power of constitutional rhetoric in the American gun debate. Policy preferences concerning guns are frequently framed by one’s understanding of constitutional law. To make sense of the political debate, then, not to mention the current state of the law, one must also understand the Constitution itself.

Popular beliefs about constitutional law have always undergirded America’s national political conversation. But the gun debate is unique in the degree to which constitutionalism is the starting point, and often the ending point, of political argument. And the version of the Second Amendment invoked in political discussions often diverges sharply from the Second Amendment recognized as constitutional doctrine. Under current law, for example, there is no reason to suppose that an equitably administered system of background checks would violate the Second Amendment. Still, many describe those checks as infringements of Second Amendment rights.

Divergence between popular discussion of the Second Amendment and constitutional law was once even more extreme. After all, it was only in 2008, with the Supreme Court’s holding in District of Columbia v. Heller, that the Second Amendment became plausibly enforceable in the way that most Americans understand constitutional rights. In a 5-4 decision, the Court found that the Amendment was not limited to members of the organized militia, but protects an “individual” right to keep and bear arms for private purposes such as self-defense, thereby pushing the law closer to the popular conception of the right. But Heller also emphasized that the individual right to keep and bear arms is subject to a broad set of potential regulations. Heller ushered in a new era for the Second Amendment. Indeed, it is no exaggeration to say that we are witnessing the nativity of a fundamental constitutional right—one whose development will, in turn, affect the future of gun policy in the United States. Still, though Heller may have helped bridge the gap between law and popular understanding of the Amendment, it has done little so far to decrease the political polarization concerning guns. Discussions of the Amendment often exhibit the same venom, blame, and misunderstanding that characterize the broader gun policy debate.

Some supporters of broad gun rights believe that the right to keep and bear arms encompasses an individual right not just to defend against would-be criminals, but also the right to resist whatever governmental tyranny the individual may detect. On this
account, gun regulation – or, more ominously, gun “control” – is a modern invention out of step with American tradition and identity. The Amendment is “absolute” and immune to regulation. Supporters of this view essentially ask, “What part of ‘shall not be infringed’ do you not understand?”

Some advocates of gun regulation, by contrast, consider the Second Amendment an anachronism at best and an outright constitutional evil at worst. Because of it, they say, we are unable to pass gun regulations to address the epidemic of firearm death in the United States – a plague that claims roughly 30,000 lives (mostly by suicide) and causes 70,000 injuries every year.13 Some say that *Heller* lacks historical support and must be overturned. More strident voices call for the repeal of the Second Amendment itself.14

The extremists are wrong about the Second Amendment. They are wrong about what the other side believes, and they are often just as wrong about what they believe. They are wrong about what they disagree about, and they are wrong about what they agree about. They are wrong to conflate support for the Second Amendment with opposition to gun regulation, wrong to equate support for gun regulation with rejection of the Second Amendment, and wrong to treat agreement with *Heller* as a litmus test for supporting the Second Amendment. Most of all, they are wrong to believe these things with such certainty.

The Second Amendment is complicated and nuanced. There are no easy answers, and nothing in this book will fully satisfy the extremists. To the contrary, we hope to show that aside from a few broad certainties – that the right protects some private purposes, and that it is and has always been subject to regulation – the Second Amendment resists the kinds of simplistic arguments lobbed for or against it by gun rights absolutists or gun prohibitionists.

We will support this position with evidence rooted in history, doctrine, and jurisprudence, but our conclusions are not limited to the academy – far from it. A solid majority of Americans – like the Constitution itself – reject the extremes, and embrace the legitimacy of both gun rights and gun regulation. More than three-quarters of Americans believe, as *Heller* held, that the Second Amendment protects an individual right to keep and bear arms.15 And yet, as the debate over

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Manchin-Toomey revealed, even more Americans support universal background checks.\textsuperscript{16} It is these overlapping groups – the quiet, consistent middle of the gun debate – who have the Second Amendment on their side, rather than those who make such broad and confident claims for or against it.

The Second Amendment as a matter of constitutional law is not the bogeyman feared by some, nor the invincible champion imagined by others. Though the gun debate tends to drive participants to political extremes, the law of the Second Amendment respects rights and regulation in the way that most Americans do.

In addition to explaining the substance and method of Second Amendment law, we hope to help point a way forward in the gun debate by giving a \textit{positive account} of the Second Amendment that is true to law, history and theory, even if it does not satisfy everyone. By “positive,” we mean a vision of the Second Amendment that is affirmative and constructive, a creature of constitutional rather than natural law, and also one that provides some right and wrong answers. We do not suppose that any account of the Second Amendment can fully satisfy all of these goals, and we do not claim to have answered all of the hard questions. But we hope to show that the Second Amendment can be understood through the kind of reasoned debate to which law aspires, rather than the extremism that gun politics too often deliver. And, to be sure, Second Amendment extremism has consequences. It hobbles productive political discussion, it blocks reasonable firearm policy, and it distorts our understanding of constitutional law.

It wasn’t always like this, and it doesn’t have to be. The Second Amendment, the Constitution, and the country should recover a discourse and doctrine that can accommodate both the fundamental right to keep and bear arms and the imperative of reasonable regulation. Consider three ways in which a better understanding of constitutional law might resolve unnecessary disagreements in the gun debate, thereby making room for the many disagreements that matter.

First, gun debate partisans often misunderstand or misrepresent the content of constitutional doctrine, for example in assuming – with either relief or resentment – that the Second Amendment is “absolute,” and permits only minimal gun regulation, or perhaps none at all. One often hears people saying that they oppose gun regulation because they support the Second Amendment, or vice versa. In fact, the history of gun rights and regulation is primarily one of accommodation and coexistence, and nothing in \textit{Heller} demands otherwise. The proper debate is about how, not whether, to accommodate rights and regulation. Although the constitution undoubtedly restricts policy choices, no constitutional right is entirely immune to regulation. As Justice Antonin Scalia emphasized in \textit{Heller}, the right to keep and bear arms is “not unlimited.”\textsuperscript{17} The right to keep and

\textsuperscript{16} Newport, \textit{supra} note 11.

\textsuperscript{17} \textit{Heller}, 554 U.S. at 595.
bear arms does not allow a person to do whatever he or she wants with a gun, just as the right to free speech does not give a person a right to say whatever he or she wants to say.

The boundaries of constitutional rights manifest in different ways. Constitutional law can establish thresholds for a principle's applicability (what counts as "speech," for example) and it can explain what the principle, if applicable, demands (the conditions under which "speech" be regulated). This means that there are at least two ways in which a constitutional claim can fail. A challenge might fall outside the scope of the asserted right altogether. If a white-collar criminal argues that his securities fraud is constitutionally protected, a court will respond that fraud is simply not "speech" for First Amendment purposes. But even constitutionally covered activity (speech in a public park, for example) can be regulated, pursuant to one of the many types of scrutiny that form the bread and butter of constitutional doctrine. Following Fred Schauer's now-familiar terminology, these two categories of limitation can be called "coverage" limitations — those in which the right does not even come into play — and "protection" limitations — those in which the right can be invoked, but also modulated based on the type and strength of government interests. These categories of limitation form the conceptual backbone of post-*Heller* Second Amendment doctrine. For example, courts have overwhelmingly held that concealed carrying falls outside the scope of the Second Amendment, and that banning it therefore raises no constitutional questions. By contrast, most courts have held or assumed that some form of public carrying is covered by the Second Amendment, but that it is subject to various forms of regulation.

Second, gun debate partisans often distort not only the substance but also the method of constitutional law. In American constitutional law, not all forms of argument are legitimate. One can usually invoke precedent, history, and tradition in support of a particular legal position, for example, but not bare political preference. The latter is not simply unpersuasive, but inapt — like using the Bible to prove a mathematical theorem, or particle physics to analyze a Renaissance poem. Like any specialized language, American constitutional law has a grammar — rules that govern not just what one says, but how one says it. A goal of this book is to affirm that constitutional reasoning has rules, and that the gun debate would benefit from respecting them.

Participants in the gun debate regularly conflate personal, partisan, or policy preferences with constitutional law. Constitutional doctrine is not the same as sound public policy, although the former may coincide with or even incorporate the latter.

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19 Schauer, supra note 18, at 1806.

20 See Chapter 5.
It is perfectly sensible to conclude that a particular regulation is desirable and yet unconstitutional, or constitutional and yet undesirable. One might, for example, believe that a ban on assault weapons would save lives and is forbidden by the Second Amendment, or that a blanket prohibition on concealed carry would be constitutional and also completely ineffective. In fact, if one’s constitutional conclusions and policy preferences regularly converge, one should stop to ask how much work constitutional law is actually doing.

Most pernicious, perhaps, is the extent to which the Second Amendment is routinely invoked to address issues that aren’t even constitutional. For example, with a few exceptions not relevant here, only government actors are subject to constitutional rules. As a matter of law, then, it is simply wrong to invoke the Second Amendment against private companies like Starbucks who forbid guns on their property. Our employer, Duke University, bans personal guns on campus. Because Duke is a private institution, this stringent rule does not even implicate, much less violate, the Second Amendment. By contrast, when public universities ban guns, they are subject to constitutional lawsuits. Gun rights advocates can of course argue that allowing firearms onto private property is good policy, and supporters of gun regulation can argue the opposite, but that debate has nothing to do with Second Amendment law.

Finally, the misunderstanding and misuse of the Second Amendment tends to aggravate geographical and political divisions. More than any other constitutional right, the Second Amendment reflects the country’s urban/rural divide – a split that has received a great deal of attention in the wake of the 2016 election. Many rights have varying degrees of constitutional salience in different geographic areas. The religion clauses, for example, might matter more (or less) in areas of varied religious practice. But little compares to the Second Amendment when it comes to regional difference. Study after study has shown that “[g]un ownership is more common among those residing in small cities and towns and in the suburbs compared to those living in large cities.” The precise figures vary, but one representative survey found that only 29 percent of urban residents own a gun, compared to 56 percent of

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3 See, e.g., DiGiacinto v. The Rectors & Visitors of George Mason Univ., 704 S.E.2d 365 (Va. 2011) (prohibition of firearms on campus did not violate visitor’s Second Amendment or state constitutional right to bear arms).
rural residents. This difference in gun ownership unsurprisingly echoes differing views about the desirability of gun regulation. One recent study found that while 56 percent of urban residents favored stricter gun control, only 34 percent of rural residents did – numbers roughly comparable to those for non-gun owners (59 percent) and gun owners (31 percent).

Moreover, the gun debate has become almost completely partisan, in a way that amplifies and reinforces common misunderstandings of the Second Amendment. In May 2016, Donald Trump told a crowd, “Hillary Clinton wants to take your guns away, and she wants to abolish the Second Amendment.” Democrats had very little to offer other than denials. Responding to a question at one of the presidential debates, Hillary Clinton insisted that she did not want to do away with guns or the Second Amendment, and then followed up with a qualifier: “Well, first of all, I support the Second Amendment ... But I also believe that there can be and must be reasonable regulation.”

What was missing from Clinton’s response was a positive constitutional account of the Second Amendment, as opposed to a series of exceptions to it. There is, we think, a serious difference between saying, “I support the Second Amendment, but I also support reasonable gun regulations,” and saying, “I support the Second Amendment and reasonable regulations.” Until liberals offer an account of the Second Amendment, as opposed to a defense against it, they will

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6 Carl T. Bogus, Gun Control and America’s Cities: Public Policy and Politics, ALB. GOV’T L. REV. 440, 464 (2008) (citing The Gallup Poll: Public Opinion 2005, at 141 (Alec M. Gallup & Frank Newport, eds., 2006)); see also Gary Langer, Some Gun Measures Broadly Backed but the Politics Show an Even Split, LANCER RESEARCH (Mar. 12, 2013), www.langerresearch.com/uploads/1.14742GunControl.pdf (reporting that gun ownership is “nearly doubly common in rural compared with urban areas”); Chuck Raasch, In Gun Debate, It’s Urban vs. Rural, USA TODAY (Feb. 27, 2013), www.usatoday.com/story/news/nation/2013/02/27/guns-ingrained-in-rural-existence/1949479/ (“A compilation of December [2012] Gallup polls showed that rural Americans – roughly one-sixth of the population – are more than twice as likely to have a gun in the home than those living in large cities.”). The General Social Survey found that only 33 percent of urban households had guns in the 2000s, compared to 56 percent in rural areas; the same study found that 22 percent of households in the Northeast had guns, compared to roughly 40 percent in the comparatively rural South and mountain regions. Sabrina Tavernise & Robert Gebeloff, Share of Homes with Guns Shows 4-Decade Decline, N.Y. TIMES, Mar. 10, 2013, at A1.


continue to lose constitutional debates. And as long as liberals choose to ignore or reject the Second Amendment, they lose a chance to shape it — ceding that authority to gun rights partisans who systematically underestimate and minimize its limits.

Conservatives must come to grips with a new reality as well: A world in which their central reading of the Second Amendment is the law, recognized by *District of Columbia v. Heller* and enforced by the courts. That is a victory, but also a change in substance and style. The constitutional Second Amendment cannot bear all of the weight that some gun rights partisans would place on it. It is enforceable by courts, but also answerable to doctrine, and not simply to imagined histories and values.

The gun debate maps on to some of the deepest divisions in American life — between individual and society, between present and past, between rural and urban, between Republican and Democrat. If these divisions can be bridged, the Second Amendment must be part of the solution. To oversimplify a bit: Liberals must take the law of the Second Amendment seriously; conservatives must take the Second Amendment seriously as law.

Skeptics may doubt that a clarification of constitutional law will be of much help in such a contentious debate and, to be fair, they have reasons for their skepticism. Many gun rights absolutists know perfectly well that *Heller* leaves ample room for most gun regulations, ranging from registries and concealed carry regulation to outright bans on dangerous and unusual weapons. Justice Scalia made that fact quite clear. On the other side, of course, there are supporters of gun regulation who play clown the historical evidence favoring an individual right to keep and bear arms. Wildly exaggerated (or misleadingly minimizing) claims about the extent of constitutional rights are nothing new in American popular discourse and nothing here will end them. We do not suppose that we will reach the skeptics or the extremists, and our object is not to confirm preconceived notions of what the Second Amendment means.

Instead, we think that — beyond the realm of passionate insiders, with their prepared talking points about the Second Amendment — there is an interested and engaged population of citizens who would actually like to know what the law of the Second Amendment says and doesn’t say. When we have discussed these issues in public fora, we’ve been struck by the degree to which people, whatever their particular commitments regarding guns, are genuinely interested in constitutional law.

Exploring the Second Amendment requires engaging with history, politics and controversy in ways that can be profoundly illuminating. The past decade has seen the development, almost from scratch, of a new constitutional right — a remarkable opportunity and challenge for anyone interested in constitutional doctrine. The Second Amendment also serves an important symbolic role; it valorizes and re-imagines a particular relation of the citizen to arms and to the
state. As a symbolic matter, *Heller* was rightly seen to embrace a particular narrative and set of norms about American identity. To make sense of the Second Amendment's many roles — as a constitutional rule, a political banner, and a cultural symbol — one must situate it in a larger story about gun rights, gun regulation, and constitutional law.

The story begins with the history of gun rights and regulation in the United States, a history in which the two have always coexisted (Chapter 1). That broad proposition is historically uncontested, and yet debate abounds concerning the proper boundary between rights and regulation and the tools with which it should be drawn. Before the Second Amendment became judicially enforceable as a personal right, some legislators regulated as if there were no rights, and some rights-advocates responded as if there was no legitimate regulation. That helped generate the first major debate for the right to keep and bear arms: Whether it is limited to arms, people, and activities bearing some connection to the militia, or whether it includes certain private purposes such as self-defense against crime. That was the central question in *District of Columbia v. Heller* (Chapter 2). The Supreme Court endorsed the latter view, and ultimately extended its application beyond federal law; it also reiterated the constitutionality of many forms of gun regulation and left open a broad range of difficult questions (Chapter 3).

*Heller*'s constitutionalization of the gun debate means that questions previously left to politics must now answer to the Constitution, as courts continue to map the boundaries and internal terrain of the Second Amendment (Chapter 4). In doing so, they — and any faithful participant in the debate — must respect the fundamental rules of constitutional argument; the “grammar” or “language” of constitutional law (Chapter 5). In addition to abiding by those rules, full elaboration of Second Amendment doctrine requires a clearer view of the Amendment's underlying value — one that might be grounded in personal safety, autonomy, or the prevention of tyranny (Chapter 6). Though it is not easy, gaining a clearer understanding of the Second Amendment can help minimize some of the gun debate's pathologies (Chapter 7).

We are not so naïve as to think that understanding the Second Amendment as constitutional law will supply ready answers to every question surrounding firearms. Nor does it guarantee that gun partisans on either side will respect or respond to legal arguments, although we hope they will. At the very least, we want to provide a framework for Second Amendment theory — to approach the myriad problems left unresolved by *Heller* with the kinds of legal tools used for other constitutional rights.

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Judges, lawyers, and legal scholars are the obvious and hopefully the most receptive audience for this approach. Much of this book, especially the middle chapters, deals with specific doctrinal challenges, and we attempt to show how they can be addressed using standard tools of legal reasoning.

For students and scholars of the law, the Second Amendment demands and rewards—but generally has not received—the kind of careful intellectual attention given to other amendments. Of the hundreds of law professors teaching at the nation’s top law schools, only a handful identify the Second Amendment as a primary academic interest. Many others have written on it, some very well; we rely on their scholarship throughout this book. But most of the existing scholarship is not focused on the Second Amendment as such. To the degree that the Amendment is discussed in legal scholarship, it is typically raised as a banner for a particular interpretive methodology or wielded as a cudgel against it; a pawn in the interpretive battles, rather than an independent subject of inquiry.

This is a loss for the Second Amendment, but also for constitutional scholarship. To make sense of the Second Amendment means operating at the very limits of the law. That is true in the obvious sense, inasmuch as it means answering novel doctrinal questions for what is essentially a new constitutional right. But it is also true in the sense that the Second Amendment exists in the borderlands between politics and law, individuals and the state. Rarely are constitutional scholars presented with such a challenge or opportunity.

But as the aftermath of Sandy Hook demonstrates, the rules, rhetoric, and opportunities of constitutional law are not the sole bailiwick of courts, lawyers, and scholars. Nor are the tools of constitutional reasoning. One need not be a law professor to recognize and evaluate claims about constitutional structure, text, history, or doctrine. And our hope is that making these tools more broadly accessible will, if even to a small degree, bring discipline to the gun debate.

We recognize the magnitude of the challenge. Attempting to move the debate from a political to a constitutional register has risks, in part because the Second Amendment both encapsulates and stokes the fear and anger that are so prominent in American politics.\textsuperscript{32} Faith in institutions appears to be plummeting;\textsuperscript{33} isolation and individualism are on the rise.\textsuperscript{34} And nothing better expresses the notion of the man-unto-himself—standing not only apart from his neighbor, but


against him – than the Second Amendment. There’s always a danger that constitutionalizing a political debate will only bring more turmoil, polarization, and intransigence.

But this is a risk we think is worth taking. A positive vision of the Second Amendment, and with it, a better gun politics and a better constitutional discourse, is impossible until the Second Amendment is understood as law.

Gun Rights and Regulation in American History

For 200 years, the Second Amendment was mostly inert as a matter of constitutional law. The Supreme Court rarely acknowledged its existence, and not a single federal case struck down a law on Second Amendment grounds during that time. Then, in 2008, the Supreme Court held in District of Columbia v. Heller that a Washington, D.C. handgun regulation violated the "individual" right to keep and bear arms for private purposes like self-defense.

The majority in Heller wrote that it was doing nothing more than refusing "to pronounce the Second Amendment extinct." That position has strong rhetorical appeal, especially among gun rights advocates; it portrays Heller as a conserver rather than innovator. But as a matter of constitutional doctrine, it is a hard position to defend. Whether or not one agrees with Heller, it represented a sea change in the law. Before 2008, there was no enforceable federal constitutional right to keep and bear arms for private purposes. After 2008, there was. Clark Neily, District of Columbia v. Heller: The Second Amendment Is Back, Baby, 2007–2008 CATO SUP. CT. REV. 127, 140. A single district court opinion, United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999), rev'd and remanded, 270 F.3d 203 (5th Cir. 2001) declared 18 U.S.C. § 922(g)(8) (criminalizing possession of a firearm while under a restraining order) unconstitutional on its face and held that the Second Amendment guarantees an individual right to bear arms. The Fifth Circuit agreed with the District Court that the Second Amendment guarantees an individual right to bear arms, but found that the statute was constitutional regardless. Additionally, some state courts struck down laws on the basis of the Second Amendment. See, e.g., In Re Brickley, 8 Idaho 597 (1902) (striking down a total ban on publicly carrying firearms in towns and cities); Nunn v. State, 1 Ga. 243 (1846) (striking down a total ban on public carry, but finding a valid a prohibition on concealed carry). District of Columbia v. Heller, 554 U.S. 570, 636 (2008); Neily, supra note 1, at 127, 148, 154. That Heller was novel doesn't make it wrong. After all, those who criticize the newness of the right recognized in Heller may simultaneously celebrate rights of even more recent vintage, such as the right of same sex couples to marry. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). As Justice Scalia noted in Heller, even the freedom of speech was hardly enforced for the first 150 years of the First Amendment's existence. Heller, 554 U.S. at 615–16. See also Frederick Schauer, Towards an
Heller claimed to be preserving a preexisting right long recognized in the historical record, but long neglected by federal judges. That makes accurate reconstruction of the history of gun rights and regulation crucial. Understanding this history is not only necessary to evaluate Heller on its own terms, but also important to address the Second Amendment questions Heller left open.

The historical record is frequently misunderstood. The story of guns in America has always involved both gun rights and gun regulation. One would not know it from the shrillness of the modern gun debate, but agreement — or at least compromise — on the vast majority of gun-related issues has been the rule, not the exception, throughout history. Neither history, nor policy, nor the Second Amendment requires an absolute choice between rights and regulation.

Although the story is primarily one of law, judges and lawyers are not the only characters. Millions of people, over hundreds of years, outlined the right to keep and bear arms — and also sketched its limits — long before the justices of the Supreme Court did. The creators of the modern right include English monarchs and Protestant chauvinists, the minutemen and the Black Panthers, Wyatt Earp and Al Capone, John Brown and John Hinckley, and the Brady Center and the National Rifle Association. It has been said that the use of history in legal interpretation is the equivalent of looking out into a crowd of people and picking out one's friends. If so, this is quite a crowd from which to pick.

Our story begins with a zealot in a port city in the west of England.

ENGLISH FOUNDATIONS

In the spring of 1686, Sir John Knight stepped out into the streets of Bristol, England, armed for confrontation. King James II's ascent to the throne had plunged the nation into bitter political and sectarian conflict, pitting the Crown against Parliament and Catholics against Protestants. Earlier that April, Knight, had broken up a Catholic conventicle at a private residence with the aid of local officials. Fearing retaliation, Knight...
equipped himself with a sword and gun, and, according to the prosecution, walked about the city before entering the Anglican church of St. Michaels.\(^7\)

In doing so, Knight had potentially broken the law. In 1328, King Edward III had enacted the Statute of Northampton, which read:

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\text{[N]o man great nor small, of what condition soever he be, except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also [upon a cry made for arms to keep the peace, and the same in such places where such acts happen,] be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure.}\(^8\)
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Although the Statute of Northampton was centuries old by the time of Knight's adventure, the idea of preventing armed persons in the streets was even older. Edward I (Edward III's grandfather) had declared in 1299 that, "under pain of forfeiture" of life, limb, and property, no one should go armed in the realm "without the King's special license"; an injunction later reiterated by his son, Edward II.\(^9\)

The notion of regulation of public weapons had become so accepted that William Blackstone, whose name is almost synonymous with English common law, would later explain that the "offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land." In this respect, the Statute of Northampton was merely a confirmation of a common law tradition traceable all the way to the "laws of Solon," under which "every Athenian was finable who walked about the city in armour."\(^10\)

The Tudor monarchs added to this ancient prohibition, concerned as they were with new lethal (and concealable) technology. Henry VIII restricted certain weapons called "hagbutts" – a kind of muzzle-loading gun – and set a minimum length for guns to prevent concealment.\(^11\) His son followed suit.\(^12\) Henry's daughter,
Queen Elizabeth I, later ordered “all Justices of the Peace” to enforce the Statute of Northampton “according to the true intent and meaning of the same,” which included a prohibition on “carrying and use of Gunnes ... and especially of Pistols, Birding pieces, and other short pieces and small shot” that could be easily concealed.13

Elizabeth’s successor King James I also emphasized the dangers of concealed weapons in a January 1613 proclamation: “[T]he bearing of Weapons covertly, and specially of short Dagges, and Pistols, (truly termed of their use, pocket Dagges, that are apparently made to be carried close, and secret) hath ever beene, and yet is by the Lawes and policie of this Realme straitly forbidden, as carrying with it inevitable danger in the hands of desperate persons...”14

With their references to royal servants and ministers, and their use of hoary terms like affray and dagges, the Statute of Northampton and its ilk call to mind a very different legal system in a very different world. But stripped of the archaic language, and taking account of technological changes in weaponry, these laws are recogniz­able as regulations designed to prevent armed violence, especially in public places, and especially with concealable weapons. Such regulations are part of a tradition that stretches from ancient Athens, through seventeenth-century England, to the modern day.

As early as the thirteenth century, London's statutes provided that no person shall “be found going or wandering about the Streets ... after Curfew tolled ... with Sword or Buckler, or other Arms for doing Mischief ... nor ... in any other Manner, unless he be a great Man or other lawful Person of good repute, or their certain Messenger, having their Warrants to go from one to another, with Lantern in hand.”15 Another fourteenth-century London law proclaimed that “for keeping the peace in the city and suburbs” it was decreed that “no stranger or privy person, save those deputed to keep the peace, shall go armed therein after they shall come to their lodgings.”16 That law's fifteenth-century successor “forbade any man of whatsoever estate or condition to go armed within the city and suburbs, or any except lords, knights and esquires with a sword.”17 Even Sir John Knight remarked that his habit ordinarily was

13 By the Queene [Elizabeth I]: A Proclamation Prohibiting The Use and Carriage of Daggers, Birding Pieces, and Other Gunnes, Contrary To the Law (London, Robert Barker 1600).
14 By the King [James I]: A Proclamation Against The Use Of Pocket-Dags (London, Robert Barker, 1613).
15 Statutes for the City of London, 1285, 13 Edw. (Eng.).
16 2 Calendar of the Close Rolls, Richard II 1381–85, at 92 (Nov. 2, 1381, Westminster) (H. C. Maxwell-Lyte, ed., 1920); see also JOHN CARPENTER, LIBER ALBUS: THE WHITE BOOK 335 (Henry Thomas Riley, ed., 1861) (1419) (specifying “[t]hat no one, of whatever condition he be, [may] go armed in the said city or in the suburbs, or carry arms, by day or by night,” except certain people connected to “great lords” or the royal family or when commanded to keep the peace).
to leave his weapons "at the end of the Town when he came in" and pick them up again "when he went out."

Regulations on hunting and the use of guns for that purpose were also longstanding in England. Many of the earliest legal restrictions imposed property requirements on hunters, thereby preserving hunting as a pastime for the nobility and aristocracy. These laws became increasingly stringent during the reign of James I, raising the property requirements and prohibiting the use of particular weapons for taking certain game, and there is good reason to think that these changes were motivated by James I's fear of insurrection and desire to disarm the supposedly violent lower classes.

Restrictions became even more severe after the Restoration under Charles II. Perhaps most notorious was the 1670 Game Act, which historian Joyce Lee Malcolm has described as having "deprived the great majority of the community of all legal right to have firearms." The history of the law is disputed, but it has been said that it was later invoked by James II as grounds for ordering the militia to search private homes for "muskets or guns" because "a great many persons not qualified by law under pretense of shooting matches keep muskets or other guns in their houses." Fifty years later, the Black Act was passed, nominally to prosecute poachers (who would blacken their faces for purposes of disguise, hence the Act's name) in the Waltham forests. It, too, is frequently described as repressive— not necessarily because hunting itself was central to the right to keep and bear arms, but because regulations that were nominally about hunting were actually designed to restrict the lower classes' ability to bear arms. Because it is unclear how much these laws

Harris, supra note 6.

The discussion in these two paragraphs is taken from Joseph Blocher, Hunting and the Second Amendment, 91 Notre Dame L. Rev. 133, 158-60 (2015).

David B. Kopel, It Isn't About Duck Hunting: The British Origins of the Right to Arms, 93 Mich. L. Rev. 1332, 1340 (1995) (discussing fourteenth-century laws); see also Joyce Lee Malcolm, To Keep and Bear Arms 72, 198 n.83 (1994) (citing a law providing that "[n]one shall hunt but they which have a sufficient living").

MALCOLM, supra note 20, at 13 (describing the 1604 Act, 1605 Act, and 1609 Act).

See, e.g., Schwoerer, supra note 11, at 35.


MALCOLM, supra note 20, at 65; L. A. Powe, Jr., Guns, Words, and Constitutional Interpretation, 38 Wm. & Mary L. Rev. 1311, 1347 (1997).


See, e.g., MALCOLM, supra note 20, at 64-71 (describing the Black Act as "draconian" and "repressive"); see also generally P. B. Munsch, Gentlemen and Poachers: The English Game Laws 1671-1831 (1981).
were aimed at protecting game and how much they represented efforts at political control, opponents of contemporary gun regulation often cite them as evidence that seemingly sensible gun regulations may be pretexts for general disarmament.

But it was the strife of James II’s kingship that motivated Knight’s armed foray in the streets of Bristol. James II’s short reign was dominated by a power struggle with Parliament over religion, and he would be the last Catholic to wear the English crown.9 Knight’s actions must be understood against the backdrop of this political and religious turmoil. Indeed, in one historian’s account, Knight’s prosecution had less to do with his decision to walk about the city armed, and more to do with his suggestion that the King was not willing or able to protect his Protestant subjects within St. Michael’s church.10 Whatever the motivation, the Attorney General pursued Knight for violating the Statute of Northampton, resulting in the spectacularly named case of *Rex v. Knight*. The charges alleged that Knight was a “very disloyall and Seditious and ill affected man” who “had caused Musketts or Armes to be carried before him in the Streets, and into the Church to publick service to the terrour of his Majesties Leige people, etc. and to the Scandall of the Government.”

In the end, Knight was acquitted. Centuries later, the question is why. What the Statute of Northampton forbade, the significance of *Rex v. Knight*, and what the Framers of the Second Amendment understood the Statute to prohibit, are all matters of significant historical debate. Some scholars conclude that the Statute banned armed travel in public places,11 while others say it “cover[ed] only those circumstances where carrying arms was unusual and therefore terrifying.”12 As historian Saul Cornell notes, one finds different interpretations of the law in Blackstone (cited to support the former view) and in the earlier work of Sir William Hawkins (cited to support the latter view). Since “the Founders were familiar with both English commentators ... it seems likely that there may have been a range of views on interpreting this question.”13

The Glorious Revolution of 1689 brought James II’s tumultuous reign to an end and installed the Protestants William III and Mary II in his place. William and Mary, in turn, promised to respect the rights of Englishmen, an agreement codified

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10 Harris, supra note 6.
11 Id.
14 Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1713 (2012). Historian Tim Harris is skeptical that anything meaningful can be gathered from Knight’s acquittal, since it pertained more to Knight’s aspersions on the King than to the incidents of traveling armed. See Harris, supra note 6.
in the English Declaration of Rights – an important predecessor of the American Bill of Rights. Among other things, the Declaration guaranteed: “Subjects which are Protestants may have Arms for the Defence suitable to their Conditions and as allowed by law.” In *Heller*, Justice Scalia wrote that this provision “has long been understood to be the predecessor to our Second Amendment,” and Blackstone himself described it as “a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.” The underlying balance between that “natural right” and “due restrictions” would soon become manifest in the colonies. In many ways, it was baked into the common law.

**GUN RIGHTS AND REGULATION IN THE COLONIES**

Guns were a part of life in the American colonies. They were used for hunting, pest control, self-protection, and the struggle for independence – all of which are now central to the cultural and historical mythology of guns in the United States. And yet that history is more complicated and nuanced than the mythology might suggest.

**Colonial Gun Regulation**

One persistent myth, widespread in public commentary and scholarship, is the notion that gun regulation is a modern development. When people refer to the “modern orthodoxy” supporting gun regulation, they are implicitly contrasting it with a time when guns were supposedly unrestricted. The assumption is that because gun regulation did not exist in the colonies, it is constitutionally suspect today.

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36 *Heller*, 554 U.S. at 593.  
37 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *139.  
39 See, e.g., Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 92 TENN. L. REV. 461, 487 (1995) (“In truth there is more historical precedent in this country for the requirement to own a gun than for a prohibition against doing so.”); Ed Apple, A Layman’s Short History of Gun Control in America, KEEP AND BEAR ARMS.COM, www.keepandbeararms.com/information/ExcelViewItem.asp?ID=2,428 (“Most people think that gun control is a recent phenomenon in America, and in a way, they’re right.”); Nelson Lund, The Second Amendment and the Inalienable Right to Self-Defense, Report #16-02, on Political Thought, HERITAGE FOUNDATION (Apr. 17, 2014), www.heritage.org/research/reports/2014/04/the-second-amendment-and-the-inalienable-right-to-self-defense (“At the time of the Framing, gun control laws were virtually nonexistent, and there was no reason for anyone to discuss what kinds of regulations would be permitted by the Second Amendment.”).  
41 See supra note 39 and sources cited therein.
History belies this assumption. As legal scholar Adam Winkler notes, “Gun safety regulation was commonplace in the American colonies from their earliest days.”43 Some colonies more or less copied the Statute of Northampton wholesale,43 and versions of it remain on the books in some of those places even today.44 Some colonial cities—including Philadelphia, New York, and Boston—regulated the storage and use of firearms and ammunition within city limits. Boston’s law, for example, provided that “the depositing of loaded Arms in the Houses of the Town of Boston, is dangerous” and that no loaded firearms were allowed in any “Dwelling-House, Stable, Barn, Out-house, Store, Ware-house, Shop or other Building.”45 Commercial enterprises handling gunpowder within cities had to comply with safe storage laws. Cornell and fellow historian Nathan DeDino note that “New York City required ships to unload gunpowder at a magazine within twenty-four hours of arrival in the harbor and before the ship ‘hawl[ed] along side of any wharf, pier or key within the city,’” while “Boston subjected any ‘Gun Powder ... kept on board any ship or other vessel laying to, or grounded at any wharf within the port of Boston’ to confiscation.”46 The prevalence of these regulations in cities is notable. The urban–rural divide in the colonial era—which echoes the Statute of Northampton’s focus on public places like fairs and markets—persists today, as there are still significant differences between urban and rural areas with regard to the costs, benefits, and regulation of guns.47

Of course, the fact that some of these laws have modern analogues does not mean that all of them are worthy of emulation. For example, some early regulations imposed racial qualifications for the purchase or possession of arms.48 Such

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43 Adam Winkler, Gunfight: The Battle over the Right to Bear Arms in America 115 (2009).
46 This division, and its implications for Second Amendment doctrine, are the subject of Joseph Blocher, Firearm Localism, 123 Yale L.J. 8a (2013).
Gun Rights and Regulation in the Colonies

laws would be impermissible today for reasons analytically distinct from the Second Amendment — they clearly violate the Constitution's Equal Protection Clause, for one thing. But they are still significant, because they show that guns were subject to legal regulation from the country's earliest days, and also that gun regulations, like any other laws, can be crafted or applied in ways that place particular burdens on disfavored groups.

The relationship between gun rights, regulation, and politics helped precipitate the Revolutionary War. By the mid-1770s, tensions between the colonies and the Crown had boiled over to the point that royal officers sought to disarm the colonists. General Thomas Gage, the Military Governor of the Massachusetts Bay Colony, did so with particular aplomb. On April 18, 1775, he sent a force of some 700 men to seize a large cache of arms rumored to be in Concord, 20 miles northwest of Boston. Unfortunately for Gage and his men, word of this plan leaked, and by the time the British began to move that night, Paul Revere had already sent his signal and begun his famous ride. When the British made it to Lexington the next morning, they found a group of armed and defiant colonists, and the first shots of the Revolution were fired. In that sense, as Winkler puts it, the Revolution itself was — within the larger context of oppression by the Crown — “a war ignited by a government effort to seize the people's firearms.”

That said, it would be too much to say that the colonists' opposition to the British march was tantamount to a broad repudiation of gun regulation.

The Militia

Even as resistance to gun confiscation helped spark the Revolution, embrace of gun regulation — albeit of a very different kind than we see today — helped facilitate it. Specifically, the colonies adopted militia regulations that generally required all eligible members to report for muster with their own weapons and ammunition at the ready. New York's law, for example, provided for the colonel or commanding officers of the militia to call a regimental parade twice a year, at which they would examine “the arms, ammunition and accoutrements of each man”; “defaulters” would be identified and subject to fines.

The specificity of the militia acts and similar laws is notable: those serving in the militia were not permitted to bring whatever arms they desired, but only those specified.

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49 WINKLER, supra note 42, at 105.
51 Saul Cornell & Kevin M. Sweeney, All Guns Are Not Created Equal, CHRON. HIGHER EDUC., FEB. 1, 2013, at B4.
In the romantic myth, training and familiarity with firearms made the minutemen into a dead-eyed, sharpshooting military force. Guns were thought to reflect the "civic virtue and military prowess of the yeoman" as compared to the "degeneration of England and ... the sharp decline of the 'liberties of Englishmen.'" As Dan Kahan noted, even prior to *Heller*, "[t]hese connotations became institutionalized in the Second Amendment."

Although the civic virtue of the colonial soldiers is undoubted, their military prowess is often overstated. As one historian put it, "[t]his force, though armed, was largely untrained, and its deficiencies were the subject of bitter complaint." George Washington himself disparaged the militia as undisciplined and unreliable, likely to "fly from their own shadows" in the confusion of battle.

Responding to the militias' deficiencies, Congress passed the Militia Act of 1792, which provided that "every citizen so enrolled [in the militia] and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt," various other accoutrements, "or with a good rifle, knapsack," and ammunition, "and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack." But, as the Supreme Court noted nearly 200 years later in *Perpich v. Department of Defense*, the Militia Act "was virtually ignored for more than a century."

By 1901, President Theodore Roosevelt concluded, "Our militia law is obsolete and worthless." That same year, Congress used its Militia Clause power to pass the Dick Act, which divided the class of able-bodied male citizens between 18 and 45 years of age into an "organized militia" – the National Guard of the several States – and the "reserve militia," which later became known as the "unorganized..."
The Context of the Amendment's Drafting

The states that emerged from the Revolutionary War were not united. Bound loosely together by the Articles of Confederation, they were nominally governed by a Congress that had virtually no power to regulate domestic affairs and only limited authority to raise revenue. The national government depended mostly on voluntary financial contributions from the states, meaning that debts to foreign nations and Revolutionary War soldiers remained outstanding nearly a decade after independence.60

Unpaid for their service, yet subject to sometimes-oppressive taxation by their own states, some colonists found themselves caught in an economic whipsaw. Daniel Shays, a farmer from Massachusetts who had fought for the Continental

60 Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789-1815 95-96 (2009). James Madison would later say that “The radical infirmity of the Articles of Confederation was the dependence of Congress on the voluntary and simultaneous compliance with its Requisitions, by so many independent communities, each consulting more or less its particular interests and conveniences and distrusting the compliance of others.” Clayton P. Gillette, The Exercise of Trumpets by Decentralized Governments, 83 Va. L. Rev. 1347, 1417 n.73 (1997).
Army at Lexington, Concord, Bunker Hill, and Saratoga, was among them. As petitions to the state government went unanswered, Shays and others like him took up arms and went on the march — an uprising known as Shays' Rebellion. Hampered by the weakness of the Articles of Confederation, the federal government could not summon a force sufficient to block the thousands of rebels making their way to the federal armory in Springfield, Massachusetts. Boston's merchants, who dominated the state government, instead hired a private militia, dispersed the rebels with cannon shots, and then pursued them as they melted back into the countryside over the following months.61

Though it caused few casualties, Shays' Rebellion helped solidify the sense that the Articles were inadequate, and that a stronger government was needed. Reflecting on the Rebellion in early 1787, John Jay wrote that "the inefficiency of the Federal government [became] more and more manifest."62 (Thomas Jefferson, ever quotable, was sanguine about the threat of armed rebellion: "[W]hat country can preserve it's liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? [L]et them take arms ... the tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. [I]t is it's natural manure."63) In February, the Continental Congress called for a group of delegates to meet in May "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."64

Throughout the course of a sweltering Philadelphia summer, those delegates produced the document we now know as the Constitution. Entire courses are taught about individual clauses of the Constitution (this book, after all, is about a twenty-seven word amendment) but the basic outline is familiar enough: enumerated federal power, separation of powers, a division of authority between the states and the federal government, supremacy of federal law, and so on.

As comfortably foundational as those principles seem to modern Americans, the very idea of the written Constitution was radical at the time, and no provision more so than the one authorizing a standing federal army. As Governor Edmund Randolph of Virginia noted, "With respect to a standing army, I believe there was not a member in the federal Convention, who did not feel indignation at such an institution."65 The military provisions of the Constitution therefore embody a compromise, one that — like the document as a whole — divides power among different

62 Id. at 123.
branches of the federal government, and between those branches and the states. Congress was allowed to raise and support a national Army and Navy, and also to organize, arm, discipline, and provide for the calling forth of "the Militia," as well as to govern "such Part of them as may be employed in the Service of the United States." The President, meanwhile, would serve as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." And the states retained the power to appoint officers and to train and discipline the militia according to rules prescribed by Congress.

Of course, in order for any of this to take effect, the Constitution had to first win ratification by at least nine of the thirteen states. Supporters of ratification (most prominently the Federalists) argued in speeches, meetings, and public papers (the most famous of which are the *Federalist Papers*) that security, freedom, and prosperity depended on the creation and recognition of a federal government with broadened powers. But the existence of a federal standing army and the precarious place of the state militia remained central concerns for ratification opponents, the Anti-Federalists. "The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless — by disarming them," Anti-Federalist George Mason warned. "Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them."

In those same debates, Anti-Federalist Patrick Henry thundered, "The great object is, that every man be armed" — a quote that some embrace as evidence that gun ownership was a right and even a duty in the Founding Era. As Michael Waldman notes, "The eloquent patriot's declaration provided the title for the ur-text for the gun rights movement, Stephen Halbrook's 1984 book, *That Every Man Be Armed*... The Second Amendment professorship at George Mason University is named after Henry. A $10,000 gift to the NRA makes you a 'Patrick Henry Member.'"

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67 Art. II, § 2.
69 *The Federalist* No. 46 (James Madison) ("Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger.").
71 *Id.*
But as Waldman demonstrates, Henry made his comment in the course of objecting to the cost of having both the federal government and the state arm the militia. Here is the full quote:

May we [the States] not discipline and arm them [the militia], as well as Congress, if the power be concurrent? [S]o that our militia shall have two sets of arms, double sets of regimentals, &c.; and thus, at a very great cost, we shall be doubly armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms, &c.?74

"Far from a ringing statement of individual gun-toting freedom," Waldman concludes, "it was an early American example of a local politician complaining about government waste."75

Eventually, the Federalists prevailed and New Hampshire’s vote on June 21, 1788, ensured the Constitution’s ratification. But the battle over the scope of federal power, and specifically over its power regarding the military and the militias, did not end with ratification. Many states – especially those with strong Anti-Federalist sentiments such as Virginia, New York, and North Carolina – proposed Amendments directed at Mason’s concern.

The relevant proposals sent by the Virginia Ratifying Convention, and endorsed by North Carolina, read as follows:

17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be UNDER strict subordination to, and be governed by, the civil power.

19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.76

New York’s proposal was largely identical:

That the people have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, natural, and safe defence of a free State .... That standing Armies, in time of Peace, are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity;

74 Patrick Henry, Remarks at the Virginia Convention Debates (June 14, 1788), reprinted in 3 Elliot, at 386 (emphasis added).
75 Waldman, supra note 73.
By directly embedding the "right to keep and bear arms" in a military context and by raising the specter of "standing Armies," the Virginia and New York proposals (as well as minority proposals from places like Maryland) suggested that the Second Amendment right to keep and bear arms is tied to militia service, not to private uses like individual self-defense.

Other constitutional proposals appeared to take a different approach. The proposals of New Hampshire and Pennsylvania, for example, did not contain express militia-based language, and have often been cited to support an alternative reading of the Second Amendment that includes a right to arms for private purposes such as self-defense, and perhaps even hunting and recreation. New Hampshire's proposal read simply: "Twelfth, Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." (This proposal, it should be noted, appeared nearly immediately after another regarding the standing army.)

A minority proposal from Pennsylvania was written even more broadly. That proposal stated:

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

77 See Heller, 554 U.S. at 677-78 (Stevens, J., dissenting) ("The proposals considered in the other three States, although ultimately rejected by their respective ratification conventions, are also relevant to our historical inquiry. First, the Maryland proposal, endorsed by a minority of the delegates and later circulated in pamphlet form, read: "4. That no standing Army shall be kept up in time of peace, unless with the consent of two thirds of the members present of each branch of Congress .... 10. That no person conscientiously scrupulous of bearing arms, in any case, shall be compelled personally to serve as a soldier." (citing 3 Elliot at 729, 735)).

78 See Heller, 554 U.S. at 657 (Stevens, J., dissenting) ("By contrast, New Hampshire's proposal, although it followed another proposal that echoed the familiar concern about standing armies, described the protection involved in more clearly personal terms. Its proposal read:

"Twelfth, Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."

79 See Heller, 554 U.S. at 657 n.22 (Stevens, J., dissenting) ("Tenth, That no standing Army shall be kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress, nor shall Soldiers in Time of Peace be quartered upon private Houses without the consent of the Owners." (citing 3 Elliot at 751).

Advocates for a broad Second Amendment right often point to the Pennsylvania minority proposal as support for the "individual rights" view of the Amendment, since it refers to "a right to bear arms for the defence of themselves and their own state." Others object that a rejected proposal put forward by a dissenting faction in a single state is slim support for such an interpretation of the right.

As primary draftsmen of the Constitution and of the Second Amendment, James Madison could draw upon all of this material. He was also writing against the backdrop of the extensive gun regulations described above, and which he showed little indication of disapproving. It is notable, then, that Madison's first draft did not include the "for the defense of themselves" language from the Pennsylvania minority proposal. Instead, it employed the language from Virginia and New York: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." The latter clause eventually dropped out during Senate debate, although the reason why remains lost to history. But during debates in the House, Mason's concern re emerged, as Elbridge Gerry expressed the fear that Congress "can declare who are those religiously scrupulous, and prevent them from bearing arms." Perhaps this explains why the third clause was removed from Madison's original draft, and the first two rephrased and reordered, before the Second Amendment as we know it was sent to the states for ratification.

The battles over the Second Amendment's phrasing set the stage for what would be the most significant constitutional debate about the Amendment's meaning: namely, whether the right it protects is limited to militia service, or whether it encompasses private and personal uses such as self-defense against criminals. That was the question at the heart of Heller, and is the focus of Chapters 2 and 3.

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85 1 Annals of Congress 749–50 (Joseph Gales ed., 1834) (statement of Rep. Gerry). The proposal that Representative Gerry opposed provided: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall compelled to bear arms." COGAN, supra note 84, at 159.
GEOGRAPHIC VARIATION IN THE RIGHT TO KEEP AND BEAR ARMS

Ratification of the Second Amendment made it a federal guarantee, which meant that it applied throughout the United States. But that did not mandate strict national uniformity in gun rights and regulation. For one thing, prior to Heller, the Second Amendment did not apply to regulation of the private use of arms—it was a national guarantee, but only for matters involving the organized militia. Moreover, as Chapter 3 explains, until the middle of the twentieth century the Bill of Rights generally did not apply to non-federal law, leaving states and cities free to strike their own balance with regards to gun rights and regulation.

The Supreme Court's 2010 decision in McDonald v. City of Chicago changed that, by making the Second Amendment applicable to state and local regulation. And yet even federal constitutional rights can be context-sensitive, meaning that a constitutional challenge that would succeed in one place might well fail in another. For example, the First Amendment permits obscenity prosecutions in Mississippi that it would forbid in Manhattan. The Fifth Amendment protects property, but property is defined by state law, which differs in important respects from state to state. Heller itself held that governments may not ban handguns everywhere, but can prohibit them in government buildings, which tend to be concentrated in some cities (like the District of Columbia) more than others.

The existence of a federal constitutional right therefore does not necessarily generate a one-size-fits-all regime of legal rights and restrictions. The history of gun regulation after ratification of the Second Amendment demonstrates how pronounced and longstanding geographic variation regarding gun rights and regulation really was.

Regional Histories

Guns have long played a prominent role in Southern culture and politics. Southerners are far more likely to grow up with guns, to use them for recreation, to oppose restrictions on their possession and use, and to profess support for the Second Amendment. But like so many other elements of Southern history, the
place of guns is surprisingly complicated, and is frequently misunderstood even by the people who celebrate it the most.

On the one hand, as historian Saul Cornell and legal scholar Eric Ruben have shown, the South did embrace, albeit with variation, aspects of the right to keep and bear arms that other regions of the country rejected.1 In particular, courts in southern states were more likely to accept the existence of a Second Amendment right to keep and bear arms in public. And yet as Cornell and Ruben point out, those cases emerge from "a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined"2 – a heritage that might not be the best candidate for contemporary constitutional respect. Moreover, there is some indication that, as a social practice, open carry was rare even in the antebellum South. As the North Carolina Supreme Court said in 1843, "[A] gun is an 'unusual weapon,' wherewith to be aimed and clad. No man amongst us carries it with him ... as a part of his dress."3 The justices went on, "[N]ever we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment."4

More importantly for Second Amendment interpretation, even assuming a Southern tradition of broad public carry rights, that tradition was not followed nationwide. An alternative model permitted public carry only in certain circumstances. Massachusetts, for example, allowed a person to carry guns publicly if he had "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property"5 - a predecessor of modern "good cause" public-carry permits. The Massachusetts statute also provided that any person publicly carrying a weapon could be arrested upon the complaint of any other person (or a justice of the peace or constable without complaint) "having reasonable cause to fear an injury, or breach of the peace."6 Gun carriers could be required to provide "sureties for his...
keeping the peace — a financial guarantee, roughly akin to bail, which would be forfeited if the person failed to keep the peace.

Concealed carry was a wholly different matter, both socially and legally. Even in the South, where open carry might have been more acceptable, stringent regulation of concealed carry was the norm. Although restrictions on concealed carry have roots as far back as England — recall the Statute of Northampton and its successors — in the United States they first became prominent in the South. It seems plausible that such regulations were designed, at least in part, to respond to the prevalence of dueling and other “honor-restoring” types of violence.

For example, in an 1850 case called State v. Chandler, the Louisiana Supreme Court upheld a ban on concealed carry, concluding that “the right guaranteed by the Constitution of the United States ... is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.” Some states, including Georgia and Tennessee in the 1830s, would go even farther, prohibiting the sale of certain concealable weapons. By the nineteenth century, restrictions on concealed carry had spread from the South and had become so much the national norm that the Supreme Court in Heller — citing both historical Southern cases and national commentaries — could conclude that the majority of nineteenth century authorities considered “prohibitions on carrying concealed weapons ... lawful under the Second Amendment or state analogues.”

The Court’s reference to “state analogues” is notable. At the time of the Founding or soon thereafter, more than a dozen states had Second Amendment analogues in
their own constitutions. But those analogues were adopted simultaneously with sometimes-extensive regulation of guns. And in keeping with that early practice, nearly all states today guarantee some version of the right to keep and bear arms in their state constitutions, though the overwhelming majority also conclude that the right is subject to “reasonable” regulation.

The Wild West and the Urban–Rural Divide

On a chilly October afternoon in 1881, Wyatt Earp was walking outside the courthouse in Tombstone, Arizona, when he bumped into Tom McLaury, a member of the “Cowboys” gang. The Cowboys were notorious for cattle rustling, horse-thefting, heavy drinking, and threatening the Earps, with whom they had a bitter feud. What escalated the conflict on that particular afternoon, and precipitated one of the most famous shoot-outs in American history, was a gun regulation. Tombstone required visitors without a license to deposit their pistols at their destination – a regulation far stricter than that found anywhere in the United States today. Wyatt, who

McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) (plurality opinion) (referring to “the four States that had adopted Second Amendment analogues before ratification, [and] nine more States [that] adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820”).

Id. at 870 n.13 (Stevens, J., dissenting); id. at 930 (Breyer, J., dissenting) (noting that “many States have constitutional provisions protecting gun possession” but that “those provisions typically do no more than guarantee that a gun regulation will be a reasonable police power regulation”).


Adam Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683, 687 (2007). In some states, there has been a push (usually pursued through ballot initiatives) to require strict scrutiny of all gun regulations. How far those laws will be adopted and whether they will have much legal impact remains to be seen. See Paul Purpura, Gun Law That Excludes Felons is Upheld by Louisiana Supreme Court, NOLA.com (July 1, 2014) www.nola.com/crime/index.ssf/2014/07/louisiana_supreme_court_uphold_4.html (noting that Louisiana's felon-in-possession law survived a constitutional challenge even after that state's adoption of a strict scrutiny amendment).

The material in this subsection is taken from Blocher, supra note 47, at 84.

There is some discrepancy in the wording of the ordinance. Paul Lee Johnson has identified it as stating as follows:

Section 1: It is hereby declared to be unlawful to carry, in the hand or upon the person, or otherwise, any deadly weapon within the limits of said city of Tombstone, without first obtaining a permit in writing for such a purpose (and upon good cause shown by affidavit) from the presiding officer of the Board of Police Commissioners.

Section 2: This prohibition does not extend to persons immediately entering or leaving said city, who in good faith and within reasonable time are proceeding to deposit, or to take from the place of deposit such deadly weapons.

Section 3: All firearms of every description and bowie knives and dirks, are included within the prohibition of this ordinance.
claimed to be acting as a deputy marshall on behalf of his brother Virgil, demanded, “Are you heeled or not?” McLaury denied that he was, though the gun visible at his hip indicated otherwise. Wyatt drew his own gun and beat McLaury with it.

A few hours later, the Earps and their men confronted the Cowboys on Fremont Street, not far from the OK Corral. Virgil was present this time, and upon seeing the Cowboys he shouted, “Throw up your hands, I want your guns!” One or both parties drew their guns and Virgil quickly added, “Hold! I don’t mean that!” but his words were followed by a barrage of shots from all sides. As the smoke cleared, Wyatt was unhurt, but Virgil and Morgan were wounded, as was their associate Doc Holliday. Tom McLaury, his brother Frank, and Billy Clanton were all dead or dying.

The legend of the OK Corral is familiar enough, but the gun regulation at its center is not. This is a significant omission, because laws like Tombstone’s demonstrate the existence of gun regulation even in places where people might least expect to find it. Some places most associated with guns – Dodge City and Tombstone among them – required people to disarm when arriving in town. Many frontier towns passed “blanket ordinances against the carrying of arms by anyone,” and generally prohibited the “carrying of dangerous weapons of any type, concealed or otherwise, by persons other than law enforcement officers.”

Pointing to these prohibitions, historian Garry Wills concludes that “[t]he West was not settled by the gun but by gun-control laws.”

Wills’ use of the word “settled” is significant, for guns were far more prevalent, and far less regulated, outside of settlements – continuing the theme, noticeable as far back as the Statute of Northampton, of regulating guns more strictly within city limits. As Winkler describes it: “Guns were widespread on the frontier, but so was gun regulation.” He continues, “[a]ll most everyone carried firearms in the untamed wilderness, which was full of dangerous Natives, outlaws, and bears. In the frontier towns, however, where people lived and businesses operated, the law often forbade people from toting their guns around.”

Robert Dykstra describes instances of zealous enforcement of urban gun control laws in the West, and Robert Spitzer similarly concludes that “[e]ven in

Section 4: Any person or persons violating the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not to exceed two hundred and fifty dollars and costs, or imprisonment in the city jail for a period not to exceed five months, or both at the discretion of the court.

Section 5: That this ordinance shall take effect and be in force from and after due publication.

See Paul Lee Johnson, The McLaury’s in Tombstone, Arizona: An O.K. Corral Obituary 323 n.18 (2012). Other writers have identified versions of the regulation without the section on affidavits.

10 Winkler, supra note 42, at 13.
12 Garry Wills, Reagan’s America: Innocents at Home 89 (1987).
13 Winkler, supra note 42, at 165 (citing Dykstra, supra note 111, at 121).
14 Id.
15 Dykstra, supra note 111, at 137 (describing, for example, the nearly one-hundred arrests in 1873 alone in Ellsworth, Texas).
the most violence-prone towns, the western cattle towns, vigilantism and lawlessness were only briefly tolerated. ... Prohibitions against carrying guns were strictly enforced, and there were few homicides." David Courtwright concludes that the laws became better enforced in the 1880s and 1890s, because "[a]s the threat of Indians and outlaws receded and the regular police system gradually became more professional and efficient, it was harder to justify carrying personal weapons for self-defense."  

In other words, as functioning governance emerged, the need and tolerance for private gun use decreased. This was not solely a frontier phenomenon, but was reflected in law nationwide. Some states made it illegal to fire weapons within the limits of a city or town — a rule that existed in the colonial era, and extended to the antebellum period and after. Some of these laws were extremely specific about their geographic reach. One 1866 Texas statute, for example, provided in part:

> It shall not be lawful for any person to discharge any gun, pistol, or fire arms of any description whatever, on, or across any public square, street, or alley, in any city or town in this State; Provided, this Act shall not be so construed as to apply to the "outer town," or suburbs, of any city or town.

Other laws flatly prohibited the carrying of nearly any weapon within towns, cities, villages, and settlements.  

The not-so-wild Western towns are representative of a broader trend that continues today. Indeed, perhaps no characteristic of gun laws in the United States is as longstanding as the stricter regulation of guns in cities than in rural areas. The

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116 Spitzer, supra note 90, at 11.
119 E.g., An Act Prohibiting the Firing of Guns and Other Fire Arms in the City of New Haven, 1845 Conn. Pub. Acts 10; An Act to Prevent the Discharging of Fire-Arms Within the Towns and Villages, and Other Places Within this State, and for Other Purposes, § 1, 4 Del. Laws 329; An Act to Incorporate the Town of Baltimore, Hickman County, § 10, 1856 Ky. Acts 139.
120 E.g., An Act to Prevent the Shooting or Firing of Guns or Pistols in the Village of Vineville, in the County of Bibb § 1, 1875 Ga. Laws 189; An Act to Prevent Parties from Shooting Within the Limits of Towns and Private Enclosures, § 1, 1873 Mont. Laws 46; Lincoln, Neb., Gen. Ordinances art. 26, § 1 (1895).
122 Wyoming, for example, forbade any resident or sojourner bearing "concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village." 1876 Wyo. Sess. Laws § 1.
geographic tailoring of gun regulation has remained largely consistent for more than two centuries. The recent spread of state “preemption” statutes, which limit the ability of municipal governments to pass their own gun control laws, breaks from that tradition and limits the degree of local variation. But it is no accident that the Supreme Court’s major gun cases – *Heller* and *McDonald*, addressed in the next two chapters – both involved municipal gun regulation.

**RACE, GUNS, AND THE CIVIL WAR**

Gun rights and regulation have always been deeply intertwined with America’s original sin, slavery, and its legacy of racial oppression. But the relationship between guns and race is more nuanced than it might seem. Guns were used to keep African Americans powerless, but African Americans and their allies also used them in the struggle for freedom and equality. Likewise, some gun regulations, even racially neutral ones, were sometimes used to render African Americans defenseless against public and private harms. But the relevance of this historical fact is a source of deep disagreement – striking down regulations based on their tainted origins could make guns more available to members of “outgroups,” but the lack of regulations could contribute to gun violence in those same communities. What cannot be gainsaid is that the histories of guns and race in the United States are inextricable.

Critics of strong gun rights have occasionally suggested that the Second Amendment was ratified at the behest of slaveowners. One recent article argued that “the real reason the Second Amendment was ratified, and why it says ‘State’ instead of ‘Country’” was that the Framers wanted “to preserve the slave patrol militias in the southern states, which was necessary to get Virginia’s vote.” This

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3. David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 Tul. L. Rev. 387, 390 (1999) (“Outgroup self-arming may in the short term provide a measure of safety, but in the long run, interpreting the Constitution to require decentralized violence will impede the formation of a consensus culture that extends protection to all.”).
4. Thom Hartmann, *The Second Amendment was Ratified to Preserve Slavery*, TRUTHOUT (Jan. 15, 2013), www.truthout.org/news/item/3890-the-second-amendment-was-ratified-to-preserve-slavery; see also Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309, 318, 321 (1998) (arguing that the Second Amendment “was written to assure the Southern states that Congress would not undermine the slave system by using its newly acquired constitutional authority over the militia to disarm the state militia and thereby destroy the South’s principal interest of slave control”).
is unlikely. At most, it could be said that the militia was intended to put down rebellions, whether that be a slave revolt in the South or Shays' Rebellion in the North.

But the fact that slave patrols were not the focus of the Amendment does not mean that they were irrelevant. Winkler notes that "[i]n the South, militias were transformed into slave patrols." John Hope Franklin observed that "in most instances there was a substantial connection between the [slave] patrol and the militia, either through the control of one by the other or through identity of personnel." The Fugitive Slave Act arising from the Compromise of 1850 explicitly gave slaveowners the right to organize posses to recapture runaway slaves and obliged law enforcement officers to assist them.

Those patrols are deeply connected to the state-sponsored violence of the Reconstruction era, and are often identified as the ancestors of the Ku Klux Klan. A Mississippi law, for example, required confiscation of black-owned guns – a process enforced by civil and military authorities. A *Harper's Weekly* article from 1866 describes the scene: "The militia of this county have seized every gun and pistol found in the hands of the (so called) freedmen .... They claim that the statute laws of Mississippi do not recognize the negro as having any right to carry arms." White hostility to African American gun ownership may have helped precipitate one of the most egregious examples of Klan violence in history, an outbreak of terror in South Carolina so severe that the President suspended the right to habeas corpus and sent in the military. Klan members defended these and other outrages on the basis that they were simply doing what they had always done – organized themselves into "self-defense" groups, a "peace police" to maintain order. (We discuss the impact of Reconstruction on Second Amendment rights in more detail in Chapter 3.)

17 Paul Finkelman, 2nd Amendment Passed to Protect Slavery? Not, THE ROOT (Jan. 21, 2013), www.the Root.com/articles/politics/2013/01/second_amendment_slave_control_not_the_aim/.

18 WINKLER, supra note 42, at 133.


20 Fugitive Slave Act, 9 Stat. 462 (1850) (repealed 1864).


25 Hearing Before the Select Committee To Inquire into the Condition of Affairs in the Late Insurrectionary States (1871) (statement of John B. Gordon), reprinted in RECONSTRUCTION (1865-77) at 98, 99, 101 (Richard N. Current, ed., 1985) (discussing the Klan in Georgia).
And yet armed groups also fought for black protection and power. Famous uprisings like those of Denmark Vesey in 1822 and Nat Turner in 1831 did not rely on firearms so much as knives, axes, and repurposed farm tools. But the 1739 Stono Rebellion in the then-colony of South Carolina did. And perhaps the most famous antislavery uprising of all was totally focused on guns, and it was led by a white, wild-eyed zealot who shot into American law and politics like a meteor.

American history has produced few characters quite like John Brown. In 1837, following the murder of abolitionist Elijah Lovejoy by pro-slavery forces, Brown made a public vow: “Here, before God, in the presence of these witnesses, from this time, I consecrate my life to the destruction of slavery!” He was a man who took such things seriously, and he honored his vow to its dramatic and bloody end. Frederick Douglass later wrote, “His zeal in the cause of my race was far greater than mine – it was as the burning sun to my taper light – mine was bounded by time, his stretched away to the boundless shores of eternity. I could live for the slave, but he could die for him.” And indeed, wherever John Brown went, death was quick to follow.

In 1855, he set out for Kansas, which had become central to the political (and soon literal) battles over slavery, thanks to the emergence of “popular sovereignty” as a supposed middle road on the slavery question. The Missouri Compromise of 1820 had forbidden slavery in many of the territories soon to be admitted to the United States, including Kansas. But in 1854, Congress passed the Kansas-Nebraska Act, which provided that the people of a territory should be able to decide for themselves whether to permit slavery within their borders.

Eager to pack the polls for the defining moment, abolitionist “free staters” and pro-slavery forces rushed to Kansas, swelling the population with factions who were both called “Jayhawks,” after a quarrelsome local bird. What followed is known, thanks to Horace Greeley’s turn of phrase, as the era of “bleeding Kansas” – a political conflict whose bitterness demonstrated the difficulty, and eventual futility of a compromise on slavery.

18 See DAVID S. REYNOLDS, JOHN BROWN, ABOLITIONIST: THE MAN WHO KILLED SLAVERY, SPARKED THE CIVIL WAR, AND SEeded CIVIL RIGHTS ix (2009) (“[John Brown] can be said to have killed slavery ... [and] 'kill' is an apt word for Brown, who went to murderous extremes, unlike other abolitionists, most of whom were pacifists who disavowed violence.”).
21 Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854).
The battle was not solely political, and the blood was not just metaphorical. The abolitionist preacher Henry Ward Beecher reportedly said “You might just as well read the Bible to Buffaloes” as argue scripture to the pro-slavery crowd, but that “they have a supreme respect for the logic that is embodied in Sharp’s rifle.” Soon thereafter, Kansas’s abolitionists started receiving cartons full of Sharp’s rifles, known affectionately as “Beecher’s Bibles.”

Arming slaves and free blacks was another matter entirely. No state specifically guaranteed African Americans a right to keep and bear arms, and many states especially in the South forbade blacks from possessing guns and threatened criminal sanctions against those who sold them weapons. The intersection of race, fear, and guns is nothing new, after all; similar laws at the time of the Founding criminalized the sale of guns to Native Americans.

When John Brown arrived, Kansas was not yet “bleeding,” having suffered only eight deaths from slavery-related violence in the previous two years. Setting up in the vicinity of Pottawatomie Creek, Brown obtained what he took to be reliable evidence that his family was to be attacked by pro-slavery forces. As is sometimes the case in incidents of armed self-defense, there is reason to believe that Brown exaggerated or over-estimated the threat. In any event, he and seven associates acted first, and on the night of May 24, 1856, took five pro-slavery settlers from their cabins and murdered them with broadswords. After the Massacre at Pottawatomie Creek, bleeding Kansas truly did live up to the name: Twenty-nine people would die in the next four months alone.

Of course, the numbers of Kansans who died during the struggle over slavery would soon be overshadowed by the staggering casualties of the Civil War, which

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44 See Cottrol & Diamond, supra note 124, at 335-42.
45 Id. at 336 (“To forestall the possibility that free blacks would rebel either on their own or with slaves, the southern states limited not only the right of slaves, but also the right of free blacks, to bear arms.”).
49 Free-State Leader Charles Robinson would later write that "such threats were as plenty as blue-berries in June, on both sides, all over the Territory, and were regarded as of no more importance than the idle wind, this indictment will hardly justify midnight assassination of all pro-slavery men, whether making threats or not." Charles Robinson, The Kansas Conflict 274 (1898).
50 Watts, supra note 147, at 127–28.
John Brown anticipated and helped incite. Having made his way back East, Brown developed a plan to seize the arsenal at Harper's Ferry, Virginia, and thence to move with a mixed-race militia throughout the South, inducing slaves to desert their plantations and disrupt the region's economy. Bringing bleeding Kansas to the rest of the country in a tangible way, Brown and his co-conspirators were armed in October 1859 with 200 Beecher's Bibles sent by abolitionists. Douglass himself was sympathetic to the cause, but not to the plan, which he actively tried to discourage. The first victim of Brown's plan — the baggage master of a passing train, who tried to alert others of the raid — was, ironically enough, a free black man. Brown and his men took the arsenal at Harper's Ferry with relative ease, but they could not defend it, and the reinforcements they hoped would emerge from among the local slave population never appeared, leaving them trapped inside. The raid would lead to the deaths of everyone involved, to say nothing of the 600,000 casualties in the war that followed. Brown himself likely would have accepted — even welcomed — all of this death as a necessary corrective for the nation's original sin. But he would not be there to see it. He was captured by a force headed by Lieutenant Colonel Robert E. Lee of the United States Army. And on December 2, 1859, proclaiming that "the crimes of this guilty land will never be purged away but with blood," John Brown was hanged. In the crowd, wearing a borrowed uniform, was a young actor named John Wilkes Booth.

Of course, Brown's raid was only one of the many events that contributed to the Civil War. The Supreme Court itself also played a role. In *Dred Scott v. Sandford*, perhaps the most notorious opinion in Supreme Court history, Chief Justice Roger Taney concluded that those of African descent were not and could never become citizens. Indeed, they "had no rights which the white man was bound to respect." To hold otherwise, the Chief Justice suggested, would mean recognizing that blacks would have a right "to keep and carry arms wherever they went" — a prospect so self-evidently unacceptable to him that it was treated as a basis for the decision. *Dred Scott* helped cause the greatest military conflagration the nation has yet seen; a war that claimed roughly as many American lives as all other American wars combined. The four years of the Civil War forced Americans to confront guns,

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2 Reynolds, supra note 148, at 95–96 ("No single person came closer than Brown to anticipating the war. True, others had predicted war. . . . But John Brown not only predicted war; he made war.").
5 Id. at 417.
6 Civil War Trust, *Civil War Facts*, www.civilwar.org/learn/articles/civil-war-facts (accessed Jan. 5, 2018) ("Roughly 1,264,000 American soldiers have died in the nation's wars — 630,000 in the Civil War and 644,000 in all other conflicts.");
gun violence, and death in ways they had never done before.\textsuperscript{56} Walt Whitman, who had written rhapsodically of the “body electric” before the war,\textsuperscript{57} served in Civil War hospitals for as long as he could stand it, and soon found himself describing “a heap of feet, legs, arms, and human fragments, cut, bloody, black and blue, swelled and sickening.”\textsuperscript{58} The experience would haunt him for the rest of his life. A young Union soldier named Oliver Wendell Holmes, Jr. was wounded three times by gunfire, but would later write of how “the generation that carried on the war has been set apart by its experience. Through our great good fortune, in our youth our hearts were touched with fire.”\textsuperscript{59}

In April 1865, the war was winding down. Less than a week after Robert E. Lee surrendered to Ulysses S. Grant at Appomattox, one of the most famous gunshots in American history was fired at Ford’s Theatre in Washington, D.C. The single-shot, six-inch long Derringer that John Wilkes Booth slipped from his pocket was the 1860s version of the concealable weapons that the law had so long regulated, going back to the “Daggies” barred by English monarchs centuries before. The bullet found its mark, and President Lincoln died hours later. About ten days after that, Joseph Johnston surrendered to William Tecumseh Sherman at Bennett Place in Durham, North Carolina, the largest surrender of Confederate troops in the Civil War.

As a constitutional matter, the end of the war brought about revolutionary change. The ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments altered forever the legal relationships between citizens of different races, between them and their government, and between the states and the federal government. But a system of oppression as deeply entrenched as slavery would not go gently. The years following the war saw a spike in racist violence – with implicit and sometimes explicit support from many state and local officials – and the passage of the Black Codes, which denied African Americans even the most basic civil rights, including the right to keep and bear arms. To take just one example, in 1865, Mississippi adopted an “Act to Regulate the Relation of Master and Apprentice Relative to Freedman, Free Negroes, and Mulattoes.” The law provided, in relevant part, that “no freedman, free negro or mulatto ... shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife” and that “any freedman, free negro or mulatto found with any such arms or ammunition” could be arrested.\textsuperscript{60}

\textsuperscript{56} See generally Drew Gilpin Faust, This Republic of Suffering: Death and the American Civil War (2009).
\textsuperscript{58} Randall Fuller, “Daybreak Gray and Dim”: How the Civil War Changed Walt Whitman’s Poetry, 32:1 Humanities, at 20 (Jan./Feb. 2011).
In part because of laws like Mississippi's, freedmen could not confidently bear arms in defense of themselves and their communities. But, after the War, the right to keep and bear arms was now officially — if not practically — theirs in a way it had never been before.\textsuperscript{61} In January 1866, Union General Daniel Sickles was responsible for overseeing the administration of South Carolina, where the first shots of the Civil War had been fired and where full reconciliation with the Union was, as a practical matter, nowhere on the horizon. To call Sickles a colorful character is something of an understatement. Before the war, he shot and killed his wife's lover (who happened to be Francis Scott Key's son and the District Attorney of the District of Columbia) and evaded jail time through the first successful invocation of the temporary insanity defense in American history.\textsuperscript{62} He was wounded by cannon fire at Gettysburg and lost a leg, which he donated to the Army Medical Museum and visited regularly thereafter.

Sickles did not command troops again during the war, but he did eventually serve as Commander of the Department of South Carolina and took significant steps to curb the rampant abuse of freedmen. That abuse included their forcible disarmament, which helped inspire Sickles' famous General Order No 1. It stated in relevant part that "[t]he constitutional rights of all loyal and well-disposed inhabitants to bear arms, will not be infringed," though such a guarantee neither permitted "the unlawful practice of carrying concealed weapons" nor authorized "any person to enter with arms on the premises of another against his consent."\textsuperscript{63} Later, Sickles issued Order No. 7, which specified that "[o]rganizations of white or colored persons bearing arms, or intended to be armed, not belonging to the military ... will not be allowed to assemble, parade, patrol, drill, make arrests or exercise any authority."\textsuperscript{64} Sickles' actions thus simultaneously recognized the existence of the right to keep and bear arms and the necessity of regulation.

That same year, the Freedmen's Bureau Act of 1866 proclaimed that freedmen should have "full and equal benefit of all laws and proceedings conceding personal liberty, security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms."\textsuperscript{65} These developments fell far short of guaranteeing African Americans the same rights enjoyed by whites. As with every other constitutional right, achieving anything like an equal right to keep and bear arms would take generations' more work.

\textsuperscript{61} AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 266 (1998) ("In short, between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman.").


\textsuperscript{64} 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 211 (1906) (reprinting sections I and III of General Order No. 7).

\textsuperscript{65} 14 Stat. 173 §14 (July 16, 1866)
In the United States, the fractures have largely broken along racial lines, but the same logic applies to other "outgroups" whether based on gender, sexual identity, or religion—recall Sir John Knight. Incidents like John Brown's raid and the Klan trials also demonstrate a central tension that still animates the gun debate. Guns in the wrong hands are powerful instruments of violence and oppression. But guns in the right hands can be effective means of self-defense and perhaps even liberation. Accommodating such costs and benefits has always been a central challenge for gun regulation.

THE BEGINNINGS OF MODERN GUN REGULATION

Some of the forms of gun regulation discussed thus far—safe storage for gun powder, race-based restrictions, and the like—seem like anachronisms. Others have stood the test of time with very little change. North Carolina still enforces the Statute of Northampton, basically as it was written in 1358. Still, gun regulations have evolved as the objects of those regulations have changed and become more powerful. Robert Spitzer has shown, for example, that laws banning what are often called "assault weapons" became prevalent in the 1920s and 1930s, precisely at the time that automatic and semi-automatic firing technology became more common.

In 1911, New York adopted the Sullivan Dangerous Weapons Act, named after Tammany Hall politician "Big" Tim Sullivan. The Sullivan Act, which is still on the books, placed a variety of restrictions on firearms, for example prohibiting their gift or sale to anyone under the age of sixteen. (Current federal law imposes a similar restriction on federal firearm licensees, forbidding them to sell rifles to anyone under the age of eighteen, or handguns to anyone under the age of twenty-one.) The most important provision, however, required anyone wishing to own a handgun to first obtain a permit.

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166 See, e.g., State v. Dawson, 272 N.C. 535, 541-42 (1968) (describing common law offense of "going armed with unusual and dangerous weapons to the terror of the people," and citing the Statute of Northampton and Sir John Knight's case); see also Virginia Bridges, A Durham Man Brought a Semi-Automatic Rifle to a Rumored KKK rally. Did He Break the Law?, THE HERALD SUN, Sept. 6, 2017, News Section; Dahlia Lithwick & Olivia Li, Can You Bring a Gun to a Protest?, SLATE MAGAZINE (Oct. 17, 2017), www.slate.com/articles/news_and_politics/jurisprudence/2017/10/protests_nights_ he_on_place_you_can_t_carly_guns.html ("In North Carolina, officers and prosecutors are finding plenty of modern-day applications for the law, ringing charges for 'going armed to the terror of the public' 344 times last year.").


169 See Sullivan Dangerous Weapons Act, 1911 N.Y. Laws ch. 195, sec. 1, § 1897 (codified as amended at N.Y. Penal Law §§ 265.01(1), 265.20(a)(5)) ("Any person over the age of sixteen years, who shall have in his possession in any city ... any pistol, revolver or other firearm of a size that which may be concealed upon the person, without a written license ... shall be guilty of a misdemeanor.").
of local police, and a 1913 amendment to the Act specified that one must first show a proper cause for doing so.\textsuperscript{170}

The discretionary permitting scheme embodied in the Sullivan Act is emblematic of a regime that preserves local discretion to grant or deny licenses for certain forms of public carrying. This basic model, with analogues reaching back to Edward I\'s England and Tombstone, Arizona, quickly spread throughout the country. In 1923, the US Revolver Association proposed the first "model" gun regulation: the Revolver Act, which included a permit requirement for concealed carry.\textsuperscript{171} The Act had other important provisions as well - some of which are features of modern gun regulation - for example, imposing harsher sentences for crimes committed with handguns and a one-day waiting period for a handgun purchase.

But over the past few decades, most states have loosened their laws, so that "shall issue," or even no licensing requirement at all, is the law of the land in more than forty states. In the remaining states, including highly populated ones such as California and New York, permit requirements are the subject of a great deal of Second Amendment litigation.\textsuperscript{172} But all states make permits available in one way or another.\textsuperscript{173}

\section*{The Federal Government Gets Involved}

Although the debate over gun rights, gun regulation, and the Second Amendment is national in scope, gun regulation is and has always been primarily a matter of state and local law. The colonial era Militia Act imposed federal rules regarding the ownership and use of arms, but it was not until the 1930s that the federal government really became involved in the regulation of guns for public safety. In part, this reflects the general growth in the scope and power of the federal government - a trend that would continue throughout the twentieth century, particularly with regard to criminal law.\textsuperscript{174} But it is also a story of gun-specific historical contingencies
and politics, as well as the unintended consequences of another federal intervention into criminal law: Prohibition.

In 1919, the Eighteenth Amendment was ratified, outlawing the manufacture, sale, and transportation of "intoxicating liquors." It would be repealed just a few years later by the Twenty First Amendment (upon whose passage President Roosevelt supposedly said, "America needs a drink") but in the meantime created a black market that facilitated the rise of archetypal gunmen like Al Capone. The conflict between the Irish and Italian mobs in Chicago has been described as "the worst gang war in American history, one that would have a profound effect on gun control legislation and the Second Amendment."175

Gangsters lived and died by the gun – most dramatically and most notoriously the Tommy Gun, named after John T. Thompson, who intended it for use in World War I.176 The gun was not ready for use until 1920, though, and so it became famous for its use on the streets of Chicago rather than in the trenches of Verdun.177 The violence it facilitated was extraordinary. On Valentine's Day, 1929, Capone and his gang lured seven members and associates of the rival North Side Gang to a warehouse in Chicago with a promise of bootlegged whiskey.178 Upon arrival, the members of the North Side Gang instead encountered men in police uniforms who made them line up against a wall. Two of the "police officers," who were actually members of Capone's Chicago Outfit, then opened fire with Tommy Guns, spraying seventy bullets into the group.179 One of them, Frank Gusenberg, was still alive when the real police arrived. Honor among thieves being what it is, when Gusenberg was asked who pulled the trigger, he said, "Nobody shot me." He died hours later of multiple bullet wounds.180

Some gangsters and bootleggers embraced the image of the gun-slinging outlaw, and were aided in that regard by a fascinated public and an eager press. John Dillinger was portrayed as a swaggering, colorful rogue, an image which so rankled J. Edgar Hoover that he used it as leverage to help create the Federal Bureau of Investigation. Dillinger's picaresque story would end with a gunshot outside of a Chicago theater – a fittingly dramatic end. But for sheer titillation and press coverage, no one could match Bonnie Parker and Clyde Darrow,

175 WINKLER, supra note 42, at 190.
176 BILL YINNE, TOMMY GUN: HOW GENERAL THOMPSON'S SUBMACHINE GUN WROTE HISTORY 2 (2009) ("The Thompson submachine gun was born of war, the Great War, and of John Thompson's desire to create something that would break the back of the most insidious of wartime conditions, the meat grinder of the stalemate. Too late for World War I, the Thompson found its way into the hands of guerrillas, soldiers, and thugs, from the Emerald Isle to the dusty, distant corners of China and the muggy jungles of Central America.").
177 Id. at 3.
178 Id. at 74-75.
179 Id. at 75.
180 Id.
whose two-year crime spree from 1932 to 1934 became a myth even as they were living it.\(^{18}\)

The details were far less romantic. Bonnie and Clyde’s life on the road was hard, and their crimes— which included kidnapping, ransom, and murder— were hardly cartoonish bank robberies in which only rich villains paid the price. Fittingly, it all ended in a hail of bullets. Ambushed by a group of lawmen on a rural road in Bienville Parish, Louisiana, Bonnie and Clyde suffered so many bullet wounds that the undertaker had trouble piecing them together for burial. In their bullet-riddled car, police found stolen automatic rifles, sawed-off semi-automatic shotguns, handguns, and several thousand rounds of ammunition.

That same year, Congress passed the first major modern federal gun control law, the National Firearms Act. Just as later federal interventions would target particular types of guns— Saturday Night Specials, for example— the Act focused on the machine-guns and short-barreled shotguns favored by the gangsters of the time. Such guns were not (and still are not) prohibited outright,\(^{182}\) but were subject to a $200 tax every time one was manufactured, sold, or transferred. Additionally, owners of such weapons had to register with the authorities and be fingerprinted.\(^183\)

Four years later, the Federal Firearms Act of 1938 created a more elaborate system of licensing and record-keeping— focusing on gun dealers, rather than purchasers—and also barred violent felons from possessing firearms,\(^184\) a restriction that would be expanded to nonviolent felons in the late 1960s, in response to another wave of violence.\(^185\)

**The New Deal and Constitutional Change**

These new federal regulations had to answer to the Constitution, not just to political imperatives. The federal government is one of enumerated powers, meaning that, unlike state governments, it has no plenary power to do anything. In order to act, the federal government must do so in furtherance of one of the powers laid out in the Constitution, especially in Articles I and II, which establish the powers of Congress and the President. The scope of the federal government’s authority, and how it interacts with that of the states, has been a central obsession of constitutional law since the founding. The fight over the constitutionality of President Obama’s health care reform is but one recent example.\(^186\)


\(^{182}\) Under federal law, neither short-barreled shotguns nor machine guns are prohibited. See 26 U.S.C. § 5841 (governing the ownership and registration of “firearms”) and 26 U.S.C. § 5845(a)-(b) (defining “firearms” to include short-barreled shotguns and machine guns).

\(^{183}\) Winkler, supra note 42, at 209.

\(^{184}\) Id. at 209.


In the 1930s, an even more ambitious President pursued a legislative agenda unlike any the nation had seen before. President Franklin Delano Roosevelt’s New Deal focused on what historians call “The Three Rs”: relief for the poor, recovery of the economy, and reform of the financial system. To achieve those goals, it generated a further alphabet soup of public works projects and agencies – the Tennessee Valley Authority (TVA), the National Labor Relations Board (NLRB), the Works Progress Administration (WPA) and the like – and relied on an expansion of federal authority that would change the face of American law.

Though these initiatives are best known for their economic goals, President Roosevelt believed that crime control, including gun regulation, was part and parcel of the New Deal. Gun violence was close to the President’s heart: figuratively and literally. In February 1933, President-Elect Roosevelt gave a speech alongside Chicago Mayor Anton Cermak in Miami’s Bayfront Park. At the back of the crowd, Giuseppe Zangara – a poor, immigrant bricklayer suffering from a stomach ailment he blamed on the government – cradled a pistol he had purchased earlier that day at a pawn shop. Zangara, who stood only five feet tall, climbed up on a chair, took aim, and began firing, but the crowd quickly grabbed and disarmed him. The President-Elect was unhurt, but a bullet struck Mayor Cermak, who reportedly said to Roosevelt, “I’m glad it was me instead of you.” The mayor died a few weeks later.

The incident helped harden Roosevelt’s resolve. But just because there is presidential will does not mean that there is a constitutional way. In the 1930s, the Supreme Court’s politically conservative majority repeatedly struck down, on constitutional grounds, many elements of President Roosevelt’s New Deal legislation. This was the era of Lochner v. New York, which invalidated a New York law regulating bakery conditions on the grounds that it interfered with the freedom of contract, and has come to be reviled as an example of inexcusable interference with economic regulation. Roosevelt’s patience wore thin, and in 1937 he responded by proposing a bill that would have granted the President power to appoint an additional Justice to the US Supreme Court, up to a maximum of six, for every member of the court over the age of seventy years and six months. The court-packing plan was unveiled in February of 1937, and met stiff resistance even from Roosevelt’s political allies.

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188 Mike Lee, Our Lost Constitution: The Willful Subversion of America’s Founding Document 163 (2015); Adam Winkler, Franklin Roosevelt: The Father of Gun Control, NEW REPUBLIC (Dec. 19, 2012); see also WINKLER, supra note 42, at 179 (“Roosevelt portrayed gun control and crime fighting simply as one more element of the New Deal – indeed, of the new America.”).
190 Id. at 87–88.
191 198 U.S. 45 (1905).
But just a few weeks later, the situation changed markedly when Justice Owen Roberts – theretofore a consistent vote against New Deal legislation – voted to uphold a minimum wage law, generating a 5-4 decision in favor of the kind of laws that Roosevelt supported. Whatever Roberts’ motivations for doing so, the “switch in time that saved nine” solidified the constitutional foundations for broad federal power that have, with occasional tremors, remained stable since then.

In the years ahead, this broadened understanding provided a firmer constitutional basis for Congress’s power to pass laws, including gun regulations. But that is only half of the constitutional question. In order to assess the constitutionality of a federal government action, one must ask both whether it is properly authorized and whether it is otherwise prohibited, for example by a provision of the Bill of Rights. The latter question came before the Supreme Court in United States v. Miller, which would be its last real word on the Second Amendment until 2008.

Jack Miller was a member of the bank-robbery O’Malley Gang. In April 1938, he was arrested with an unregistered sawed-off shotgun in his possession, and charged with violating the National Firearms Act. Hauled into district court, Miller argued that the Act violated his Second Amendment rights – an argument that the district judge, himself a supporter of New Deal gun regulation, somewhat surprisingly accepted. This was not particularly unwelcome news for the federal government, however, since Roosevelt’s Attorney General Homer Cummings was happy to have a test case for the constitutionality of the Act. Miller’s prosecution might even have been engineered for that very purpose.

Miller was apparently not a very good bank robber, and he was an even worse constitutional crusader. He disappeared as soon as he was released from jail, as the district judge had guessed he would. The lawyer who had been appointed to represent him, in turn, had no particular interest in briefing the case, nor in traveling to Washington on his own dime to argue it before the Supreme Court. He wrote “Unable to obtain any money from clients to be present and argue case,” and suggested that the Justices decide based solely on the government’s briefs.

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94 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
95 See Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 45 (1998).
98 Winkler, supra note 42, at 213-14.
100 Id. at 66-67.
Even if Miller's attorney had made the trip to Washington, the balance of lawyering would have been tilted almost comically in the government's favor. The United States was represented by Solicitor General Robert Jackson, who would go on to serve as a Supreme Court Justice and a prosecutor at Nuremberg. Associate Justice Louis Brandeis, himself one of the nation's greatest lawyers before he became one of its greatest Justices, once said that Jackson should be "Solicitor General for life."  

Defending the constitutionality of the Firearms Act against Miller's Second Amendment challenge, Jackson focused on the first clause of the Amendment, arguing that the right was "restricted to the keeping and bearing of arms by the people collectively for their common defense and security." He added that the first clause "indicates that the right ... is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state."  

In doing so, Jackson articulated the militia-based view that was central to the debate about the Amendment's meaning in the decades leading up to Heller. On this view, the right extends only to those people, arms, and activities bearing some connection to the militia, and not to "private purposes," including self-defense. It hardly needed to be said that Miller was not a member of a well-regulated militia.  

The Court's decision was unanimous, though not exactly its best work. In a relatively brief opinion, Justice McReynolds seemed to embrace Jackson's view: "With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." Miller's possession of a sawed-off shotgun did not have any "reasonable relationship to the preservation or efficiency of a well regulated militia," because there was no evidence such a gun would be useful in that context, and thus the Act's regulation of it therefore raised no Second Amendment problems.  

The outcome was clear, but its significance was and is contested. Some, especially those who favor a broad reading of the Second Amendment, say that Miller should be given relatively little weight, since it was unargued on one side and the opinion is so brief. And even assuming that the holding matters, there is disagreement about what that holding actually was: A broad endorsement of the militia-based reading, or a narrow holding about which guns are protected by the Amendment.
As for Miller, the Justices' decision meant nothing. Six weeks before the Supreme Court's decision was published, he and some accomplices robbed a bar in Oklahoma. Hours later, Miller's corpse was found in a dry creek bed nearby, shot four times with a .38. The .45 next to his body had been fired three times.306

Federal Gun Regulation in the 1960s

The structure of gun rights and regulation that emerged in the 1930s was shaped by a volatile mix of politics, policy, violence, and uncertainty. The same ingredients led to the next major wave of federal gun regulation in the 1960s. The civil rights movement is a major part of that story, as Chapter 6 explains in more detail, and the Black Panthers' activities in California are particularly important for understanding the changes on the state level. But the chaos and fear of the late 1960s led to a tightening of federal laws as well.

President Kennedy was shot and killed in November 1963; Malcolm X in February 1965. On April 4, 1968, Martin Luther King, Jr. was shot and killed on the balcony of the Lorraine Motel in Memphis. That night, before a largely black audience in Indianapolis, Senator Robert Kennedy publicly spoke of his brother's murder for the first time, and concluded by exhorting Americans to "dedicate ourselves to what the Greeks wrote so many years ago: to tame the savageness of man and to make gentle the life of this world."307

Two months later, Kennedy won the California Democratic primary. That night, he gave brief remarks to his supporters at the Ambassador Hotel in Los Angeles, and was making his way through the kitchen when he paused to shake hands with Juan Romero, a busboy. As he did so, a Palestinian activist named Sirhan Sirhan opened fire with a .22, squeezing off five shots before he was wrestled to the ground. Kennedy collapsed, and Romero cradled his head and placed a rosary in his hand. Kennedy asked Romero, "Is everybody okay?" Romero responded, "Yes, everybody's okay." Kennedy turned away and said, "Everything's going to be okay."308 He died early the next morning.

President Lyndon Johnson used Bobby Kennedy's murder as an occasion to finally win passage of the gun control measures he had been proposing since taking office: "Let us now spell out our grief in constructive action."309 Moved by the

not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons - is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.

306 Frye, supra note 198, at 68.
assassinations, the Panthers, the wave of riots in the summer of 1968, and a stunning increase in the availability of guns, Congress responded.

The Federal Gun Control Act of 1968 made an effort to restrict Saturday Night Specials — cheap pistols used disproportionately by criminals — and extended the felon-in-possession ban to cover even nonviolent felons. But perhaps most importantly, it required anyone “engaged in the business” of selling guns to have a federal license and maintain records of all gun sales, including the names and addresses of the purchasers. “Private” transfers were exempt from this requirement. Policing the line between these categories would remain a central challenge for firearms law and policy for decades to come, and it is manifested in modern efforts to close what it sometimes called the “gun show loophole” — an exception for nonlicensed gun dealers supposedly not “engaged in the business” of selling guns, even though many apparently do so in great volume.

Closing the gun show loophole was among the regulatory questions raised in the wake of Sandy Hook, bringing us back to where this book began. Thus far, we’ve shown that the history of the Second Amendment is a history of accommodating gun rights and regulation. But that tradition, though harmonious in some sense, contains inescapable tensions between emancipation and subjugation, promise and violence, security and fear. It is no option to simply recognize these tensions, for constitutional law sometimes demands a choice between competing narratives. For the Second Amendment, the central question was, as Chapter 2 explains, whether and how the right to keep and bear arms extends beyond the organized militia. Chapter 3 explains the method and substance of the Supreme Court’s answer.

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\[\text{The number of imports exploded, from 67,000 in 1955 to over 1 million in 1968. Winkler, supra note 42, at 250.}\]


\[\text{Corripure Andrew Goddard, A View Through The Gun Show Loophole, 12 Rich. J.L. & Pub. Int. 357, 358–59 (2009) ("Gun shows have been reported to be involved with the trafficking of approximately twenty-six thousand firearms over a two and a half year period, a figure that represents thirty percent of all guns identified in federal criminal trafficking cases over that period") (citing Mayer Against Illegal Guns, The movement of Illegal Guns in America 9–10 (2005)) with Nicholas Johnson, Imagining Gun Control in America: Understanding the Remainder Problem, 43 Wake Forest L. Rev. 837, 876–77 (2008) (arguing that "people who complain about the gun show loophole can really only be satisfied by a flat ban on private transfers").}\]
As a matter of legal doctrine, the modern Second Amendment was created on June 26, 2008 – the day the Supreme Court held in District of Columbia v. Heller that the right to keep and bear arms covers private purposes such as self-defense.¹ At that moment, the Second Amendment became an enforceable personal legal right, one that would be the basis for at least a thousand constitutional challenges over the next decade.² But Heller also held that the right to keep and bear arms is subject to legal regulation.

Heller is celebrated in some quarters, lamented in others. But, as with the history of gun rights and regulation that helped shape the decision, many people misunderstand what Heller was about, what it settled, and what questions it left open. Our object is to understand the Second Amendment as law, so doctrinal questions are our bread and butter. But we do not suppose that Heller’s significance can be measured solely by doctrine. Supreme Court decisions have expressive force – they frequently bless one story among competing narratives, even when they do little to change law on the books. Brown v. Board of Education, to take just one example, was and is an important statement of constitutional value, whatever its impact on the desegregation of schools.³

The same is true of Heller. In holding that the right to keep and bear arms includes private purposes like self-defense, the Supreme Court – intentionally or not – endorsed a particular view of guns in the United States. We will show in later chapters that the Court’s decision leaves significant leeway for gun regulation, and that few of the gun laws likely to emerge from American gun politics will be anywhere near the constitutional line. But even if not a single law fell in its wake, Heller

³ See generally Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991) (arguing that courts have a limited ability to spur political and social reform).
would still be a significant constitutional event. The Supreme Court anointed one constitutional vision of the Second Amendment as definitive. This chapter explains how that happened.

BACKGROUND

D.C.'s Law

Between 1960 and 1969, the homicide rate in the District of Columbia tripled. By 1974, it hit an all-time high, capped off by a triple murder over the Christmas holidays. Embattled residents began to joke that “D.C.” stood for “Dodge City.” They wanted action, and city officials complied in 1976, passing a law that functionally banned handguns and required guns to be locked or disassembled when not in use.

That the law was passed in the District is significant. As the last chapter showed, the vast majority of gun regulation has always happened at the state and local levels. In part, this is a function of local variation and the fact that gun violence is a persistent urban problem – the District in the 1960s and 1970s was certainly no exception. But the District is not a state, and it is unique as a municipality. Legally, although the city does enjoy some local authority, final control over the District ultimately lies with Congress. And thus it was a subcommittee of the U.S. House of Representatives that held hearings in 1976 about the purposes and justifications underlying the District’s proposed Firearms Control Regulations Act.

The basic details and purpose of the Act were captured in a report produced by a committee of D.C.’s governing council. The report declared that the purpose of the law was “to reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia” and to “strengthen the capacity of the District of Columbia government to monitor the traffic in firearms” within the city. The committee noted that firearms accounted for “one out of every 100 deaths”

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8 The data and justifications are conveyed at greater length in Justice Breyer’s dissenting opinion. Heller, 554 U.S. at 693-96 (Breyer, J., dissenting).
Sixty-nine persons were killed with firearms every day, amounting to "approximately 25,000 gun-deaths" and 200,000 injuries in addition. For every intruder stopped by a homeowner with a firearm, the committee reported, "there are 4 gun-related accidents within the home." National trends showed that handguns were used in 54 percent of murders, as well as 60 percent of robberies and 26 percent of assaults. Eighty-seven percent of all murders of law enforcement officers involved a handgun.

Though it cited national statistics, the committee tailored its recommendations to address the District's specific concerns. The District had suffered 285 murders in 1974, 155 of which were committed with handguns. Most crime guns recovered in the city were difficult to track, as less than half a percent of firearms used in crime were registered in the District. The committee concluded that, in the absence of stronger national regulation, local governments "act to protect their citizens, and certainly the District of Columbia as the only totally urban statelike jurisdiction should be strong in its approach." The committee's recommendations "denote[d] a policy decision that handguns ... have no legitimate use in the purely urban environment of the District of Columbia." That said, the committee noted that "[i]t should be apparent that this bill would not cause a confiscation law ... and would take nothing away from sportsmen and collectors."

The final version of the law made it illegal to have an unregistered firearm and simultaneously forbade the registration of new handguns, thus effectively making it illegal to possess a new handgun in the District. Separately, the law required residents to keep their firearms — including long guns like rifles and shotguns — "unloaded and dissembled or bound by a trigger lock or similar device" except when located in a place of business or being used in lawful recreational activities.

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10 Id.
11 Id.
12 Id.
13 Id. at 26.
14 Id.
15 Id.
16 Id.
17 Id. at 27.
18 Id. at 31.
19 Id. at 33.
20 See D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001). There was an effort to grandfather weapons in such a way to avoid constitutional problems. See Council Hearing, supra note 9, at 31, 33. This grandfathering was assumed in subsequent litigation. See Parker v. District of Columbia, 511 F. Supp. 2d 103, 103 (D.D.C. 2004) (specifying that registration was not available for a "[p]istol not validly registered to the current registrant in the District prior to September 24, 1976" (internal citation and quotation marks omitted)); Fesjian v. Jefferson, 399 A.2d 861, 864 (D.C. 1979) (rejecting equal protection challenge to rules that made "handguns and new machine guns unregisterable, yet contain a grandfather clause permitting owners of previously registered handguns to retain and re-register their firearms").
Although a few localities had adopted handgun bans during roughly the same period, the District's law stood apart in its severity. Such extreme regulations tend to become the focus of political opposition and constitutional challenges, and thus tend to shape constitutional doctrine. The District's regulation did exactly that, galvanizing an organization that, more than any other, has shaped modern American gun law.

The Changing Role of the National Rifle Association

Roughly a century before the District of Columbia adopted its handgun law, a group of Union veterans, disappointed with the poor marksmanship of federal soldiers during the Civil War, founded the National Rifle Association. Its stated goal was to "promote and encourage rifle shooting on a scientific basis," and its major organizational activity was the formation of rifle clubs.

As the nation urbanized and gun regulation gained political salience, the NRA promoted the safe use of guns and helped shape and support restrictions on their use and carry. The NRA's president in the 1930s, Karl Frederick, helped draft the Uniform Firearms Act and later claimed that the NRA "sponsored" it. Almost unimaginably, given the organization's current stance, Frederick once said, "I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses." General Milton Reckard, the Executive Vice President of the organization during the 1930s, said that the NRA was "absolutely favorable to reasonable gun control."
But the country changed, and the NRA did, too. Rising crime rates and a steady decline in the popularity of hunting and recreational gun use (the predominant reasons for private gun ownership until very recently) sapped energy from the NRA's original mission. Self-defense became more prominent in discussions of gun rights and regulation. In keeping with the intensity of this interest, subsequent waves of gun owners and NRA members were less inclined to compromise on gun regulations, and a rift developed within the organization.

The NRA's old guard remained focused on gun safety and shooting sports and was relatively more open to gun regulation. In the 1970s, it was planning to move the organization's headquarters from the outskirts of Washington, D.C. to Colorado. The new leaders, however, were not interested in compromise or in retreating from the corridors of federal power. They were led by a "blue-eyed, bald-headed bulldog of a man" named Harlon Carter, who controlled the NRA's Institute for Legislative Action (NRA-ILA) — the wing of the organization focused on political and legal advocacy. Carter's restive faction was growing in strength when, in November 1976, the old guard tried to reassert control by firing eighty of Carter's allies.

The effort failed. Carter's sympathizers doubled down. And when the District of Columbia passed its gun law that same year, it unwittingly added fuel to the conflagration. Soon after the law was passed, the NRA decided to move the organization's annual meeting from D.C. to Cincinnati. And it was there, on May 21, 1977, that the members of the Carter group executed their takeover. Taking advantage of the NRA's procedural rules, they outmaneuvered and outvoted the old guard.

Following an all-night meeting (during which the upstarts coordinated their efforts using walkie-talkies), Carter was named Executive Vice President of the NRA. The "Cincinnati Coup" produced the modern NRA — a single-issue lobbying juggernaut, opposed to almost every gun regulation. It was this NRA that would play a massive role in the development of gun policy and the modern Second Amendment over the next few decades. Instead of retreating to the mountains of Colorado, the

and proposal.

In a Pew Research study conducted in February 2013, approximately 39 percent of gun owners listed hunting or sport shooting as their primary reason for owning a gun; in 1999, the combined figure was 57 percent. The same study found that 48 percent of gun owners listed protection as their primary reason for ownership in 2013, up from 26 percent in 1999. Pew Res. Ctr., Why Own a Gun? Protection Is Now Top Reason, Pew Res. Ctr. (Mar. 12, 2013), www.people-press.org/2013/03/12/why-own-a-gun-protection-is-now-top-reason/; see also Kate Masters, Fear of Other People Is Now Primary Motivation for American Gun Ownership, A Landmark Survey Finds, The Trace (Sept. 19, 2016), www.thetrace.org/2016/09/harvard-gun-ownership-study-self-defense/

" According to an analysis of the [2012 General Social Survey], only a quarter of men in 2012 said they hunted, compared with about 40 percent when the question was asked in 1972.


Winkler, supra note 35, at 65.

Id. at 67.
Militias, Private Purposes, and the Road to Heller

The new leadership, starting with Carter and continuing with his "most important successor," Executive Vice President Wayne LaPierre, transformed the NRA from an organization of hunters, sportsmen, and veterans into a feared political and social institution. Part lobbying shop, part think tank, part advocacy group, part industry alliance, the NRA is often called the most powerful interest group in Washington. It rarely loses, despite pushing policies frequently in conflict with popular opinion and sometimes even the preferences of its own membership. When explaining Republican opposition to President Barack Obama's nomination of Judge Merrick Garland to the Supreme Court, Senate Majority Leader Mitch McConnell said, "I can't imagine that a Republican majority in the United States Senate would want to confirm ... a nominee opposed by the National Rifle Association." The New York Times editorial board responded by accusing the Senate of "defer[ring]" its constitutional judgment to the NRA.

Alongside this rise to dominance, the NRA's rhetoric has shifted from "favor[ing] ... reasonable gun control," as Reckard said in the 1930s, to near total opposition. Absolutism is common: each gun regulation is the worst, and every debate is the

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13 Id. at 69.
14 Walter Hickey, How the Gun Industry Funnels Tens of Millions of Dollars to the NRA, BUS. INSIDER (Jan. 16, 2013, 1:25 PM), www.businessinsider.com/gun-industry-funds-nra-2013-1 ("[L]ess than half of the NRA’s revenues come from program fees and membership dues. The bulk of the group’s money now comes in the form of contributions, grants, royalty income, and advertising, much of it originating from gun industry sources.").
18 Interview by Chris Wallace with Mitch McConnell on Fox News Sunday (Mar. 20, 2016), www.youtube.com/watch?v=1X7Q1lPlA_E.
21 DAVIDSON, supra note 10, at 92 ("Never has an issue been more distorted or downright lied about than the armor-piercing bullet issue. The anti-gun forces will go to any lengths to void your right to keep and bear arms." (quoting anинфamational mailer sent to NRA members)); id. at 110 ("You and I are
Background

last chance to save the right to keep and bear arms. Osha Gray Davidson, in a book-length study of the NRA, provides a few examples of the apocalyptic rhetoric:

Unless you call, write, help organize and deliver the vote of your Congressman, I guarantee you that strict, total gun control will be imposed on all of America.

...[This bill] is the worst gun legislation ever to be seriously considered on Capitol Hill.

It's now or never for our gun rights.

...You'd better make your calls now. There won't be time later.

In the entire history of the NRA Institute, American gun owners have never before been under such constant, vicious attacks from the gun banners to which the truth means nothing.

The change in rhetoric isn't just stylistic, but reflects a fundamental change in the nature of the NRA's arguments. Gun regulations are depicted not just as bad policy, but as unconstitutional. Adam Winkler notes that in the 1930s, the Second Amendment was largely absent from the NRA's advocacy, and that the NRA's newsletter—which had primarily focused on matters like target shooting—began to regularly cite the Second Amendment in the 1960s. Now, in the NRA's bylaws, "protect and defend the Constitution of the United States" is listed first among the organization's purposes and objectives.

The NRA's growing reliance on constitutional rhetoric has paralleled an increasingly inflexible opposition to gun regulation. Almost exactly four years after the Cincinnati Coup, John Hinckley—seeking to impress actress Jodie Foster, with whom he was obsessed—shot a .22 caliber revolver six times at President Reagan outside the Hilton Hotel in Washington, D.C. Reagan was wounded in the chest. His press secretary, James Brady, was shot in the head and left partially paralyzed. Brady and his wife Sarah became prominent supporters of gun regulation, and nearly fifteen years after the shooting their efforts eventually helped secure passage of one of the last major federal gun control laws: the Brady Bill, signed during the Clinton administration. Its central mechanism was a system of background checks to ensure
that would-be purchasers did not have prior felony convictions, mental illness, or other prohibitors.

Support for the Brady Bill was bipartisan. Former President Reagan himself spoke in favor of the law: "You do know that I'm a member of the NRA, and my position on the right to bear arms is well known. But I want you to know something else ... I support the Brady bill, and I urge the Congress to enact it without further delay." Despite this endorsement from one of its most popular members, the NRA was having none of it: The Bill, signed into law by President Bill Clinton, was an affront to the "sovereign American citizen." Government agents, the NRA warned, would soon "go house to house, kicking in the law-abiding gun owners' doors."

D.C.'s gun law coincided with and contributed to the NRA's transformation from a moderate hunting and sportsmanship organization to an entrenched player in D.C. politics, driven by an unwavering devotion to a particular reading of the Second Amendment. In its expanded Fairfax headquarters, the NRA prominently displayed a truncated version of the Amendment: "the right of the people to keep and bear arms shall not be infringed." How to interpret that phrase was the central question in the Supreme Court case that would give new legal life to the Second Amendment.

The Central Question

Amidst the legislative debate over D.C.'s gun law, one consideration was conspicuously absent: the Second Amendment. Although some people raised objections, the record reveals little concern that the law, despite being one of the most stringent in the country, would run afoul of the right to keep and bear arms. In Congress, only a handful of people raised constitutional concerns - among them, a new Congressman from Texas named Ron Paul. Certainly, there was nothing like the insistent invocation of the Second Amendment that accompanies any contemporary gun regulation proposal.

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47 Winkler, supra note 28, at 71.
48 Id. at 71–72.
49 H. Richard Uviller & William C. Merkel, The Militia and the Right to Arms, Or, How the Second Amendment Fell Silent 232 n.4 (2002) ("Residents and visitors to Northern Virginia may have noted that, as recently as 1999, the NRA Headquarters building, visible from Interstate 66, proudly displayed the motto 'The Right to Keep and Bear Arms Shall Not Be Infringed,' but failed to quote the Second Amendment's introductory language. The sign has since been removed.").
50 This is not to say that there was no opposition: Winkler, supra note 28, at 17 ("Douglas Moore, a member of the NRA and the one council member opposed to the ban, warned that the Ku Klux Klan was enjoying a 'resurgence' in the neighboring states of Maryland and Virginia. The ban, he said, 'will make it difficult for the people of this city - the majority of whom are black - to defend themselves.'").
51 Congressman Ron Paul stated during the committee hearing that the law was "unconstitutional," explaining, "I believe that the second amendment does protect the individual law-abiding citizen's right to keep and bear arms, to keep weapons for his protection." Council Hearing, supra note 9, at 71 (statement of Ron Paul, Congressman from Texas).
With the benefit of hindsight, it is tempting to marvel at this muted response. But at the time, the vast majority of scholars and lawyers would have reached the same conclusion, and for the same reason: As a matter of constitutional doctrine, the Second Amendment applied only to people, arms, and activities having some connection to a “well-regulated militia.”

The central question in *Heller* would be whether this interpretation, or an alternative that included the personal possession of arms for activities like self-defense against crime, better captures the meaning of the Second Amendment. It is important, therefore, to identify the best versions of the arguments on both sides.

Even this descriptive task means stepping into a minefield. The common labels—collective right versus individual right; civic republican right versus Standard Model—all convey something important, but also can mischaracterize what they describe, or fail to distinguish the alternatives. Many who support the militia-focused reading also believe that the right is held by individuals. Many who believe that the right protects armed self-defense also argue that it has an important connection to the militia. Our goal here is to briefly describe and contrast the best versions of each theory.

**THE MILITIA-BASED INTERPRETATION**

The militia-based reading of the Amendment holds that the right to keep and bear arms is generally limited to people, arms, and activities having some connection to the militia. As a matter of doctrine, this view prevailed for more than two centuries, meaning that most Second Amendment challenges were dismissed on the basis that the person bringing the challenge had no plausible connection to a militia, let alone a well-regulated one. This did not mean that guns were illegal, of course, nor even that they lacked constitutional protection. The vast majority of state constitutions include a right to keep and bear arms, and those provisions were often invoked, giving rise to a rich body of doctrine. As Adam Winkler has shown, state courts have long interpreted state constitutional rules to require that a gun regulation be “reasonable” — a standard that gives the government a good deal of latitude, while striking down outlier laws. But these were matters of state law, and the Second Amendment itself did almost no work during this period as a legal matter.

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53 This is primarily a descriptive claim, and some disagree. See, e.g., Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 UCLA L. Rev. 1211, 1211 (2009) [Kates, A Modern Historiography] (“The Second Amendment right to arms was uniformly viewed as an individual right from the time it was proposed in the late eighteenth century until legal debate over gun controls began in the twentieth century.”). It is, however, difficult to see *Heller* as simply a confirmation of two centuries of settled doctrine — certainly it has brought about a radical change in Second Amendment litigation. Roughly 100 claims have succeeded since 2008, compared to almost none before that. Ruben & Blocher, supra note 2.


The militia-oriented view dominated not only doctrine, but most commentary and scholarly writing, for most of American history. It was endorsed by leading voices left, right, and center. "I'm not an expert on the Second Amendment," said conservative judicial icon Robert Bork in 1989, "but its intent was to guarantee the right of states to form militia, not for individuals to bear arms." Two years later, he emphasized the point, again in originalist terms: "The National Rifle Association is always arguing that the Second Amendment determines the right to bear arms. But I think it really is people's right to bear arms in a militia. The NRA thinks that it protects their right to have Teflon-coated bullets. But that's not the original understanding." Conservative Chief Justice Warren Burger likewise insisted that individual rights claims under the Second Amendment are "the subject of one of the greatest pieces of fraud - I repeat the word 'fraud' - on the American public by special interest groups that I have ever seen in my lifetime."

Whether the public shared this view is hard to say, as it is difficult to find polling on the question prior to Heller. Certainly there have always been people - including judges, lawyers, politicians, and scholars - who have believed that the Second Amendment includes a right to keep arms for private purposes like self-defense. But the most significant obstacle to strict gun regulations was the simple fact that most Americans, in most places, simply did not support it as policy matter.

So if the militia reading of the Amendment does not prohibit stringent regulation of private gun use, what does it prevent? The central concern would have to be regulations that would prevent the people of the states from maintaining a well-regulated militia. The Second Amendment right was designed to mitigate the risks of a standing federal army - an astonishing and terrifying institution at the time of ratification - by providing a check on the power Article I gave Congress over military matters. Laws disarming the state militia, or actions similar to those of the British at Concord, would fall within the right's core prohibition. If this worry seems implausibly archaic, consider that the Second Amendment's neighbor, the Third Amendment, prohibits quartering of troops in the home without consent, except in time of war - a real grievance in the late 1700s, although far from a pressing concern today.

Because of the central role it gives to militias and federalism, the militia-based reading is sometimes characterized (occasionally by its supporters, but usually by

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56 Miriam Bensimhorn, Advocates: Point and Counterpoint, Laurence Tribe and Robert Bork Debate the Framers' Spacious Terms, LIFE, Fall 1991 (Special Issue), at 96, 98.
58 See ALEC M. GALLUP AND FRANK NEWPORT, THE GALLUP POLL: PUBLIC Opinion 2008 215 (2009). Polls have long asked general questions about gun rights and regulations, but the specific question of private versus militia right was not posed by most polls until after Heller. See, e.g., Pew Res. Ctr., Public Continues to Oppose Banning Handgun Sales, PEW RES. CTR. (May 14, 2008), www.people-press.org/2008/05/14/public-continues-to-oppose-banning-handgun-sales/.
its detractors) as a “collective” right, or as one held by states, rather than by individuals. Such a view is rightly criticized, at least inasmuch as it suggests that only states can raise Second Amendment claims. But it is perfectly consistent to say that a structural check on federal power can be enforced by non-state actors—the vast majority of cases claiming Congress has exceeded an enumerated power, after all, are brought by individual plaintiffs.

That said, there are many variations on the militia-based reading of the Amendment. Historian Saul Cornell has argued that the Second Amendment protects a “civic” right. This approach, sometimes called the “sophisticated collective rights view,” casts the right to keep and bear arms in civic republican terms—a right, and sometimes an obligation, to keep and bear arms for the purposes of state militia service, as a check against federal power. Again, this is a right held by individuals, albeit one situated in a broader set of public-regarding interests.

It follows that the hardest question about the meaning of the Second Amendment is not whether it protects a “collective” or “individual” right, but rather what is encompassed by the latter. As Justice Stevens would note in the very first sentence of his opinion in *Heller*: “The question ... is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right.’ Surely it protects a right that can be enforced by individuals.” However, “that the Second Amendment protects an individual right does not tell us anything about the scope of that right.”

**THE PRIVATE PURPOSES INTERPRETATION**

For more than two centuries, the militia-based reading dominated federal legal doctrine. But outside the courtroom, another narrative began to flourish. Even as casebooks and legal reports faithfully noted that the Amendment covers only people, arms, and acts bearing some connection to the well-regulated militia, many people spoke about “Second Amendment” rights in far more individualized terms.

It is well-recognized that changes in constitutional doctrine often begin outside the courts. Statements about the constitution that are far-fetched, aspirational, or just plain false today can become law tomorrow, whether they originate on the right or the left. Those who believed them all along will resist the characterization, but one might say as much about claims that the constitution protects same

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37 See *Gun Control and the Constitution: Sources and Explorations on the Second Amendment* xxxvi (Robert J. Cottrol, ed., 1994).
38 *Heller*, 554 U.S. at 636 (Stevens, J., dissenting).
sex marriage, or that the Affordable Care Act does not fall within the scope of the Commerce Clause power. Both arguments, once “off the wall” as a matter of constitutional doctrine, have now been recognized by the Supreme Court.

The popular reading of the Second Amendment – ultimately adopted in *Heller* – is that it protects the right to keep and bear arms for some personal purposes, most prominently self-defense against criminals. Some advocates of this view argue that deterrence of tyranny is another such private purpose – to be accomplished not through the organized state militia, but through the “general,” “unorganized,” or “citizen’s” militia. Others speak of gun ownership as a manifestation of liberty itself, and valuable for that reason alone. But even those who favor a broad private purposes reading do not suppose that it covers all private purposes – the crucial point is that it is not limited to active militia service.

The private purposes reading, like the militia-based reading, continues to be subject to overstatements by its supporters and distortions by its opponents. Supporters often call it the “individual rights” view. But as noted above, this nomenclature does not distinguish it from the standard militia-based alternative, which is likewise grounded in a right that “can be enforced by individuals.” And just as it is misleading to call the militia-based reading a “collective” rights view, so too is it unnecessary for a supporter of the private purposes view to disregard the militia entirely. Indeed, many supporters of the private purposes argument say, as the Court would eventually hold, that individual self-defense is the core of the right to keep and bear arms but that the right was codified in order to protect the militia from disarmament.

It is difficult to trace a single starting point for the ascendance of the private purposes reading, especially since its proponents assert that it has always been true. It had undoubtedly gained ground by the 1960s, coinciding with the NRA’s increasing emphasis on constitutional argument. As legal scholar Reva Siegel explains, the chaos and fear of the 1960s helped give rise to a “law and order” frame in American social and political life, which in turn helped animate a particular vision of the right to keep and bear arms in American constitutional culture, one that focused less on institutions like the militia and more on the claims of virtuous “law abiding citizens” defending themselves against violent criminals.

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66 *Heller*, 554 U.S. at 636 (Stevens, J., dissenting).

67 *Id.* at 554.

Trends in scholarship followed an analogous path, seemingly influencing the development of constitutional law to a surprising extent. Most modern legal scholarship is published in student-edited law reviews; thousands of articles are published every year in hundreds of journals. In part because law review articles tend to be long and arcane, sometimes with hundreds of footnotes, the vast majority will only ever be read and cited by a handful of people. In fact, although some leading articles might be cited hundreds of times, nearly half of articles are never cited by anyone.7

As to substance, it is often said that contemporary law professors give little attention to technical doctrinal developments, especially those originating outside the Supreme Court.71 Scholarship deemed too “doctrinal” is viewed with disdain in many quarters of the legal academy, while many lawyers and judges seem to regard the whole enterprise as navel-gazing. In Chief Justice John Roberts’s assessment, “Pick up a copy of any law review that you see and the first article is likely to be ... the influence of Immanuel Kant on evidentiary approaches in 18th century Bulgaria.”

Although some discrete areas of contemporary legal doctrine have been revolutionized by scholarship,73 few law professors will ever be directly cited by a lawyer or judge, let alone exert noticeable influence on an area of law or even a single case. And that’s what makes the role of scholarship in the doctrinal development of the Second Amendment all the more remarkable. In the course of adopting a position elaborated by scholars and advocates for decades, the majority in Heller cited more secondary materials, and cited them more often, than all traditional legal sources — constitutional provisions, statutes, cases, and the like — combined.74 Scholarship shaped the debate and provided materials for the Court’s decision long before the case was even filed.

The changing substance of Second Amendment scholarship is also notable. As Adam Winkler notes, very few law review articles addressed the Second Amendment until the 1960s. But in 1965, lawyer and future federal judge Robert Sprecher won the American Bar Association’s constitutional law prize with an essay in which he argued, “We should find the lost Second Amendment, broaden its scope and determine that it affords the right to arm a state militia and also the right of the individual to keep and bear arms.”75 The NRA’s American Rifleman began to emphasize the Amendment

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73 For example, Robert Bork’s argument that consumer welfare should guide antitrust policy has shaped basic thinking about antitrust's fundamental purpose. See Kenneth Hay, Consumer Welfare and the Legacy of Robert Bork, 57 J. L. & Econ. 19 (2014).

74 See Chapter 1, note 4 (citing study by Alyssa Rutsch).

throughout the 1960s, and Ronald Reagan himself authored an article arguing that "the Second Amendment is clear, or ought to be. It appears to leave little, if any, leeway for the gun control advocate." These articles generally did not represent traditional voices from within the academy. But in subsequent decades – especially the 1980s and 1990s – law reviews published a wave of pro-gun scholarship, with 125 articles on the Amendment, most of which supported the private purposes reading. Many of these articles were authored by the same handful of people, few of whom were traditional legal academics, and many of whom were paid by one side or the other. Winkler notes that "[m]ost of the early individual-rights scholarship was written by lawyers employed by gun rights organizations .... Seed money from the NRA and others helped transform the once barren field of individual-rights scholarship."

The quality of these articles was uneven at best. But some, whether or not one agrees with their conclusions, were serious pieces of scholarship. In 1983, Don Kates published "Handgun Prohibition and the Original Meaning of the Second Amendment" in the Michigan Law Review, representing the first time that an article supporting the private purposes view was published in a major law journal. Kates was not a law professor, but his work was careful and well-supported, and has had a significant impact on Second Amendment debates. (While arguing for an individual purposes interpretation, Kates also acknowledged in the article the constitutionality of many gun regulations, including some regarding public carry.) Six years later, the well-respected liberal constitutional scholar Sanford Levinson joined the fray with his article "The Embarrassing Second Amendment," published in the Yale Law Journal. Levinson called out constitutional scholars, especially those who

76 Winkler, supra note 28, at 95.
78 Winkler, supra note 28, at 95-96.
79 Kates, A Modern Historiography, supra note 52, at 1216-17.
80 See Winkler, supra note 28, at 97.
82 According to a Westlaw Keycite, Kates' article has been cited in more than twenty cases, including Heller, and nearly 300 law review articles.
83 Kates, Handgun Prohibition, supra note 81. Kates would later reject these limitations, but his initial position is worth noting if only to describe how far the gun rights position has moved. Kates observed that "[l]argely as a result of gun-owner organizations' own legislative proposals, the laws of every state but Vermont prohibit at least the carrying of a concealed handgun off one's own premises." He further noted that "[a] common proposal, already the law in many jurisdictions, is to prohibit even the open carrying of handguns (or all firearms), with limited exceptions for target shooting and the like, without a permit." Some proposals went so far as to "impose a mandatory minimum jail sentence for the unauthorized carrying of a handgun (or any firearm) off the owner's premises." To Kates, "[t]he constitutionality of such legislation under the amendment can be established on the same basis as the unconstitutionality of a ban on possession ... [W]hile the [historical] statutes used 'keep' to refer to a person's having a gun in his home, they used 'bear' only to refer to the bearing of arms while engaged in militia activities." Id. at 267.
claimed to be committed to the Bill of Rights, for essentially ignoring the Second Amendment and the strength of the arguments in favor of the private purposes reading. Leading scholars such as Laurence Tribe and Akhil Amar eventually came to agree, albeit on different grounds, that the Second Amendment protects the right to keep and bear arms for private purposes, though both of them stressed that it still permits reasonable regulation.

In 1995, law professor Glenn Harlan Reynolds declared victory for the private purposes reading, dubbing it the “Standard Model,” a label that was celebrated by those who favored it and sometimes used even by those who did not. There was, in fact, much to celebrate, as echoes of the “Standard Model” could soon be heard from the bench. In Printz v. United States, NRA lawyer Stephen Halbrook, who had authored many of the articles and books described above, argued that Congress could not compel state and local law enforcement officers to perform the background checks required by the Brady Act. The Supreme Court agreed, holding that the system amounted to unconstitutional “commandeering” of state officials by the federal government.

Technically the case did not involve the Second Amendment, but in his concurring opinion, Justice Clarence Thomas signaled his interest in the private purposes theory and the scholarship that supported it: “Although somewhat overlooked in our jurisprudence, the Amendment has certainly engendered considerable academic, as well as public, debate.” He noted the “impressive array of historical evidence” and the “growing body of scholarly commentary [that] indicates that the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.” Thomas concluded his opinion by speculating that the future may present an opportunity for the Court “to determine whether Justice Story was correct when he wrote that the right to bear arms ‘has justly been considered, as the palladium of the liberties of a republic.’”

A few years later, in May 2001, Attorney General John Ashcroft sent a letter to the NRA announcing that the Department of Justice “unequivocally” supported, apparently for the first time, the view that the Amendment protects a non-militia-centered right. After a major court of appeals decision adopted the private purposes reading, Ashcroft issued a memorandum endorsing the “individual” right to keep and bear arms.

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87 Kates, A Modern Historiography, supra note 52, at 1212 n.7 (noting use even by supporters of militia-based interpretation).
88 A year later, a system of checks on federal government computers—the NICS—was introduced, so the background check system itself is still in place.
90 Id.
91 Id. at 939.
92 See Letter from John D. Ashcroft, Attorney General, to James Jay Baker, Executive Director of the NRA’s Institute for Legislative Action (May 17, 2001). Winkler notes that the NRA was one of the
arms, but also insisting that the Justice Department “will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws.”

That court decision – *United States v. Emerson*, decided by the US Court of Appeals for the Fifth Circuit – struck the same balance, adopting the private purposes theory while upholding a federal gun law. Joe Emerson was the subject of a temporary restraining order for having threatened his wife, and was arrested for violating the federal law that barred such persons from possessing a firearm. Emerson argued, among other things, that this restriction implicated his Second Amendment right to bear arms for private purposes. In keeping with Ashcroft’s declaration, the Department of Justice conceded that the Second Amendment was implicated, but insisted that the law was constitutional nonetheless. In a divided decision, the Fifth Circuit became the first federal court of appeals to endorse the view as well, finding that Emerson did not have to show a connection to the organized militia in order to claim Second Amendment rights. Nevertheless, the court held that people like Emerson with a history of violence can constitutionally be denied access to guns.

The Ashcroft letter and memorandum and the Fifth Circuit’s decision in *Emerson* were important signals that the private purposes view was gaining ground within the law, and not just in scholarship. One small group of committed libertarian lawyers recognized that those developments “all but guaranteed that a Second Amendment case would eventually be brought to the Supreme Court.” Within a few years, the Court would get its chance.

THE CHALLENGE

Clark Neily of the Institute for Justice and Robert Levy of the Cato Institute shared what Levy would later describe as “a political philosophy centering on strictly limited government and expansive individual liberties.” That philosophy, more than either man’s personal predilection for firearms, led them to support the private purposes reading of the Second Amendment and the potential limits it could impose.

*US Dept. of Justice, Attorney General John Ashcroft, Memorandum for all United States’ Attorneys from the Attorney General, Re: United States v. Emerson (Nov. 9, 2001).*

*Id. at 260 (“We hold, consistent with *Miller*, that [the Second Amendment] protects the right of individuals, including those not then a member of any militia … to privately possess and bear their own firearms.”).*

*Id. at 261.*

*Winkler, supra note 28, at 58.*

*The story of the *Heller* litigation is ably told in Adam Winkler’s superb book, *Gunfight*. The following relies heavily on his account, which incorporates interviews with many of the major players in the lawsuit.*

*Winkler, supra note 28, at 53.*
In order to get that theory before the Supreme Court, however, they needed a case, and in order to have a case they needed a plaintiff. In one journalist's description, Dick Heller was not a "tobacco-spitting ... camouflage-wearing caricature" but "an everyman with a spotless background." A special police officer for the Federal Judicial Center (the administrative center of the federal courts), Heller was permitted to carry a handgun while on duty. But Heller, a strong Second Amendment rights supporter whose house had been hit with bullets twice in the 1970s, wanted to keep a handgun at home for self-defense. He also shared Neily and Levy's desire to expand civil liberties more generally. At the urging of a friend, Heller applied for a permit for a pistol, which was summarily denied under the D.C. law. This would prove to be a crucial move in making Heller a legally appropriate plaintiff.

But Heller was not Neily and Levy's first choice to be the face of the litigation. They had originally designated Shelly Parker as lead plaintiff. Parker lived in a high crime area, and her efforts to self-police her community had led to threats from local drug dealers. African American, a long-time District resident, and a neighborhood crusader, she seemed a perfect figurehead for the civil rights framing of their suit. She was joined by a handful of other plaintiffs, including a wealthy Georgetown resident and a gay Cato Institute employee bullied in his youth.

The team now had a theory and a named plaintiff, but still needed a lawyer. To fill that role, Neily and Levy recruited a 37-year-old attorney with libertarian sympathies named Alan Gura. After law school at Georgetown and some time on the Hill, Gura had opened up a private practice in Alexandria, Virginia. He agreed to represent the plaintiffs for what Levy called "subsistence wages" and has been at the vanguard of Second Amendment litigation ever since.

101 Id. at 52-54.
104 Levy, supra note 103, at 28.
105 See Marcia Coyle, The Roberts Court 141-42 (2013).
106 WINKLER, supra note 28, at 60.
108 WINKLER, supra note 28, at 60.
111 Id.
Gura expected support from the Court’s four most conservative members, and hoped to win over Justice Kennedy. But he faced opposition from an unexpected quarter: the NRA itself. The organization was so opposed to the lawsuit that it sent two emissaries to argue for dropping it: Charles Cooper, a heavyweight D.C. lawyer, and Nelson Lund, a law professor who held the NRA-funded Patrick Henry Chair at George Mason Law School. Cooper and Lund argued that the votes simply weren’t there for the non-militia reading, even though the Court had changed significantly—and become, by nearly any measure, more conservative—since Thomas issued his invitation in Printz.

Perhaps the Court was never the main concern, though. Winkler writes that Gura, Neily, and Levy believed the NRA was concerned in part that a Supreme Court victory might undermine the organization’s ability to keep its members motivated by fear of confiscatory gun control. Neily and Levy also wondered whether the NRA was upset that the pair were “stepping on some toes” in an area of law and legislation previously dominated by the NRA and its interests. Whatever the reason, the NRA would later try to hijack Gura’s suit by filing its own challenge, then petitioning the court to have its suit consolidated with Gura’s, with their lawyer Stephen Halbrook at the helm. But the NRA’s suit, Seegars v. Ashcroft, was dismissed for lack of standing, leaving Gura to carry the mantle.

**Trial and Appeal**

Although the Supreme Court was the end goal, Gura had to work his way through the lower federal courts. The first stop was the US District Court for the District of Columbia.

Gura’s case initially looked to be in peril. Parker was found to have suffered no legally cognizable injury, because she merely desired a gun permit, but had not actually been denied one. She therefore had no legal standing. All the other plaintiffs in the suit were similarly dismissed, except one: Dick Heller, who had sought the permit and had been denied, and thus had standing to sue.

As to the merits of Heller’s claim, Judge Emmett Sullivan stitched close to United States v. Miller, the Supreme Court’s last real statement on the Second Amendment. According to Sullivan, the militia-based reading was the law of the land, notwithstanding “thought-provoking and historically interesting arguments for finding an
individual right.” Judge Sullivan concluded that it would be error “to overlook sixty-five years of unchanged Supreme Court precedent and the deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia.”

Gura expected this result, and quickly sought review with the US Court of Appeals for the District of Columbia, perhaps the most prominent appellate court besides the Supreme Court itself. In a 2-1 decision, that court became only the second federal court of appeals (along with the Fifth Circuit in Emerson) to hold that the Amendment protects an “individual” right to keep and bear arms, and the first to strike down a law on that basis. The majority concluded that although the preservation of the militia was the primary reason for the Amendment's ratification, the right to keep and bear arms also included the right to defend one's home against violent attack. Having done so, it also concluded that D.C.'s handgun ban and safe storage requirements were an unconstitutional violation of that individual right. In dissent, Judge Karen Henderson argued, among other things, that the Second Amendment applied only to the states, and not the District.

It seemed clear, after the D.C. Circuit's decision, that the case would make its way to the Supreme Court, and so it was no surprise when, on November 20, 2007, the Justices granted certiorari. In the meantime, the lineups of plaintiffs and lawyers in the case had shuffled a bit more. Dick Heller was now the lead plaintiff, replacing Parker on the caption on appeal. Meanwhile, the District chose veteran Supreme Court litigator Walter Dellinger to defend the law. Dellinger had been a law professor at Duke Law School (home institution of this book's authors), and subsequently head of the Office of Legal Counsel and Solicitor General in the Clinton Administration, and by the late 2000s was a partner in the Supreme Court practice group of O'Melveny & Myers LLP. (One of the authors of this book was a junior associate at O'Melveny at the time, and assisted the District's briefing in Heller.)

The Supreme Court

Since the Court had not squarely confronted a Second Amendment case in eighty years, Gura and Dellinger had to convey an enormous amount of material in their briefs and oral arguments. But they were not alone. Prominent cases often draw what are known as amicus – “friend of court” – briefs from interested parties, some of which can be quite influential. Heller saw a record-setting 68 amicus briefs filed

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119 Parker, 311 F. Supp. 2d at 103-110.
120 Parker, 478 F. 3d at 195.
121 David Nakamura, City Picks Head of Team for Supreme Court Case, WASH. POST, Jan. 4, 2008, B4.
by a wide range of advocacy organizations, scholars, and politicians. Halbrook filed one such brief on behalf of 55 Senators and 250 Representatives arguing that D.C.'s law was an unconstitutional infringement of the individual right to keep and bear arms.\(^3\) The fact that a majority of both houses of Congress filed a brief arguing against the constitutionality of a law that they probably could have changed through legislation (given Congress's power over the District\(^6\)) demonstrates that Heller was about far more than the D.C. law itself. The most notable signatory on the Halbrook brief was Vice President Dick Cheney, the first vice president to join an amicus that contradicted the position of his own administration.\(^16\)

The Office of the Solicitor General, then led by Paul Clement, represented the United States. Consistent with the earlier Ashcroft letter, Clement's brief—which technically filed in support of neither side—argued that the Second Amendment right extends to private purposes, but is nonetheless subject to "reasonable restrictions."\(^1\)\(^2\)\(^1\)\(^2\) Clement requested and received oral argument time, much to the chagrin of more strident gun rights supporters (who thought the administration's position too weak) and Gura, who groused that Clement "advocated for a meaningless individual right."\(^1\)\(^2\)\(^8\)

The common wisdom of modern Supreme Court practice is that briefs are more important than oral arguments, but that oral argument can reveal the Justices' inclinations.\(^1\)\(^9\) Justice Scalia, unsurprisingly, announced at oral argument his view that "The two clauses go together beautifully: Since we need a militia, the right of the people to keep and bear arms shall not be infringed."\(^1\)\(^0\) He was squarely on the side of the private purposes theory. The big question was where the perennial swing vote — Justice Anthony Kennedy — would land. A few minutes into Dellinger's oral argument, the matter was more or less settled. Kennedy suggested that the best way to read the Amendment was as saying "we reaffirm the right to have a militia, we've established it, but in addition, there is a right to bear arms." In his view, the second clause meant "there's a general right to bear arms quite without reference to the militia either way," and that the Amendment must have arisen from "the concern of


\(^{13}\) D.C. Code § 1-206.01 (reserving to Congress the power to enact legislation for the District or to amend or repeal any law passed by the Council).

\(^{14}\) WINKLER, supra note 26, at 186.


\(^{16}\) WINKLER, supra note 26, at 183–87.


the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that.”

The question from that point was not so much whether the Court would endorse the private purposes view, but whether it would uphold the law nonetheless. Recognizing as much, Dellinger pivoted, arguing that the regulation did not violate the “individual” right, in part because the law should be read to have a self-defense exception. Clement, too, emphasized that the right to keep and bear arms has “always coexisted with the reasonable regulations of firearms.” Even Gura noted that the recognition of an individual right would not deprive the District of “a great deal of leeway in regulating firearms.” So long as there was an explicit self-defense exception, the District could, he suggested, “require safe storage” of guns, “for example, in a safe.” It could require a license, conditioned on “demonstrated competency,” require “background checks,” and prohibit minors from possessing guns.

As Winkler notes, “None of the justices seemed particularly interested in the only potentially controlling precedent involved in the case, United States v. Miller.” The decision in Heller, it was clear, would be groundbreaking.

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11 Id. at 8. As is common, the comment was formed as a question, but seemed to be a statement of Justice Kennedy’s thinking.
12 Id. at 39.
13 Id. at 64.
14 Id. at 72.
15 WINKLER, supra note 28, at 261.