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January 2010

# The Right to Arms in the Living Constitution

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# THE RIGHT TO ARMS IN THE LIVING CONSTITUTION

*David B. Kopel**

THIS ARTICLE PRESENTS A BRIEF HISTORY OF THE SECOND Amendment as part of the living Constitution. From the Early Republic through the present, the American public has always understood the Second Amendment as guaranteeing a right to own firearms for self-defense. That view has been in accordance with élite legal opinion, except for a period in part of the twentieth century.

## I. WHY LIVING CONSTITUTIONALISM MATTERS

The Supreme Court's 2008 decision in *District of Columbia v. Heller*[1] was the epitome of originalist jurisprudence. The argument between Justice Scalia's opinion and Justice Stevens' dissent was conducted almost entirely on originalist grounds. *Heller* delves more deeply and broadly into originalism than any previous Supreme Court opinion.

So why think about living constitutionalism and the Second Amendment? First of all, it may be true that "we are all originalists now"[2] in Second Amendment interpretation—if "we" means the Justices of the Supreme Court and almost all scholars who have written on the

* Adjunct Professor of Advanced Constitutional Law, Denver University, Sturm College of Law. Research Director, Independence Institute, Golden, Colorado. Associate Policy Analyst, Cato Institute, Washington, D.C. davekopel.org. Author of, most recently, AIMING FOR LIBERTY: THE PAST, PRESENT AND FUTURE OF FREEDOM AND SELF-DEFENSE (2009). Other works available at http://www.ssrn.com/author=42480. I would like to thank William Van Alstyne, Eugene Volokh, Nelson Lund, Nicholas Johnson, Stephen Halbrook, and John Frazer for helpful suggestions.

1 128 S. Ct. 2783 (2008).

2 Dave Kopel, *Conservative Activists Key to DC Handgun Decision*, HUM. EVENTS, June 27, 2008, http://www.humanevents.com/article.php?id=27229.

Second Amendment. But there are still important analysts who reject originalism entirely, and at least one of them, Cass Sunstein, has often been mentioned as a potential nominee for the Court. Sunstein argues that *Heller* was rightly decided under living constitutionalism—because it respected the moral intuitions of millions of Americans that they have a right to arms for self-defense.[3] Other scholars too, including Jack Balkin and Adam Winkler, have written that *Heller* was properly decided under living constitutionalism.[4]

Second, there are living Constitution elements in *Heller*. The *Heller* list of presumptively constitutional gun controls includes controls that were not practiced in the Founding Era and cannot reasonably be derived from the controls that were practiced.[5] A few other aspects of *Heller*'s reasoning arguably have a hint of living constitutionalism.[6]

Moreover, in the current Supreme Court, only two of the nine Justices describe themselves as committed originalists. Accordingly, a more precise analysis of the Second Amendment in the living Constitution may provide some background in understanding *Heller*, and also guidance about the scope of permissible gun control post-*Heller*.

Before beginning, it would be helpful to define originalism and living constitutionalism in their current stages of development.

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3 Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as Griswold*, 122 HARV. L. REV. 246 (2008), *available at* http://www.ssrn.com/abstract=1204942; *cf.* Reva B. Siegel, Heller *& Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399 (2009); Reva B. Siegel, *Dead Or Alive: Originalism As Popular Constitutionalism In* Heller, 122 HARV. L. REV. 191 (2008) (noting that *Heller* can be understood in part as the result of a successful social movement).

4 Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009) [hereinafter Balkin, *Framework Originalism*]; Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551 (2009).

5 *Heller*, 128 S. Ct. at 2817–18 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."); Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009), *available at* http://www.ssrn.com/abstract=1324757; C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695 (2009) (noting that a lifetime ban on the possession of any gun by persons convicted of almost any felony dates only to the federal Gun Control Act of 1968).

6 *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 419 (2009), *available at* http://www.legalworkshop.org/wp-content/uploads/2009/09/nyu-a20091002-blocher.pdf (discussing the *Heller* passage that lower court judges' overreading and "erroneous reliance" on *United States v. Miller* "cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms." Blocher writes that the citation of "popular understanding is living constitutionalism, plain and simple" (parenthetical in original quote)).

When serious consideration of originalism returned to the legal academy several decades ago, it went by the name of "original intent." Modern courts were supposed to figure out what the Framers intended. At the worst, original intent required its players to answer "What Would Madison Do?"—sometimes an impossible question, for the intent of the Founders regarding modern issues was not always discernable.[7]

The return of originalism was intended to stop living constitutionalism, which at the time was often a euphemism for a dead Constitution. Under dead constitutionalism, when a judge decided that part of the Constitution (e.g., the Second Amendment, the Contracts Clause, the Privileges or Immunities Clause) was, in his personal view, no longer useful to society, he could disregard it. Dead-not-living constitutionalism amounted to making the Constitution depend on what the judge had for breakfast.[8] One notorious example was *Home Building and Loan Association v. Blaisdell*, which violated the plain text and unmistakable original meaning of the Contracts Clause.[9] The *Slaughter-House Cases*[10] and *United States v. Cruikshank*,[11] in which the Court declared that the Privileges or Immunities Clause of the Fourteenth Amendment does not require states to obey the Bill of Rights, were also examples of dead constitutionalism, willfully disregarding the oft-stated intent of the authors of the Amendment, the Congress that passed it, and widespread public understanding.[12]

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7 Part II of Justice Stevens' dissent in *Heller* is an example of simplistic original intent originalism. The dissent points out that the Framers (including the state ratifying conventions) were very concerned about militia issues. From this accurate fact, he makes the inference (for which he can supply no actual statements from anyone) that the Founders meant the Second Amendment to be only about the militia. *Heller*, 128 S.Ct. at 2831–36.

8 *Cf.* Jerome Frank, *Are Judges Human? (Part One)*, 80 U. PA. L. REV. 17, 24 (1931).

9 290 U.S. 398 (1934) (allowing a state to modify contracts for the benefit of one type of party to the contract). The text and original meaning of the Contracts Clause are unmistakably clear regarding the unconstitutionality of the type of law which was nevertheless upheld in *Blaisdell*. Any self-proclaimed originalist who asserts that *Blaisdell* was a legitimate decision is an OINO (Originalist In Name Only).

The justification for *Blaisdell*, if any, would be an analogy to President Lincoln's violations of the Constitution during the Civil War, under the theory that the U.S. during the Great Depression was on the brink of a fascist or communist revolution, and it was better to temporarily sacrifice part of the Constitution than to lose the whole thing. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998) (discussing Lincoln's wartime actions). Not that the analogy is particularly strong, since during the Depression, Congress could have modified the bankruptcy laws to help debtors, without permanently eviscerating the Contracts clause.

10 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

11 United States v. Cruikshank, 92 U.S. 542 (1875).

12 *See infra* notes 53–55 and accompanying text.

Similarly, while there arguably might have been ways to write an abortion rights decision based on constitutional law, *Roe v. Wade* as it actually was written was a raw judicial fiat, an expression of dead constitutionalism.[13]

In the twenty-first century, both sides have moderated. Most originalists now look to original public meaning, rather than original intent. The former has many more surviving written sources, and does not require mental guessing games.

Perhaps more importantly, mainstream originalism—thanks to the distinction between "constitutional interpretation" and "constitutional construction,"—now allows for constitutional development beyond 1800.[14] "Constitutional interpretation" is based purely on original public meaning, and is used to decide the meaning of words in the Constitution. For example, does "Congress shall make no law . . . abridging the freedom of speech"[15] mean that Congress can

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13 Roe v. Wade, 410 U.S. 113 (1973). The blatant willfulness of *Roe v. Wade* has left it, like the *Slaughter-House Cases*, almost bereft of intellectual defenders. However, while few scholars have attempted to provide an alternative legal rationale for *Slaughter-House*'s rejection of the Bill of Rights, *Roe v. Wade* has kept two generations of legal scholars busy attempting to devise alternate legal justifications for the result. *See, e.g.*, WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin ed., 2005).

*Roe v. Wade* might fit into a very loose theory of framework originalism, in that the Congresspeople who wrote and the American people who ratified the Fourteenth Amendment do not appear to have considered the possibility that the Amendment might affect abortion law. Unlike *Blaisdell*, *Roe* did not uphold a type of law which the Constitution was specifically intended to prohibit. One can abstract the Fourteenth Amendment's principle to such an abstract level that they can accommodate an abortion right. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) [hereinafter Balkin, *Abortion*]. But one could just as easily abstract the Fourteenth Amendment to conclude that it prohibits the killing of millions of unborn children. *See* Lund, *supra* note 5.

However, if *Roe* is approached seriously from the perspective of living constitutionalism, it looks like a very bad decision. While the trend since 1967 in what was still a minority of states had been towards liberalization of abortion laws, as of 1973, neither state constitutions, state laws, repeated enactments of Congress, public opinion, nor any other sources of living constitutionalism supported the unlimited abortion right which *Roe v. Wade* and its companion case *Doe v. Bolton* fabricated. (*Doe v. Bolton*, 410 U.S. 179 (1973), in effect converted Roe's trimester system into an unlimited abortion right up to and including ninth month.)

If there is a living (not dead) constitutional argument to be made for abortion rights, the better source is in *Planned Parenthood v. Casey*, which politely acknowledged that *Roe v. Wade* had been wrongly decided, but that much of post-*Roe* American public had acquired an expectation of a right to legal abortion. The Court's "undue burden" test allowed a wide range of restrictions on the right which would be inappropriate for an enumerated right (or for an unenumerated right legitimately derived from American tradition), but which comported with moderate public views favoring the legality of abortion as well as some prudential regulations on the exercise of the right. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

14 *E.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–27 (2004); Randy E. Barnett , *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615 (2009).

15 U.S. CONST. amend I.

never punish anyone for saying anything? The originalist looks to sources of original public meaning, finds that "the freedom of speech" was a term of art, and that some forms of speech (e.g., libel, criminal conspiracies, treason, obscenity) were considered outside the scope of that freedom; therefore some forms of speech are not protected from congressional interference.

"Constitutional construction" allows courts to fill in gaps, and formulate rules and doctrines. Examples include the First Amendment's "time, place, and manner" rules, or the Fourth Amendment's exclusionary rule. Under "constitutional construction," these rules are legitimate, even if those rules were not practiced in the Founding Era.

Living constitutionalism has also moderated. Instead of being a dead-constitution pretext for judicial willfulness, living constitutionalism today tends to be more bounded to identifiable, stable sources of meaning—such as state constitutions.

Jack Balkin takes the position that originalism and living constitutionalism are not opposites, but are instead opposite sides of the same coin.[16] Originalism provides the framework of our constitutional structure, but everything within that frame is the result of continuing, always-changing public and political dialogue over the Constitution, in which interest groups such as the NAACP or NRA play an especially prominent role.[17] Even if one does not agree with Balkin's hybrid theory, his careful examination of how living constitutionalism works provides a useful framework for a close study of the Second Amendment in the living Constitution, particularly in the twentieth and twenty-first centuries.

In this Article, I take no position on whether originalism, living constitutionalism, or a hybrid is the correct theory for courts to use in deciding cases. Living constitution advocates can consider this Article as a detailed explanation of why *Heller* was rightly decided; pure originalists can take the Article as a "judicial behaviorism" explanation of how living constitutionalism helped save the original Second Amendment from being destroyed by dead constitutionalism.

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16 Balkin, *Framework Originalism*, *supra* note 4, at 551; Balkin, *Abortion*, *supra* note 13.
17 Balkin, *Framework Originalism*, *supra* note 4.

## II. NINETEENTH CENTURY

### A. *Commentators*

The preeminent legal treatise of the Early Republic was St. George's Tucker's 1803 American edition of William Blackstone's *Commentaries*. Tucker described the Second Amendment right to arms as an expansion of the arms right from the 1689 English Declaration of Right, and as including the right to arms for self-defense and for hunting.[18] The book was based on Tucker's unpublished William & Mary law lecture notes from 1791-1792. So Tucker is close enough to the Founding (Madison appointed him a federal judge, and he knew many of the Founders well) to be an important originalist source, but the leading role of his book in the early decades of the nineteenth century also makes him an early source for living constitutionalism.[19]

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[18] WILLIAM BLACKSTONE, COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., Philadelphia, Birch & Small 1803), *available at* http://www.constitution.org/tb/tb-0000.htm; David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1370-78 [hereinafter Kopel, *The Second Amendment in the Nineteenth Century*].

[19] Since Tucker in his 1791-1792 lectures and his 1803 book was addressing the whole Constitution, among the many topics he dealt with were the congressional militia powers which are granted by Article I, Section 8. In the course of lecturing about those congressional powers, Tucker addressed militia aspects of the Second Amendment, and said that if the federal government neglected its Article I duty to provide for the arming of the militia, the Second and Tenth Amendments supported the argument that states could remedy the federal inaction by arming the militia themselves. Modern historian Saul Cornell wrote an influential article asserting that Tucker's lecture notes were contrary to his 1803 description of the Second Amendment as specifically a including right of arms for self-defense and hunting. According to Cornell, "Tucker's earliest commentary on the Second Amendment does not support the individual rights view." Cornell claimed that Tucker had changed his mind between 1792 and 1803. Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1125 (2006).

In truth, since Tucker was lecturing his way through the Constitution, he *did* deliver his lecture on federal militia powers (including Second Amendment angles thereof) earlier than he delved into the Bill of Rights and lectured on the Second Amendment. The federal militia power lecture comes twenty pages of lecture notes earlier than the Second Amendment lecture. When Tucker did lecture on the Second Amendment, Tucker described it nearly verbatim as he would in his 1803 book: as including an individual right to own guns, especially for self-defense, and also for hunting. Cornell did not inform his readers that Tucker had lectured separately on the Second Amendment, and that the lecture matched Tucker's 1803 book. Nor did Cornell reveal that that lecture language which Cornell did quote came from a lecture on federal militia powers, not a lecture on the Second Amendment. *See* David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. COLLOQUY 272 (2008), *available at* http://www.ssrn.com/abstract=1284475; *see also* David T. Hardy, *Originalism and its Tools: A Few Caveats*, 2 AKRON L. REV. STRICT SCRUTINY (forthcoming 2010) [hereinafter

Tucker's Blackstone was replaced as the leading constitutional treatise by William Rawle's 1825 *A View of the Constitution of the United States of America*, which explained that the Second Amendment right belonged to "the people" and not just "the militia," for "the prohibition is general."[20]

Supreme Court Justice Joseph Story was also a Harvard Law professor and a prolific author of treatises. Explaining the Second Amendment, he observed that "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms."[21]

Many other legal treatise authors in the nineteenth century likewise described the Second Amendment as an important right, which belonged to the people, not just to militiamen. These authors include Justice Thomas Cooley (the preeminent legal scholar of the latter part of the century, Michigan Supreme Court Justice, and second Dean of the University of Michigan law school),[22] Oliver Wendell Holmes, Jr. (future U.S. Supreme Court Justice),[23] Henry St. George Tucker (President of the Virginia Supreme Court, and University of Virginia

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Hardy, *Originalism*], *available at* http://www.ssrn.com/ abstract=1508604.

Unfortunately, Justice Stevens in his *Heller* dissent repeated Cornell's inaccurate story. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2839 n.32 (Stevens, J., dissenting). For Cornell's response to Hardy's criticism, see Saul Cornell, *St. George Tucker's Lecture Notes, The Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. 1541 (2009); Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet The New Boss, Same As The Old Boss"*, 56 UCLA L. REV. 1095 (2009) [hereinafter Cornell, *Law Office History*]. Hardy addresses the Cornell response in Hardy, *Originalism*, *supra.* For more on Cornell's misleading claims about Tucker, see Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty"*, 3 TENN. J.L. & POL'Y 183 (2007), *available at* http://law.bepress.com/expresso/eps/1824/.

"Law office history" is often one-sided, but it is supposed to be factually accurate and to reflect the duty of candor which an advocate owes to the court. Cornell's work on St. George Tucker does not rise to this level.

20 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Philadelphia, H.C. Carey & I. Lea 1825); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1384–88.

21 JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264–65 (Boston, Marsh, Capen, Lyon & Webb 1840); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1388–97. Story cited Tucker and Rawle with approval, but unlike them, he did not specifically describe self-defense as among the benefits of the Second Amendment. Even so, he clearly viewed a general right to arms as necessary to preserve the existence of the militia.

22 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 350 (Boston, Little, Brown & Co. 1868); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1461–68.

23 JAMES KENT, COMMENTARIES ON AMERICAN LAW (O.W. Holmes, Jr. ed., Boston, Little, Brown & Co., 12th ed. 1873); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1479–81.

law professor),[24] Francis Lieber (very influential writer on the laws of war, and Columbia law professor),[25] Timothy Farrar (law partner of Daniel Webster, and later a widely-respected judge),[26] Joel Bishop (leading criminal treatise author),[27] John Pomeroy (NYU law professor and one of the top ten law professors of the latter nineteenth century),[28] further American editions of Blackstone,[29] H. Von Holst (member of the German Privy Council, and author of scholarly series on American history),[30] John Ordonaux (Columbia law professor),[31] and James Schouler (a law lecturer at Johns Hopkins University, and founder of the legal field of domestic relations).[32] The story remains the same all the way through the century, to the 1897 second edition of Henry Campbell Black's *Handbook of American Constitutional Law*.[33] (Black is best-known as the author of *Black's Law Dictionary*.)

One of the very few contrary voices was the obscure writer

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24 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAW OF VIRGINIA, COMPRISING THE SUBSTANCE OF A COURSE OF LECTURES DELIVERED TO THE WINCHESTER LAW SCHOOL (The Lawbook Exchange, Ltd. 1998) (3d ed. 1846); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1397–99.

25 FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT (Theodore D. Woolsey ed., Da Capo Press 1972) (3d ed. 1877); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1402–03.

26 TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Boston, Little, Brown & Co. 1867); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1470–72.

27 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES (Boston, Little, Brown & Co. 1873); 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW (Boston, Little, Brown & Co., 3d ed. 1865); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1473–76.

28 JOHN POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (New York, Hurd & Houghton 1868); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1473–76.

29 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Herbert Broom & Edward A. Hadley eds., Albany, John D. Parsons, Jr. 1875); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (William Draper Lewis ed., Philadelphia, Rees Welsh & Co. 1897); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1481–83.

30 H. VON HOLST, THE CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA (Alfred Bishop Mason trans., Chicago, Callaghan & Co. 1887); H. VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES (John J. Lalor trans., Chicago, Callaghan & Co.) (first published in 1873, as *Verfassung und Demokratie der Vereinigten Staaten*); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1484.

31 JOHN ORDRONAUX, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES: ITS ORIGIN, AND APPLICATION TO THE RELATIVE POWERS OF CONGRESS, AND OF STATE LEGISLATURES (1891); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1488–90.

32 JAMES SCHOULER, CONSTITUTIONAL STUDIES: STATE AND FEDERAL (Da Capo Press 1971) (1897); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1496–98.

33 HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 462–63 (St. Paul, West Publ'g Co., 2d ed. 1897); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1493–94.

Benjamin Oliver, who wrote in 1832 that the Second Amendment was intended to be a militia-only right, but that it was now understood to be much broader.[34] From the standpoint of living constitutionalism, Oliver's book supports the *Heller* decision.

The legal treatises were consistent with the general public's understanding of the Second Amendment: it guaranteed an individual right which included the right to personal defensive arms.[35]

### B. *Courts*

Likewise, court cases, to the extent that they mentioned the Second Amendment (usually while construing a right to arms provision in a state constitution), agreed that the Second Amendment protected a right to own and carry firearms for all lawful purposes, including self-defense. The legal disputes were not whether the right was only for the militia. Whether the right to carry included the right to carry *concealed* was often litigated, and usually courts held that the legislature could regulate the manner of carrying.[36]

There were also cases testing what "arms" were protected by the

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[34] BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN; WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES (Boston, Marsh, Capen & Lyon 1832). According to Oliver, the Second Amendment

> was probably intended to apply to the right of the people to bear arms for such [militia] purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed. A different construction however has been given to it.

*Id.* at 177. In other words, the Second Amendment as of 1832 had been given a construction which barred Congress and the states legislature from prohibiting citizens from going armed.

Benjamin Oliver has two friends among modern scholars. One of them is me; I found Oliver in 1998 and introduced him to modern readers. Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1399–1400. Saul Cornell exalts Oliver as "one of the most influential legal writers of the early nineteenth century." Cornell, *Law Office History*, *supra* note 19, at 1117. Cornell provides no citation for this extravagant claim. One might say that since Justice Stevens in *Heller* (relying on Cornell) cited Oliver, then Oliver is today among the most influential of legal writers of the early nineteenth century. District of Columbia v. Heller, 128 S. Ct. 2783, 2839 n.33 (Stevens, J., dissenting). During the early nineteenth century, and rest of the century, Oliver was certainly *not* among the most influential commentators. Indeed, a search of the Westlaw databases of nineteenth-century cases reveals not a single citation to Oliver. Hardy, *Originalism*, *supra* note 19 (manuscript at 12 n.59, available at http://www.ssrn.com/abstract=1508604).

[35] *See, e.g.*, Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *"This Right is Not Allowed by Governments that are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment was Ratified*, 17 GEORGE MASON L. REV. (forthcoming 2010), *available at* http://www.ssrn.com/abstract=1491365.

[36] Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1409–33.

Second Amendment. The dominant line of cases held that militia-suitable arms (e.g., firearms, swords) were protected, but weapons that were supposedly useful only for brawling (e.g., the Bowie knife, the Arkansas toothpick) were not. The right to arms was for all "the people," but the type of arms protected was governed by the introductory clause about the militia.[37]

Deviation from nineteenth century consensus was rare. A concurring opinion by one judge in Arkansas in 1842 said that the Second Amendment right to arms was militia-only, but this theory was never followed in Arkansas in future cases.[38]

One important case, *Aymette v. State*, upheld a ban on concealed carrying of Bowie knives and Arkansas toothpicks because, as the Tennessee Supreme Court read the state's constitution and the Second Amendment, the right to "bear" arms related only to bearing while in militia service. However, even *Aymette* affirmed an "unqualified" right of citizens to *possess* militia-suitable arms.[39]

In contrast to Arkansas toothpicks, handguns were considered respectable. So the Georgia Supreme Court in 1846 used the Second Amendment to overturn the only antebellum law which attempted to disarm citizens—a state ban on the ownership or carrying of most handguns.[40] The Supreme Court in *Dred Scott* recognized the right "to keep and carry arms wherever they went" as among the rights of citizens of the United States.[41]

Meanwhile, the idea that the Second Amendment limited federal interference with state militias was conspicuously absent from the many cases in which the boundaries between state and federal militia powers were litigated.[42] The one notable exception was an 1863 Pennsylvania case in which the Pennsylvania Supreme Court ruled federal military conscription unconstitutional; a concurring opinion said that a federal

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37 *Id.*

38 State v. Buzzard, 4 Ark. 18, 32–33 (1842) (Dickinson, J., concurring); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1422–25.

39 Aymette v. State, 21 Tenn. (2 Hum.) 154, 160 (1840) ("The citizens have the unqualified right to *keep* the weapon, it being of the character before described, as being intended by this provision. But the right to *bear arms* is not of that unqualified character."); Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994).

40 Nunn v. State, 1 Ga. 243 (1846).

41 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 417 (1857).

42 J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001), *available at* http://www.guncite.com/journals/heath.html.

draft would violate the Second Amendment because it would allow Congress to destroy the state militia "by absorbing the militia into the army . . . calling them out individually without requisition on the states."[43] Nine weeks later, the Pennsylvania Supreme Court reversed itself.[44]

### C. *The Civil War and its Aftermath*

Before the Civil War, abolitionists such as Lysander Spooner and Joel Tiffany creatively argued that slavery was unconstitutional because slaves were prevented from exercising their right to own firearms for personal use.[45] Whether or not the abolitionist argument was right in its bold claim about slavery, the use of the Second Amendment in the argument reflected the public understanding of the Second Amendment as a personal right of all Americans to own guns.

During Bleeding Kansas, Republicans complained that the pro-slavery territorial government installed by the Lecompton Convention had violated the Second Amendment by confiscating firearms from anti-slavery Kansans. Massachusetts Representative Charles Sumner—one of the most eminent anti-slavery congressmen—furiously denounced the Second Amendment violations as "The crime against Kansas."[46] During the war, Democrats complained that the Lincoln

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[43] Kneedler v. Lane, 45 Pa. 238, 272 (1863) (Thompson, J., concurring). The theory that the Second Amendment forbids federal conscription (because it would destroy the state militias) is not necessarily incompatible with regarding the Second Amendment as also being an individual right, which all persons, not just militiamen, can exercise. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162–73 (1991).

[44] Kneedler v. Lane, 3 Grant 523 (1863).

[45] JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (Cleveland, J. Calyer 1849); LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (Burt Franklin, 2d. ed. 1965) (1860); Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 18, at 1435-41. For selections from Spooner's work on slavery, see Lysander Spooner, *The Unconstitutionality of Slavery*, 28 PAC. L.J. 1015 (1997).

[46] Congressman Sumner continued:

> And yet such is the madness of the hour, that, in defiance of the solemn guaranty, embodied in the Amendments to the Constitution, that "the right of the people to keep and bear arms shall not be infringed," the people of Kansas have been arraigned for keeping and bearing them, and the Senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed—of course, that the fanatics of Slavery, his allies and constituents, may meet no impediment.

CHARLES SUMNER, THE KANSAS QUESTION. SENATOR SUMNER'S SPEECH, REVIEWING THE ACTION OF THE FEDERAL ADMINISTRATION UPON THE SUBJECT OF SLAVERY IN KANSAS 2, 22-23 (Cincinnati, G. S. Blanchard, 1856) (reprinting speech delivered on the floor of the United States Senate, May 19 & 20, 1856), *available at* http://moa.umdl.umich.edu/cgi-bin/moa/sgml/moa-idx?notisid=ABT6369.

administration was confiscating guns from people suspected of disloyalty in Missouri, which had not seceded.[47]

After General Lee's surrender, several southern states passed Black Codes which restricted or eliminated firearms possession and carrying by the freedmen. Whenever the Ku Klux Klan attempted to impose its reign of terror in an area, the first step was the confiscation of firearm from the freedmen.[48]

Congress reacted by passing the Freedmen's Bureau Act, the Civil Rights Act, and the Fourteenth Amendment. The two statutes had specific language protecting the freedmen's Second Amendment right to self-defense arms. Congress voted for the Fourteenth Amendment with the specific, oft-expressed intent of the Amendment's framers and supporters (and with corresponding complaints from opponents of the Amendment) that the Privileges or Immunities Clause would force states to respect the Second Amendment right of freedmen to possess personal defensive arms.[49] This understanding was widely reported in the press.[50]

Once the Fourteenth Amendment was ratified, Congress used its new powers under Section Five to enact the Enforcement Act of 1870 (making it a felony to conspire to injure a person in order to prevent his exercise of constitutional rights), and the Civil Rights Act of 1871 (allowing civil suits by persons whose constitutional rights had been violated). Congressional advocates of those laws stated their objective of stopping interference with freedmen's Second Amendment right to own arms for self-defense.[51]

Starting with the 1798 Sedition Act, and continuing into the late nineteenth century, Congress enacted laws which, at least arguably,

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47 Democratic Platform of 1864, *reprinted in* NATIONAL PARTY PLATFORMS, 1840-1972, at 34 (Donald Bruce Johnson & Kirk H. Porter eds., 5th ed. 1973); *see also* C. CHAUNCEY BURR, NOTES ON THE CONSTITUTION OF THE UNITED STATES (New York, J. F. Feeks 1864); Frémont's Declaration of Martial Law in Missouri, Aug. 30, 1861, *in* 1 THE WAR OF THE REBELLION, ser. 2, at 221 (Washington, Gov't Printing Office 1894).

48 STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998) [hereinafter HALBROOK, FREEDMEN]; Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995) [hereinafter Halbrook, *Personal Security*], *available at* http://www.stephenhalbrook.com/law_review_articles/security.pdf.

49 HALBROOK, FREEDMEN, *supra* note 48; Halbrook, *Personal Security*, *supra* note 48.

50 David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-68*, 30 WHITTIER L. REV. 695 (2009), *available at* http://www.ssrn.com/abstract=1322323.

51 HALBROOK, FREEDMEN, *supra* note 48, at 119–34.

infringed First Amendment rights.[52] In contrast, Congress enacted no laws which restricted Second Amendment rights; all the congressional legislation regarding the right was to protect it from state or private infringement.

In the latter nineteenth century, the Supreme Court nullified the Privileges or Immunities Clause of the Fourteenth Amendment,[53] and in doing so, refused to apply the Second Amendment to the states.[54] The Court also overturned the Enforcement Act, by which Congress had criminalized private conspiracies to violate the Second Amendment rights of American citizens.[55] Yet the Second Amendment right itself remained unquestioned.[56]

The Equal Protection Clause of the Fourteenth Amendment did prevent states from explicitly using race in gun control laws. So as Jim Crow intensified in the South, several states enacted handgun licensing or registration laws.[57] One Florida judge frankly explained the racist purpose:

> The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. . . . [T]he Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population . . . . [I]t is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. . . . [T]here has never been, within my knowledge, any effort to enforce the provisions of this statute as to

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52 *E.g.*, The Comstock Act, ch. 258, 17 Stat. 598 (1873) (outlawing the mailing of "obscene, lewd, or lascivious" materials, including scientific information about contraceptives).

53 The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

54 Presser v. Illinois, 116 U.S. 252 (1886). The only full-length law journal analysis of *Presser*'s history is Stephen P. Halbrook, *The Right of Workers to Assemble and to Bear Arms:* Presser v. Illinois, *One of the Last Holdouts against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943 (1999).

55 United States v. Cruikshank, 92 U.S. 542 (1875).

56 For example, the Attorneys General of the United States treated the Second Amendment as guaranteeing a broad individual right. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (argument presented to the Court by the Andrew Johnson administration); *Ex parte* Rapier, 143 U.S. 110, 113 (1892) (argument by the Benjamin Harrison administration); David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases*, 18 ST. LOUIS U. PUB. L. REV. 99, 152–55, 154 n.218, 171 n.307 (1999), *available at* http://www.davekopel.org/2A/LawRev/35FinalPartOne.htm.

57 *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995).

> white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.[58]

In our living Constitution, it is these racist laws which are the starting point for what *Heller* called "laws imposing conditions and qualifications on the commercial sale of arms."[59] These laws spread to other states in the early decades of the twentieth century, being aimed primarily at immigrant populations (e.g., Italians and Jews in New York City) or at labor agitators (California), or in response to blacks having defended themselves against race riots (Missouri and Michigan).[60]

By the end of the century, the popular militias favored by the Founders had withered. They had been replaced by the bane of the Founders: a "select militia" comprising only a tiny, uniformed fraction of the population. These select militias were no check at all on the abuses of power, but tended instead to be used as government goon squads for strike-breaking, in the service of state governors beholden to large corporations.[61]

In a living constitution sense, the first clause of the Second Amendment had become dormant. However "necessary" a "well-regulated militia" may have been considered by the Founders, the American people after the Civil War did almost nothing to organize or maintain a Second Amendment militia. The main clause of the Amendment, though, had grown ever more vital.

In sum, the living Constitution history of the Second Amendment in the nineteenth century shows overwhelming evidence for an unquestioned right of all Americans, not just the militia, to own and (usually) carry unconcealed firearms for personal defense. The consistent, oft-repeated understanding from St. George Tucker's 1803 treatise all the way through to Jonathan Bingham's 1866 Fourteenth Amendment does, as *Heller* recognized, provide some inferential evidence regarding original meaning in the late eighteenth century.

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58 Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

59 District of Columbia v. Heller, 128 S. Ct. 2783, 2817 (2008); *see also* Robert J. Cottrol & Raymond T. Diamond, *"Never Intended To Be Applied To The White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995), *available at* http://www.guncite.com/journals/cd-reg.html.

60 Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, *in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 15–22 (Don B. Kates, Jr., ed., 1979).

61 For example, in 1914, the Colorado National Guard participated in a massacre of striking mine workers, and their wives and children, at Ludlow, Colorado. *See* BARRON B. BESHOAR, OUT OF THE DEPTHS: THE STORY OF JOHN R. LAWSON, A LABOR LEADER (5th ed. 1980).

Moreover, whatever the Founders thought, the living Constitution of the nineteenth century guaranteed a right of all Americans to own and carry firearms for personal defense. The right was important enough to merit four congressional statutes, plus a constitutional amendment, designed to protect that right.

Although not everyone agreed, the dominant line of legal authority in the century held that the Second Amendment was not absolute. Concealed carrying could be prohibited, as could arms which were, as *Heller* later put it, "not typically possessed by law-abiding citizens for lawful purposes."[62]

## II. TWENTIETH CENTURY

Legal élite and popular opinion about the Second Amendment had been mutually consistent in the nineteenth century. For a period in the latter twentieth century, they diverged. During the nineteenth century, the only sustained threats to the exercise of Second Amendment rights had been aimed at blacks in the South; but in the twentieth century, the Second Amendment rights of all citizens faced serious national threats. Yet the Second Amendment ended the century stronger than ever.

### A. *Courts*

Early in the new century, in Salina, Kansas, a man was prosecuted for carrying a gun in public without a license. He argued that the city ordinance restricting gun carrying violated the right to arms provision in the Bill of Rights of the Kansas Constitution. The prosecution contended that the licensing law was a permissible regulation under the right. *Sua sponte*, the Kansas Supreme Court in *Salina v. Blakesly* in 1905, nullified the right.[63] According to the court, the state constitutional right to arm was merely an affirmation of the right of the state government of Kansas to direct the Kansas militia. The opinion was absurd; the right to arms clause was part of the "Bill of Rights"—not part of the separate article (Article VIII) in the Kansas Constitution which specifies the state government's militia powers. Not one source

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62 Heller, 128 S. Ct. at 2816.
63 Salina v. Blaksley, 83 P. 619 (Kan. 1905).

cited by the court in *Salina* supported the court's claim about the meaning of the right to arms. In dicta, the *Salina* court said that the Second Amendment had the same (null) meaning as the Kansas provision.[64]

*Salina* was later abandoned, although not formally over-ruled, by the Kansas Supreme Court in *Junction City v. Mevis*.[65] The 2010 election in Kansas will have a vote on a Kansas constitutional amendment which will almost certainly finish the job of overturning *Salina*.

But *Salina* did unleash the meme. Unlike in the nineteenth century (when the meme had been raised by an Arkansas judge), the meme found some eager carriers. A federal district court picked up the meme in 1935.[66] By 1970, there were plenty of people who were sure that the Second Amendment only guaranteed a "state's right" or a "collective right,"[67] rather than an individual right. The idea was usually presented as being based on originalism, although there was and is no known writing or speech by any Founder that says so.[68] The true source of the idea is not the Founding Era, but the 1905 Kansas Supreme Court.

Still, under some theories of living constitutionalism, if the meme triumphed, then the resulting nullification of the Second Amendment would be constitutionally legitimate—even if the meme itself had been invented without support in precedent, tradition, or original meaning.[69]

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64 Kopel, *The Second Amendment in the Nineteenth Century*, *surpra* note 18, at 1510–12; Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 187–191 (1982).

65 Junction City v. Mevis, 601 P.2d 1145 (Kan. 1979) (using overbreadth, a doctrine originally created for the First Amendment, but later applied in state constitutional right to arms cases, to find a local gun control unconstitutional).

66 United States v. Adams, 11 F. Supp. 216, 219 (S.D. Fla. 1935) (The Second Amendment refers "to the collective body and not individual rights.").

67 As used in the Second Amendment debate, the "collective right" was an oxymoron. It referred to a right which supposedly belonged to all the people at once, but which could be exercised by none of them, and which in practice only belonged to the government. This "collective right" was thus similar to "collective property" in a communist dictatorship.

68 STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 83 (1984) ("If anyone entertained this [non-individual] notion in the period during which the Constitution and the Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis."); *cf.* Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 72 (translating the Second Amendment into Latin reveals that it was intended to have no legal effect).

69 *Cf.* United States v. Nelsen, 859 F.2d 1318, 1320 (8th Cir. 1988):

> Nelsen claims to find a fundamental right to keep and bear arms in that amendment, but this has not been the law for at least 100 years. In *United States v. Cruikshank* [citation omitted], the Supreme Court overturned criminal convictions based on

The meme's spread was assisted by the Supreme Court's cryptic decision in *United States v. Miller* in 1939.[70] Miller was the result of a collusive prosecution involving a United States Attorney, a federal district judge who was a strong supporter of gun control, and a defense attorney who, in effect, willingly became an instrument for the U.S. Attorney. The result was to bring the weakest possible case to the Supreme Court, in order to uphold the validity of the National Firearms Act of 1934. (That Act required payment of a tax, and registration for the tax payment, for possession of short shotguns and machine guns.[71]) The district judge wrote a one-sentence opinion, with no analysis, saying that the NFA was a violation of the Second Amendment; the case involved the worst possible Second Amendment claimants (career criminals with sawed-off shotguns). The "defense" attorney filed no brief and told the Court to rely on the government's brief.[72]

The government brief in the Supreme Court argued in the alternative: either there was no individual right to arms (per *Salina*) or the tax was permissible because it applied only to arms which were not protected by the individual right. The Supreme Court ruled that whether a short-barreled shotgun was a militia-type weapon (and therefore protected by the Second Amendment) was not within judicial notice. So the one-sentence district court opinion declaring the NFA facially unconstitutional was reversed, and the case was remanded.

*Miller* was cryptically written. Before *Heller* definitively construed the case (as standing for the principle that short shotguns and machine guns are not within the Second Amendment), many articles and judicial opinions argued about what the case meant. Nothing in the case said that the Second Amendment was a "state's right" or a "collective right." But there was language which, particularly when read in isolation from the case as a whole, could be quoted to support the theory that only

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> interference with supposed second amendment rights. "The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution." [citation omitted] Later cases have analyzed the second amendment purely in terms of protecting state militias, rather than individual rights.

70 United States v. Miller, 307 U.S. 174 (1939).

71 National Firearms Act of 1934, Pub. L. No. 73-474, §§ 3–5, 48 Stat. 1236, 1237–38. The NFA taxed but did not ban machine guns because the Roosevelt administration believed that a ban would violate the Second Amendment. *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways and Means*, 73d Cong. 19 (1934). The NFA as proposed would have included handguns, but they were removed from the bill after the National Rifle Association objected.

72 Brian L. Frye, *The Peculiar Story of* United States vs. Miller, 3 N.Y.U. J.L. & LIBERTY 48 (2008), *available at* http://www.ssrn.com/abstract=981831.

militiamen have Second Amendment rights.[73]

As *Heller* would later observe, in the following decades many lower federal courts overread *Miller*.[74] Most of the federal cases arose after Congress passed the Gun Control Act of 1968, which barred convicted felons from possessing firearms. The Second Amendment issue was often a desperate and thinly-reasoned argument made by a public defender whose client was obviously guilty.

Many of the lower court cases asserted that the Second Amendment was solely a collective right or a state's right. Others said that *Miller* meant the Second Amendment was militia-only. The collective/state reading was plainly contrary to *Miller*, and the militia-only reading was much less obvious than many lower courts asserted.[75]

The Court, however, remained silent. *Certiorari* was never granted. One may reasonably draw two conclusions from the inaction. First, in that "*Qui tacet consentit*," a majority of the Court was probably content with allowing the lower courts to do the work of eliminating the Second Amendment as a meaningful part of the American Constitution.

Second, the Court was unwilling to do the job itself. There were cert. petitions from the convicted felons and other losers in the lower courts. There were high-profile cases like the Morton Grove, Illinois,

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73 The best analysis of the various ways to read *Miller* is Michael P. O'Shea, *The Right to Defensive Arms after* District of Columbia v. Heller, 111 W. VA. L. REV. 349 (2009) (closely examining various ways in which *Miller* might have been read in itself, as well as the different readings of *Miller* in the Scalia, Stevens, and Breyer opinions in *Heller*).

74 District of Columbia v. Heller, 128 S. Ct. 2783, 2815 & n.24 (2008). The majority opinion in *Heller* was responding to Justice Stevens' dissent, in which he listed nineteen lower court opinions which he said had relied on the militia-only interpretation of *Heller*. *Id.* at 2823 & n.2 (Stevens, J., dissenting). Actually, ten of the nineteen cases had not really relied on even a plausible overreading of *Miller*, for they had declared that the Second Amendment was a "collective right," not an individual right. *See* Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002); United States v. Napier, 233 F.3d 394 (6th Cir. 2000); Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999); United States v. Scanio, No. 97–1584, 1998 WL 802060 (2d Cir. Nov. 12, 1998) (unpublished op.); Hickman v. Block, 81 F.3d 98 (9th Cir. 1996); Thomas v. City Council of Portland, 730 F.2d 41 (1st Cir. 1984) (per curiam); United States v. Johnson, 497 F.2d 548 (4th Cir. 1974) (per curiam); Bach v. Pataki, 289 F. Supp. 2d 217 (N.D.N.Y. 2003); Sandidge v. United States, 520 A.2d 1057 (D.C. 1987).

All nine Justices in *Heller* considered the "collective right" view to be preposterous. Justice Stevens and his three fellow dissenters brushed off the "collective right" in the first paragraph of their opinion: "The question presented by this case 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." *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting).

75 Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961 (1996), *available at* http://www.constitution.org/2ll/2ndschol/17denc.pdf.

handgun ban, for which cert. petitions were filed in 1983.[76]

The claim of the gun control lobbies was that certiorari was never granted because the Second Amendment was so well-settled.[77] But the Second Amendment was obviously not well-settled, because it remained a huge and highly-contested issue in public debate. Because the very large majority of the American public believed that the Second Amendment guaranteed an individual right,[78] the Second Amendment remained a powerful political impediment to gun control.

Yet the Court declined the repeated opportunity to clarify the question.[79] It is reasonable to infer that the Court was well aware that a

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76 Quilci v. Village of Morton Grove, 464 U.S. 863 (1983) (denying certiorari in case about a village's handgun ban).

77 *E.g.*, Dennis Henigan, *Exploding The NRA's Constitutional Myth*, LEGAL TIMES, Apr. 22, 1991, at 22 ("The Court's refusal to hear *Farmer* reflects not its unwillingness to tackle controversy, but rather the settled state of Second Amendment law."). Dennis Henigan is the head attorney for the Brady Center, then known as the Center to Prevent Handgun Violence. *Farmer v. Higgins* was a NRA certiorari petition on the federal law restricting the sale of machine guns manufactured after May 19, 1986. 18 U.S.C. § 922(o) (2006) (banning transfers of new machine guns, except "a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof"). The district court had construed the ban narrowly (so that citizens could still buy new machine guns, as long as they complied with the federal registration requirement of the 1934 National Firearms Act). The district court argued that a narrow construction was necessary because a broad construction (that civilians cannot purchase machine guns made after May 19, 1986) would cause a conflict with the Second Amendment. The Eleventh Circuit tersely reversed, without addressing the Second Amendment issue, and the Supreme Court denied certiorari. Farmer v. Higgins, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991).

78 According to Alan M. Gottlieb, President of the Second Amendment Foundation:

> In a 1975 national poll question regarding whether the second amendment "applies to each individual citizen or only to the National Guard," 70% of the respondents endorsed the individual right alternative, while another 3% said it applied to both. Cong. Rec., No. 189—Part II, December 19, 1975. A 1978 national poll which asked "Do you believe the Constitution of the United States gives you the right to keep and bear arms?" received an 87% affirmative response. Decision Making Information, ATTITUDES OF THE AMERICAN ELECTORATE TOWARD GUN CONTROL (mimeo, 1978).

Alan M. Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113, 135 n.79 (1982), *available at* http://www.guncite.com/journals/gottcons.html; *see also* Gordon Witkin et al., *The Fight to Bear Arms*, U.S. NEWS & WORLD REP., May 22, 1995, at 28 ("A new U.S. News poll shows that 75 percent of all American voters believe the Constitution guarantees them the right to own a gun."); *The Times Poll: Nation Divided on What Law Should Allow*, L.A. TIMES, Dec. 14, 1991, at 28, *available at* 1991 WLNR 3886164 (asking if "[t]he right to own a gun or a rifle . . . [i]s guaranteed by [the] Constitution," with 62% saying that it is).

79 The Court did issue a summary affirmance in *Burton v. Sills*. In that case, the New Jersey Supreme Court had upheld New Jersey's gun licensing law; the New Jersey court relied on *Presser* for the view that the Second Amendment is not applicable to the states. Burton v. Sills, 394 U.S. 812 (1969) (dismissing for "want of a substantial federal question"), *aff'g* 248 A.2d 521 (N.J. 1968). The *Burton* affirmance did not resolve the meaning of the Second Amendment itself.

Meanwhile, much of the legal élite pronounced that there was no individual right to own a gun, but this pronouncement was more an expression of prejudice than of legal knowledge. Sanford Levinson was the first of the élite professoriate to admit in print that the emperor had no

decision explicitly denying the Second Amendment right would spark an enormous public reaction which would make the backlash against *Roe v. Wade* or *Miranda*[80] look tiny. So why spend an enormous amount of the Court's finite political capital, especially when the lower courts were taking care of things satisfactorily?[81]

The Court's timidity about issuing a holding which limited the Second Amendment solely to the militia is a good example of Balkin's theory of how the public as a whole, not just the courts, participate in our living constitutionalism. The reason that that Court never formally killed the Second Amendment was that the Second Amendment was alive and well in the hearts and minds of the American people, and the Supreme Court knew it. The public operated as a check on the Court, and thereby kept the Second Amendment alive—even though lower federal courts prevented the Amendment from being legally enforceable.

### B. *Congress*

Balkin writes that "the political branches actually produce most living constitutionalism," and that "[m]ost of what courts do in constitutional development responds to these political constitutional constructions."[82]

Congress continued to view the Second Amendment as an important individual right. In 1941, Congress looked with horror at what gun confiscation had led to in Nazi-occupied Europe and in the Soviet Union. When Congress passed the Property Requisition Act to

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clothes:

> I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning," interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.

Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989).

80 Miranda v. Arizona, 384 U.S. 436 (1966). Two years after *Miranda* was decided, Congress enacted a statute purporting to overrule it. 18 U.S.C. § 3501 (2006). Not until more than three decades later had *Miranda* become well-enough established in American public expectations of criminal procedure that the Supreme Court finally had the nerve to declare the statute unconstitutional. *See* Dickerson v. United States, 530 U.S. 428 (2000).

81 A footnote by Justice Blackmun in a Sixth Amendment case in 1976 made the gratuitous assertion (on an unbriefed issue) that *Miller* stood for the militia-only version of the Second Amendment. Lewis v. United States, 445 U.S. 55, 65-66, 65 n.8 (1976). This footnote of dicta was the high-water mark, at the Supreme Court, for the militia-only Second Amendment.

82 Balkin, *Framework Originalism*, *supra* note 4, at 561.

allow the federal government to take property needed for national defense against tyranny, Congress made sure that the American people would retain their ability to resist tyranny. The Act forbade the federal government "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law)," or "to impair or infringe in any manner the right of any individual to keep and bear arms."[83]

Later, the Firearms Owners' Protection Act of 1986 affirmed the individual Second Amendment right, and enacted reforms to stop various abuses of that right by federal, state, or local officials.[84]

To be sure, there were plenty of gun control laws enacted during the twentieth century. Unlike in the nineteenth century, today we live in an administrative state. In every state, there is an "instant" background check (based on a telephone or computer database query to state or federal law enforcement) which is conducted before a gun is sold by a firearms dealer. A minority of states have licensing, registration, or waiting period laws for handguns; a few also have such laws for long guns. More recently, though, some of these laws have been eliminated, now that the instant check is operational.

Significantly, at the federal level, the prohibition of common firearms never went anywhere.[85] The conspicuous exception was the

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[83] The Property Requisition Act, and other congressional laws enacted to protect Second Amendment rights, are discussed in Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 599 (1995) [hereinafter Halbrook, *Declarations by a Co-Equal Branch*], *available at* http://www.guncite.com/journals/halcoeq.html.

For historical details on the Nazis' use of gun registration lists to disarm their intended victims, see Stephen P. Halbrook, *"Arms in the Hands of Jews are a Danger to Public Safety": Nazism, Firearm Registration, and the Night of the Broken Glass*, 21 ST. THOMAS L. REV. 109 (2009), *available at* http://www.stephenhalbrook.com/law_review_articles/Halbrook_macro_final_3_29.pdf; Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT'L & COMP. L. 483 (2000), *available at* http://www.stephenhalbrook.com/article-nazilaw.pdf. For a critique and response, see Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (A Call to Historians)*, 73 FORDHAM L. REV. 653 (2004), *available at* http://www.ssrn.com/abstract=557183; Stephen P. Halbrook, *Nazism, the Second Amendment, and the NRA: A Reply to Professor Harcourt*, 11 TEX. REV. L. & POL. 113 (2006), *available at* http://www.stephenhalbrook.com/law_review_articles/nazism.nra.pdf.

[84] Act of May 19, 1986, sec. 1, § 106, Pub. L. No. 99-308, 100 Stat. 449, 459; David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585 (1987), *available at* http://www.guncite.com/journals/hardfopa.html.

[85] With the exception of old or officially sanctioned machine guns; the sale of new machine guns to civilians was banned in 1986. 18 U.S.C. §922(o) (2006). However, machine guns are probably considered outside the scope of protected Second Amendment "arms"—at least according to *Heller* and to current public opinion.

1994 ban on so-called "assault weapons."[86] (Guns which function like other ordinary guns, but which have frightening, cosmetically-incorrect features, such as bayonet lugs, or stocks make from black plastic.[87]) That ban produced a tremendous counter-response from the public, as Democrats lost control of the House of Representatives for the first time in nearly half a century, and the Senate too changed hands. That December, President Clinton acknowledged that "The NRA is the reason the Republicans control the House."[88] The ban sunset by its own terms in 2004.

The history of congressional action raises serious doubts about the legality of gun registration, under a living constitution theory. The Property Requisition Act of 1941,[89] the Firearms Owners' Protection Act of 1986,[90] and the Brady Act (1994) all forbid the creation of a federal gun registration database.[91] The most concerted push for national gun registration came in the push for what became the Gun Control Act of 1968. Congress rejected central registration, and instead created a system of decentralized record-keeping; records of gun sales are retained by licensed firearms dealers, and are available for law enforcement inspection when such inspection is part of a *bona fide* criminal investigation.[92] The compromise allows for the law enforcement benefits of record-keeping, while reducing the potential for misuse of registration in order to facilitate gun confiscation.

In 1978, the Jimmy Carter administration proposed that dealer records be used to create a limited federal gun registration database.

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86 18 U.S.C. §§ 922(v) & (w) (2000) (repealed 2004).

87 *See* David B. Kopel, *Rational Basis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381 (1994), *available at* http://www.davekopel.org/2A/LawRev/rational.htm.

88 *A Conversation with President Clinton*, PLAIN DEALER, Jan. 14, 1995, at 11B, *available at* 1995 WLNR 4964201 ("The fight for the assault-weapons ban cost 20 members their seats in Congress."). President Clinton elaborated in his memoirs:

> On November 8, we got the living daylights beat out of us, losing eight Senate races and fifty-four House seats, the largest defeat for our party since 1946 . . . .
>
> . . . .
>
> The NRA had a great night. They beat both Speaker Tom Foley and Jack Brooks, two of the ablest members of Congress, who had warned me this would happen. Foley was the first Speaker to be defeated in more than a century. . . . The gun lobby claimed to have defeated nineteen of the twenty-four members on its hit list. They did at least that much damage. . . .

BILL CLINTON, MY LIFE 629–30 (2004).

89 *See* Halbrook, *Declarations by a Co-Equal Branch*, *supra* note 83.

90 Act of May 19, 1986, sec. 1, § 106, Pub. L. No. 99-308, 100 Stat. 449, 459.

91 Brady Handgun Violence Prevention Act, § 103(i), P.L. 103-159, 107 Stat. 1536, 1542 (1993) (imposing a ban on the use of National Instant Check records for registration of guns or gun owners).

92 18 U.S.C. § 923(g) (2006).

The administration said that no additional funds would be needed, since the federal Bureau of Alcohol, Tobacco and Firearms could implement the five million dollar project from existing appropriations. The House of Representatives voted 314-80 to prohibit the expenditure of any federal funds on gun registration. For good measure, the House also cut BATF's appropriation by five million dollars.

In the states, gun registration is the minority position. Of the states with registration, most register only handguns. Registration of all guns is the policy in a few jurisdictions, including California, New York City, New Jersey. In each of those jurisdictions, registration records have been used to confiscate long guns.

Accordingly, under living constitutionalism, the legality of centralized gun registration appears doubtful. Federally, the political branches have expressed continued, strong aversion to registration; at the state level, the jurisdictions with most extensive registration are also the places which have witnessed the very abuses which registration facilitates.

And of course there is nothing in the original meaning of the Constitution which would support the legitimacy of comprehensive gun registration; in the Founding Era and Early Republic, some jurisdictions required militia members (i.e. most all adult males) to prove that they had a firearm suitable for militia use. If this counts as "registration," then it is registration narrowly tailored to the citizens' militia duty.

### C. *The States*

State Constitutions are "by far the best expression of the constitutional commitments of We the People," writes Adam Winkler, in support of his claim that "[t]he living Constitution strongly supports the *Heller* majority's recognition of an individual right to keep and bear arms."[93]

Nicholas Johnson ably traces the growth of state constitution right to arms provisions, from Pennsylvania in 1776 to Wisconsin in 1988.[94]

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[93] Winkler, *supra* note 4, at 1573–74.

[94] Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 723–46 (2005); *see also* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006) (compiling provisions), *available at* http://www.trolp.org/main_pgs/issues/v11n1/Volokh.pdf.

Although there have been many law review articles published on the Second Amendment, Johnson's article is the only one to study the Second Amendment in terms of living

Today 44 states have a constitutional right to arms.[95] In every state where the people have had the opportunity to vote directly, they have endorsed the right to arms by landslide margins. Most recently, in 1998 Wisconsin adopted an arms right guarantee by a vote of 1,205,873 to 425,052. Since 1963, the people of twenty states have chosen, either through their legislature or through a direct vote, to add a right to arms to their state constitution, to re-adopt the right to arms, or to strengthen an existing right.

In addition, thirty-seven state constitutions specifically protect the right of self-defense—sometimes as part of the arms right, and sometimes stated separately.[96]

Under the state constitutions, courts have found some gun control laws to be unconstitutional, while upholding many others.[97]

"The Supreme Court often looks to the direction of change in state

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constitutionalism. One shorter piece by a prominent professor also sketched out a living constitution analysis of the Second Amendment. Eugene Volokh, *Who's Right on Second? Living, Breathing Decisions*, NAT'L REV. ONLINE, Dec. 6, 2002, http://www.nationalreview.com/comment/comment-volokh120602.asp.

[95] The individual right has been judicially nullified in Massachusetts. *See* Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976). *But see* Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896) (holding that an individual right does not prevent a ban on armed parades without permit); Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 314 (1825) (right to arms is like free speech, in that the individual right is protected, but abuse of the right, such as libel, may be punished); *see also* David Kopel, *What Did They Mean in Massachusetts?*, CATO UNBOUND, July 24, 2008, http://www.cato-unbound.org/2008/07/24/david-kopel/what-did-they-mean-in-massachusetts/.

[96] David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 128 n.444 (2008) (listing and quoting provisions), *available at* http://www.ssrn.com/abstract=1022097.

[97] For cases finding a law unconstitutional, see Wilson v. State, 33 Ark. 557 (1878) (pistol carrying statute); City of Lakewood v. Pillow, 501 P.2d 744 (Colo. 1972) (restriction on sale, possession, and carrying); People v. Nakamura, 62 P.2d 246 (Colo. 1936) (statute prohibiting possession by aliens of a firearm for hunting); *In re* Brickey, 70 P. 609 (Idaho 1902) (gun carrying statute); Junction City v. Mevis, 601 P.2d 1145 (Kan. 1979) (gun carrying ordinance was overbroad); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822) (concealed carrying statute; state constitution was later amended to allow regulation of concealed carrying of arms); People v. Zerillo, 189 N.W. 927 (Mich. 1922) (prohibition of legal aliens' possession of firearms); City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. Ct. App. 1971) (gun carrying ordinance); State v. Kerner, 107 S.E. 222 (N.C. 1921) (statute requiring license to carry pistol); *In re* Reilly, 31 Ohio Dec. 364 (Ct. Com. Pl. 1919) (ordinance forbidding hiring armed guard to protect property); State v. Delgado, 692 P.2d 610 (Or. 1984) (statute banning switchblade knives); State v. Blocker, 630 P.2d 824 (Or. 1981) (prohibition of carrying a club); State v. Kessler, 614 P.2d 94 (Or. 1980) (prohibition of possession of a club); Barnett v. State, 695 P.2d 991 (Or. Ct. App. 1985) (statute prohibiting possession of black-jack); Glasscock v. City of Chattanooga, 11 S.W.2d 678 (Tenn. 1928) (gun carrying ordinance); Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871) (pistol carrying statute); Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866) (gun confiscation law); Jennings v. State, 5 Tex. Ct. App. 298 (Ct. App. 1878) (statute requiring forfeiture of pistol after misdemeanor conviction); State v. Rosenthal, 55 A. 610 (Vt. 1903) (pistol carrying ordinance as too restrictive); State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139 (W. Va. 1988) (gun carrying law as too restrictive).

practices," observes Balkin.[98] The last quarter-century's changes in state practices are useful guideposts of contemporary interpretation of the Second Amendment in a living constitution.

First of all, *Heller*'s determination that handgun prohibition is per se unconstitutional fits with what the American voters have said. The 1975 handgun ban enacted by the District of Columbia's City Council was supposed to start the dominos falling for a national handgun ban. But every time voters were given a chance to ban handguns, they voted "no"—in Massachusetts in 1976 (69%), California in 1982 (63%), and in three Wisconsin towns: Milwaukee (67%), Kenosha (73%), and very left-leaning Madison (51%) in 1993-1994.[99]

In the early 1980s, city councils in Chicago and Morton Grove, Illinois, did ban handguns, and four other Chicago suburbs later followed suit. In response, legislatures in almost every other state enacted preemption laws to forbid local handgun bans or other local gun controls. Forty-six states now have limited or complete preemption of local firearms laws.[100] Many commentators have noted that the Court is more willing to find a particular practice to be unconstitutional if that practice (e.g., the criminalization of sodomy) only exists in a few states. Because of the American people's use of the political process to express their constitutional values, the D.C. ban was never a trend-setter, but always remained an extremist outlier, enjoying the company of only one large city and a few of that city's many suburbs.

In many American states, the last several decades have seen a litany of statewide legislation designed to protect the right to arms, such as:

- A preemption law which wiped out some or all local gun control;[101]
- Range protection, so that shooting ranges are not shut down by

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98 Balkin, *Framework Originalism*, *supra* note 4, at 571 (making this point in regards to construction of vague clauses such as "cruel and unusual punishments").

99 David Kopel, *Court, Capital and Handgun*, STAR TELEGRAM, Nov. 19, 2007, *available at* http://www.cato.org/pub_display.php?pub_id=8799. San Francisco did vote for a handgun ban in 2005, but the vote was mostly symbolic, since a state statute preempted a ban, as the courts quickly ruled. Fiscal v. City of San Francisco, 70 Cal. Rptr. 3d 324 (2008) (affirming the district court decision via a unanimous opinion of the three-judge appellate panel).

100 David B. Kopel, *Limited Preemption of Firearms Laws*: *A Good Step for Civil Rights*, INDEPENDENCE INSTIT. ISSUE BACKGROUNDER, No. 2003-B, Mar. 11, 2003, *available at* http://www.davekopel.org/2A/IB/Limited-Preemption.htm (describing laws in 44 states). Full preemption in Ohio and limited preemption in Colorado were enacted subsequent to the publication of the Issue Paper; the preemption laws in several states, were also strengthened after 2003.

101 *Id.*

people who built a house near a range, and then complain about the noise;[102]

- Product liability reform, to protect the makers of firearms which function properly from a type of lawsuit that was pushed in the 1970s and 1980s;[103]
- Additional tort reform, to preempt municipal governments from suing firearms manufacturers;[104]
- A Shall Issue law for licensed defensive handgun carrying;[105] and
- Changes in self-defense law to expand the circumstances under which firearms may lawfully be used against criminal attackers.[106]

The average state in this period also enacted a "gun-free school zone law," and some other laws restricting gun possession by juveniles not under adult supervision. These are fairly small potatoes compared to overall broadening of arms rights protections.

To be sure, a few states have moved in other direction; gun rights are much more restricted in California and Massachusetts than they were in 1975, and the already restrictive situation in New Jersey has gotten somewhat tighter. Living constitutionalism, however, tends to favor the dominant national trend; for example, when legal discrimination against black people were being repealed or weakened in most states, the Court followed the national trend, regardless of

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102 In 1994, eight states had range protection laws. By 2003, forty-eight states (all but Nebraska and Washington) did. *Range Protection Laws*, NRA-ILA, May 18, 2003, http://www.nraila.org/Issues/FactSheets/Read.aspx?id=49.

103 The laws were a response to suits orchestrated by gun control lobbies, and arguing that some or all handguns were inherently defective under product liability doctrine, even if the handgun functioned properly.

104 Because many legislatures had already prohibited product liability design defect lawsuits against firearms manufacturers, the municipal lawsuits usually used theories of negligence, public nuisance, or ultrahazardous activity. In 1990, no state had lawsuit preemption against these types of suits; by 2005, 33 states had such laws. *See* Protecting the American Firearms Industry from Junk Lawsuits, NRA-ILA, http://www.nraila.org/images/lawsuits2005.jpg.

105 *See infra* notes 111–114 and accompanying text.

106 The NRA has been successfully pushing such changes for decades. The most recent round started with the enactment of "Castle Doctrine" legislation in Florida in 2005. Since then, twenty-three states have enacted "Castle Doctrine" laws. *See* Castle Doctrine: Protecting Our Right to Self-Defense, NRA-ILA, Oct. 9, 2006, http://www.nraila.org/images/cd.jpg. The name comes from the principle of English law that "a man's home is his castle." *See* Semayne's Case, (1604) 77 Eng. Rep. 194, 195 (K.B.) ("Que la meason de chescun est a luy come son castle & fortres si b'n'p' son defe'ce encou'ter iniurie & viole'ce, come put son repose."); *James Otis' Speech Against the Writs of Assistance, Feb. 24, 1761*, in 1 DOCUMENTS OF AMERICAN HISTORY 45–46 (Henry Steele Commager ed., 9th ed. 1973) ("A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."). However, Castle Doctrine laws may involve changes in self-defense in public places, as well as in the home.

whether race restrictions were being intensified in a few states.

### D. *Everyday Micropractices*

Another aspect of living constitutionalism is "everyday micropractices."[107] When it became common to see women at work, public attitudes (and, in the long run, judicial constitutional attitudes) about women's equality changed. Likewise, when homosexuals started coming out of the closet, public attitudes began to change, as many heterosexual citizens realized that their friends, neighbors, and co-workers who happened to be homosexual were generally pretty "normal."

During the late 1960s, it was common to assert that changing micropractices had made the Second Amendment obsolete. Hunting was declining, and a once-rural nation was now mostly urban. But "the Second Amendment isn't about duck hunting."[108] More precisely, it is not only about hunting. Americans continued their micropractices of arming themselves more heavily than the people of any other nation in the world. As of 1948, Americans owned guns at a per capita rate about equal to what the French and Norwegians do now.[109] By 2004, per capita gun ownership had risen by 158%, so that there now almost as many American guns as there are Americans.[110]

As of the early 1970s, the legal carrying of handguns for protection in public places was suppressed in most states. They typical system was that carrying required a permit, the permit required "good cause" in the view of police administrator, and ordinary citizens who just wanted to protect themselves were almost never considered to have "good cause." Only a few states were exceptions to the general rule.

But starting in Florida in 1987, state after state enacted "shall

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107 Balkin, *Framework Originalism*, *supra* note 4, at 569.

108 David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333 (1995), *available at* http://www.davekopel.org/2A/LawRev/It_Isn't_About_Duck_Hunting.htm (reviewing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)).

109 David B. Kopel, Carlisle Moody & Howard Nemerov, *Is There a Relationship between Guns and Freedom? Comparative Results from Fifty-Nine Nations*, 13 TEX. REV. L. & POL. 1 (2008), *available at* http://www.ssrn.com/abstract=1090441.

110 Brief of The Int'l Law Enforcement Educators and Trainers Ass'n et al. as Amici Curiae in Support of Respondents at App. 13–15, District of Columbia v. Heller, 128 S.Ct. 2783 (2008) (No. 07-290), 2008 WL 405576, *available at* http://www.davekopel.org/Briefs/07-290bsacreprintIntlLawEnforcementEduc&Trainers.pdf (.36 guns per capita in 1948, .93 in 2004).

issue" licensing laws. These laws use an objective standard. If an adult passes a fingerprint-based background check, and (in most states) a safety class, then she "shall" be issued a concealed handgun carry permit. Today, in forty states a law-abiding, competent adult has a clear path to a concealed carry permit.[111] The living constitutionalism importance of this is twofold:

First, we see how changing social attitudes have altered the preferred mode of exercising constitutional rights. In the nineteenth century, concealed carry was often considered outside the scope of the right to bear arms. Today, it is the most common way in which people exercise their right to bear arms.

Perhaps even more importantly, the proliferation of concealed carry laws means that most Americans now live in places where, every time they go to a shopping mall, a fast food restaurant, a park, or almost any other public place, they are in a location where there is a good chance that some people are lawfully carrying firearms. Whether concealed carry causes a statistically significant decline in violent crime is the subject of scholarly debate, but the evidence is indisputable that there is no statistically significant *increase* in crime.[112] In every state where Shall Issue has become the law, it has disappeared from the gun control debate within a few years. Most of the American public has acclimated to an environment in which public carrying of defensive handguns is common, safe, and unremarkable. This surely is having a long-term effect in shaping public attitudes.

The gun prohibition movement sought to make guns into cigarettes—pushed out of public spaces, and confined in an ever-smaller physical zone where permission was granted.[113] Turning smokers into

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111 *See* Johnson, *supra* note 94, 747–65 (describing the spread of Shall Issue laws, and analyzing the trend in terms of Bruce Ackerman's living constitutionalism).

112 *See, e.g.*, JOHN R. LOTT JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS (1998) (finding statistically significant reductions in homicide, assault, rape, and robbery); NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 2 (2005) (concluding that the current level of research does not allow strong conclusions about whether Shall Issue laws have positive effects); Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN L. REV. 1193 (2003) (finding no statistically significant effects); Carlisle E. Moody & Thomas B. Marvell, *The Debate on Shall-Issue Laws*, 5 ECON J. WATCH 269 (2008) (adding additional years and variables to the Ayers-Donohue analysis shows that in the long term, the only statistically significant effect is reduced assault).

113 For example, Dr. Mark Rosenberg, who in 1994 was director of the Centers for Disease Control, National Center for Injury Prevention and Control, stated that the CDC hoped to make the public perceive firearms as "dirty, deadly—and banned." William Raspberry, *Sick People With Guns*, WASH. POST, Oct. 19, 1994, at A23; Harold Henderson, *Policy: Guns 'n' Poses*, CHI. READER, Dec. 16, 1994, at 8, 24, *available at* http://www.chicagoreader.com/chicago/policy-

literal outcasts has had the effect of further delegitimizing smoking, thus reducing its public support, and making even further restrictions possible. America's evolution into a Shall Issue nation is having precisely the opposite effect for firearms.

The Shall Issue laws also have a more immediate legal lesson. From the late 1960s until Florida's 1987 legislation, most Americans (for the first time in history) lived in states where carrying a gun in the ordinary course of life (e.g., while walking in one's neighborhood) was unlawful in practice, requiring a permit that would rarely be issued. The carry restrictions of the late 1960s and early 1970s were, like many of the gun control laws from that period, a reaction against urban riots and other racial unrest.[114]

As of 1975, a living constitutionalist might have been able to argue that the right to bear arms is satisfied if people can carry guns while hunting, and can transport guns to and from gun stores and gun repair shops. Today, the right to bear arms, as it actually exists under our living state constitutions, clearly includes the right to carry handguns for lawful protection. At the same time, the right to bear arms may be regulated by objective, fair laws for background checks, licensing, and training.

### E. *The Second Amendment's Constitutional Moments*

Bruce Ackerman's theory of "constitutional moments" points to the Civil War and Reconstruction, plus the Franklin Roosevelt administration, as times of crisis when our Constitution was changed without going through for the formal amendment process.[115] During those momentous times, the living Second Amendment was plainly applied in its modern sense, as an individual right to own unregistered guns for self-defense.

Constitutional moments do not have to be defined as rigidly as in

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guns-n-poses/Content?oid=886267; *see also* Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 536 (1994), *available at* http://www.guncite.com/journals/tennmed.html (noting that leading handgun prohibition advocate Dr. Katherine Christoffel her colleague Dr. Robert Tanz, "plan to do to handguns what their profession has done to cigarettes . . . [and] turn gun ownership from a personal-choice issue to a repulsive, antisocial health hazard.").

114 *See* ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL (1973); Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947 (1999).

115 BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS (1998).

Ackerman's five-step recipe. For example, in *Origins of the Bill of Rights*, Leonard Levy detailed how the election of 1800 changed the First Amendment.[116] The Sedition Act of 1798 may well have been consistent with the original First Amendment, in that there was no prior restraint, and truth was a defense to a prosecution for seditious libel.

However, as Levy shows, many Americans considered the Sedition Act to be an outrage. And they took out their anger in the election of 1800, in which Thomas Jefferson defeated John Adams, even though Adams had beaten Jefferson in 1796. From then onward, Levy writes, the First Amendment was understood to prohibit even post-publication punishment for writings which criticized the government.

Like the First Amendment in 1800, the Second Amendment was put to the test in elections. In May 2000, the Fifth Circuit Court of Appeal heard oral argument in *United States v. Emerson*, to decide whether the Second Amendment guaranteed an individual right.[117] The Clinton administration told the judges that the Second Amendment allowed for unlimited gun confiscation.[118] A few weeks later, Solicitor General Seth Waxman answered a citizen's letter about *Emerson* by declaring, as the citizen had asked, that the Clinton administration really did believe that it could "'take guns away from the public,' and 'restrict ownership of rifles, pistols and shotguns from all people.'"[119]

The NRA put those words on billboards where voters could see them, and in the 2000 election, the Second Amendment issue cost Al Gore at least five swing states: West Virginia, Missouri, Florida, Clinton's Arkansas, and Gore's own Tennessee. President Clinton

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116 LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS (1999).

117 United States v. Emerson, 270 F.3d 203 (5th Cir. 2001) (holding that the Second Amendment guarantees an individual right, but does not forbid disarming a person who is the subject of a domestic violence restraining order).

118 Consider this exchange from the oral argument in *United States v. Emerson*:

> Chief Judge Garwood: "You are saying that the Second Amendment is consistent with a position that you can take guns away from the public? You can restrict ownership of rifles, pistols and shotguns from all people? Is that the position of the United States?"
> [Assistant United States Attorney William Mateja]: "Yes."
> Garwood: "Is it the position of the United States that persons who are not in the National Guard are afforded no protections under the Second Amendment?"
> AUSA: "Exactly."

Dave Kopel, Paul Gallant, & Joanne Eisen, *Keep It with the People: The Dems, the law, and the right to bear arms*, NAT'L REV. ONLINE, Oct. 24, 2000, http://www.nationalreview.com/kopel/kopel102400.shtml.

119 Letter from Seth P. Waxman, Solicitor General (Aug. 22, 2000), *available at* http://www.nraila.org/waxman.pdf.

stated that Gore had lost the election because of the NRA.[120]

Like the election of 1800, the election of 2000 was very close, and went into "overtime."[121] In both elections, an expansive view of a contested constitutional freedom finally won the day.

## III. THE TWENTY-FIRST CENTURY

Restoring the Department of Justice's traditional position that the Second Amendment is an individual right, new Attorney General John Ashcroft reversed a contrary position which had been articulated by the Nixon and Clinton DOJs.[122]

Congress passed more laws to protect Second Amendment rights. The Protection of Lawful Commerce in Arms Act ended a coordinated series of lawsuits against handgun manufacturers which had been directed by the Brady Campaign.[123] Thirty-three states had already enacted similar laws to protect arms rights from what the legislators considered to be lawsuit abuse.[124]

After Hurricane Katrina, civil society collapsed in New Orleans, and many citizens formed voluntary neighborhood associations to use their personal firearms to protect their communities from roving bands of murderers and looters. Yet New Orleans police superintendant Eddie Compass ordered officers to confiscate all the firearms belonging to all the people of New Orleans.[125] Compass's order was a flagrant

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120 Bill McAllister, *Clinton pins Gore loss on NRA*, DENVER POST, Dec. 20, 2000, at A06 ("President Clinton said Tuesday that his administration's advocacy of gun control measures had cost Vice President Al Gore 'at least' five states in the election and suggested that Colorado illustrated Gore's difficulty with the gun issue.").

121 JOHN FERLING, ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800 (2004).

122 *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel (Aug. 24, 2004), *available at* http://www.usdoj.gov/olc/secondamendment2.pdf. For the historic Department of Justice position, see Brief for Amici Curiae Former Senior Officials of the Department of Justice in Support of Respondent, District of Columbia v. Heller, 128 S.Ct. 2783 (2008) (No. 07-290), 2008 WL 405551, *available at* http://www.gurapossessky.com/news/parker/documents/07-290bsacFormerSeniorOfficialsoftheDepartmentofJustice.pdf (filed by former Attorneys General Edwin Meese and William P. Barr, by former Acting Attorneys General Robert H. Bork and Stuart Gerson, and by other former high-ranking DOJ officials). For the Clinton and Nixon positions, see Letter from Seth P. Waxman, *supra* note 119; Letter from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, to George Bush, Chairman, Republican National Committee (July 19, 1973) (on file with author) ("[T]here is no personal constitutional right, under the Second Amendment, to own or to use a gun.").

123 Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005).

124 *See supra* note 104.

125 GORDON HUTCHINSON & TODD MASSON, THE GREAT NEW ORLEANS GUN GRAB (2007); Stephen P. Halbrook, *"Only Law Enforcement will be Allowed to Have Guns": Hurricane*

violation of Louisiana state law,[126] and it was speedily enjoined on, *inter alia*, Second Amendment grounds a few days after it was issued.[127] Congress and twenty-six states passed legislation to specifically forbid gun confiscation during natural disasters or other emergencies.[128]

In 2004, John Kerry came closer to defeating an incumbent President in wartime than had any candidate since DeWitt Clinton in 1812. As with Gore, Kerry's Second Amendment record cost him the Presidency. The result was that by the time *Heller* reached the Supreme Court, there were two new Justices, appointed by George W. Bush, and those Justices made the difference in a 5-4 decision.

The Democrats in 2006 and 2008 reversed the curse of 1994, taking back control of Congress, thanks to the dozens of pro-Second Amendment candidates whom they put forward.

As Balkin notes, "the Supreme Court often takes direction about how to construct doctrine from contemporaneous expressions of constitutional values by political majorities."[129] The importance of the living, vital, Second Amendment was expressed not only in election results which the Supreme Court read about, but in briefs filed by Congress.

In *Heller*, 55 Senators and 250 Representatives joined an amicus brief urging the Court to hold the D.C. handgun ban

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*Katrina and the New Orleans Firearm Confiscations*, 18 GEO. MASON U. CIV. RTS. L.J. 339 (2008) (article by lead attorney in the suits against the gun confiscations).

126 LA. REV. STAT. ANN. § 14:329.6 (2009) (allowing the "regulating and controlling" but not the "prohibiting" of firearms and ammunition in emergencies, following appropriate official notices and declarations, none of which were made); David Kopel, *New Orleans Gun Confiscation is Blatantly Illegal*, VOLOKH CONSPIRACY, Sept. 9, 2005, http://www.volokh.com/archives/archive_2005_09_04-2005_09_10.shtml#1126317466.

127 Nat'l Rifle Ass'n v. Nagin, No. 05-20,000 A (E.D. La., Sept. 23, 2005) (temporary injunction; defendants denied confiscating guns), *available at* http://www.stephenhalbrook.com/lawsuits/nagin-order.pdf; *see also* Nat'l Rifle Ass'n v. Nagin, No. 05-4234 J(2) (E.D. La., Oct. 9, 2008) (ordering defendants to return the firearms which they had confiscated), *available at* http://www.stephenhalbrook.com/lawsuits/Consent_Order_Final_NRA-Nagin.pdf.

128 For post-Katrina state enactments, see Emergency Powers Legislation, NRA-ILA, http://www.nraila.org/images/ep.jpg.

What ultimately passed Congress in 2006 was Louisiana Senator David Vitter's rider to the Department of Homeland Security Appropriations Act, H.R. 5441, 109th Cong. (2006) (enacted). The rider, S.Amdt. 4615, 109th Cong. (2006), passed the Senate 84-16. 152 Cong. Rec. S7458, S7497 (daily ed. July 13, 2006). In the rider, the proposed Section 540 stated: "None of the funds appropriated by this Act shall be used for the seizure of a firearm based on the existence of a declaration or state of emergency." S.Amdt. 4615.

A few weeks before, the House had voted 322 to 99 for a stand-alone bill, The Disaster Recovery Personal Protection Act of 2006, H.R. 5013, 109th Cong. (2006). 152 CONG. REC. H5814 (daily ed. July 25, 2006). Sponsored by Rep. Bobby Jindal of Louisiana, that bill also forbade gun confiscation in emergencies or natural disasters.

129 Balkin, *Framework Originalism*, *supra* note 4, at 573.

unconstitutional.[130] This was the largest number of Congresspersons who had ever joined in a Supreme Court amicus brief. The amicus brief of Congresspersons on the pro-prohibition side of the case had zero signers from the Senate, and 18 from the House.[131]

The congressional amicus brief in *McDonald v. Chicago*, urging the Court to strike the Chicago handgun ban, garnered 57 Senators and 251 Representatives.[132]

In *Heller*, 31 elected state Attorneys General filed an amicus against the D.C. ban; the brief even urged that the Second Amendment be incorporated against the states.[133] In *McDonald*, with incorporation squarely before the Court, 38 states filed an amicus in favor of incorporation.[134] The *Heller/McDonald* briefs represent one of the very largest, bi-partisan, expressions of the views of the political branches ever presented in Supreme Court briefing.

The political branches are accurately representing the constitutional values of the American people. Even before the *Heller* decision was announced, the Gallup Poll found that 73% of Americans believed that the Constitution guaranteed an individual, non-militia right to arms.[135]

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130 Brief for Amici Curiae 55 Members of United States Senate, The President of the United States Senate, and 250 Members of United States House of Representatives in Support of Respondent, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 383530, *available at* http://www.gurapossessky.com/news/parker/documents/07-290bsacMembersUSSenate.pdf.

131 Brief of Members Of Congress as *Amici Curiae* in Support of Reversal, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 136351, *available at* http://www.gurapossessky.com/news/parker/documents/07-0290acMembersofCongress.pdf.

132 Brief for *Amici Curiae* Senator Kay Bailey Hutchison et al., McDonald v. City of Chicago, No. 08-1521 (U.S. Nov. 23, 2009), *available at* http://www.chicagoguncase.com/wp-content/uploads/2009/ 11/08-1521tsaccongress.pdf. As of the writing of this article, the amicus briefs on behalf of Chicago have not yet been filed.

133 Brief of the States of Texas et al. as *Amici Curiae* in Support of Respondent, District of Columbia v. Heller, 128 S.Ct. 2783 (2008) (No. 07-290), 2008 WL 405558, *available at* http://www.gurapossessky.com/news/parker/documents/07-290bsacTexas.pdf.

134 Brief for Amici Curiae the States of Texas, et al., in Support of Petitioner, McDonald v. City of Chicago, No. 08-1521 (U.S. Nov. 23, 2009), 2009 WL 4378909, *available at* http://www.chicagoguncase.com/wp-content/uploads/2009/11/08-1521-tsac-state-of-texas.pdf.

135 Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns: Nearly three in four say Second Amendment guarantees this right*, GALLUP, Mar. 27, 2008, http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-Own-Guns.aspx; *see also Second Amendment Supreme Court Ruling Matches With Public Opinion*, HARRIS INTERACTIVE, June 26, 2008, http://www.harrisinteractive.com/harris_poll/index.asp?PID=922 (finding that 17% of public believes that Second Amendment is state militia right; 41% believe it is an individual right, and 29% believe it is both); Daniel Merkle, *America: It's Our Right to Bear Arms*, ABC NEWS, May 14, 2002, http://abcnews.go.com/sections/us/DailyNews/guns_poll020514.html (finding that 73% of individuals polled believed gun ownership was an individual right).

"When courts exercise judicial review to strike down laws, they often work in cooperation with the dominant national political coalition," says Balkin.[136] Thus, *Brown v. Board* came only after most states had already abolished de jure racial segregation in schools, and *Lawrence v. Texas* only after most states had repealed criminal laws against sodomy.[137] Similarly, the fact that handgun prohibition in the United States was very rare (only D.C., Chicago, and five Chicago suburbs) is a crucial fact in understanding *Heller* via living constitutionalism.

## IV. POST-HELLER

"Constitutional constructions become durable," says Balkin, "when people stop fighting about them and accept them in practice."[138] With *Heller*, the fighting never even began. Presidential candidates Barack Obama and John McCain rushed to announce their agreement with the decision.[139] During the election campaign, there was no controversy at all about *Heller*, except that McCain's side accused Obama of being insufficiently devoted to the decision, and Obama's side retorted that Obama was a firm supporter of *Heller*; quite a contrast to cases such as *Miranda* or *Roe v. Wade*, which instantly became hot political issues, with many candidates building political capital by denouncing the Court's decision.

On the academic front, only a single post-*Heller* law review article by a leading scholar has argued that the case was wrongly decided.[140]

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136 Balkin, *Framework Originalism*, *supra* note 4, at 563.

137 Balkin, *Framework Originalism*, *supra* note 4, at 563–64.

138 Balkin, *Framework Originalism*, *supra* note 4, at 588.

139 Marc Ambdiner, *Obama Likes Heller*, THEATLANTIC.COM, June 26, 2008 (quoting Obama campaign statement released the day that *Heller* was announced); *McCain and Obama Statements on* DC v. Heller, 2008CENTRAL.NET, June 26, 2008, http://www.2008central.net/2008/06/26/mccain-and-obama-statements-on-dc-v-heller/. The decision-day statement was inconsistent with Obama's previously-expressed support for the D.C. ban. *See* James Oliphant & Michael J. Higgins, *Gun Case Gets Higher Calling*, CHI. TRIB., Nov. 21, 2007, at 4 (reporting the Obama campaign's statement in response to the grant of certiorari in *Heller*: "Obama believes the D.C. handgun law is constitutional" and that "local communities" should have the ability "to enact common sense laws"). In a living constitutionalism sense, the possible insincerity of his praise for *Heller* was all the more evidence of the strength of American public support for the decision, and the candidate's recognition thereof.

140 J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009), *available at* http://www.ssrn.com/abstract=1265118. *But see* Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson, III*, 25 J.L. & Politics 1 (2009), *available at* http://www.ssrn.com/abstract=1309714 (arguing that Wilkinson's criticism of *Heller* is internally incoherent).

*Heller* resulted in an eight point increase in the percentage of the public who thought the Supreme Court was doing a good or excellent job. Of respondents who knew about the *Heller* decision, 63% agreed and 25% disagreed.[141] Of course a Court which takes its job seriously will sometimes displease political majorities, because the protection of constitutional rights and constitutional structure must sometimes be countermajoritarian. In *Heller*, though, protection of the textual right meshed with public views.

Significantly, *Heller* appears to have become, like *Griswold*, a litmus test for Supreme Court nominees.[142] During the confirmation hearings of Sonia Sotomayor, she was questioned extensively by both Democrats and Republicans about her record on Second Amendment issues—testing whether she was "pro-gun" enough to serve on the Court. She responded affirmatively, and even talked about her friends who hunt, and her godchild who belongs to the National Rifle Association.[143] Whether Justice Sotomayor in her heart is as pro-Second Amendment as she claimed during her confirmation hearings can be debated.[144]

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Two other critiques from noted conservatives were published. Richard Posner said that he favored a "thin" Constitution, and therefore *Heller* should have erred on the side of not protecting rights. Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 32. This is consistent with the view expressed Judge Posner and the rest of the Seventh Circuit panel in the *McDonald* case: that it would be constitutional for the government to outlaw self-defense. *McDonald v. Chicago*, 567 F.3d 856, 859–60 (7th Cir. 2009).

In the summer of 2008, Douglas Kmiec penned three essays in which he described the *Heller* decision as utterly indefensible and lawless. The essays were odd, in that Kmiec had joined in the amicus brief of former Department of Justice officials which urged the Supreme Court to do exactly what the Court eventually did in *Heller*. *See* Brief for Amici Curiae Former Senior Officials of the Department of Justice in Support of Respondent, *supra* note 122; David Kopel, *Kmiec v. Kmiec regarding Heller*, VOLOKH CONSPIRACY, Jan. 6, 2009, http://www.volokh.com/posts/1231289178.shtml.

141 *Supreme Court Viewed More Favorably Following Gun Control Ruling*, RASMUSSEN REPORTS, June 29, 2008, http://www.rasmussenreports.com/public_content/politics/mood_of_america/mood_of_america_archive/supreme_court_ratings/supreme_court_viewed_more_favorably_following_gun_control_ruling.

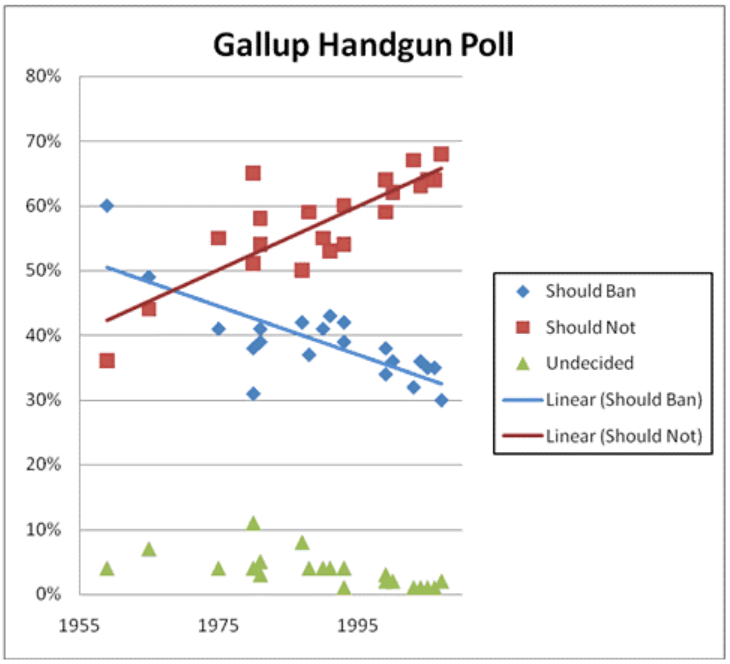
142 "Durable and canonical constitutional constructions like *Griswold* or the Voting Rights Act become part of the 'constitutional catechism' that all Supreme Court Justices who seek confirmation must accept as valid." Balkin, *Framework Originalism*, *supra* note 4, at 589 (noting, also, that Robert Bork's nomination was defeated in part because he was considered not to be a reliable supporter of *Griswold*).

143 *See Transcript: Sotomayor Confirmation Hearings, Day 2*, N.Y. TIMES, July 14, 2009, http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?pagewanted=all (questions from Committee chairman Leahy, Sen. Hatch, Sen. Feingold, Sen. Kyl); *Transcript: Sotomayor Confirmation Hearings, Day 3*, N.Y. TIMES, July 16, 2009, http://www.nytimes.com/2009/07/15/us/politics/15confirm-text.html?pagewanted=all (Sen. Coburn, Sen. Klochubar, Sen. Specter, Sen. Sessions); *Transcript: Sotomayor Confirmation Hearings, Day 4*, N.Y. TIMES, July 17, 2009, http://www.nytimes.com/2009/07/16/us/politics/16confirm-text.html?pagewanted=all (Sen. Graham, Sen. Coburn, Sen. Hatch, Sen. Kyl, Sen. Cornyn, Sen. Sessions).

144 In my own written and oral testimony to the Senate Judiciary Committee, I suggested that her record on Second Amendment issues was poor. *See* Confirmation Hearings for the

From the standpoint of living constitutionalism, the key fact is that to be confirmed to the Court, she had to affirm her allegiance to *Heller*, and to promise to respect the individual right to arms.

A 2009 Gallup Poll found that support for banning handguns had dropped to only 28%—the lowest level since Gallup began polling the issue half a century ago.[145] The long-term trend of the Gallup question (as of 2008) is presented in this graph:[146]




Finally, if there were no National Rifle Association, the story of the last hundred years would have ended very differently, with the Second Amendment lying is the graveyard of the dead Constitution, along with the Contracts Clause and the Privileges or Immunities

Appointment of Sonia Sotomayor to the Supreme Court of the United States of America: Hearing Before the S. Comm. on the Judiciary (July 16, 2009) (statement of David B. Kopel, Research Director, Independence Institute, Golden, Colorado & Associate Policy Analyst, Cato Institute, Washington D.C.), http://judiciary.senate.gov/pdf/07-16-09KopelTestimony.pdf.

145 *Guns*, GALLUP, http://www.gallup.com/poll/1645/Guns.aspx. The 29% figure probably overestimates public support for handgun prohibition. The precise question is "Do you think there should or should not be a law that would ban the possession of handguns, except by the police and other authorized persons?" The phrasing is broad enough so that a person might answer "yes" if he supported legal possession of handguns under a licensing system. From 1975 to 2007, the "yes" figure was usually in the 30s, occasionally breaking into the low 40s. It was 49% in 1965, and 60% in 1959, the first time Gallup asked the question. Support dipped to 29% in 2008, and fell one more point in 2009.

146 This graph was originally posted in Posting of Dave Kopel to Volokh Conspiracy, http://volokh.com/archives/archive_2008_03_16-2008_03_22.shtml#1205694368 (Mar. 16, 2008, 3:06PM) (graph submitted by a reader).

Clause. The modern, living right to arms would not exist if not for the NRA, just as without the American Civil Liberties Union we would not have the robust First Amendment of today, and without the NAACP, the Equal Protection clause would have remained constitutionally near-dead.[147]

As Balkin observes, the ability of groups such as the NRA, ACLU, and NAACP to mobilize constituencies, persuasively communicate their constitutional vision to the public, and influence the political process in favor of the appointment of sympathetic judges is a major force which shapes our living constitution.[148]

For the Second Amendment, the NRA was important not only for its direct role in law and policy, but also for its role in what Balkin calls "micropractices." Ever since the NRA was founded by Union army officers in 1871, the association has worked on many fronts to teach and encourage Americans how to use firearms responsibly.[149] The NRA is by far the leading national organization which trains and certifies firearms safety instructors; millions of Americans have learned firearms safety from NRA instructors. The NRA has been the governing body for many of the shooting sports in America, and was the primary creator

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147 Conversely, the poor record of judicial protection for constitutional property rights can be attributed in part of the absence of a major supportive social organization such as the NRA or ACLU.

148 Jack M. Balkin, *How Social Movements Change (Or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 65 (2005) ("The best strategy for having one's rights protected and recognized by courts is to be politically strong, not weak, so that one can influence both public opinion and the composition of the federal judiciary."). In other words:

> Courts usually do not get involved in developing new constitutional doctrines—whether about gun rights or gay rights—until political forces are strong enough to make them sit up and take notice. The great irony of the *Carolene Products* doctrine that the courts will look out for the interests of "discrete and insular minorities" is that no group gets recognized as "discrete and insular," and therefore deserving of judicial protection, until it has gained the attention of political majorities. Until it gains some political clout, a minority group is usually simply ignored. Blacks got increasing attention from the courts after black migration to the North and to urban areas made them swing voters who could influence elections, and after Jim Crow became an embarrassment to the American foreign policy establishment during the Cold War. Blacks made progress in the courts, in other words, because they made political progress through a halting and agonizingly slow process. (Of course, the one place blacks made little or no progress was in the South, and the civil rights revolution essentially imposed a national majority's views about race on the country, displacing those of a regional majority in the South.)

Balkin, *Framework Originalism*, *supra* note 4, at 594 (footnotes omitted).

149 The NRA's first President was Ambrose Burnside, who as a Union General had been a leader in integrating freed blacks into the army; Burnside had previously been Governor of Rhode Island, and later served as a U.S. Senator. Other early NRA Presidents included former U.S. President and Army of the Potomac commander Ulysses Grant; Philip Sheridan (cavalry commander of the Army of the Potomac), and Winfield Scott Hancock (the hero of Gettysburg, and 1880 Democratic presidential nominee). Nine of the NRA's ten Presidents during the nineteenth century had fought against slavery during the Civil War.

of formal, national target-shooting championships in the United States. Thousands of shooting ranges and gun clubs in the United States have used NRA expertise to operate safely, to manage sporting events, and to introduce newcomers to the sport.

The parallel would be if the American Civil Liberties Union, which defends the right to read, were also the main U.S. organization teaching people how to read, providing operating advice to libraries, giving out the annual awards to the best authors, and so on.[150]

In short, the NRA for 128 years has diligently and successfully worked to increase the number of Americans who own guns, who know how to use them safely, and who engage in sport activities to increase their expertise. The result is a much larger social base of gun owners, some of whom agree with the NRA's core principle that responsible gun ownership is an embodiment of American civic virtue and constitutional freedom. The more gun owners, the more pro-gun voters, and the stronger the living constitutional right to arms. The more people that exercise a right, the better that it may be protected.

## CONCLUSION

From an originalist standpoint, the living constitutionalism of the Second Amendment had a positive influence, in that the social and political forces which living constitutionalism celebrates finally convinced the Supreme Court to stop ignoring the Second Amendment. The Second Amendment's living constitutionalism was founded on originalism, in that activists who supported the individual right to keep and bear arms for lawful self-defense believed that they were supporting the original meaning. Living constitutionalism does not always lead back to enforcement of original meaning, but in *District of Columbia v. Heller*, it did.

The Founding Father of living constitutionalism was Oliver Wendell Holmes, Jr. As he wrote in *Gompers v. United States*:

> [T]he provisions of the Constitution are not mathematical formulas

150 The NRA is far from the only group that works to recruit new shooters and teach them safety, or to promote the shooting sports in other ways. The National Shooting Sports Foundation, which is the trade association for the firearms business, now has very extensive programs, and many smaller groups focus on a subset of issues such as hunter safety training, or particular types of shooting, or particular types of potential firearms owners. However, the NRA is the original national organization to teach gun safety and to manage the shooting sports, and all the other contemporary efforts are in a sense carrying out the NRA's founding mission.

> having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.[151]

Likewise in *Missouri v. Holland*, Holmes declared that the words of the Constitution

> have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[152]

Holmes's words are the living Constitution's answer to those who would claim that the Second Amendment is militia-only. The militia-only interpretation is a "mathematical" and "formal" theory which says: "Bear arms" is an exclusively a military term of art. "Keep" gets turned into a military-only word by being used in the phrase "keep and bear arms." The only form of arms-bearing which is explicitly mentioned in the Second Amendment is militia. Therefore, the Second Amendment right protects only the militia.

Each of the above formulaic steps can be refuted by looking at the historical evidence of original meaning in the Founding Era.[153] But even if the militia-only formal argument were correct, Justice Holmes and the living Constitution would tell us to consider how those words have been used *after* the Founding, and over the course of our nation's development.

As our nation has grown and evolved, through periods of crisis and

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151 233 U. S. 604, 610 (1914).

152 252 U.S. 416, 433 (1920).

153 *See, e.g.*, STEPHEN HALBROOK, THE FOUNDERS' SECOND AMENDMENT (2008); David Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); David Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781 (1997); David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

periods of calm, the people and their elected officials have affirmed and defended the personal right of all law-abiding Americans, not just the militia, to keep and bear arms for self-defense, hunting, and other legitimate purposes. The Second Amendment is, and always has been, alive and well in the hearts and minds of the American people.