

THE SECOND AMENDMENT STANDARD OF REVIEW AFTER
McDONALD: “HISTORICAL GUIDEPOSTS” AND THE
MISSING ARGUMENTS IN *McDONALD V. CITY OF CHICAGO*

Patrick J. Charles *

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* Patrick J. Charles is the author of the articles *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO. 18 (2010), “*Arms for Their Defence*”?: *An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should be Incorporated in McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351 (2009), and the book *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* (2009). The recipient of the 2008 Judge John R. Brown Award for his research on the Second Amendment and States’ “bear arms” provisions, Patrick’s research was cited in Justice Breyer’s dissent in *McDonald v. City of Chicago* and was the basis of the English Historians *Amici Curiae* Brief. He received his J.D. from Cleveland-Marshall School of Law and his B.A. from the George Washington University. He is currently a historian for the United States Air Force in Mildenhall, UK. The views and opinions in this article do not convey those of the Air Force, Department of Defense, or the federal government. Patrick would like to thank the assistance of Heather Horvath Gilbert, Erin Kidwell, Darrell Miller, and Julie Silverbrook for reviewing a draft of this work. A special thanks to Richard L. Aynes for taking the time to review and provide a detailed critique. Although we disagree on some important aspects of the Fourteenth Amendment, Professor Aynes’ advice, expertise, and support is very much appreciated and highly respected.

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I. INTRODUCTION

In *McDonald v. City of Chicago*¹, a narrow 5-4 plurality held that the “Second Amendment right recognized in *District of Columbia v. Heller*”² is incorporated to the States as applied to United States citizens.³ The plurality was extremely divided with Chief Justice Roberts, Justice Scalia, and Justice Kennedy joining only portions of Justice Alito’s opinion. Meanwhile, Justices Thomas and Scalia each wrote their own concurrence. In the end, what stands out is that the five Justices comprising the *McDonald* plurality were the same five Justices that decided the majority opinion in *Heller*.⁴ Unlike the unified *Heller* majority, the *McDonald* plurality was divided as to how the Second Amendment should be incorporated through the Fourteenth Amendment. While Chief Justice Roberts and Justices Scalia, Kennedy, and Alito incorporated *Heller* right through the Fourteenth Amendment’s Due Process Clause,⁵ Justice Thomas incorporated it through the Privileges or Immunities Clause.⁶

This division is significant in many respects. Perhaps what is most important is that the voting paradox effectively limited incorporation to the right recognized in *Heller*—the right of armed, individual self-defense of the home with a handgun—to citizens,⁷ for Justice Thomas’s concurrence states:

1. 130 S. Ct. 3020 (2010).
 2. 128 S. Ct. 2783 (2008).
 3. *McDonald*, 130 S. Ct. at 3026.
 4. 128 S. Ct. 2783 (the majority consisted of Chief Justice Roberts and Associate Justices Scalia, Kennedy, Thomas, and Alito).
 5. *McDonald*, 130 S. Ct. at 3041-48.
 6. *Id.* at 3058-88 (Thomas, J., concurring).
 7. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“But we think the basic premise for this line of reasoning is faulty. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as

I conclude that the right to keep and bear arms applies to the States through the Privileges or Immunities Clause, which recognizes the rights of United States “citizens.” The plurality concludes that the right applies to the States through the Due Process Clause, which covers all “person[s].” Because this case does not involve a claim brought by a noncitizen, I express no view on the difference, if any, between my conclusion and the plurality’s with respect to the extent to which the States may regulate firearm possession by noncitizens.⁸

Whether aliens, lawfully present, undocumented or both, have a constitutional right to arms is just one of the many legal issues left unanswered by the *McDonald* opinion.⁹ Another unsettled issue involves any clarification as to a standard of review for *Heller*’s longstanding regulatory prohibitions.¹⁰ The opinions of Justices Alito and Thomas merely recite *Heller*’s constitutional presumption as to traditional regulatory “prohibitions on the possession of firearms by felons and the mentally ill,” and “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sales of arms.”¹¹ Any hope that a more expansive Second Amendment would be identified was dashed when every plurality opinion merely incorporated the limited right recognized in *Heller*—nothing more.¹² Not even *Heller*’s brief mention of the importance of bearing arms to

that position taken by those Members who concurred in the judgments on the narrowest grounds’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

8. *McDonald*, 130 S. Ct. at 3083 n.19.

9. Prior to *McDonald*, courts have consistently held that the right recognized in *Heller* does not extend to undocumented aliens because they do not qualify as “persons,” see *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 U.S. Dist. LEXIS 8166, at *5-13 (D. Kan. Jan. 28, 2010); *United States v. Boffil-Rivera*, No. 08-20437-CR, 2008 U.S. Dist. LEXIS 84633, at *11-22 (S.D. Fl. Aug. 12, 2008); *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 U.S. Dist. LEXIS 103448, at *3 (W.D.N.C. Oct. 3, 2008) (noting *Heller* “did not find that all individuals present in America are protected by the Second Amendment . . . [and] described that protection as belonging to American citizens.”).

10. *Heller*, 128 S. Ct. at 2816-17 (“Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose 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.”).

11. *McDonald*, 130 S. Ct. at 3047 (quoting *Heller*, 128 S. Ct. at 2816-17).

12. *Id.* at 3020.

hunt¹³ was restated as dicta¹⁴ and the prefatory language “well-regulated militia” did not appear once in the five Justice plurality.

In sum, the *McDonald* decision did little to change the legal landscape of “gun rights” as we know them other than preventing state and municipal governments from having outright bans on handgun possession in the home. This begets the question, “What, if any, other Second Amendment protections will be extended, and what is the constitutional standard of review by which future courts may extend them?” Surprisingly, the answer to this question rests with the courts using “historical guideposts.” While the plurality shunned historical academia in examining the constitutional scope of the right to “keep and bear arms,”¹⁵ it ironically affirmed that much of this same history will aid courts in carving out future Second Amendment protections.¹⁶

The Court’s deviation from historical academia is not a novel concept. Throughout our jurisprudence, justices have wrestled with

13. *Heller*, 128 S. Ct. at 2801 (“The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”).

14. Neither Alito, Scalia, or Thomas’ opinions identified a right to hunt as applied to the States. See *McDonald*, 130 S. Ct. at 3021-88. In fact, Alito’s plurality seems to intentionally exclude hunting, writing, “[W]e stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense.” *Id.* at 3048.

15. *Id.* at 3048 (“[W]hile there is certainly room for disagreement about *Heller’s* analysis of the history of the right to keep and bear arms, nothing written since *Heller* persuades us to reopen and question there decided.”). The historical scholarship questioning *Heller’s* originalism is immense. See Paul Finkelman, *It Really Was About a Well-Regulated Militia*, 59 SYRACUSE L. REV. 267 (2008); William Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349 (2009); Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUBLIC 585 (2009); PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* (2009) [hereinafter *THE SECOND AMENDMENT*]; Patrick J. Charles, *The Constitutional Significance of a “Well-Regulated Militia” Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence*, 3 NORTHEASTERN L. REV. 1 [hereinafter *The Constitutional Significance of A “Well-Regulated Militia”*]; Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO. 18, 22-24 (2010) [hereinafter *The Right of Self-Preservation and Resistance*]; Patrick J. Charles, “*Arms for Their Defence*”?: *An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351 (2009) [hereinafter “*Arms for Their Defence*”?]; Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095 (2009); Saul Cornell, *St. George Tucker’s Lecture Notes, the Second Amendment and Originalist Methodology*, 103 NW. U. L. REV. 1541 (2009); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009).

16. The plurality opinion begins with a thorough recitation of Second Amendment history in order to frame the direction of the following arguments. *McDonald*, 130 S. Ct. at 3036-44.

history; coming to conclusions that do not comport with the historical consensus.¹⁷ Perhaps the primary reason for the differences of interpretation rests with the conflicting duties of a historian compared to that of an advocate or jurist.¹⁸ Historians sort through thousands of pieces of historical evidence to recreate an event according to “beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day,” removing themselves from modern biases, which often leaves us with more questions than answers.¹⁹ Advocates use historical evidence differently. They compile data and facts as a means to place their client in the best position to succeed in the cause or litigation.²⁰ Also, this evidence is narrowly focused and but a sampling of the whole. While advocates may properly quote sources and provide historical facts, they ignore or recast others and fail to remove their modern biases. Most importantly, advocates often lack the historical expertise to provide context—a crucial aspect of the historical profession in determining the truth and credibility of the work.²¹ However, given that the goal of an advocate is to succeed in the litigation, they are almost compelled to cast history in a light that supports their stance, not what accepted historical methodologies command.²² It is a rare occurrence that advocates and jurists are applauded by professional historians.²³

In many ways it is as if history and advocacy cannot co-exist. This is because the law requires providing definitive answers to questions that historians cannot confirm with accuracy, and advocates almost have a duty to make conclusions that are not supported by social, philosophical, and political norms of the historical era at issue. At the same time, history and advocacy must co-exist. This is due to the fact that the use

17. See, e.g. Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 418-21 (2002). Judicial conclusions may deviate from historical consensus for a variety of reasons, not limited to page limitations and the selective nature of choosing history that supports the desired result.

18. Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 382-88 (1998).

19. *Id.* at 378.

20. *Id.* at 382 (“One can hardly expect detached, unbiased history to appear within the context of such an argument, for though advocates may pay lip service to the truth, their main objective is victory.”). See also *id.* at 451 (“The honest historian, then, must recognize her biases and try to subdue them, even as she realizes that to some degree she will probably fail. The effort, however, is one of the things that makes the history credible.”).

21. *Id.* at 389-96.

22. *Id.* at 382.

23. Robert H. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 6 (1945).

of legal precedent is history in itself.²⁴ Furthermore, it is almost a necessity that advocates and jurists use some form of historical methodology to determine the legislative intent of statutes, laws, and ordinances. Lastly, and most importantly, history and advocacy must co-exist, for when answering new constitutional questions it is imperative that some aspect of “original intent” be examined through historical sources.²⁵

Although history and advocacy must co-exist, this does not mean that history and legal opinions addressing historical events will be or have to be mirror images of one another.²⁶ The differing methodologies of law and history often command that the two disciplines operate in parallel universes. While each universe may have similarities as to the “who, what, when, and where,” it is the “why” that divides history from the law. The *Heller* opinion offers the perfect example of how the historical and legal professions diverge in this regard. Indeed, there are scholarly works that support the *Heller* majority’s conclusion and provide the adequate “who, what, when, and where.”²⁷ However, these

24. Melton, *supra* note 18, at 416.

25. For some approaches to fulfilling “original intent,” see JACK N. RAKOVE, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (1990); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2000) (discussing “original intent” in the constraints of the history of slavery); Michael Kent Curtis, *Teaching Free Speech From an Incomplete Fossil Record*, 34 AKRON L. REV. 231, 257-58 (2000) (discussing the problems of “original intent” when courts do not take history in context).

26. Melton, *supra* note 18, at 383-88.

27. For the two most prominent, see STEPHEN P. HALBROOK, THE FOUNDERS’ SECOND AMENDMENT (2008); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994). One great example, of many, concerning this divergence rests with the 1775 THE DECLARATION OF THE CAUSES AND NECESSITY FOR TAKING UP ARMS. One of the grievances states:

The inhabitants of Boston being confined within that town by the General, their Governor, and having, in order to procure their dismissal, entered into a treaty with him, it was stipulated that the said inhabitants, having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in open violation of honor, in defiance of the obligation of treaties, which even savage nations esteemed sacred, the Governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire to leave their most valuable effects behind.

THE DECLARATION OF THE CAUSES AND NECESSITY FOR TAKING UP ARMS (July 6, 1775), reprinted in SOURCE OF OUR LIBERTIES 295, 298 (Richard L. Perry ed., rev. ed. 1972) (Congress 1775). Individual Right Scholars stress that this grievance proves that the colonists were disarmed in

works lack the adequate “why” by jumping to predetermined conclusions, maintaining modern ideological biases, and taking historical events out of context; analyses that are not accepted by historical academia because they conflict with the conducting of historical methodologies.²⁸

The fact that historical academia and the Supreme Court have diverged on the Second Amendment does not mean the courts should discard history altogether when examining the “right to keep and bear arms” in future cases and controversies. It needs to be a point of emphasis that—out of the three branches of government—only the judiciary has a duty to preserve our past²⁹ through precedents, legislative intent, and the Constitution with what is referred to as “original intent.” To put it another way, jurists have a duty to maintain a “historical consciousness.”³⁰ In the words of Oliver Wendell Holmes, this means:

In order to know what [the law] is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.³¹

This maintaining of a “historical consciousness” requires jurists to be forthright and honest in their opinions with their use of “historical guideposts.” It is the rare occasion that historical events will specifically correlate with a case or controversy before the court. The best that jurists can hope for is to use “historical guideposts” to explain legal outcomes based on some form of an accepted historical methodology.³²

violation of their right to “have arms.” What is apparent upon looking at the grievance is that there is no mention of a right or privilege to “have arms.” This is odd seeing that the Declaration describes the deprivation of trial by jury grievance as denying an “accustomed and inestimable privilege”—a grievance that was described in the 1774 *Declaration of Rights and Grievances* as a “constitutional” right. See Charles, “*Arms For Their Defence*,”? *supra* note 15, at 444. More importantly, the grievance against Gage was not with the seizure of arms, but that he violated the “treaty” with Boston’s inhabitants—a fact that is evidenced by the Declaration’s language “in defiance of the obligation of treaties” and the contemporaneous literature of the period. *Id.* at 443-48.

28. See *supra* note 15.

29. Erin Rahne Kidwell, *The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review*, 62 ALB. L. REV. 91, 109-10, 146 (1998).

30. *Id.* at 146; Melton, *supra* note 18, at 384 (“If judges are going to write history, they should strive to do a competent job of it.”).

31. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

32. Melton, *supra* note 18, at 385 (“[D]isparity in the state of research tools and sources . . . is a principal reason why accomplished attorneys, judges, and law professors often turn out to be poor

Perhaps the most effective historical methodology for jurists to use is the combination of Social History and New Intellectual History. Naturally, before combining the two, each methodology must be defined according to its own terms. First, Social History focuses on “social groups rather than on individuals, on the masses rather than the elites, and on ordinary folk rather than prominent people.”³³ It examines what the Supreme Court has dubbed “public understanding” or “popular understanding”; a showing of social acceptance of an issue, case, or controversy dependent on the era in question. Meanwhile, New Intellectual History stresses political philosophy, “taking the ideas of the founding fathers seriously and [accepting] their rhetoric as reflecting more their view of reality.”³⁴ In the constraints of judicial review, New Intellectual History takes into account political and philosophical restraints on the issue, case, or controversy dependent on the area in question. Thus, if we combine Social History and New Intellectual History, it requires the courts to give consideration to both the ideologies of the founding fathers and how the public understood those ideologies in practice.

This leaves us with the question: “What is a ‘historical guidepost’ within the constraints of this Social History and New Intellectual History methodological approach?” A “historical guidepost” is a historical event, philosophy, or political ideology that was prominent or influential in impacting the law, statute, or constitutional provision at issue. For the purposes of analyzing the Second Amendment, a “historical guidepost” is either a longstanding historical restriction on the “keeping” or “bearing” of arms circa 1791 or a longstanding philosophical or political ideology for regulating or restricting the “keeping” or “bearing” of arms as understood circa 1791.

This article sets forth how the courts should address such “historical guideposts” by prescribing a standard of review. First, the purpose of a “historical guidepost” standard of review is to work within the conflicting pursuits of the history and legal professions. As discussed above, it is almost impossible for historians, advocates, and jurists to come to the same historical conclusions.³⁵ The purpose of a historian is to seek the truth by balancing the historical evidence and

amateur historians. Another reason is the law’s emphasis on an analytical approach to the subject is in many ways not just different from, but the antithesis of, a historical approach.”).

33. 1 INTERPRETATIONS OF AMERICAN HISTORY 19 (Gerald N. Grob & George A. Billias eds., 6th ed. 1992).

34. *Id.* at 168.

35. Melton, *supra* note 18, at 382.

attempting to disprove the historian's thesis, which ultimately leads to many questions being unanswered. Meanwhile, advocates and jurists seek to provide definitive answers despite the lack of empirical evidence.³⁶

Second, the "historical guidepost" standard of review works within the constraints of judicial precedent. Although judicial precedent may not comport with the historical consensus, advocates and jurists are almost required to work within the history provided from the higher court.³⁷ It is only at the Supreme Court that controversial history can be reexamined to comport with the historical consensus.³⁸

Third, and most importantly, the "historical guidepost" standard of review requires jurists to maintain a "historical consciousness." This requires jurists to accept our "[changing] societies, cultures, and communities,"³⁹ when examining "historical guideposts." It will be a rare occasion that a modern Second Amendment issue, case, or controversy will exactly replicate eighteenth century facts or restrictions on the "right to keep and bear arms" circa 1791. However, this should not disparage that there existed longstanding political and philosophical restrictions on arms circa 1791. It is these political and philosophical restrictions that provide historic insight as to the constitutionality of current "arms" regulations. What the "historical guidepost" approach does is it takes into account these philosophies through the combination of Social History and New Intellectual History methodologies.⁴⁰

To be clear, the "historical guidepost" approach seeks to work within the constraints of judicial precedent and *stare decisis*. It requires a responsible use of history by advocates and jurists within these constraints. Its purpose is not to overturn *Heller's* acknowledgment of an English common law right to armed self-defense in the home, for only the Supreme Court has the authority to rewrite this version of Second Amendment history,⁴¹ even though it does not comport with the

36. *Id.*

37. *Id.* at 383.

38. See *U.S. Term Limits v. Thornton*, 514 U.S. 779, 788 (1995); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 458–59 (1983); *Smith v. Allwright*, 321 U.S. 649, 665–666 n.9–10 (1944); *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (J. Scalia, J., dissenting); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 574–75 (1985) (J. Souter, J., concurring in part).

39. CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* 70 (1989).

40. See *supra* note 33.

41. See *supra* note 38.

historical consensus.⁴² In other words, the “historical guidepost” standard of review requires the inclusion of history through advocacy to solve legal issues, cases and controversies. It does not serve or pretend to serve as providing historical answers. It merely seeks to use history responsibly and as an effective tool to analyze the “right to keep and bear arms.”

In addition to establishing the framework of this judicial standard, the second part of this study sets forth to address two key arguments that were missing from the City of Chicago’s briefs. This includes: (1) differentiating the importance of the right to “keep arms,” the right to “bear arms,” and a “well-regulated militia” through State Second Amendment analogues circa 1789, 1803, and 1868, and (2) providing the Court with historical evidence that the Fourteenth Amendment’s chief architect, John Bingham, and the whole Reconstruction Congress may have only intended to incorporate the Second Amendment as to protect the right of citizens to take part in defending their liberties in a “well-regulated militia.”

It is within the second part of this study where the methodology of the “historical guidepost” standard of review partially divorces itself from the rest of the study. The analyses of the right to “keep arms,” the right to “bear arms,” and a “well-regulated militia” through State Second Amendment analogues are effective tools under the “historical guidepost” approach. However, the primary approach of this article is to provide a key legal history argument that the City of Chicago did not fully address in its brief or at oral arguments.

Meanwhile, the analysis of the Fourteenth Amendment ratifiers’ “popular understanding” of how the Second Amendment bound the States through the Privileges or Immunities Clause works solely within accepted historical methodologies. It seeks to expound the argument that the historical record is incomplete as to whether the consensus among the ratifiers was that the Second Amendment protected armed, individual self-defense of the home. The answer as to what constitutes “popular understanding” circa 1868 is not as clear and convincing as the *Heller* majority and *McDonald* plurality would have it. The fact that some members of Congress may have viewed the Second Amendment as securing a right against private violence does not dictate how Congress or “popular understanding” as a whole may have understood it. The Amendment’s mention of a “well-regulated militia” and a “free State” was often construed as protecting purely a militia right. Until a more

42. See *supra* note 15.

exhaustive historical study is conducted, professional historians cannot state with certainty what the drafters' intent as a whole constituted.

II. LESSONS IN HISTORY: *MCDONALD*, *HELLER*, AND ESTABLISHING THE HISTORICAL GUIDEPOST STANDARD FOR DETERMINING THE CONSTITUTIONALITY OF GUN CONTROL REGULATIONS

In light of *Heller*, the use of some form of “historical guideposts” to determine the constitutionality of gun control restrictions has been common practice in recent court decisions.⁴³ These courts have rationalized that since the *Heller* majority used “original meaning” to determine the right to “keep and bear arms,” the logical starting point, as to whether a restriction is constitutional, is to examine it in the historical constraints as understood at the founding. The Seventh Circuit Court of Appeals seems to be the first to establish a form of the “historical guidepost” standard of review in the first ruling of *United States v. Skoien*:

[W]e read *Heller* as establishing the following general approach to Second Amendment cases. First, some gun laws will be valid because they regulate conduct that falls outside the terms of the right as publicly understood when the Bill of Rights was ratified. If the government can establish this, then the analysis need go no further. If, however, a law regulates conduct falling *within* the scope of the right, then the law will be valid (or not) depending on the government's ability to satisfy whatever level of means-end scrutiny is held to apply; the degree of fit required between the means and the end will depend on how closely the law comes to the core of the right and the severity of the law's burden on the right.⁴⁴

43. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008). For courts following this standard, see *United States v. Rene*, 583 F.3d 8, 11-12 (1st Cir. 2009) ([The court first looked] to nineteenth century state laws imposing similar restrictions, as the *Heller* Court did.); *United States v. Skoien*, 587 F.3d 803, 808-09 (7th Cir. 2009), *vacated, reh'g en banc*, No. 08-3770, 2010 U.S. App. LEXIS 6584 (7th Cir. Feb 22, 2010), *and on reh'g en banc* No. 08-3770, 2010 WL 2735747 (7th Cir. July 13, 2010); *United States v. Chester*, No. 09-4084, 2010 U.S. App. LEXIS 3739, at *16-19 (4th Cir. 2010) (unpublished opinion) (following the Seventh Circuit Court of Appeals in *Skoien*); *United States v. Tooley*, No. 3:09-00194, 2010 U.S. Dist. LEXIS 58591, at *17 (S.D. WV June 14, 2010) (“To determine the appropriate level of review, this Court will engage in a historical analysis of the Second Amendment as it would apply to 18 U.S.C. s 922(g)(9).”); *United States v. Walker*, No. 3:10CR358-HEH, 2010 U.S. Dist. LEXIS 39473, at *11-12 (E.D. Va. Apr. 21, 2010); *United States v. Brown*, No. 3:09cr339, 2010 U.S. Dist. LEXIS 51515, at *21-29 (E.D. Va. May 25, 2010) (discussing the history of the arms restrictions at the Founding).

44. *Skoien*, 587 F.3d at 808-09 (emphasis in original).

To paraphrase, the Seventh Circuit believed that judicial deference should be given to historical Anglo-American restraints on “arms.” It is only when the government cannot provide an accepted Anglo-American restraint, as understood by the founding fathers, that the court will undertake further review. In *United States v. Chester*, the Fourth Circuit Court of Appeals followed this standard of review, determining that because the plaintiff was not a “law-abiding, responsible citizen” that he was “at least one step ‘removed from the core constitutional right’” recognized in *Heller*.⁴⁵ Naturally, using “historical guideposts” to determine the constitutionality of gun control laws can be viewed as questionable given that the *Skoien* decision was vacated and *Chester* was unpublished.

However, the Seventh Circuit Court of Appeals recently upheld the “historical guidepost” approach in its *Skoien* en banc decision.⁴⁶ Not to mention, other circuits agree with the use of “historical guideposts” because they have adopted similar approaches. In *United States v. Rene*, the First Circuit Court of Appeals agreed it was important to look at nineteenth century state laws as the *Heller* Court did, and rested its “conclusion on the existence of longstanding tradition of prohibiting juveniles from both receiving and possessing handguns[.]”⁴⁷ Recently, the Third Circuit Court of Appeals agreed with a “historical guidepost” approach when it held, “If the Second Amendment codified a pre-existing right to bear arms, it codified the pre-ratification understanding of that right.”⁴⁸

Numerous district courts are similarly adopting “historical guideposts” as a standard of review. For instance, in *United States v. Walker* and *United States v. Brown*, the United States District Court for the Eastern District Court of Virginia has adopted the use of “historical

45. *Chester*, 2010 U.S. App. LEXIS 3739, at *18.

46. *United States v. Skoien*, No. 08-3770, 2010 U. S. App. LEXIS 14262, at *6 (7th Cir. July 13, 2010) (“[F]or current purposes . . . the legislative role did not end in 1791. That *some* categorical limits are proper is part of the original meaning, leaving to the people’s elected representatives the filling in the details.”); *id.* at 35 (Sykes, J., dissenting) (“[M]y colleagues elide the historical-scope question; they do not decide whether persons convicted of a domestic violence misdemeanor are completely “outside the reach” of the Second Amendment as a matter of founding-era history.”). See also *United States v. Williams*, No. 09-3174, 2010 WL 3035483, at *5 (7th Cir. Aug. 5, 2010) (also upholding the “two step approach” with the first step examining “whether the challenged conduct falls within the scope of the Second Amendment’s protection . . . at the founding”).

47. *Rene*, 583 F.3d at 12.

48. *United States v. Marzarella*, No. 09-3185, 2010 U.S. App. LEXIS 15655, at *13 (3rd Cir. July 29, 2010).

guideposts” as “compelling.”⁴⁹ Meanwhile in *United States v. Tooley*, the United States District Court for the Southern District of West Virginia found the use of “historical understanding” as being “based upon the plain language in *Heller*, and is consistent with the approach taken by courts in analyzing protections for freedom of speech under the First Amendment.”⁵⁰

Unfortunately, the use of “historical guideposts” has been applied differently and inconsistently. For instance, the First Circuit gave substantial deference to the fact that juvenile restrictions had traditionally existed in the nineteenth century when coming to its determination.⁵¹ In contrast, the Seventh Circuit’s vacated decision in *Skoien* took more of a historical parallel approach by comparing domestic violence misdemeanants to Founding-Era restrictions, concluding that there was no exact historical comparison.⁵² The *Walker* court similarly took this narrow approach by determining “it would have made little sense for the Founders” to place gun control restrictions based on the nature of the offense and “length of incarceration as is done today.”⁵³ Meanwhile, the *Tooley* court used “historical guideposts” to determine whether the restriction was “outside the ‘core’ of the right—in which case lesser review than strict scrutiny would most likely be appropriate.”⁵⁴ In other words, the *Tooley* court used historical parallels as the means to quantify a constitutional standard of scrutiny.

Given the unpredictable nature of the use of “historical guideposts,” one may argue that a different standard should be used to examine future Second Amendment challenges.⁵⁵ Based on the plurality opinion in

49. *Walker*, 2010 U.S. Dist. LEXIS 39473, at *10; see also *Brown*, 2010 U.S. Dist. LEXIS 51515, at *21-29.

50. *United States v. Tooley*, No. 3:09-00194, 2010 U.S. Dist. LEXIS 58591, at *18 (S.D. WV June 14, 2010).

51. *Rene*, 583 F.3d at 11-13.

52. The court failed to find a perfect fit and went to the second part of its test. See *United States v. Skoien*, 587 F.3d 803, 810-11 (7th Cir. 2009). The *Skoien en banc* decision skipped the Founding-Era historical review, stating “the legislative role did not end in 1791.” *Skoien*, 2010 U.S. App. LEXIS 14262, at *6.

53. *Walker*, 2010 U.S. Dist. LEXIS 39473, at *13.

54. *Tooley*, 2010 U.S. Dist. LEXIS 58591, at *18. See also *id.* at *18 n.4 (“The historical treatment of the regulated conduct guides the determination of the extent to which a core right, or something less, is implicated.”).

55. For other commentary on standards of review after *Heller*, see Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551 (2009); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009); Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1

McDonald v. City of Chicago, however, the Supreme Court disagrees. Justice Alito's plurality opinion joined by Chief Justice Roberts, Justice Scalia, and Justice Kennedy acquiesced to the continuance of *Heller's* "historical guidepost" framework. They all agreed that the "Fourteenth Amendment has not been historically understood to restrict the authority of the States to regulate firearms" within constitutional restraints.⁵⁶ The opinion went on to affirm that the Second Amendment is not historically a right "to keep and carry any weapon whatsoever and for whatever purpose."⁵⁷

Furthermore, similar to his majority opinion in *Heller*, Justice Scalia's concurring opinion unequivocally supports using "historical guideposts" to determine the constitutionality of gun control laws. Writing in response to Justice Stevens' dissent, Scalia confirms that the "traditional restrictions [on arms] go to show the scope of the right" just as history helps to define "other rights."⁵⁸ Scalia concedes that conducting "historical analysis can be difficult," and will sometimes require courts to resolve "threshold questions, and mak[e] nuanced judgments about which evidence to consult and how to interpret it."⁵⁹ However, he believes the historical method need not be the "*perfect means . . .* but whether it is the *best means available* in an imperfect world."⁶⁰ In particular, Scalia prefers "historical guideposts" because:

In the most controversial matters brought before this Court . . . *any* historical methodology, under *any* plausible standard of proof, would lead to the same conclusion. Moreover, the methodological differences that divide historians, and the varying interpretative assumptions they bring to their work, are nothing compared to the differences among the American people[.]⁶¹

Thus, according to the *McDonald* plurality, it is a requisite that courts use "historical guideposts"—longstanding historical restrictions on the "keeping" or "bearing" of arms circa 1791 or a longstanding political or philosophical ideology for regulating or restricting the

(2009); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009).

56. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

57. *Id.* (quoting *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008)). The plurality and Justice Thomas also confirmed that the longstanding restrictions were constitutionally permissible. *Id.* at 3059-88.

58. *Id.* at 3056 (emphasis in original).

59. *Id.* at 3057.

60. *Id.* at 3057-58 (emphasis in original).

61. *Id.* at 3058 (emphasis in original).

“keeping” or “bearing” of arms circa 1791—when analyzing the constitutional scope of the Second Amendment. This still leaves one very important question: “What should a responsible and effective historical guidepost standard look like?”

A. *The “Historical Guidepost” Standard of Review*

As was seen by the conflicting views in the First, Third, Fourth, and Seventh Circuit Court of Appeals, and the subsequent federal district courts, “historical guideposts” have been applied inconsistently.⁶² Despite this fact, all the courts seem to be in concurrence with one important fact; there is a two-part test in determining the constitutionality of gun control laws.⁶³ The test stipulates that if history cannot answer whether a restriction is constitutionally permissive, differing degrees of scrutiny should apply dependent upon how close the restriction is to the “core” of the *Heller* right.⁶⁴ Regarding the second part of this test, the Seventh Circuit in *Skoien* held, “the degree of fit required between the means and the end will depend on how closely the law comes to the core of the right and the severity of the law's burden on the right.”⁶⁵ In making this determination the court can use “historical guideposts” to mitigate or enhance the level of scrutiny.⁶⁶

While this study will not seek to provide an exhaustive study as to the differing levels of scrutiny in the second part of the “historical guidepost” standard of review, it will acknowledge a few caveats. First, it is well-established that Justice Breyer’s interest balancing approach has been denounced by both the *Heller* majority and *McDonald* plurality.⁶⁷ Second, given that the *McDonald* plurality only recognized, incorporated, and ranked as “fundamental” the limited right expounded in *Heller*,⁶⁸ the Supreme Court seems to have only acquiesced to “strict scrutiny” applying towards regulations that expressly diminish the

62. See *supra* notes 51-54 and accompanying text.

63. See *supra* note 43; *United States v. Marzarella*, No. 09-3185, 2010 U.S. App. LEXIS 15655, at *12-13 (3rd Cir. July 29, 2010).

64. *United States v. Tooley*, No. 3:09-00194, 2010 U.S. Dist. LEXIS 58591, at *18 (S.D. WV June 14, 2010)

65. *United States v. Skoien*, 587 F.3d 803, 809 (7th Cir. 2009), *vacated, reh’g en banc*, No. 08-3770, 2010 U.S. App. LEXIS 6584, *4-5 (7th Cir. Feb 22, 2010), *and on reh’g en banc* No. 08-3770, 2010 WL 2735747 (7th Cir. July 13, 2010).

66. For the most detailed application of this standard, see *Tooley*, 2010 U.S. Dist. LEXIS 58591, at *18-35.

67. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

68. *McDonald*, 130 S. Ct. at 3036-48.

limited right recognized in *Heller*. In other words, “strict scrutiny” may only apply to restrictions that aim to prevent a “law-abiding” citizen from exercising the right of armed self-defense in the home with a handgun.

What this study will seek to provide is a workable and responsible analysis for the courts in answering the first part of the “historical guidepost” standard of review, for without it, judges will be forced to weigh history that they may not be familiar with.⁶⁹ It is this lack of professional historical training that may lead courts to “point in any direction the judges favor.”⁷⁰ As Justice Stevens noted in his *McDonald* dissent, “It is not the role of federal judges to be amateur historians.”⁷¹ His comment was not meant to “criticize judges’ use of history in general or to suggest that it always generates indeterminable answers[.]”⁷² Instead, Stevens’ point was that the *McDonald* plurality provided no guidance as to which historical “pieces to credit and which to discount, and then . . . assemble them into a coherent whole.”⁷³

The “historical guidepost” standard of review assuages such concerns. It seeks to work within the constraints of judicial precedent and stare decisis. It requires the responsible use of history by advocates and jurists to solve legal issues, cases, and controversies. It does not serve or pretend to serve as providing definitive historical answers. It merely seeks to use history responsibly and as an effective tool to analyze the “right to keep and bear arms” through the lens of “historical guideposts.” For the purposes of analyzing the Second Amendment, a “historical guidepost” is either a longstanding historical restriction on the “keeping” or “bearing” of arms or a longstanding ideology for regulating or restricting the “keeping” or “bearing” of arms. This standard is in line with both the vacated and en banc *Skoien* decisions.⁷⁴ It requires the courts give federal and state governments some deference to adopt gun restrictions that fall within traditional and historical areas of regulation as would have been publicly accepted by the founding

69. One legal dilemma for judges is that historians and lawyers ask different questions. See Eric Foner, *The Second Founding: Remarks at the Conference on the Second Founding*, 11 U. PA. J. CONST. L. 1289, 1290 (2008).

70. *McDonald*, 130 S. Ct. at 3058. See also generally Cornell, *supra* note 15.

71. *McDonald*, 130 S. Ct. at 3119.

72. *Id.* at 3118.

73. *Id.* at 3117.

74. *United States v. Skoien*, 587 F.3d 803, 808-09 (7th Cir. 2009), *vacated, reh’g en banc*, No. 08-3770, 2010 U.S. App. LEXIS 6584, *4-5 (7th Cir. Feb 22, 2010), and *on reh’g en banc* No. 08-3770, 2010 WL 2735747 (7th Cir. July 13, 2010).

fathers.⁷⁵ As the Third Circuit Court of Appeals held in *United States v. Marzzarella*, the threshold question is not whether there is a perfect historical parallel, but whether it was “commonly understood at the time of ratification,” for “the Second Amendment codified a pre-existing right to bear arms . . . [and] the pre-ratification understanding of that right.”⁷⁶

Restrictions that generally fall within this framework are those designed to protect the public against injury,⁷⁷ and regulations on aliens, both documented and undocumented,⁷⁸ hunting,⁷⁹ felons and the

75. *McDonald*, 130 S. Ct. at 3118 (Stevens’ dissent argues that the plurality’s view is that public understanding at the founding controls interpretation); *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them”). For the argument that the best way to understand the founders’ “popular understanding” of the right to arms and the Second Amendment is through an historical examination of contemporaneous laws, see CHARLES, *THE SECOND AMENDMENT*, *supra* note 15, at 17-34.

76. *United States v. Marzzarella*, No. 09-3185, 2010 U.S. App. LEXIS 15655, at *12-13 (3rd Cir. July 29, 2010).

77. In 1534, Henry VIII passed a statute banning weapons from “any Place within the Distance of two Miles from the same Sessions or Court, nor any Town, Church, Fair, Market or other Congregation, except it be upon a Hute or Outcry[.]” 26 Hen. 8, c. 6 (1534) (Eng.). Even after the 1689 Declaration of Rights “have arms” provision was codified as the English Bill of Rights, Parliament and the crown maintained unfettered authority to disarm “dangerous and disaffected persons.” Charles, “*Arms for Their Defence*,”? *supra* note 15, at 386-98. The American colonies similarly disarmed those who would not profess their allegiance to Congress or local governments. CHARLES, *THE SECOND AMENDMENT*, *supra* note 15, at 82-83; Charles, *The Constitutional Significance of a “Well-Regulated Militia*,” *supra* note 15, at 18. See also AN ACT IN ADDITION TO THE SEVERAL ACTS ALREADY MADE TO THE PRUDENT STORAGE OF GUN POWDER WITHIN THE TOWN OF BOSTON (Mass. 1783); AN ACT TO IMPOWER THE CORPORATION OF THE BOROUGH OF NORFOLK TO ASSESS A TAX ON THE INHABITANTS THEREOF, FOR THE PURPOSES THEREIN MENTIONED (Va. 1772), *reprinted in* 8 VIRGINIA STATUTES AT LARGE 611-13 (William Walter Hening ed., 1821); THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS (Dec. 17, 1787) (“That the people have a right to bear arms for the defence of themselves and their own state . . . unless for crimes committed, or real danger of public injury from individuals.”).

78. The entire legal premise for excluding aliens from the right to “keep and bear arms” was being a member of the political community. In other words, the doctrine of allegiance, as prescribed by the government according to their respective spheres, controls whether aliens can enjoy the right with citizens. For doctrine of allegiance in prescribing the rights of aliens within the constraints of the Plenary Power Doctrine, see generally Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusion: A Historical Perspective*, 15 TEX. REV. L. & POL. (Forthcoming Fall 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618976. For the importance of being a member of the political community to bear arms, see generally Charles, *The Constitutional Significance of a “Well-Regulated Militia*,” *supra* note 15. See also THE INDEPENDENT GAZETTEER (Philadelphia, PA), Sept. 23, 1786, at 3, col.2 (“To instruct vagabonds, servants, or slaves, in the military art, and even arm them at the expence of the state, will be the worst policy.”); INSTRUCTIONS FOR THE OFFICERS OF SEVERAL REGIMENTS OF THE MASSACHUSETTS BAY FORCES...10TH DAY OF JULY 1775 (1775) (“You are not to Enlist any Person who is not an

mentally ill,⁸⁰ the carrying of arms in public,⁸¹ concealed weapons,⁸² limiting the types of arms individuals may possess,⁸³ the transportation

American-born, unless such Person has a Wife and Family, and is a settled Resident in this Country.”).

79. Charles, “*Arms for Their Defence*,”? *supra* note 15, at 386-98 (discussing the Anglo understanding of hunting restrictions); CHARLES, THE SECOND AMENDMENT, *supra* note 15, at 20-21 (discussing that neither “bear arms” nor “keep arms” was ever used in hunting restrictions preceding, contemporaneous, or immediately following the adoption of the Constitution). In fact, one Maryland law made it unlawful for an individual to use his militia arms for hunting. A SUPPLEMENT TO THE ACT ENTITLED, AN ACT TO REGULATE AND DISCIPLINE THE MILITIA OF THIS STATE, § 30 (Md. 1799) (“[A]ny private or non commissioned officer, to whom a musket is delivered, shall use the same for hunting, gunning or fowling, or shall not keep his arms . . . in neat and clean order . . . shall” pay a fine). For examples of other hunting restrictions, see AN ACT FOR THE PRESERVATION OF THE BREED OF WILD DEER (Md. 1729); AN ACT FOR MORE EFFECTUAL PRESERVATION OF THE BREED OF DEER (Md. 1773); AN ACT FOR THE PRESERVATION OF THE BREED OF WILD DEER, AND FOR OTHER PURPOSES THEREIN (Md., November 1789); AN ACT TO PREVENT KILLING OF DEER OUT OF SEASON AND AGAINST CARRYING GUNS AND HUNTING BY PERSONS NOT QUALIFIED (N.J. 1722); A SUPPLEMENTARY ACT TO THE ACT ENTITLED, “AN ACT TO PREVENT THE KILLING OF DEER OUT OF SEASON AND AGAINST CARRYING GUNS AND HUNTING BY PERSONS NOT QUALIFIED” (N.J. 1751); AN ACT FOR THE PRESERVATION OF DEER AND OTHER GAME, AND TO PREVENT TRESPASSING WITH GUNS (N.J. 1771); AN ACT TO PREVENT HUNTING WITH FIRE-ARMS IN THE CITY OF NEW-YORK, AND THE LIBERTIES THEREOF (N.Y. 1763); AN ACT TO AMEND AN ACT ENTITLED, “AN ADDITIONAL ACT TO AN ACT, ENTITLED, AN ACT TO PREVENT KILLING DEER AT UNREASONABLE TIMES AND FOR PUTTING A STOP TO MANY ABUSES COMMITTED BY WHITE PERSONS UNDER THE PRETENCE OF HUNTING (N.C. 1766); AN ACT TO PREVENT THE KILLING OF DEER OUT OF SEASON, AND AGAINST CARRYING OF GUNS OR HUNTING BY PERSONS NOT QUALIFIED (Pa. 1721); AN ACT TO PREVENT THE HUNTING OF DEER . . . AND AGAINST KILLING DEER OUT OF SEASON (Pa. 1760); AN ACT FOR THE PRESERVATION OF DEER, AND TO PREVENT THE MISCHIEFS ARISING FROM HUNTING AT UNREASONABLE TIMES (S.C. 1769).

80. AN ACT FOR THE SPEEDY TRIAL OF CRIMINALS, AND ASCERTAINING THEIR PUNISHMENT IN THE COUNTY COURTS WHEN PROSECUTED THERE, AND FOR THE PAYMENT OF FEES DUE FROM CRIMINAL PERSONS (Md. 1715) (“[A]ny person or persons whatsoever, that have been convicted of the crimes aforesaid, or other crimes, or that shall be of the same evil, or a vagrant, or dissolute liver, that shall shoot, kill or hunt, or seen to carry a gun, upon any person’s land . . . shall forfeit and pay one thousand pounds of tobacco.”); THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS (1787) (“That the people have a right to bear arms for the defence of themselves and their own state . . . unless for crimes committed, or real danger of public injury from individuals.”). See also THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (B. Schwartz ed., 1971) (Samuel stated the right to arms should “never [be] construed . . . to prevent the people of the United States citizens who are peaceable citizens, from keeping their own arms.”); MASSACHUSETTS SPY (Boston, MA), Mar. 28, 1771, at 14, col. 3 (“Justly does the *law* presume that every *wrong* is committed with force and arms: for every wrong inferred being against the peace, must require force to support it. As force therefore must in one shape or other, be repelled by force, it clearly follows, that there must be somewhere in civil society, a force sufficient to *protect* the honest, industrious and peaceable citizen.”); JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 13 (Newbern, James Davis 1774) (“[A]ny Justice of the Peace may command Weapons to be taken from a Prisoner brought before him”).

81. Such restrictions can be found in laws concerning riots, tumults, and assemblies of persons in arms, see AN ACT TO PREVENT ROUTS, RIOTS, AND TUMULTUOUS ASSEMBLIES, AND THE EVIL CONSEQUENCES THEREOF, SEPTEMBER SESSION, CHAPTER VIII (Mass. 1786); AN ACT FOR

THE MORE SPEEDY AND EFFECTUAL SUPPRESSION OF TUMULTS AND INSURRECTIONS IN THE COMMONWEALTH, SEPTEMBER SESSION, CHAPTER IX (Mass. 1787); AN ACT TO PREVENT ROUTS, RIOTS, AND TUMULTUOUS ASSEMBLIES (N.J. 1797); AN ACT TO PREVENT HUNTING WITH FIRE-ARMS IN THE CITY OF NEW-YORK, AND THE LIBERTIES THEREOF (N.Y. 1763); AN ACT AGAINST RIOTS AND RIOTERS (Pa. 1705). *See also* AN ACT TO RESTRAIN TAVERN-KEEPERS AND OTHERS FROM SELLING STRONG LIQUORS TO SERVANTS . . . AND FROM HUNTING OR CARRYING A GUN ON THE LORD'S DAY (N.J. 1751). At the same time, however, the government can require individuals to carry arms for the public security similar to the hue & cry. *See* AN ACT TO OBLIGE THE MALE WHITE PERSONS IN THE PROVINCE OF GEORGIA TO CARRY FIRE-ARMS IN ALL PLACES OF PUBLIC WORSHIP (Ga. 1757); AN ACT FOR ESTABLISHING AND REGULATING PATROLS (Ga. 1757); AN ACT FOR THE BETTER ESTABLISHING AND REGULATING OF PATROLS IN THIS PROVINCE (S.C. 1744); DAVIS, *supra* note 80, at 13 ("Justices of the Peace, upon their own view, or upon Complaint, may apprehend any Person who shall go or ride armed with unusual and offensive Weapons, in an Affray, or among any great Concourse of the People, or who shall appear, so armed, before the King's Justices sitting in Court."); JAMES PARKER, *THE CONDUCTOR GENERALIS . . . ADAPTED TO THESE UNITED STATES* 11-12 (New York, John Patterson 1788) ("[T]hat no man cannot excuse the wearing such armour in public, by alledging that such a one threatened him, and that he wears it for the safety of his person from his assault."); BURN'S ABRIDGEMENT, OR THE AMERICAN JUSTICE, CONTAINING THE WHOLE PRACTICE, AUTHORITY AND DUTY OF JUSTICES OF THE PEACE, WITH CORRECT FORMS OF PRECEDENTS RELATING THERETO, AND ADAPTED TO THE PRESENT SITUATION IN THE UNITED STATES 22 (2d ed., Dover, Eliphalet Ladd 1792) ("[I]n some cases there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people; which is said to have been always an offence at the common law, and strictly prohibited by statute."). *See also supra* notes 83, 85 for other sources.

82. 25 Edw. 3, St. 5, c. 2, § 13 (1350) (Eng.) (if "any Man of this Realm ride armed covertly or secretly with Men of Arms against any other . . . shall be judge Treason"); 1 Jac.1, c. 8 (1603-4) (Eng.) (also known as the Statute of Stabbing). For evidence that Edward III's statute was still in force in the United States, see FRANCOIS-XAVIER MARTIN, *A COLLECTION OF STATUTES OF PARLIAMENT OF ENGLAND IN FORCE IN THE STATES OF NORTH CAROLINA* 60-61 (Newbern 1792) (confirming that no person may go ride armed by night nor by day, in fairs, markets, nor in the presence of the King's Justices, or other ministers, nor in no part elsewhere); *A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE* 33 (1794) (confirming that no person may go ride armed by night nor by day, in fairs, markets, nor in the presence of the King's Justices, or other ministers, nor in no part elsewhere).

83. 33 Hen. 8, c. 6 (1541-42) (Eng.) ("Because people have "willfully and shamefully committed, perpetrated and done diurse detestable and shamefull murders, robberies, felonies, riots and routs with Crossbowes, little short handguns, and little haquebuts, to the great peril and continual feare and danger of the kings loving subjects."); 33 Hen. 8, c. 6 (1541-42) (Eng.) (requiring all lawful guns "being not the length of one whole yard, or haquebut, or demy hake, being not of the length of three quarters of a year x. li. sterling."). Writing in 1782, Granville Sharp attested to the validity of such restrictions. *See* GRANVILLE SHARP, *TRACTS, CONCERNING THE ANCIENT AND ONLY TRUE LEGAL MEANS OF NATIONAL DEFENCE, BY A FREE MILITIA* 17-18 (3d ed. London, Dilly 1782); Charles, "*Arms for Their Defence*,"? *supra* note 15, at 411-14. For evidence that Henry VIII's statutes were still in place at the Founding Era, see 1 GILES JACOB, *A NEW LAW DICTIONARY, at "armour and arms"* (T.E. Tomlins ed., London, Andrew Strahan 1797) (citing 33 Hen. 8, c. 6 (1541-42) (Eng.) as a lawful restriction on 1 W. & M. 2, c. 2 (1688) (Eng.)); 1 GILES JACOB, *THE LAW-DICTIONARY EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE OF THE ENGLISH LAW* 123 (T.E. Tomlins ed., Philadelphia, P. Byrne 1811) (citing 33 Hen. 8, c. 6 (1541-42) (Eng.) as a lawful restriction on 1 W. & M. 2, c. 2 (1688) (Eng.)).

of arms,⁸⁴ and the discharging of arms in public.⁸⁵ With the exception of regulations designed to prevent “public injury,”⁸⁶ regulations that fall within these traditional restraints should be viewed under a rationale basis standard of review.⁸⁷ In other words, traditional regulations circa 1791 should be analyzed under a low standard of scrutiny unless the challenging party can show that the founding fathers would have thought such regulations were not constitutionally permissible. It is when the challenging party succeeds that the courts should move to step two.

Critics of this approach will argue that the *McDonald* plurality defined the Second Amendment as a “fundamental” right and it should be treated as such.⁸⁸ Therefore, they will argue that all regulations should be examined according to the “strict scrutiny” standard of review as are other enumerated “fundamental rights,” or at a minimum a heightened “intermediate scrutiny” standard.⁸⁹ This article does not dispute that enumerated “fundamental” rights should be afforded higher levels of scrutiny. However, neither the *Heller* majority nor the divided *McDonald* plurality defined any Second Amendment rights as

84. At the founding it was well established that it was within the power of government to prevent persons from going riding armed. 2 Edw. 3, c. 3 (1328) (“That no Man . . . [is] to go or nor ride armed by Night nor by Day in Fairs, Markets, nor in the Presence of the Justices or other Ministers nor in no Part elsewhere.”); 7 Rich. 2, c. 13 (1383) (Eng.); 20 Rich. 2, c. 1 (1396-97) (Eng.). See also 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49 (1769) (“The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edw. 2, C.3 upon pain of forfeiture of arms.”).

85. For English examples, see 33 Hen. 8, c. 6 (1541-42) (Eng.) (limiting the shooting of arms “to shoot with any Handgun Demie hake, or Haquebut at any Butt or Banke of earth only in place convenient for the same”). For some American examples, see AN ACT TO PREVENT THE FIRING OF GUNS, AND OTHER FIRE-ARMS WITHIN THIS COLONY (N.Y. 1773); AN ACT TO SUPPRESS THE DISORDERLY PRACTICE OF FIRING GUNS, &C. ON THE TIMES THEREIN MENTIONED (Pa. 1774); AN ACT FOR THE BETTER ORDERING AND GOVERNING OF THE NEGROES AND OTHER SLAVES IN THIS PROVINCE, XXIII (S.C. 1740); AN ACT FOR SUPPRESSING AND PROHIBITING EVER SPECIES OF GAMING...AND ALSO FOR RESTRAINING THE DISORDERLY PRACTICE OF DISCHARGING FIRE ARMS AT CERTAIN HOURS AND PLACES (Ohio 1790); 1 VIRGINIA STATUTES AT LARGE 228, 248, 261, 437, 480 (William Walter Hening ed., New York 1823) (laws against shooting); 2 VIRGINIA STATUTES AT LARGE 126 (William Walter Hening ed., New York 1823) (laws against shooting).

86. See *supra* note 77.

87. This article understands that the *Heller* majority rejected adopting a baseline “rational basis” standard of review for examining the constitutionality of gun restrictions. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 n.27 (2008). However, the majority also acquiesced to “longstanding prohibitions.” See *id.* at 2816-17. Thus, this article argues if certain types of regulations were accepted by the public in the late eighteenth century, in what many Individual Right Scholars characterize as an era of liberal gun possession and use, it must certainly pass constitutional muster today.

88. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036.

89. See Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J. L. & PUB. POL’Y 203, 208 (2010).

“fundamental” other than “the right to possess a handgun in the home for the purpose of self-defense,”⁹⁰ and the Court has yet to revisit the Second Amendment in the constraints of a “well-regulated militia” right.⁹¹

This begets the important question, “What if a traditional restriction on arms expressly conflicts with the limited right recognized in *Heller*?” On its face, it seems that restrictions on felons, criminals, the mentally ill, and aliens possessing handguns for defense of the home would qualify in this regard. However, the *Heller* majority made it clear that the right only extends to “law-abiding, responsible citizens to use arms in defense of hearth and home.”⁹² In other words, the *Heller* majority acquiesced to the longstanding ideological restraints for the “keeping” or “bearing” of arms—a factor that the “historical guidepost” standard takes into account. What qualifies as a “law-abiding” citizen can be debated back and forth, but longstanding ideological restraints can definitively provide courts with a strong historical and philosophical base to work from.

Naturally, this still leaves one historical and traditional restriction without an affirmative judicial standard of review. Specifically, the government has been traditionally allowed to pass firearms restrictions as to prevent “public injury.” Given the broad nature of what may qualify as a constitutionally permissible restriction to protect the public from “injury,” restrictions that fall squarely within or intimately relate to this category should be given a slightly heightened form of scrutiny than that of the other historical or traditional restrictions—a low to medium level of intermediate scrutiny. This standard is based on the popular understanding of the Founders’ right to arms. In other words, “public injury” restrictions should not warrant “strict scrutiny” unless the “public injury” restriction expressly restricts the limited right recognized in *Heller*.⁹³ Support for adopting this standard for traditional “public injury” restrictions can be found in the *Heller* majority’s reliance⁹⁴ on the Pennsylvania Minority proposal, which states:

90. *McDonald*, 130 S. Ct. at 3050.

91. See *Houston v. Moore*, 18 U.S. 1, 53 (Story, J., dissenting) (stating that the Second Amendment “confirms and illustrates” the States’ concurrent authority over the militia, “rather than impugns” it); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (stating that State regulations limiting the assemblage, training, or discharging of arms would not violate the Second Amendment because it does not “prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security”).

92. *Heller*, 128 S. Ct. at 2821, 2831.

93. See *infra* note 94 and accompanying text.

94. *Heller*, 128 S. Ct. at 2804.

That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people or any of them, *unless for crimes committed, or real danger of public injury from individuals*; and as standing armies in time of peace are dangerous to liberty, they ought not be kept up; and that the military shall be kept under strict subordination to and governed by the civil powers.⁹⁵

The *Heller* majority's classification of the proposal as "highly influential"⁹⁶ gives credence to the legal argument that even broad individual and state rights proponents "viewed the right to possess and carry arms as limited—particularly from those who had committed crimes or were a danger to the public."⁹⁷ What is also legally significant is that the Minority's proposal does not protect a right to "keep arms."⁹⁸

95. THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS (Dec. 17, 1787) (emphasis in original).

96. *Heller*, 128 S. Ct. at 2804. The Minority Report is especially important because it is a provision that Individual Right advocates have consistently relied on to support their understanding of the right to arms. It was one of their main arguments supporting an individual right even though its language was not included in the Second Amendment. However, while they embrace the "defence of themselves" and "hunting" language they cast aside the rest of the proposal. One cannot have it both ways. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1406-7 (1998) ("[W]e know that 'bear' was used with a broad meaning in one of the key documents that gave birth to the Second Amendment: the minority report from the Pennsylvania ratifying convention. The minority demanded constitutional protection for the right of the people 'to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game.' Hunting—'killing game'—is obviously a personal, non-militia purpose for which one could 'bear arms.'"); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 59-60 (1996) ("[T]hose responsible for the adoption of the Second Amendment generally accepted the individual right of self-defense as the natural basis for the right to arms. Like Blackstone . . . the people who gave us the Second Amendment drew no fundamental distinction between an individual's right to defend himself against a robber or a marauding Indian and that same individual's right to band together with others in a state regulated militia. The inseparability of these concepts was reflected in two early state constitutions . . . [including] the Anti-Federalist minority at the Pennsylvania ratifying convention."); Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty"*, 3 TENN. J. L. & POL'Y 120, 159-60 (2007).

97. *United States v. Tooley*, No. 3:09-00194, 2010 U.S. Dist. LEXIS 58591, at *28 (S.D. WV June 14, 2010). For support for this interpretation, see CHARLES, THE SECOND AMENDMENT, *supra* note 15, at 40; Charles, "Arms for Their Defence,"? *supra* note 15, at 365-66, 373-73, 376, 382-83, 405 (discussing how the government retained unfettered authority to disarm "dangerous and disaffected persons" despite the 1689 Declaration of Rights "have arms" provision).

98. By 1792, only one state constitution protected the right to "keep arms," and that was for the "common defence." MASS. CONST. OF 1780, art. XVII ("The people have a right to keep and bear arms for the common defence."). See also David Thomas Konig, *Arms and the Man: What Did the Right to "Keep" Arms Mean in the Early Republic?*, 25 LAW & HIST. REV. 177 (2007) (discussing that "keep arms" was not an unfettered right).

Historically, who may “keep arms” was an issue that had always been a matter of state sovereignty conditioned on allegiance to the laws and government.⁹⁹ This is supported by 1789 and 1803 State Second Amendment analogues, which omit the right to “keep arms” except in reference to the “common defence” or the “State.” See Chart I (“State Second Amendment Analogues Circa 1803”).

Perhaps what makes the Minority’s proposal so “highly influential” for courts in analyzing restrictions on “arms” is the fact that it was published throughout the colonies¹⁰⁰ and not one reply disputed its contentions on the disarming of criminals or restrictions to prevent “public injury.”¹⁰¹ It seems only Noah Webster, signing under the pen name *America*, addressed the Minority’s understanding of arms within the constraints of the federal Constitution. However, Webster only addressed the subject through the auspices of hunting, and chastised the Minority for even asserting a right to hunt:

But to complete the list of unalienable rights, you would insert a clause in your declaration, *that every body shall, in good weather, hunt on his own land, and catch fish in rivers that are public property.* Here, Gentlemen, you must have exerted the whole force of your genius! Not even the *all-important* subject of *legislating for a world* can restrain my laughter at this clause! As a supplement to that article of your bill of rights, I would suggest the following restriction: “That Congress shall never restrain any inhabitant of America from eating and drinking, at *seasonable times*, or prevent his lying on his *left side*, in a long winter’s night, or even on his back, when he is fatigued by lying on his *right.*” . . . But to be more serious Gentlemen, you must

99. Charles, *The Constitutional Significance of a “Well-Regulated Militia,” supra* note 15, at 43. See also *infra* note 207 and accompanying text (discussing “keep arms” in State constitutions).

100. PENNSYLVANIA EVENING HERALD (Philadelphia, PA), Dec. 15, 1787, at 2, cols. 4-5; THE INDEPENDENT GAZETTEER (Philadelphia, PA), Dec. 17, 1787, at 2; THE FREEMAN’S JOURNAL (Philadelphia, PA), Dec. 19, 1787, at 1, cols. 1-3; THE CARLISLE GAZETTE (Carlisle, PA), Dec. 26, 1787, at 3, cols. 1-3; THE DAILY ADVERTISER (New York, NY), Dec. 22, 1787, at 2, cols. 2-4; THE PROVIDENCE GAZETTE AND COUNTRY JOURNAL, Jan. 19, 1788, at 1, cols. 1-3; THE PROVIDENCE GAZETTE AND COUNTRY JOURNAL, Jan. 26, 1788, at 1, cols. 1-3; THE UNITED STATES CHRONICLE (Providence, RI), Feb. 14, 1788, at 4, cols. 1-2.

101. See THE INDEPENDENT GAZETTEER (Philadelphia, PA), Jan. 16, 1788, at 2, cols. 2-3; THE CARLISLE GAZETTE (Carlisle, PA), Feb. 13, 1788, at 1, cols. 3-4; THE DAILY ADVERTISER (New York, NY), Dec. 31, 1787, at 1, col. 4; THE DAILY ADVERTISER (New York, NY), Jan. 12, 1788, at 2, col. 2 (“The next consideration is, *whether the liberties of the people will be safe under the Constitution proffered to us by the late Convention?* To determine this very important question, I contend it is by no means necessary to go into a minute investigation of every part. It is amply sufficient for this purpose, if a few leading principles have been carefully attended to.”); JAMES MADISON, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT: WITH AN ATTEMPT TO ANSWER SOME OF THE PRINCIPAL OBJECTIONS THAT HAVE BEEN MADE TO IT 23, 30-31 (Petersburg, VA 1788).

have had in idea the forest-laws in Europe, when you inserted that article; For no circumstances that ever took place in America, could have suggested the thought of a declaration in favor of hunting and fishing. Will you forever persist in error? . . . You may just as well ask for a clause, giving license for every man to till *his own land*, or milk *his own cows*.¹⁰²

To clarify how this differing “public injury” classification would look in the constraints of the “historical guidepost” standard of review, this article will examine the constitutionality of 18 U.S.C. § 922(g)(9), which provides, “It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess . . . any firearm.” Arguably, 18 U.S.C. § 922(g)(9) can be viewed as a traditional restriction on felons, but for the purposes of this article it will be viewed in the light of a “public injury” classification because a recidivist violent misdemeanant does not historically or legally equate with a felon.

Before analyzing § 922(g)(9), this article will use the “historical guidepost” standard of review to analyze the historical restriction of discharging firearms. In particular, this article will address a hypothetical law that restricts the shooting, firing, or discharging of firearms with the exception of lawful self-defense in the home. To many this law can seem like a reasonable restriction, but to others it may be seen as an infringement on their property rights—both real and personal—or as an infringement of their right to train to effectuate a “well-regulated militia.”

B. The Constitutionality of Regulations on Discharging of Firearms Under the “Historical Guidepost Standard” of Review

As discussed above, traditional regulations that would have been publicly accepted circa 1791 should be upheld unless the challenging party can show that the founding fathers would have thought such regulations were not constitutionally permissible. The threshold judicial query is not whether the restriction at issue has a 1791 parallel, but whether there is sufficient historical evidence to suggest that it was publicly accepted. Perhaps in no area does the “historical guidepost” standard of review control then to the discharging of firearms on public

102. THE DAILY ADVERTISER (New York, NY), Dec. 31, 1787, at 2, col. 3 (emphasis in original). See also NOAH WEBSTER, A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS: ON MORAL, HISTORICAL, POLITICAL AND LITERARY SUBJECTS 149 (Scholars’ Facsimile & Reprints 1977) (1790).

or private property. Limitations on the discharging of “arms” dates back to 1541 when Parliament passed a statute limiting the firing of any “Handgun Demie hake, or Haquebut” to only a “Butt or Banke of earth . . . convenient for the same.”¹⁰³

Naturally, public safety was the consideration in putting such a restriction in place and the colonies passed similar laws with public safety in mind. For instance, in 1773, New York made it unlawful for “any Person or Persons of any Age or Quality” to “fire or discharge any Gun, Pistol . . . or other Fire-work” in “any House, Barn, or other Building, or before any Door, or in any Garden, Street, Lane, or other Inclosure[.]”¹⁰⁴ Ten years earlier, New York had passed a similar ordinance restricting the carrying or discharging of firearms on public lands without a license.¹⁰⁵ It also prevented the carrying or discharging of firearms on private lands unless authorized by the “Owner, Proprieter, or Possessor[.]”¹⁰⁶

Surprisingly, the most expansive law concerning the discharging of firearms in the United States was not in an established city such as Boston, New York or Philadelphia, but on the expansive Northwestern Territory. At a time when the Second Amendment would have directly applied to this federal territory, a 1790 statute touched upon the negligent discharging of firearms in populated areas such as “streets and [in the] vicinity of cities, towns, villages and stations[.]” It stated:

That if any person shall presume to discharge or fire, or cause to be discharged or fired, any gun or other fire-arms at any mark or object, or upon any pretence whatever, unless he or she shall at the same time be with such gun or fire-arms at the distance of at least one quarter of a mile from the nearest building of any such city, town, village or station, such person shall for every such offence, forfeit and pay to use of the county in which the same shall be committed, a sum not exceeding five dollars, nor less than one dollar. And if any person being within a quarter of a mile of any city, town, village or station as aforesaid, shall at the same time willfully discharge or fire any gun or fire-arms, or cause to procure the same to be discharged or fired, at any time after the setting of the sun and before the rising of the same, he or

103. 33 Hen. 8, c. 6 (1541-42) (Eng.).

104. AN ACT TO PREVENT THE FIRING OF GUNS, AND OTHER FIRE-ARMS WITHIN THIS COLONY (N.Y. 1773).

105. AN ACT TO PREVENT HUNTING WITH FIRE-ARMS IN THE CITY OF NEW-YORK, AND THE LIBERTIES THEREOF (N.Y. 1763).

106. *Id.*

she so offending, shall in like manner pay to the use aforesaid, a sum not exceeding five dollars, nor less than one dollar¹⁰⁷

At no point did the law deny the use of “arms” for lawful purposes prescribed by the legislature, such as the *Heller* right of armed self-defense in the home with a handgun,¹⁰⁸ for it stated:

That nothing herein contained shall be deemed or construed to extend to any person lawfully using fire-arms as offensive or defensive weapons, in annoying, or opposing a common enemy, or defending his or her person or property, or the person or property of any other, against the invasions or depredations of an enemy, or in support of the laws and government; or against the attacks of rebels, highwaymen, robbers, thieves, or other unlawfully assailing him or her, or in any other manner where such opposition, defence, or resistance is *allowed by the law of the land*.¹⁰⁹

Thus, given that laws governing the discharging of firearms in private and public places were understood as permissible circa 1791, courts can assume modern laws governing the subject are within the constitutional constraints of the Second Amendment. Certainly, almost all laws governing the discharging of firearms, including the placement of limitations on the discharging of handguns for self-defense in the home, would pass strict scrutiny. However, under the “historical guidepost” standard of review the court can mitigate this scrutiny to a “rational basis” standard of review.

The result does not change if one was to argue that laws preventing the discharging of firearms are in violation of the Second Amendment’s “well-regulated militia” guarantee. First, the Constitution prescribes that the States have plenary authority to “train[] the Militia according to the discipline prescribed by Congress.”¹¹⁰ This authority includes the power to prescribe the time, place, and manner in which the discharging of firearms may take place to effectuate the national or state militias.¹¹¹ Second, there are numerous historical examples that the individual exercise and discharging of arms does not accomplish or effectuate a

107. AN ACT FOR SUPPRESSING AND PROHIBITING EVER SPECIES OF GAMING . . . AND ALSO FOR RESTRAINING THE DISORDERLY PRACTICE OF DISCHARGING FIRE ARMS AT CERTAIN HOURS AND PLACES, § 4 (Ohio 1790).

108. At no point does the law use or incorporate a form of the phrase “bear arms.” CHARLES, THE SECOND AMENDMENT, *supra* note 15, at 138. For a textual and historical analysis of the Ohio right to “bear arms,” *see id.* at 133-57.

109. *See supra* note 107 (emphasis in original).

110. U.S. CONST. art. I, § 8 cl. 16.

111. *Presser v. Illinois*, 116 U.S. 252, 267-68 (1886).

“well-regulated militia.”¹¹² Lastly, any argument that grants people a right to assemble and train as a militia, absent the consent of the political branches, runs afoul of the founding principle that the military shall always be subordinate to the civil authorities.¹¹³

C. *The Constitutionality of 18 U.S.C. § 922(g)(9) Under the “Historical Guidepost Standard” of Review*

In the recent *Skoien* en banc decision, both the majority and the dissent touched upon “historical guideposts” in determining the constitutionality of 18 U.S.C. § 922(g)(9). The majority only briefly addressed gun control circa 1791, citing the Pennsylvania Minority proposal and laying the claim that the founders “did not extend this right [to bear arms] to persons convicted of crime.”¹¹⁴ However, the majority

112. See TIMOTHY PICKERING, AN EASY PLAN OF DISCIPLINE FOR A MILITIA, preface at 6 (Samuel & Ebenezer Hall, Salem 1775) (“An exercise ought to include not only every action necessary to be performed in a day of battle, but also all such as may be useful on any other occasion or duty . . . to keep the men alert, to save time, and to throw as many shot as possible at your enemy, with *uniformity*, to prevent the interruptions of each other, the confusion and dangerous accidents which would inevitably happen, if the men in close order took each his own way to perform an action.”); WILLIAM BRETON, MILITIA DISCIPLINE, at “To the Reader” (2d ed., London 1717) (“[W]ithout [militia] practice, and exercise . . . the unskil[ful] Bearers, but too often prove Dangerous, and Hurtful, both to themselves, and Fellows, that Rank and File with them.”). See also AN ACT FOR REGULATING AND GOVERNING THE MILITIA OF THE STATE OF VERMONT, AND FOR REPEALING ALL LAWS HERETOFORE FOR THAT PURPOSE § 36 (Vt. 1793) (“Whereas the good citizens of this State, are often injured by the discharge of single guns . . . no commissioned officer, or private, shall unnecessarily fire a musket, or single gun, in any public road, or near any house, or near the place of parade . . . unless embodied under the command of some officers.”); AN ACT FOR FORMING AND REGULATING THE MILITIA WITHIN THE COMMONWEALTH OF MASSACHUSETTS...FOR THAT PURPOSE, at 15 (Mass. 1781) (“That no Soldier . . . shall unnecessarily discharge his Firelock from and after his appearing . . . on a Training or Muster-Day, without the express Order or License of his Superior Officer.”); *An Act for Establishing and Conducting the Military Force of New Jersey* § 53 (N.J. 1806), reprinted in MILITIA LAWS OF THE UNITED STATES AND NEW JERSEY (Wilson & Halet, Trenton 1806) (“That it shall not be lawful for any . . . private to come on parade with a loaded or charged musket.”).

113. This was frequently conveyed in State constitutions. See MASS. CONST. OF 1780, DECLARATION OF RIGHTS, art. XVII (“The people have a right to keep and bear arms for the common defence . . . and the military shall always be held in exact subordination to the civil authority and governed by it.”); N.C. CONST. OF 1776, DECLARATION OF RIGHTS, art. XVII (“That the people have a right to bear arms, for the defence of the State...the military should be kept under strict subordination to, and governed by the civil power.”); OHIO CONST. OF 1802 art. VIII, § 20 (“That the people have a right to bear arms for the defense of themselves and the state: and as standing armies in time of peace, are dangerous to liberty, they shall not be kept up; and that the military shall be kept under strict subordination to the civil power.”). See also Charles, *The Right of Self-Preservation and Resistance*, supra note 15, at 31-34, 41-43, 47-49, 54, 58-59 (discussing the politics and reasons concerning placing this power with the political branches).

114. *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), vacated, *reh’g en banc*, No. 08-3770, 2010 U.S. App. LEXIS 6584, *6 (7th Cir. Feb. 22, 2010), and on *reh’g en banc* No. 08-3770,

circumvented any further historical review. Implying the lack of a 1791 historical parallel, the court jumped to the second part of the “historical guidepost standard” of review and analyzed § 922(g)(9) under a heightened intermediate scrutiny standard.¹¹⁵

Meanwhile, the dissent gave more deference to the use of “historical guideposts” in analyzing § 922(g)(9). While this article agrees with the dissent that the en banc court should have given more deference to the “historical guideposts,” it disagrees with the dissent’s approach in compiling historical resources. What is particularly concerning is that the dissent only cited analyses that support broad protections of the right to arms and ignored longstanding ideological restraints on the “keeping” or “bearing” of arms—the very judicial bias that Justice Stevens was concerned with.¹¹⁶

Another problem with the dissent’s analysis is that it utterly negates the Pennsylvania Minority proposal by claiming that its acknowledgement of governmental power to disarm persons for “crimes committed” or who may be a “real danger” to “public injury” “did not find its way into the Second Amendment.”¹¹⁷ In support of this argument, the dissent alludes to the fact that the 1791 Second Amendment analogues did not exclude “persons convicted of crime.”¹¹⁸ As will be shown in the next section and Chart I (“State Second Amendment Analogues Circa 1803”), this kind of selective interpretation of historical sources and State Second Amendment analogues treads upon dangerous grounds. If the courts are to take anything from the history of the right to arms¹¹⁹ in State analogues circa

2010 WL 2735747 (7th Cir. July 13, 2010) (citing STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT* 273, *supra* note 27 (2008)); C. Kevin Marshall, *Why Can’t Martha Stewart have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 700-13 (2009).

115. *Skoien*, 2010 U. S. App. LEXIS 14262, at *8.

116. Stevens’ concern was the historical approach could still lead to judicial bias, because judges will not know which “pieces to credit and which to discount, and then . . . assemble them into a coherent whole.” *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3117 (2010). The dissent did not cite or incorporate the work of one Ph.D. Historian specializing in Anglo-American legal history or Colonial/Early American history or a work that has gained the support of historical academia in its historical analysis. *See Skoien*, 2010 U. S. App. LEXIS 14262, at *22-51 (Sykes, J., dissenting).

117. *Skoien*, 2010 U. S. App. LEXIS 142662 at *31.

118. *Id.* MASS. CONST. OF 1780, art. XVII (“The people have a right to keep and bear arms for the common defence.”); PA. CONST. OF 1776, art. XIII (“That the right of citizens to bear arms for the defence of themselves and the State.”); N.C. CONST. OF 1776, art. XVII (“That the people have a right to bear arms, for the defence of the State.”); VT. CONST. OF 1786, art. XVIII (“That the people have a right to bear arms, for defence of themselves and the State.”).

119. *See generally* Charles, *The Constitutional Significance of a “Well-Regulated Militia,” supra* note 15.

1791, it is that a “well-regulated militia” was seen as superior to the right to “bear arms” and the right to “keep arms” was non-existent in “individual right” analogues.¹²⁰

Regarding a proper “historical guidepost” standard of review in analyzing § 922(g)(9), the threshold judicial query is whether the disarming of recidivist violent misdemeanants falls within the traditional or historical “public injury” restrictions on firearms that would have been publicly accepted at the time of the founding. The issue is not finding an exact parallel to a 1791 restriction. It is whether it would have been publicly accepted according to longstanding ideological and philosophical constraints that the founders understood.

To begin, a court must work within the constraints of *Heller* and take into account that the Supreme Court recognized that the “right to keep and bear arms” is deeply rooted in our Anglo origins.¹²¹ Assuming the *Heller* majority’s historical interpretation as the true and correct version given the constraints of judicial review,¹²² the courts must work within this framework and assume that, “By the time of the founding, the right to have arms had become fundamental for English subjects.”¹²³ It was a right that “unlike some other English rights . . . was codified in a written Constitution.”¹²⁴

Logically, given that the founders borrowed their understanding of the right to arms from their English ancestors, they would have also borrowed and understood the permissible restrictions on the right,¹²⁵ including the right to “keep arms.” This is significant because Parliament and the crown possessed virtually unchecked authority to disarm “dangerous and disaffected” persons as a means to preserve public safety and government.¹²⁶ This power remained unchecked and unquestioned despite the recognition of the right of Protestants to “have arms for their defence.”¹²⁷

120. In 1791, five state constitutions protected the right to a “well-regulated militia” compared to four “bear arms” analogues. Furthermore, not one state “bear arms” analogue protected a right to “keep arms” other than for the “common defence.” See *infra* notes 184-90 and accompanying text.

121. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008).

122. See *supra* notes 35-40 and accompanying text (discussing the legal restraints on litigating history and that the “historical guidepost” approach requires working within those interpretative restraints no matter whether that history corresponds with historical academia).

123. *Heller*, 128 S. Ct. at 2798.

124. *Id.* at 2801.

125. *United States v. Marzzarella*, No. 09-3185, 2010 U.S. App. LEXIS 15655, at *12-13 (3rd Cir. July 29, 2010).

126. Charles, “*Arms for Their Defence*,”? *supra* note 15, at 356-403.

127. *Id.*; 1 W. & M. 2, c. 2 (1688) (Eng.).

In fact, the seventeenth-century English print culture reveals the importance of the common consent of the people, i.e., Parliament, in determining who was “dangerous” and could be restricted from bearing arms. John Sadler wrote that it was within parliamentary power to determine “*how, and when, and where it shall seem good*” for individuals to bear arms.¹²⁸ Sadler felt “all matters of History, telleth us” the “general Custom was; *Not to entrust any man with bearing Arms . . . till some Common Council, more or less, had approved him.*”¹²⁹ Similarly, in a 1658 tract entitled *The Leveller*, it stated that the power over arming the people rested with Parliament because it is “prudent and safe for the People to be masters of their own Arms, and to be commanded in the use of them by a part of themselves, (that is their Parliaments) whose interest is the same with theirs.”¹³⁰

This English history of the right to arms is significant for many reasons under the “historical guidepost” approach. Perhaps most importantly because the *Heller* majority recognized that the founding fathers codified the English right into the Constitution as the Second Amendment.¹³¹ The difference between the English “have arms” provision and the Second Amendment being that the latter is not dependent on privileges of wealth or birth. Early constitutional commentators were in agreement on this historical and legal fact. For instance, St. George Tucker distinguished the two provisions, writing that the difference is that “the right of bearing arms is confined to protestants, and the words suitable to their condition and degree[.]”¹³² Tucker would similarly write in his edition of *Blackstone’s Commentaries* that the Second Amendment differed in that the “right of the people to keep and bear arms” is “without any qualification as to their condition or

128. JOHN SADLER, RIGHTS OF THE KINGDOM, OR, CUSTOMS OF OUR ANCESTORS, TOUCHING THE DUTY, POWER, ELECTION, OR SUCCESSION OF OUR KINGS AND PARLIAMENTS, OUR TRUE LIBERTY, DUE ALLEGIANCE, THREE ESTATES, THEIR LEGISLATIVE POWER, ORIGINAL, JUDICIAL, AND EXECUTIVE, WITH THE MILITIA, FREELY DISCUSSED THROUGH THE BRITISH, SAXON, NORMAN LAWS AND HISTORIES, WITH AN OCCASIONAL DISCOURSE OF GREAT CHANGES YET EXPECTED IN THE WORLD 159 (London, n. pub. 1682) (emphasis in original).

129. *Id.* (emphasis in original).

130. THE LEVELLER, OR, THE PRINCIPLES & MAXIMS CONCERNING GOVERNMENT AND RELIGION, WHICH ARE ASSERTED BY THOSE THAT ARE COMMONLY CALLED, LEVELLERS 9 (London, n. pub. 1658).

131. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798, 2801 (2008); *See also Marzzarella*, 2010 U.S. App. LEXIS 15655, at *12-13.

132. ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 239 (Clyde N. Wilson fwd., 1999). The phrase “suitable to their condition or degree” was in reference to the fact that access to arms was based on socio-economic and hierarchal status; what is known as the “chain-of-being.” *See Charles, “Arms for Their Defence,”? supra note 15*, at 358, 365, 378-80, 383, 385-86, 396, 398-99, 402, 403, 407.

degree, as is the case in the British government.”¹³³ William Rawle also concluded that the “right to keep and bear arms” was “secured to protestant subjects only, on the revolution of 1688; and it is cautiously described to be that of bearing arms for their defence, ‘suitable to their conditions and as allowed by law.’”¹³⁴

This evidence supports that the founding fathers understood and accepted the English understanding of the right to “have arms” and its constitutional limitations. This would have included understanding the constitutionality of firearm restrictions on “dangerous and disaffected” persons. While gun control laws circa 1791 do not draw an exact parallel to the § 922(g)(9) disarming of recidivist violent misdemeanants, the founding fathers understood the legal concept of the law-abiding or virtuous citizen.¹³⁵ Thus, the right to bear arms was unequivocally connected to individuals being in support of just government and its laws.

The Pennsylvania Minority proposal supports this understanding of the right to arms, for they were willing to grant the federal government great latitude in deciding who may “keep arms” and where such arms may be “kept.”¹³⁶ Thus, in many respects the Pennsylvania Minority’s right to “bear arms” resembled its English predecessor, where Parliament gave the crown nearly unfettered discretion to disarm

133. 2 WILLIAM BLACKSTONE, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA* 143 n.40 (St. George Tucker ed., Philadelphia, Birch & Small 1803).

134. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 126 (2d ed. Philadelphia, Nicklin 1829).

135. See Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 492 (2004); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 *LAW & CONTEMP. PROBS.* 125, 130 (1986); Charles, *The Constitutional Significance of a “Well-Regulated Militia,”* *supra* note 15, at 18-21, 46-47; MARTIN POST, *AN ORATION DELIVERED AT CORNWALL ON THE 5TH DAY OF JULY, A.D. 1802, FOR THE ANNIVERSARY OF AMERICAN INDEPENDENCE* 9 (1802) (“Virtue is the palladium of liberty and the bulwark of the rights of the man.”); 2 ALEXANDER ADDISON, *REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT . . . OF THE STATE OF PENNSYLVANIA* 150-51 (Philadelphia, Colerch & May 1800) (“[V]irtue is the principle of a republican government” and to “produce public good, there must be public virtue on the whole people; for in the hands of the whole people is the authority and force of the nation really vested.”); *THE GAZETTE OF THE UNITED STATES* (Philadelphia, PA), Nov. 9, 1791, at 221, col. 1 (“Let it then be the glory of every American to have arms in his hands, with some knowledge how to use them, on proper occasions, against the enemies of his country: and let it be established, as a point of honour, and the criterion of a virtuous citizen, to pay the greatest deference to the common and necessary laws of a camp.”).

136. CHARLES, *THE SECOND AMENDMENT*, *supra* note 15, at 39-40. See also *infra* notes 196-206 and accompanying text (discussing State Second Amendment analogues).

“disaffected and dangerous” persons.¹³⁷ Furthermore, the fact that the founding fathers exercised similar discretion when they disarmed dangerous and disaffected persons throughout the American Revolution supports that the founders would have publicly accepted the disarming of recidivist violent misdemeanants who repeatedly show a disregard for the laws of the community.¹³⁸

Certainly, drawing historical parallels between § 922(g)(9) and the broad allowance granted to 1791 legislatures to disarm “dangerous and disaffected” persons is not a perfect historical fit. However, finding an exact historical parallel between a contemporary regulation and 1791 is a rare occurrence. History seeks to provide the truth, leaving many questions unanswered. The law works differently, but it must co-exist with historical methodologies. It requires jurists to find answers to issues, cases, and controversies based on the same historical evidence that historians use. So long as jurists are honest and maintain a “historical consciousness,” their use of “historical guideposts” does not offend the Constitution.

In the constraints of the “historical guidepost” standard of review, the use of “historical guideposts” does not require linking § 922(g)(9) to a 1791 restriction to qualify as “publicly accepted.” The question the courts have to ask is whether the founder’s understanding of the right to arms would have accepted the restriction as necessary to prevent “public injury.” As Justice Scalia wrote in his *McDonald* concurrence, the historical method does not have to be the “*perfect means* . . . but whether it is the *best means available* in an imperfect world.”¹³⁹ In other words, the historical issue is whether under “*any* historical methodology, under *any* plausible standard of proof, would lead to the same conclusion.”¹⁴⁰ To phrase it another way, the § 922(g)(9) question is whether there is a longstanding ideological consensus circa 1791 for regulating or restricting the “keeping” or “bearing” of arms of recidivist violent misdemeanants that would have been accepted by the founding fathers. Given the Founders’ emphasis on the law-abiding and virtuous citizen, and that the legislatures were granted broad authority to disarm “dangerous and disaffected” persons to prevent public injury, it is most certain that such a restriction would be deemed constitutionally

137. Charles, “*Arms for Their Defence*,”? *supra* note 15, at 356-403.

138. Charles, *The Constitutional Significance of a “Well-Regulated Militia,”* *supra* note 15, at 37-38.

139. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3057-58 (2010) (emphasis in original).

140. *Id.* at 3058 (emphasis in original).

permissible under the requisite low to intermediate scrutiny standard of review.

III. THE MISSING ARGUMENTS IN *MCDONALD V. CITY OF CHICAGO*

Given *McDonald* was a divided plurality, for many years legal commentators will speculate as to why five Justices were at odds in joining one unified opinion. Naturally, Thomas's concurrence reveals that he interpreted the Fourteenth Amendment's Privileges or Immunities Clause as the historical impetus for incorporation.¹⁴¹ However, what is left unanswered is why Chief Justice Roberts, Justice Scalia, and Justice Kennedy did not join Alito's entire opinion.¹⁴² It raises questions as to whether certain historical arguments would have swayed a Justice to join the dissent and ultimately change the outcome of the case.

While we will never affirmatively know the answer to these questions, there is a lesson that lawyers, legal scholars, and historians can take from the *McDonald* plurality; the importance of providing cogent legal history arguments in litigating constitutional rights. In the end, the professional historians that sided with the City of Chicago¹⁴³ were both losers and winners. They were "losers" in the sense that five members of the Court embraced a historical interpretation of the Second Amendment that is not supported by academia.¹⁴⁴ Meanwhile, they were "winners" because the plurality embraced historical scholarship, albeit in a "historical guidepost" approach, as the judicial means to define the scope of the Second Amendment as its jurisprudence moves forward.¹⁴⁵

This begets the question: "What arguments could have been made by the City of Chicago to alter the outcome of *McDonald*?" As will be detailed below, two arguments stand out as missing. The first is an

141. *Id.* at 3058-88.

142. *Id.* at 3026-50.

143. See Brief for English/Early American Historians as Amici Curiae Supporting Respondents, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521) (supported by twenty-one scholars and historians); Brief for Thirty-Four Professional Historians and Legal Historians as Amici Curiae Supporting Respondents, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521); Brief for Professional Historians as Amici Curiae Supporting Respondents, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521) (supported by six scholars and historians); Brief of Historians on Early American Legal, Constitutional and Pennsylvania History as Amici Curiae Supporting Respondents, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521) (supported by four historians).

144. As of today, only two academic Ph.D. historians (Joyce Lee Malcolm and Robert J. Cottrol) support interpreting the Second Amendment in line with the *Heller* majority. The overwhelming consensus by academic historians is to the contrary. See *supra* note 143.

145. See *supra* notes 15-16 and accompanying text.

argument addressing the importance of State Second Amendment analogues in determining whether the right to “keep arms” is incorporated to the States through the Fourteenth Amendment’s Due Process Clause. At no point did the City of Chicago or its *amici* provide an analysis touching upon this issue; leaving Justice Alito to agree with the petitioners, writing, “[F]our States that had adopted Second Amendment analogues before ratification, nine more States adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820.”¹⁴⁶

Alito also had no competing analysis addressing Second Amendment analogues circa 1868, leading him to believe:

In 1868, 22 of 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms . . . [thus] it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.¹⁴⁷

The second argument that was missing was the use of accepted historical methodologies to discuss John Bingham and the Reconstruction Congress’s views on applying the Second Amendment to the States. Scholars and historians are in general agreement that there were members of the Reconstruction Congress that viewed the Second Amendment as protecting armed, individual self-defense. However, the historical evidence is not dispositive in determining the intent of the whole Congress, for there is competing evidence that the majority may have only sought to incorporate a right to “keep and bear arms” in the constraints of a “well-regulated militia.”¹⁴⁸ In other words, because the intent of the Reconstruction Congress as a whole is an issue of historical uncertainty and discontent, an argument should have been posed that the decision in *Presser v. Illinois* should be upheld as the intent of the Reconstruction Congress.¹⁴⁹

147. *McDonald*, 130 S. Ct. at 3042. By 1868, only seventeen state constitution “bear arms” provisions could be read to protect the right recognized in *Heller*. Naturally, this is looking at the provision in a light most favorable to the “individual right” stance. However, out of these seventeen “bear arms” provisions, eleven could just as easily be interpreted as protecting only a militia right. Charles, “*Arms for Their Defence*,”? *supra* note 15, at 459 n.740.

148. *Id.* at 456-60.

149. *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (the Second Amendment prevents the states from “prohibit[ing] the people from keeping and bear arms, so as to deprive the United States of their rightful resource for maintaining the public security”). A brief written by Lyman Trumbull gives weight to this understanding of the Second Amendment. Representing one of the plaintiffs in error, Trumbull advocated for “the right of the people to keep and bear arms for the purpose of

A. *The “Right to Keep and Bear Arms” in State Constitutions in 1789, 1803, and 1868: Correcting Justice Alito’s Analysis in McDonald v. City of Chicago*

The powers to arm, disarm, and regulate the use, possession, and maintaining of firearms had always been a power that resided with the States. This power existed prior to the adoption of the Articles of Confederation, prior to the adoption of the Constitution,¹⁵⁰ after the adoption of the Constitution,¹⁵¹ and had never been questioned by the Supreme Court in the first two hundred and twenty years of existence.

forming a well regulated militia . . . [as] an attribute of national citizenship, and as such, under the protection of, and guaranteed by the United States.” Trumbull also wrote, “The citizen of the United States has secured to him the right to keep and bear arms as part of the militia which Congress has the right to organize, and arm, and drill into companies.” Whether Trumbull believed in a non-militia “right to keep and bear arms” is less certain. He thought the Court should not consider the question of whether “a State may not prohibit its citizens from keeping or bearing arms for other than militia purposes[.]”

150. For history of regulations and power to disarm, *see generally* Cornell, *supra* note 15; SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America*, 25 *LAW & HIST. REV.* 139 (2007). *See also* CHARLES, *THE SECOND AMENDMENT*, *supra* note 15, at 17-34, 83-87, 136-39; Charles, *The Constitutional Significance of a “Well-Regulated Militia,” supra* note 15, at 37-38 (discussing how the Continental Congress advised the States to pass laws disarming the disaffected); Charles, “*Arms for Their Defence*,”? *supra* note 15, at 386-418 (addressing the English laws concerning arms, which the founding fathers were familiar with); Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, in *THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS* 207, 207–21 (Carl T. Bogus ed., 2000).

151. The early constitutional commentators differed of opinion as to whether the Second Amendment bound the States. It seems that James Wilson was the first to claim the States were bound by its guarantee. However, he limited its protection to the advancement of the “common defence.” 2 *JAMES WILSON, THE COLLECTED WORKS OF JAMES WILSON* 1141–42 (Kermit L. Hall & Mark David Hall eds., 2007). In 1829, William Rawle was the second to claim the Second Amendment bound the States as well as the federal governing, writing:

The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed as a restraint on both.

RAWLE, *supra* note 134, at 125-26. Many Individual Right Scholars have interpreted this statement as preventing the States and federal government from disarming the people outside of a “well-regulated militia.” *See* Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *MICH. L. REV.* 204 (1983); Joyce Lee Malcolm, *Arming America*, 79 *TEX. L. REV.* 1657, 1675 (2001) (book review); Clayton E. Cramer & Joseph E. Olson, *What Did “Bear Arms” Mean in the Second Amendment?*, 6 *GEO. J. L. & PUB. POL’Y* 511, 519-20 (2008). However, this interpretation cannot survive because Rawle qualifies the right was “judiciously added” because “a disorderly militia is disgraceful to itself, and dangerous not to the enemy, but to its own country.” RAWLE, *supra* note 134, at 125. *See also generally* Charles, *The Constitutional Significance of a “Well-Regulated Militia,” supra* note 15.

State police powers in this area were particularly understood at the time of the framing of the Constitution. A fact that James Wilson took note of in one of his William & Mary lectures. Wilson differentiated between the rights the Second Amendment and the Pennsylvania Constitution afford, writing that the Second Amendment protects citizens in participating in the “common defence.”¹⁵² Meanwhile, it was through the medium of the Pennsylvania Constitution that Wilson viewed citizens as having the privilege of bearing arms in defense of their “person or house.”¹⁵³

Despite the *Heller* majority writing that “self-defense” was the “central component” of the Second Amendment,¹⁵⁴ there is virtually no substantiated evidence that the Framers intended for the Second Amendment to bind the States outside of its “well-regulated militia” context. Similar to James Wilson, other contemporaneous commentary on the Second Amendment reveals that it was only meant to bind the States as preserving the “common defence.” For instance, on October 25, 1790, militia Lieutenant Bernard Hubley hoped that a “well Regulated militia corresponding with the Constitution” would be “adopted” throughout the nation to ensure “the best end.”¹⁵⁵ A 1789 letter from Fayetteville, North Carolina recognized that the “best security” of the right to “keep and bear arms” was “that military spirit, that taste for the martial exercise, which has always distinguished the free citizens of these States.”¹⁵⁶ In 1801, Samuel Dana described the Second Amendment as being “recognized among our unalterable laws” and protecting the “right of bearing arms for the common defence[.]”¹⁵⁷ Meanwhile Anti-Federalist John Taylor described the Second Amendment as enshrining “a real national militia.”¹⁵⁸

Again, prior to *Heller*, Supreme Court precedent supported this limited application of the Second Amendment to the States. In *Presser*

152. WILSON, *supra* note 151, at 1141–42.

153. *Id.* at 1142.

154. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008). The *Heller* majority was correct that “self-defense” or “self-preservation” was the right the Second Amendment affords. However, they took these terms out of their original context by misreading the 1689 Declaration of Rights. See generally, *supra* note 15; see Charles, *The Right of Self-Preservation and Resistance*, *supra* note 15.

155. 11 PENNSYLVANIA ARCHIVES 738 (Samuel Hazard ed., Philadelphia, Joseph Severns & Co. 1855).

156. THE GAZETTE OF THE UNITED STATES (Philadelphia, PA), Oct. 14, 1789, at 3, col. 2.

157. SAMUEL DANA, AN ADDRESS ON THE IMPORTANCE OF A WELL REGULATED MILITIA 10 (Charleston, Samuel Etheridge, September 1801).

158. JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF GOVERNMENT 450 (n. pub. 1814).

v. Illinois, the Court held that the Second Amendment prevents the States from “prohibiting the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security[.]”¹⁵⁹ Meanwhile, in *United States v. Schwimmer*, the Court held that the use of arms “to defend our government against all enemies whether necessity arises is a fundamental principle of the Constitution.”¹⁶⁰ Herein lies the protection the Second Amendment was meant to apply to the States—United States citizens have the right to take part in defending their liberties through a “well-regulated militia.”

Naturally, the *McDonald* plurality disagreed, but this can be partially attributed to the lack of a comprehensive analysis emphasizing the right to “keep arms” through State Second Amendment analogues.¹⁶¹ Not one of the briefs in support of the City of Chicago distinguished the different State Second Amendment analogues and their importance or applicability to incorporating the right to “keep arms. For instance, looking at the state provisions as codified circa 1789, Justice Alito writes that “four States . . . adopted Second Amendment analogues before ratification” that protected “an individual right to keep and bear arms[.]”¹⁶² Alito’s characterization of 1789 is flat wrong in two respects. First, only two states’ “bear arms” provisions could be read to protect a right to armed, individual self-defense of a person.¹⁶³ Second, only one state’s “bear arms” provision protects the right to “keep arms.”¹⁶⁴

Alito was correct that four state constitutions contained Second Amendment analogues, including Massachusetts,¹⁶⁵ Pennsylvania,¹⁶⁶

159. *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

160. *United States v. Schwimmer*, 279 U.S. 644, 650 (1929).

161. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3109 (2010). (Stevens, J., dissenting) (characterizing the legal issue as “Petitioners wish to acquire certain types of firearms, or to keep certain possession of chattels”).

162. *Id.* at 3037. Justice Alito cites the *Heller* opinion to support this conclusion. However, the *Heller* majority’s understanding of these earlier constitutional provisions had been refuted. See CHARLES, THE SECOND AMENDMENT, *supra* note 15, at 131-32.

163. PA. CONST. OF 1776, art. XIII (“That the right of citizens to bear arms for the defence of themselves and the State.”); VT. CONST. OF 1786, art. XVIII (“That the people have a right to bear arms, for defence of themselves and the State.”). The Supreme Court did not provide individual analysis on these provisions, which could be interpreted as protecting the limited militia right. See CHARLES, THE SECOND AMENDMENT, *supra* note 15, at 131-32; Charles, *The Right of Self-Preservation and Resistance*, *supra* note 15, at 29 (discussing that “defence of themselves” was often used to describe defending the realm or restoring the Constitution).

164. MASS. CONST. OF 1780, art. XVII (“The people have a right to keep and bear arms for the common defence.”).

165. *Id.*

North Carolina,¹⁶⁷ and Vermont.¹⁶⁸ However, only the 1780 Massachusetts Constitution protected a right to “keep arms” which was expressly limited to the “common defence.”¹⁶⁹ This limited interpretation of the Massachusetts protection was confirmed in the wake of Shays’ Rebellion. The Massachusetts Legislature and Governor James Bowdoin clarified that the “right to keep and bear arms” was included in the Massachusetts Constitution because it was “necessary for the safety of the state” in order “to support the civil government and oppose attempts of factitious and wicked men who may wish to subvert the laws and constitution of their country.”¹⁷⁰

At no point was there a reference to the right protecting the “keeping” of arms for any and all purposes, including armed, individual self-defense. In fact, the Shays’ insurgents that refused to submit to the Massachusetts government had their arms seized with no mention of a right to arms being violated by them, any of the prominent founders, or the contemporaneous popular print culture.¹⁷¹ While one may argue that participating in armed rebellion would clearly warrant disarmament, even at the founding period, this does not explain why much to do was made of the fact that the insurgents were being denied the right to vote. For instance, George Washington and Benjamin Lincoln could not see “how, upon republican principles . . . can we justly exclude them from the right of Governing.”¹⁷² Meanwhile James Madison was of the opinion that such political exclusion brought on a “new crisis” because it “disenfranchised a considerable portion of disaffected voters.”¹⁷³

Indeed, this raises a very important question: “Was the right to vote and participate in government viewed as superior to the right to “keep and bear arms for the common defence”?” The answer is no. Both the right to “keep and bear arms” and a right to vote were codified in the

166. PA. CONST. OF 1776, art. XIII (“That the right of citizens to bear arms for the defence of themselves and the State”).

167. N.C. CONST. OF 1776, art. XVII (“That the people have a right to bear arms, for the defence of the State.”).

168. VT. CONST. OF 1786, art. XVIII (“That the people have a right to bear arms, for defence of themselves and the State.”).

169. MASS. CONST. OF 1780, art. XVII.

170. AN ACT FOR THE MORE SPEEDY AND EFFECTUAL SUPPRESSION OF TUMULTS AND INSURRECTIONS IN THE COMMONWEALTH (Mass. 1787).

171. CHARLES, THE SECOND AMENDMENT, *supra* note 15, at 84-87.

172. 4 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 433 (Philander D. Chase ed., 1995).

173. 9 THE PAPERS OF JAMES MADISON 286, 307 (Gaillard Hunt ed., 1975). *See also id.* at 315, 343, 395-96, 399.

1780 Massachusetts Constitution.¹⁷⁴ The only difference between the two provisions is that the right to “keep and bear arms” was expressly limited to the “common defence.” This limited interpretation of the right to “keep arms” is supported by the use of the phrase in contemporaneous militia laws and military treatises.¹⁷⁵ Commentators seem to forget that the *Heller* majority held that “keep arms” was a phrase that was “not prevalent in the written documents of the founding period that we have found.”¹⁷⁶

In other words, the *Heller* majority did not examine the phrase in contemporaneous laws and literature. This interpretational farce could have been significant in *McDonald* because the City of Chicago and its *amici* could have more thoroughly¹⁷⁷ illuminated that the phrase was consistently used in state laws to describe the maintaining of military arms for militia service. For instance, in Delaware’s 1782 Militia Act it required every enrolled militiaman to “keep the [same] arms by him at all times, ready and fit for Service” or pay a fine of twenty shillings.¹⁷⁸ In Maryland’s 1799 Militia Act it restricted the “keeping” of arms when it provided if “any private or non commissioned officer, to whom a musket is delivered, shall use the same in hunting, gunning or fowling or shall not keep his arms . . . in neat and clean order . . . shall forfeit” a fine.¹⁷⁹ Meanwhile, Virginia’s 1784 militia law required the slave patrols to “constantly keep the aforesaid arms, accoutrements, and ammunition ready.”¹⁸⁰

Furthermore, the fact that the right to “keep arms” circa 1789 only appears in the 1780 Massachusetts Constitution for the “common defence” illuminates the argument that the States have always had a compelling interest in determining who owns or possesses arms, outside the “well-regulated militia” context, in the interest of public safety, and therefore the *Heller* right should not have been applied to the States. This interpretation is even supported by the history of the 1792 National

174. See MASS. CONST. OF 1780, CHAP. I, § 2, art. II.

175. CHARLES, THE SECOND AMENDMENT, *supra* note 15, at 22-30.

176. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2792 (2008).

177. To my knowledge only the English Historians’ brief addressed this fact. See Brief for English/Early American Historians as *Amici Curiae* Supporting Respondents, *supra* note 143, at 38-39.

178. AN ACT FOR ESTABLISHING A MILITIA WITHIN THIS STATE, § 6 (Del. 1782).

179. A SUPPLEMENT TO THE ACT ENTITLED, ‘AN ACT TO REGULATE AND DISCIPLINE THE MILITIA OF THIS STATE, § 30 (Md. 1799).

180. 11 STATUTES AT LARGE OF VIRGINIA 478-79 (William Hening ed., Richmond, George Cochran 1823).

Militia Act.¹⁸¹ Congress intentionally left to the States the authority to enforce the Act's arming provisions,¹⁸² which reveals that the federal government had no intention of impeding the States' authority to regulate the "keeping" or maintaining of arms.¹⁸³

Lastly, the fact that five state constitutions (compared to only four "bear arms" provisions) protected a right to a "well-regulated militia"¹⁸⁴ could have been used to support this argument—i.e., that the right to "keep arms" should only apply to the States in the limited context recognized in *Presser* and *Schwimmer*. As addressed above, Justice Alito claimed that four states circa 1789 "adopted Second Amendment analogues" protecting the *Heller* right,¹⁸⁵ but a general reading does not support that either the Massachusetts or North Carolina constitutions protected such a right.¹⁸⁶ Certainly, Pennsylvania and Vermont's constitutional guarantees could be read in a light that supports *Heller*.¹⁸⁷ However, these guarantees make no mention of a right to "keep arms." Thus, there is a strong constitutional presumption that the founding fathers viewed individualized arms ownership as akin to the Pennsylvania Minority dissent, which permitted the disarming of people "for crimes committed" or when the legislatures thought there would be a "real danger of public injury from individuals[.]"¹⁸⁸

181. 1 U.S. STAT. 271 (1792).

182. For a history, see CHARLES, THE SECOND AMENDMENT, *supra* note 15, at 71-79, 139-53.

183. *Id.* at 139-53. This includes the state keeping the arms and only distributing them during times of muster. *Id.* at 31-34. This practice was consistent with their English forefathers, see 4 & 5 Phil. & Mary. c. 2, § 5 (1557-8) (Eng.) (the arms of cities, boroughs, towns, parishes, and hamlets shall "be kepte in suche Place as by the sayd Commissioners shalbe appointed"); 30 Geo. 2, c. 25 (1757) (Eng.).

184. MD. CONST. of 1776 art. XXV ("That a well-regulated militia is the proper and natural defence of a free government."); N.H. CONST. of 1784 art. XXIV ("A well regulated militia is the proper, natural, and sure defence of a state."); DECLARATION OF RIGHTS AND FUNDAMENTAL RULES art. XVIII (Del. 1776) ("That a well regulated Militia is the proper, natural and safe Defense of a free government."); DECLARATION OF RIGHTS art. XIII (Va. 1776) ("That a well regulated militia, composed of the body of people trained to arms, is the proper, natural, and safe defence of a free State."); N.Y. CONST. of 1777, art. XL ("And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it; this convention therefore, in the name and by the authority of the good people of this State, doth ordain, determine, and declare that the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service.");

185. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3037 (2010).

186. *See supra* note 167, 169 and accompanying text.

187. *See supra* note 166, 168.

188. THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS (Dec. 17, 1787).

This status quo did not change with the addition of the States of Kentucky, Tennessee, and Ohio. All three constitutions would include a “bear arms” provision,¹⁸⁹ but only the Tennessee Constitution included a right to “keep arms.” Similar to Massachusetts, this right only extended to the keeping and bearing of arms for the “common defence.” Thus, by 1803, out of seventeen State constitutions the Second Amendment analogues could be categorized as follows in Chart I (“State Second Amendment Analogues Circa 1803”).¹⁹⁰

Of course, Justice Alito did not distinguish the Second Amendment analogues in this fashion because it was never brought to the Court’s attention. Instead, Alito reiterated the *Heller* majority’s classification of armed, individual self-defense in the home as the “palladium of liberty”¹⁹¹—a characterization that does not comport with the founders’ understanding of the Second Amendment.¹⁹² “Arms” by themselves were not the “palladium of liberty” to which St. George Tucker and Joseph Story referred.¹⁹³ It was the Second Amendment’s “well regulated militia” that the founding generation repetitively described as the “palladium of liberty,” for it encompassed an ancient constitutional

189. OHIO CONST. of 1802 art. VIII, § 20 (“That the people have a right to bear arms for the defense of themselves and the state: and as standing armies in time of peace, are dangerous to liberty, they shall not be kept up; and that the military shall be kept under strict subordination to the civil power.”); KY. CONST. of 1799 art. X, § 23 (“That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.”); TENN. CONST. of 1796 art. XI, § 26 (“That the freemen of this State have a right to keep and bear arms for their common defence.”).

190. This is interpreting the respective state constitutions in a light most favorable to the right recognized in *Heller*. However, there is sufficient evidence available to interpret these provisions as being limited to a militia right. See CHARLES, *THE SECOND AMENDMENT*, *supra* note 15, at 132-34. Even if one takes the State Second Amendment analogues circa 1820, only Mississippi’s protects a right to “keep arms” for personal self-defense. MISS. CONST. of 1817 art. I, § 23 (“The right of every citizen to keep and bear arms in defense of his home, person, or property, or in the aid of the civil power when thereto legally summoned, shall not be called into question, but the legislature may regulate or forbid the carrying of concealed weapons.”). Indiana and Alabama’s analogues were limited to “bear arms.” IND. CONST. of 1816 art. I, § 20 (“That the people have a right to bear arms for the defence of themselves and the state.”); ALA. CONST. of 1819 art. I, § 23 (“Every citizen has a right to bear arms in defence of himself and the State.”). Louisiana’s analogue only protected a militia right. LA. CONST. of 1812 art. III, § 22 (“The free white men of this State, shall be armed and disciplined for its defence”). The Illinois Constitution circa 1820 did not contain a Second Amendment analogue.

191. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008).

192. See Charles, “*Arms for Their Defence*,”? *supra* note 15, at 420-21; CHARLES, *THE SECOND AMENDMENT*, *supra* note 15, at 50. See also generally Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123 (2006).

193. See TUCKER, *supra* note 132, at 238; JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1001 ((Boston, C.C. Little & J. Brown 1833).

CHART I: STATE SECOND AMENDMENT ANALOGUES CIRCA 1803

States	Second Amendment Analogue	Heller Right	Militia Right	Well-Regulated Militia	Keep Arms	Heller Right to Keep Arms	Militia Right to Keep Arms
Connecticut*							
Delaware (1776)				X			
Georgia (1798)							
Kentucky (1799)	X	X					
Maryland (1776)				X			
Massachusetts (1780)	X		X		X		X
New Hampshire (1784)				X			
New Jersey (1776)							
New York (1777)				X			
North Carolina (1776)	X		X				
Ohio (1802)	X	X					
Pennsylvania (1790)	X	X					
Rhode Island*							
South Carolina (1778)							
Tennessee (1796)	X		X		X		X
Vermont (1793)	X	X					
Virginia (1776)				X			
Totals	7	4	3	5	2	0	2
Percentile	41.20%	23.50%	17.60%	29.40%	11.80%	0.00%	11.80%

balance consistent with the republican ideals of the Roman, Florentine, and the English Constitutions.¹⁹⁴

This understanding of a “well-regulated militia” as the “palladium of liberty” was frequently conveyed in the popular print culture. For example, a July 1789 edition of *The New-York Packet* discussed how a “well regulated Militia” requires the “habitual exercise” of military training and “manly discipline, which is the bulwark of the country[.]”¹⁹⁵ This knowledge of the military art was the “sole means to render a standing army useless” and to “form a truly warlike militia.”¹⁹⁶ It was not “arms” in itself that secured the nation. It was the maintenance of knowledge in the military art, for “education is a bulwark against tyranny, it is the grand palladium of true liberty in a republican government.”¹⁹⁷ James Simmons similarly described the “militia of America” as the “palladium of our security, and the first effectual resort in case of hostility.”¹⁹⁸ Isaac Crane wrote that the national assemblage of the militia was the “*grand palladium* of our liberties[.]”¹⁹⁹ Meanwhile, a 1798 militia address published in the *Connecticut Gazette* stated, “The importance and practicability of a well regulated and disciplined Militia, in a free country, cannot be doubted, this day you have evinced that such a thing is altogether practicable—You are the *palladium* of which your country leans for the protection against all foreign invasion[.]”²⁰⁰

Therefore, given that there were (a) more “well-regulated militia” analogues than *Heller* right analogues, (b) not one *Heller* right analogue protected a right to “keep arms,” and that (c) St. George Tucker and Joseph Story were referring to the militia as a “palladium of liberty,” it makes little sense for Alito to claim that the Second Amendment analogues protected “an individual right to keep and bear arms” that “legal commentators confirmed the importance of[.]”²⁰¹ If anything, the Second Amendment analogues contemporaneous with the Constitution reveal that the States had varying views on the right to “bear arms,” with the majority supporting a right to a “well-regulated militia,” to “bear

194. Charles, *The Constitutional Significance of a “Well-Regulated Militia,”* *supra* note 15, at 12-13, 21-22, 52-53.

195. THE NEW-YORK PACKET (New York, NY), July 25, 1789, at 2 col. 4.

196. *Id.* at 3, col. 1.

197. *Id.*

198. JAMES SIMMONS, A MILITARY ESSAY 12 (Charleston, Markland & M’lver 1793).

199. ISAAC WATTS CRANE, AN ORATION DELIVERED AT THE PRESBYTERIAN CHURCH, AT ELIZABETH-TOWN, ON THE FOURTH OF JULY, 1794, at 15 (Newark, Woods 1795).

200. AMERICAN MERCURY (Hartford, CT), Nov. 1, 1798, pg. 2 col. 3.

201. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3037 (2010).

arms” for the “common defence” of the State, and the right to “keep arms” outside of this context was a matter of state control.

This still leaves the state constitutions as codified at the time of the Fourteenth Amendment’s ratification. Justice Alito writes, “22 of 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms,” making it “clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”²⁰² Here again, Alito’s statement needs to be qualified because the evidence is not as clear and convincing as he was led to believe in an amicus brief submitted by thirty-seven State Attorneys General.²⁰³

As shown in Chart II (“State Second Amendment Analogues Circa 1868”) only seventeen state analogues can be interpreted to protect the right recognized in *Heller*;²⁰⁴ less than half of the State constitutions circa 1868. Most importantly, out of these seventeen *Heller* right analogues only five protected a right to “keep arms” – the legal question at issue in

202. *Id.* at 3042.

203. See Brief for Texas and Thirty-Seven Other States as Amici Curiae Supporting Petitioners, at 15-16, *McDonald*, 130 S. Ct 3020 (2010) (No. 08-1521).

204. ALA. CONST. of 1867 art. I, § 28; CONN. CONST. of 1818 art. I, § 17; FLA. CONST. of 1868 art. I, § 22; GA. CONST. of 1868 art. I, § 14; IND. CONST. of 1851 art. I, § 32; KAN. CONST. of 1859, BILL OF RIGHTS, § 4; KY. CONST. of 1850 art. XIII, § 25; MICH. CONST. of 1850 art. XVIII, § 7; MISS. CONST. of 1868 art. I, § 15; MO. CONST. of 1865 art. I, § 8; N.C. CONST. of 1868 art. I, § 24; OHIO CONST. of 1851 art. I, § 4; OR. CONST. of 1857 art. I, § 27; PA. CONST. of 1838 art. IX, § 21; R.I. CONST. of 1842 art. I, § 22; TEX. CONST. of 1868 art. I, § 13; VT. CONST. of 1793 ch. I, art. XVI. This is looking at each state’s constitution in a light most favorable to the “individual right” stance. However, out of these seventeen states, arguably eleven of these “bear arms” provisions could be interpreted as merely a militia right. See CHARLES, THE SECOND AMENDMENT, *supra* note 15, at 132-34 (discussing how the Courts should determine whether a state provision is a militia or individual self-defense right); FLA. CONST. of 1868 art. I, § 22 (“[R]ight to bear arms in defence of themselves and the lawful authority of the State.”); GA. CONST. of 1868 art. I, § 14 (“[R]ight of the people to keep and bear arms shall not be infringed.”); IND. CONST. of 1851 art. I, § 32 (“[R]ight to bear arms for the defence of themselves and the State.”); § 4; KY. CONST. of 1850 art. XIII, § 25 (“[R]ight of the citizens to bear arms in defence of themselves and the State shall not be questioned.”); MO. CONST. of 1865 art. I, § 8 (“[R]ight to bear arms in defence of themselves and of the lawful authority of the State cannot be questioned.”); N.C. CONST. of 1868 art. I, § 24 (“[R]ight of the people to keep and bear arms shall not be infringed.”); OHIO CONST. of 1851 art. I, § 4 (“[P]eople have the right to bear arms for their defense and security.”); OR. CONST. of 1857 art. I, § 27 (“[P]eople shall have the right to bear arms for the defence of themselves and the State.”); PA. CONST. of 1838 art. IX, § 21 (“[R]ight of the citizens to bear arms, in defence of themselves and the State, shall not be questioned.”); R.I. CONST. of 1842 art. I, § 22 (“[R]ight of the people to keep and bear arms shall not be infringed.”); VT. CONST. of 1793 ch. I, art. XVI. (“[P]eople have a right to bear arms for the defence of themselves and the State.”).

CHART II:

STATE SECOND AMENDMENT ANALOGUES CIRCA 1868

States	Second Amendment Analogue	<i>Heller</i> Right	Militia Right	Well-Regulated Militia	Keep Arms	<i>Heller</i> Right to Keep Arms	Militia Right to Keep Arms
Alabama (1867)	X	X					
Arkansas (1868)	X		X		X		X
California (1849)							
Connecticut (1818)	X	X					
Delaware (1831)							
Florida (1868)	X	X					
Georgia (1868)*	X	X		X	X	X	
Illinois (1848)							
Indiana (1851)	X	X					
Iowa (1857)							
Kansas (1859)	X	X					
Kentucky (1850)	X	X					
Louisiana (1868)							
Maine (1820)	X		X		X		X
Maryland (1867)				X			
Massachusetts (1780)	X		X		X		X
Michigan (1850)	X	X					
Minnesota (1857)							

States	Second Amendment Analogue	Heller Right	Militia Right	Well-Regulated Militia	Keep Arms	Heller Right to Keep Arms	Militia Right to Keep Arms
Mississippi (1868)	X	X			X	X	
Missouri (1865)	X	X					
Nebraska (1866)							
Nevada (1864)							
New Hampshire (1792)				X			
New Jersey (1844)							
New York (1846)							
North Carolina (1868)*	X	X		X	X	X	
Ohio (1851)	X	X					
Oregon (1857)	X	X					
Pennsylvania (1838)	X	X					
Rhode Island (1842)	X	X			X	X	
South Carolina (1868)	X		X		X		X
Tennessee (1834)	X		X		X		X
Texas (1868)	X	X			X	X	
Vermont (1793)	X	X					
Virginia (1864)				X			
West Virginia (1863)							
Wisconsin (1848)							
Totals	22	17	5	5	10	5	5
Percentile	59.50%	45.90%	13.50%	13.50%	27.00%	13.50%	13.50%

McDonald.²⁰⁵ At the same time, however, five state constitutions expressly limited the “right to keep and bear arms” to the “common defence.”²⁰⁶

It is nonsensical to incorporate a right to “keep arms” for armed self defense of the home and classify it as “fundamental to a scheme of ordered liberty” when only five State analogues circa 1868 protected such a right. If anything, the fact that five State analogues limited the right to “keep arms” for the “common defence,” coupled with the fact that a total of thirty-two States did not protect a right to “keep arms” for personal self-defense presents a strong constitutional presumption that that the “keeping” of arms is a power reserved to the States.

Despite the availability of these state analogue statistics, no one sought to analyze them to counter the claims of gun right advocates’, Individual Right Scholars’, and the *McDonald* petitioners’ improper equation of a right to “keep arms” with other fundamental rights circa 1868. As seen in comparing Chart II to Chart III (“State Constitutional Analogues Circa 1868”), a right to “keep arms” for personal self-defense was in no way equal to other fundamental rights of the era such as freedom of speech and religion, due process, right to a fair jury trial for alleged crimes committed, double jeopardy, cruel and unusual punishment, and unlawful searches and seizures. Excluding double jeopardy (eighty-third percentile), these fundamental rights are within the eighty-sixth percentile. Furthermore, the fact that unincorporated rights such as the quartering of troops, excessive bail, and the grand jury clause substantially exceed the right to “keep arms,” the *Heller* decision does not favor incorporation. Even taking Alito’s characterization of the Second Amendment analogues as true, the “right to keep and bear arms” circa 1868 falls within the realm of the unincorporated rights of

205. GA. CONST. of 1868 art. I, § 14 (“A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed.”); MISS. CONST. of 1868 art. I, § 15 (“All persons shall have a right to keep and bear arms for their defence.”); N.C. CONST. of 1868 art. I, § 24 (“A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.”); R.I. CONST. of 1842 art. I, § 22 (“The right of the people to keep and bear arms shall not be infringed.”); TEX. CONST. of 1868 art. I, § 13 (“Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State.”).

206. ARK. CONST. of 1868 art. I, § 5 (“The citizens of this State shall have the right to keep and bear arms for their common defence.”); ME. CONST. of 1820 art. I, § 16 (“Every citizen has the right to keep and bear arms for their common defence.”); MASS. CONST. of 1780 art. XVII (“The people have a right to keep and bear arms for the common defence.”); S.C. CONST. of 1868 art. I, § 28 (“The people have a right to keep and bear arms for the common defence.”); TENN. CONST. of 1834 art. I, § 26 (“That the free white men of this State have a right to Keep and to bear arms for their common defence.”).

CHART III: STATE CONSTITUTIONAL ANALOGUES CIRCA 1868

	Freedom of Speech and Religion	Trial By Jury	Cruel and Unusual Punishment	Due Process	Unlawful Seizure	Double Jeopardy	Quartering Soldiers	Excessive Bail or Fines	Grand Jury
States	Incorporated Rights Through the Fourteenth Amendment						Unincorporated Rights		
Alabama (1867)	X	X	X	X	X	X	X	X	X
Arkansas (1868)	X	X	X	X	X	X		X	X
California (1849)	X	X	X	X	X	X		X	X
Connecticut (1818)	X	X		X	X		X	X	X
Delaware (1831)*	X	X	X	X	X	X	X	X	X
Florida (1868)	X	X	X	X	X	X	X	X	X
Georgia (1868)	X	X	X	X	X	X		X	
Illinois (1848)	X	X		X	X	X	X	X	X
Indiana (1851)	X	X	X	X	X	X	X	X	
Iowa (1857)	X	X	X	X	X	X	X	X	X
Kansas (1859)	X	X	X	X	X	X	X	X	
Kentucky (1850)	X	X	X	X	X	X	X	X	X
Louisiana (1868)	X	X	X	X	X	X		X	
Maine (1820)	X	X	X	X	X	X	X	X	X
Maryland (1867)	X	X	X	X	X		X	X	
Massachusetts (1780)	X	X	X	X	X		X	X	
Michigan (1850)	X	X		X	X		X		
Minnesota (1857)	X	X	X	X	X	X		X	X
Mississippi (1868)	X	X	X	X	X	X		X	X

	Freedom of Speech and Religion	Trial By Jury	Cruel and Unusual Punishment	Due Process	Unlawful Seizure	Double Jeopardy	Quartering Soldiers	Excessive Bail or Fines	Grand Jury
States	Incorporated Rights Through the Fourteenth Amendment						Unincorporated Rights		
Missouri (1865)	X	X	X	X	X	X	X	X	
Nebraska (1866)	X	X	X	X	X	X		X	X
Nevada (1864)	X	X	X	X	X	X	X	X	X
New Hampshire (1792)	X	X	X	X	X	X	X	X	
New Jersey (1844)	X	X	X	X	X	X	X	X	X
New York (1846)	X	X	X	X		X		X	
North Carolina (1868)+A11	X	X	X	X	X		X	X	X
Ohio (1851)	X	X	X	X	X	X	X	X	X
Oregon (1857)	X	X	X	X	X	X	X	X	
Pennsylvania (1838)	X	X	X	X	X	X	X	X	
Rhode Island (1842)	X	X	X	X	X	X	X	X	X
South Carolina (1868)	X	X	X	X	X	X	X	X	X
Tennessee (1834)	X	X	X	X	X	X	X	X	
Texas (1868)	X	X	X	X	X	X		X	
Vermont (1793)	X	X		X	X	X		X	
Virginia (1864)	X	X	X		X			X	
West Virginia (1863)	X	X	X	X	X	X		X	
Wisconsin (1848)	X	X		X	X	X		X	X
Totals	37	37	32	36	36	31	24	36	20
Percentile	100.00%	100.00%	86.50%	97.30%	97.30%	83.80%	64.90%	97.30%	54.10%

quartering troops and grand jury clause (fifty-ninth percentile). Perhaps what is most striking is that the *Heller* right analogues fall significantly short of all unincorporated rights at less than half of all State constitutions circa 1868 (forty-fifth percentile)—a fact that makes it hard to classify the *Heller* right as fundamental to an ordered scheme of liberty.

To paraphrase, a detailed analysis of the Second Amendment analogues circa 1789, 1803, and 1868 may have prevented incorporation in *McDonald* because what constituted the “right to keep and bear arms” substantially varied throughout the United States. Of particular importance is that the right to “keep arms” for individual purposes was nonexistent in 1789 state constitutions, and in only five of thirty-seven state constitutions circa 1868. Even under a “living constitution” argument, the Second Amendment analogue argument fails, for only twenty-eight of fifty states have “keep arms” analogues that can be interpreted as protecting individual self-defense—a measly 56% of all state constitutions.²⁰⁷ Thus, there is a strong argument that the right to “keep arms” should be viewed as unique and distinct from the other protections in the Bill of Rights. It was a right that has always affected the safety of the whole community, and has been viewed as intimately connected with the police power of the State.²⁰⁸

Despite *McDonald* incorporating the Second Amendment to the States, perhaps this evidence can still be useful in future courts examining the constitutionality of gun control laws. The evidence is clear and convincing that the States have always had a compelling interest in regulating the “keeping” of arms to protect the community. The absence of “keep arms” in “individual right” Second Amendment analogues circa 1789 and 1803, coupled with their limited use in 1868 constitutions (5 of 37 States), drives this point home. Thus, should the courts ever decide to give greater deference to the States regulating the “keeping” of arms than that of “bearing” arms,” it would comport with the historical guidepost approach, for such regulations would fall within traditional norms.

207. This count is based on a compilation of state “bear arms” analogues by Eugene Volokh. See Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions*, 11 TEX. REV. L. & POL. 191 (2006).

208. RAWLE, *supra* note 134, at 125 (an armed nation is “dangerous not to the enemy, but to its own country”).

B. John Bingham's Second Amendment?: Competing History and Reexamining the "Privilege" to "Bear Arms" and Incorporation Through the Fourteenth Amendment's Privileges or Immunities Clause

In a concurring opinion Justice Thomas described the process of selective incorporation as a “legal fiction” and a “dangerous one” at that.²⁰⁹ Instead of focusing on whether a right was essential to the American “scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition,” Thomas felt incorporation should be reexamined under the Fourteenth Amendment’s Privileges or Immunities Clause “consistent with public understanding at the time of its ratification.”²¹⁰

In a way, Thomas’s concurrence was the opinion that the City of Chicago did not attempt to sway by providing the competing concerns of the Fourteenth Amendment’s ratifiers. It was well known that Thomas had expressed a desire to reexamine the history of the Privileges or Immunities Clause should the appropriate case arise.²¹¹ Perhaps if the City of Chicago had brought forth an argument using accepted historical methodologies to show the competing evidence, Justice Stevens’ concerns—touching upon the use of history to define incorporation of rights to the States—would have been given more weight. Stevens queried:

Under the “historically focused” approach . . . numerous threshold questions arise before one ever gets to the history. At what level of generality should one frame the liberty interest in question? What does it mean for a right to be “deeply rooted in this Nation’s history and tradition”? By what standards will that proposition be tested? Which types of sources will count, and how will those sources be weighed and aggregated? . . . It is hardly a novel insight that history is not an objective science, and that its use can therefore “point in any direction the judges favor.”²¹²

To paraphrase, Stevens was arguing that history alone should not sway the Court’s determination, for it can produce competing results. This holds especially true when trying to calculate the “public” or “popular understanding” of how the Second Amendment was intended to apply to the States through the Fourteenth Amendment. Certainly, the City of Chicago presented historical arguments that the Second

209. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3062 (2010).

210. *Id.* at 3062.

211. *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting).

212. *McDonald*, 130 S. Ct. at 3116-17.

Amendment should not be incorporated through the Fourteenth Amendment's Privileges or Immunities Clause.²¹³ Their argument was two-fold. First, the City of Chicago argued that 1868 "public understanding" does not support incorporation of the entire Bill of Rights through the Fourteenth Amendment's Privileges or Immunities Clause.²¹⁴ Second, it was argued that congressional concerns about discriminatory disarmament is insufficient to show "public understanding" of the Second Amendment being incorporated.²¹⁵

Both of these arguments were useful in illustrating that there is some academic disagreement regarding the meaning of the Privileges or Immunities Clause.²¹⁶ However, what the City of Chicago did not consider was challenging whether the Fourteenth Amendment's ratifiers could constitutionally alter the founding fathers' interpretation of the Second Amendment and its intended application to the States.²¹⁷ Akhil Amar and many followers have sold legal academia on the notion that John Bingham and the Reconstruction Congress sought to unequivocally alter the founders' view of a national "well-regulated militia" right,²¹⁸ and apply a right to bear arms for personal self-defense to the States through the Fourteenth Amendment's Privileges or Immunities Clause.²¹⁹ It is asserted that the threat of the Ku Klux Klan, increased

213. The City of Chicago dedicated forty-six pages of their brief to this argument. See Brief of Respondent City of Chicago and Village of Oak Park, at 54-79, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521).

214. *Id.* at 54-74.

215. *Id.* at 75-79.

216. For scholarship supporting the City of Chicago's view, see James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985); Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 615 (2006); Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 AM. J. LEGAL HIST. 41 (1996); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEG. ISSUES 361 (2009); George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323 (2009).

217. There is sufficient historical evidence supporting that the founding fathers viewed the Second Amendment as requiring the maintenance of a constitutional "well-regulated militia" or an individual right to protect the "common defence." See generally Charles, *The Constitutional Significance of a "Well-Regulated Militia," supra* note 15. See also discussion on James Wilson *supra* note 151, at 1141-42.

218. Amar admits that the founding fathers had a "well-regulated militia" right in mind when drafting the Second Amendment. See AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 50-59 (1998).

219. Amar believes the Reconstruction Congress could alter the Second Amendment as it was originally understood by the framers to a right of armed, individual self-defense of the home without altering the text of the Second Amendment itself. *Id.* at 258-65. There is a multitude of

Southern violence towards Freedmen, and Black Crow laws concerning firearms compelled the Reconstruction Congress to ensure the “right to keep and bear arms” extended to all citizens, white and black.²²⁰

Assuming the historical conclusion that the Fourteenth Amendment was drafted to apply the Bill of Rights to the States,²²¹ Amar’s assertion needs to be qualified using accepted historical methodologies.²²² There is no denying that there were members of the Reconstruction Congress that viewed the Second Amendment as protecting armed, individual self-defense of one’s person, property, and family.²²³ However, in many instances that the “right to keep and bear arms” was stated in speeches, it was only done in passing when listing the Bill of Rights.²²⁴ In these

scholarship supporting that the Reconstruction Congress viewed the Second Amendment as affirmatively protecting against private violence, but it primarily stems from the work of Stephen P. Halbrook. See generally STEPHEN P. HALBROOK, *FREEDMEN AND THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-76* (1998) [hereinafter *FREEDMEN AND THE FOURTEENTH AMENDMENT*]; STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (2d ed. 1994) [hereinafter *THAT EVERY MAN BE ARMED*]. See also Kopel, *supra* note 96. For an “individual right” popular understanding analysis, see Clayton Cramer, et al., *This Right is Not Allowed by Governments That Are Afraid of the People*, 17 *GEO. MASON L. REV.* 823 (2010).

220. See *supra* note 219.

221. For some of the prominent scholarship supporting this view, see Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 *U. PA. J. CONST. L.* 1295 (2009) [hereinafter *Ink Blot or Not*]; Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 *J. CONTEMP. LEGAL ISSUES* 77 (2009) [hereinafter *Enforcing the Bill of Rights Against the States*]; Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 *J. CONTEMP. LEGAL ISSUES* 3 (2009) [hereinafter *The Bill of Rights and the States*]; Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper’s Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 *CHI.-KENT L. REV.* 1113 (1993) [hereinafter *The 1859 Crisis Over Hinton Helper’s Book*]; MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1990) [hereinafter *NO STATE SHALL ABRIDGE*].

222. Charles, “*Arms for Their Defence*”? *supra* note 15, at 458.

223. According to my research, there are only four instances in the Congressional Globe circa 1866 that definitively speak to members of Congress supporting the stance that the Second Amendment protects the having and using arms for personal self-defense. See 39 *CONG. GLOBE*, FIRST SESSION 1073 (1866) (Mr. Nye stated, “As citizens of the United States [Freedmen] have equal right to protection, and to keep and bear arms for self-defense.”); *id.* at 1182 (Mr. Pomeroy stated Freedmen “should have the right to bear arms for the defense of himself and family and his homestead.”); *id.* at 371 (Mr. Davis stated the founding fathers “were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.”); *id.* at 1838.

224. There are numerous instances of this during Reconstruction, but for some examples see *id.* at 1629; (Mr. Hart listed “the privileges and immunities of other citizens” as: “no law shall be made prohibiting the free exercise of religion; ‘where ‘the right of the people to keep and bear arms shall not be infringed; ‘where ‘the right of the people to be secure in their persons, houses’”); *id.* at 2765 (Senator Howard stated the “privileges and immunities” include “the freedom of speech and the press; the right of the people peaceably to assemble and petition the Government for a redress of

instances, no indication was given as to whether it was in reference to an individual militia right or a right to repel burglars. There was no context, thus each member of Congress could have taken their own interpretation as to what encompassed the “right to bear arms.”

Furthermore, the fact that the Second Amendment was debated intensively when Congress sought to disarm unlawful Southern militias supports the historical interpretation that members of Congress had differing interpretations as to what “right to bear arms” in these general speeches inferred.²²⁵ Perhaps most importantly, and what this article sets forth to illuminate, is that there is a significant amount of evidence to suggest that members of Congress only intended to incorporate the Second Amendment as to preserve the founders’ intent, i.e., a national militia where “the people” would equally participate in “bearing arms” for the defense of the community and nation. Meanwhile any rights pertaining to the use of “arms” for other purposes would have been protected by the Fourteenth Amendment’s Equal Protection Clause.

The historical point is that it is inconclusive as to whether the entire Congress viewed the Second Amendment as applying to the States in the manner Justice Thomas conveyed.²²⁶ Just as some may have viewed it as a right to repel private violence, others would have viewed it as purely a militia right. Again, this article does not seek to challenge that there were members of Congress and the public circa 1868 who viewed the Second Amendment as protecting against individual violence.²²⁷ What it does set forth to dispose is that Justice Thomas’ interpretation—of the Second Amendment applying to the States through the Privileges or Immunities Clause circa 1868—is not dispositive of the entire Congress or the people as a whole, for the historical evidence does not provide an unequivocal answer.

Support for a more limited application of the Second Amendment to the States is supported by an 1871 speech delivered by John Bingham at Belpre, Ohio. Bingham detailed how he saw the Fourteenth Amendment’s Privileges or Immunities Clause applied the Bill of Rights to the States:

Under the Constitution as it was, no State of this Union ever had the right to make or enforce any law which abridged the privileges or immunities of the citizens of the United States, as guaranteed by the

grievances . . . the right to keep and bear arms; the right to be exempted from the quartering of soldiers . . .”).

225. Charles, “*Arms for Their Defence*,”? *supra* note 15, at 457 n.733.

226. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058-88 (2010).

227. For some scholarship examining this view, *see supra* note 219.

Constitution of the United States. Yet in nearly half the States of the Union these privileges and immunities of the citizen were abridged by the State legislation and State administration. The freedom of speech was abridged, the freedom of the press was abridged, the freedom of conscience was abridged, the right of the people to peaceably assemble was abridged, the equal right of the citizen to vote at all elections was abridged, and finally, the right to bear arms for the Union and the Constitution was abridged and prohibited by States laws[.]²²⁸

Of particular interest is how Bingham understood the Second Amendment as applying to the States. Notice that he makes no mention of a right to “bear arms” for personal or private interests. Bingham only makes mention of the fact that state legislatures prevented Freedmen from “the right to bear arms” in defense of “the Union and the Constitution[.]”²²⁹ Was this done intentionally? Did Bingham only seek to apply a militia right to the States via the Second Amendment? The evidence is debatable. However, if we take Bingham’s 1871 speech verbatim there is an argument to be made that the Second Amendment had limited application to the States.

Perhaps what makes Bingham’s speech of great significance, in support of this argument, is his personal involvement in drafting the Fourteenth Amendment. In fact, one may argue that Bingham’s interpretation should be the only interpretation that the courts should follow in conducting a “popular understanding” analysis.²³⁰ This begets the question: “What was Bingham explicitly referring to, and why did he not include bearing arms for personal self-defense?”

To begin, it is often forgotten that blacks were excluded from most state militias and even from the Union Army until the creation of the infamous 54th Massachusetts Regiment. It did not matter that thousands of blacks, free and slave, had fought valiantly in the American

228. THE CINCINNATI DAILY GAZETTE (Cincinnati, OH), Sept. 15, 1871, at 2, col. 4.

229. *Id.*

230. Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 591 (2003) [hereinafter *The Continuing Importance of Congressman John A. Bingham*] (“Bingham’s inseparable link with the Amendment makes him worthy of attention from both a legal and an historical view . . . his words may provide meaning or context for what has been termed original intent, meaning or understanding of the Fourteenth Amendment.”); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 103 (1993) [hereinafter *On Misreading John Bingham and the Fourteenth Amendment*] (discussing the importance of Bingham’s views on contemporaries and the first federal courts to apply the Fourteenth Amendment). Justice Thomas’s concurrence also found Bingham’s view to be “particularly significant as “the principal draftsman of §1[.]” *McDonald*, 130 S. Ct. at 3072.

Revolution.²³¹ This military service had gone forgotten in the pantheons of history until Civil War abolitionists sought the participation of black troops. Despite the urging of prominent abolitionists such as Frederick Douglass, the Lincoln administration refused to enlist blacks because they “had never shown any ability in the nation’s history.”²³² Thus, to urge Abraham Lincoln to enlist an all black regiment, a history was compiled by a librarian and historian named George Moore.²³³ Entitled *Historical Notes on the Employment of Negroes in the American Revolution*, Moore sought to “set the record straight” by highlighting the valiant service of the all black First Rhode Island Regiment as well as other instances of blacks participating in the achievement of American independence.²³⁴

By the end of the Civil War, over 200,000 black soldiers had taken up arms in defense of the Union, mostly slaves from the South. In reward of their service, Congress offered them the purchase of their service rifle, believing that many of these men would be called upon again to secure peace and order in a national or state run militia. However, Congress did not account for the fact that many Southern militia laws forbade blacks from serving and disarmed the very veterans they had provided arms. Congressman Clarke conveyed his displeasure because “the brave black soldiers of the Union” were “disarmed and robbed by this wicked and despotic order” when “these brave defenders of the nation paid for the arms with which they went to battle.”²³⁵ On May 23, 1866, it was reported to Congress:

More than twenty-five thousand colored men of Kentucky have been soldiers in the Army of the Union . . . in many instances are scourged, beaten, shot at, and driven from their homes and families. Their arms are taken from them by the civil authorities and confiscated for the benefit of the Commonwealth. The Union soldier is fined for bearing

231. For history discussing the contribution of blacks fighting in the American Revolution, see GARY NASH, *THE FORGOTTEN FIFTH: AFRICAN AMERICANS IN THE AGE OF REVOLUTION* (2006); BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION* (1961); PATRICK J. CHARLES, *WASHINGTON’S DECISION: THE STORY OF GEORGE WASHINGTON’S DECISION TO REACCEPT BLACK ENLISTMENTS IN THE CONTINENTAL ARMY, DECEMBER 31, 1775* (2006); GLEN KNOBLOCK, “STRONG AND BRAVE FELLOWS”: NEW HAMPSHIRE’S BLACK SOLDIERS AND SAILORS IN THE AMERICAN REVOLUTION, 1775-84 (2003).

232. PHILIP S. FONER, *BLACKS IN THE AMERICAN REVOLUTION* 3 (1975).

233. GEORGE MOORE, *HISTORICAL NOTES ON EMPLOYMENT OF NEGROES IN THE AMERICAN REVOLUTION* (1862) (New York, Charles T. Evans 1862).

234. FONER, *supra* note 232, at 4.

235. 39 CONG. GLOBE, FIRST SESSION 1839 (1866).

arms. Thus the right of the people to keep and bear arms as provided in the Constitution is infringed.²³⁶

The Committee of Reconstruction similarly reported, “[P]ersons of color constitute no part of the militia of the State, and no one of them shall, without permission in writing from the district judge or magistrate, be allowed to keep a fire-arm . . . pistol, musket or other fire-arms or weapon appropriate for purposes of war.”²³⁷

Disarming grievances such as these had nothing to do with armed, individual self-defense, and everything to do with military service, a national militia, and equality.²³⁸ Could the disarming of these veterans, i.e., the reserve national militia, been the impetus for applying the “right to keep and bear arms” to the States? It is plausible, but much is left unanswered. Again, many Freedmen had valiantly served to restore the United States, yet, were being deprived the very liberty that they fought to obtain.²³⁹ What was extremely troubling was that they were being denied two of the most important political badges of citizenship; the right to vote and the right to “keep and bear arms.”²⁴⁰ As was portrayed

236. *Id.* at 2774.

237. Ex. Doc. No. 118, 39 CONG. GLOBE, FIRST SESSION 7 (1866). *See also* LOWELL DAILY CITIZEN & NEWS (Lowell, MA), Sept. 13, 1866, pg. 2, col. 1 (“We understand that soldiers who have served in the Union armies, and when mustered out pain the United States for their guns, have been deprived of these by ex-rebel soldiers, who do not constitute our police.”).

238. This is not to say that there were not more general disarming grievances that support the broader individual right view. *See* Cramer et al., *supra* note 219, at 855-61.

239. *See* N.Y. TRIB., May 21, 1866, at 1, col. 6 (“But what would most disturb all our hopes would be to see those freedmen who had spilled their blood for the defense of the Union rewarded for their devotion by being deprived of those rights which are, in all republican governments, the appanage of those brave men who are called to bear arms for their country . . . To give those guilty of high treason the power to reduce good citizens to the position of political *pariahs* is to reward treachery and to discourage patriotism.”); DAILY AUSTIN REPUBLICAN (Austin, TX), Sept. 14, 1868, at 2, col. 2 (“We tax property as the blacks have—we put a poll tax on every mother’s son of them—they pay import duties on all they purchase . . . and in the event of invasion or insurrection, they will be called on to bear arms. Whatever difference of opinion whites may entertain as to their privileges, there is a surprising unanimity as to their obligations.”). Many in the New York legislature thought it was justifiable to let the Freedmen to bear arms in defense of the Union, yet deny them the right to vote; BOSTON DAILY ADVERTISER, Feb. 27, 1866, at 1, col. 4 (“Because blacks have fought for the country, it is not necessary to give them the right to govern it or participate in its government. IF it were otherwise every brave boy from 16 to 21 who fought in the Union ranks should have a vote without waiting for years to participate in the government . . . The blacks fought for a country, and they have it; they fought for freedom, and they have it . . . [but] the able-bodied only bear arms, and the able-minded only should vote.”).

240. These two rights were seen as interrelated. *See* 39 CONG. GLOBE, FIRST SESSION 1183 (1866) (“The ‘right to bear arms’ is not plainer taught or more efficient than the right to carry ballots.”); LA TRIB. DE LA NEW ORLEANS, Nov. 7, 1865, at 3, col. 2 (“We are forced to pay taxes without representation—to submit without appeal to laws, however offensive, without a single voice in framing them—to bear arms without the right to say whether against friend or foe, against loyalty

in the popular print culture of the era, it was philosophically perplexing that it was politically acceptable for blacks to serve and die in defense of the Union,²⁴¹ be counted for apportionment, but at the same time be denied service in state militias.²⁴² Not to mention, it was upsetting that Freedmen were deprived of the very military “arms” that they had been given the privilege to purchase from Congress.

Disfavor with the disarming of Freedmen veterans—who constituted the Union’s national militia—can even be found in the popular print culture. For instance, in an editorial published in the *Liberator*, the Second Amendment was stated verbatim with the following to support it:

or disloyalty.”); N.Y. TRIB., Mar. 3, 1866, at 9, col. 3 (“[A] democracy of laws which compels the able bodied to bear arms and pay taxes, but prohibits the able-minded from having either a vote or voice in the policies which control them, is a monstrosity in legislation, a falsehood of politics, and a sandy foundation for a Republic.”); LA TRIB. DE LA NEW ORLEANS, Dec. 21, 1866, at 4, cols. 1-2 (“No one will think of imposing military duties on women and children, compel them to shoulder the musket, and send them into the line to fight the battles of the country . . . There is a fixed relation between rights and duties . . . Ability to serve and defend the country, in the fields of labor and war is, therefore, the basis of electoral immunity.”); N.Y. TRIB., Feb. 24, 1866, at 6, col. 2 (“If our brave boys of 16 to 21 years had been expected to volunteer and fight for their country—perhaps die for it—but that they would in no case and never be allowed a voice in its government . . . If this isn’t base and ungrateful, what would be?”); THE LIBERATOR (Boston, MA), Oct. 6, 1865, at 158, col. 2 (“The moment the Government decided that his aid was necessary to save the Government, and put arms into his hands, the question was settled, because to bear arms is the highest position of honor, and if he was good enough to fight in the ranks side by side with our brave boys in blue, he is good enough to go to the polls.”).

241. Members of Congress were also confused how they could rely on these men to defend the nation, yet deny them political rights. See 39 CONG. GLOBE, FIRST SESSION 206 (1866) (Mr. Farnsworth stated, “we compel them to bear arms in support and defense of the Government, and also to that other important fact, that we tax them for the support of Government . . . [yet] that man has no right to a voice in the choice of his rulers, and has no lot or part in the Government.”); *Id.* at 792 (Thomas Williams stated, “He counts in the representation. He pays taxes, and must bear arms if necessary, and he has done it. No sensible man now pretends to doubt that he is a citizen, or can doubt it in view of these considerations.”); *Id.* at 2801 (The Address of the Swiss Conventions read, “But what would most disturb all our hopes would be to see those freedmen who had spilled their blood for the defense of the Union . . . [to be] deprived of those rights which are, in all republican Governments, the appanage of those brave men who are called to bear arms for their country.”). See also *id.* at 145, 1183; 38 CONG. GLOBE, FIRST SESSION 1995 (1864); 42 CONG. GLOBE, FIRST SESSION, at 266 (1871).

242. See THE CINCINNATI DAILY GAZETTE, Jan. 10, 1867, at 1, col. 8 (The Ohio States’ Equal Rights League proclaimed: “Because we bear arms. We have watered the tree of liberty copiously with our blood. The battlefields of the American Revolution, those of 1812, and of the late terrible rebellion, all furnish abundant proofs of the courage and devotion of the colored American, and his valuable services as a patriot and soldier. If then the State relies on us to defend it with our lives in war, we solemnly ask in the name of justice for that protection which is only secured by a full and equal enjoyment of its privileges in time of peace.”).

When our great war closed, it was deemed advisable that the soldiers of the Union should be allowed to retain the arms they had so nobly borne, on condition of payment by each of what was considered by the Government their cash value. An order was accordingly issued by the War Department proffering to each honorably discharged soldier the privilege of purchasing his weapon on payment of that sum. So said, so done, until now, on the representation of the ex-rebels of Louisiana, Gen. Canby has nullified Mr. Stanton's order, directing that the colored soldiers mustered out of service in his department shall not be allowed to buy their muskets!²⁴³

Three weeks later the *Liberator* published another editorial discussing the unequal treatment Freedmen received. Regarding the constitutional right to "bear arms," it read:

"Persons of color constitute no part of the militia of the State!" But this is an insult to every survivor of Fort Wagner. No one of them," says the code, "shall be allowed to keep a fire-arm, sword, or other military weapon." And all this in spite of the Declaration of Independence and the Constitution of the United States, both of which assert the citizen's right to bear arms.²⁴⁴

The Second Amendment was primarily looked to as protecting the right of Freedmen to "keep and bear arms" for service in the militia for many reasons. For instance, Judge R.H. Dana, Jr. delivered a speech proclaiming, "We have a right to demand that [Freedmen] shall bear arms as soldiers in the militia. Have we not?"²⁴⁵ Citing the Second Amendment as authority, Dana's view was that it was unlawful for states to exclude Freedmen from the "right to bear arms" because it is not dependant "upon the decision of any State."²⁴⁶ Instead, he rationalized that because "Congress makes the [national] militia" that it was within the national interest to "see to it that the emancipated slaves have the privilege, the dignity and the power of an arms-bearing population."²⁴⁷

In an 1866 editorial published in *The North American and United States Gazette*, the author applauded the "bold step to make soldiers of such men in a region where they had been so long held to an inferior race[.]"²⁴⁸ "The real importance" of affording Freedmen the privilege to

243. THE LIBERATOR, Nov. 17, 1865, at 183, col. 3.

244. THE LIBERATOR, Dec. 8, 1865, at 193, col. 5.

245. LA TRIBUNE DE LA NEW ORLEANS, July 1, 1865, at 3, col. 2.

246. *Id.*

247. *Id.*

248. THE NORTH AMERICAN AND UNITED STATES GAZETTE (Philadelphia, PA), Oct. 23, 1866, at 2, col. 1.

serve their country, wrote the author, “is the recognition thus afforded of the right of the blacks to bear arms, always disputed previously, notwithstanding the guarantee of the national Constitution.”²⁴⁹ However, these “very men who were deemed fit to be soldiers of the Union” were now being “disarmed by rebel State officials all over the south”—which was viewed as an express violation of the Second Amendment.²⁵⁰ The editorial elaborated on this point, stating:

Recurring . . . to the language of the Constitution, we find that [the Second Amendment] couples this great right with the necessity for a militia, showing obviously enough that the people to be allowed to keep and bear arms are those of whom a militia can be composed. Of course, we shall here be answered that the militia is a State institution, regulated by State laws, and as no blacks are included in it by the laws of the southern States, none of them are deprived by this article of the Constitution. Why, then, does the Constitution deem it necessary to throw this safeguard around it? If the militia be wholly a State institution, why should the national Constitution look after it thus? Moreover if the militia belong wholly to the State, where is the republic to look for soldiers when the State orders the militia to rebel? . . . [Freedmen] are peculiarly the “people” of the nation, and under the words of the Constitution are entitled to bear arms. This is clear from the fact that they have so borne arms as soldiers of the republic . . . Thus . . . we see but one conclusion—that the negroes of the south have the constitutional right to keep and bear arms. If they have not, then they cannot constitutionally be counted at all in apportioning representatives to the south.²⁵¹

Other newspaper reports reveal that Freedmen were fighting for a militia right to “keep and bear arms” alongside whites. For instance, the *Chicago Tribune* reported its disfavor of South Carolina’s Black Codes, including the law proclaiming “No person of color shall bear arms or serve in the militia.”²⁵² Similar disfavor was conveyed by the South Carolina Colored Convention when it proclaimed that such laws are “*forbidden*, as a plain violation of the Constitution, and unjust to many of us in the *highest degree*, who have been soldiers, and purchased our muskets from the United States Government when mustered out of the service.”²⁵³

249. *Id.*

250. *Id.*

251. *Id.*

252. THE SUN (Baltimore, MD), June 2, 1869, at 3, col. 5.

253. THE LIBERATOR, Dec. 8, 1765, at 195, col. 4.

Meanwhile, other Freedmen organizations expressed their appreciation in being granted their Second Amendment right to participate in state militias. For instance, after the adoption of the 1866 Civil Rights Act,²⁵⁴ the Tennessee Freedmen's Convention thanked the Thirty-Ninth Congress for ensuring that the "inherent privilege as free citizens to bear arms" was protected.²⁵⁵ The Convention promised to exercise their right by enrolling "in the militia of the State ready for the defense of Tennessee with the same privileges allotted to white inhabitants."²⁵⁶ Naturally, not every state complied with changing their militia laws to include Freedmen. For this reason the Baltimore Republican State Convention displayed its disfavor by stating if the people of Maryland "expect us to bear arms" for the Union, "there is no reason why we should not be allowed in time of peace to organize volunteer companies to acquaint ourselves with military service."²⁵⁷

To sum up the legal dilemma at hand, there is substantiating historical evidence to suggest that a majority of the Reconstruction Congress viewed the Privileges or Immunities Clause as applying a "well-regulated militia" right to the States. As Judge Dana rationalized it, given that "Congress makes the militia," people of all classes, including "the emancipated slaves[,] have the privilege, the dignity and the power" to bear arms in federal and state militias.²⁵⁸ Opponents of this approach will argue that this evidence does not override the fact that

254. It is often asserted that the 1866 Freedman's Bureau Act proves that the Reconstruction Congress wanted to secure a right to possess arms in the home. See Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 269 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, HOW THE SECOND AMENDMENT FELL SILENT* (2002)). However, there is evidence suggesting that the drafters may have been primarily concerned with protecting a militia or auxiliary right. The pertinent Freedman's Bureau Act section states that citizens shall "have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms." 14 U.S. STAT. 176-77 (1866). Notice how the text "constitutional right to bear arms" is separated from the text "personal security." *Id.* This is significant because Mr. Raymond also separated the Second Amendment from self-defense when he stated before Congress: "He has a defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms; a right to testify in the federal courts; he has all those rights that tend to elevate him." 39 CONG. GLOBE, FIRST SESSION 1266 (1866). This separation of text implies that the drafters were protecting the limited militia or auxiliary right. In many ways, one may read the act as akin to William Blackstone's fifth auxiliary right. See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 138-39 (1765); Charles, *The Right of Self-Preservation and Resistance*, *supra* note 15, at 24-60.

255. NEW YORK TRIBUNE, Aug. 11, 1866, at 1, col. 3.

256. *Id.*

257. THE LIBERATOR, Nov. 17, 1865, at 183, col. 3.

258. *Id.*

Fourteenth Amendment ratifiers viewed the Second Amendment as protecting the right to “keep and bear arms” against private violence as well. It will be argued that the historical record is full of evidence suggesting that the ratifiers sought to protect this personal individual right, as well as the militia right.

This article respectfully disagrees that the Individual Right Scholar approach reflects the unequivocal view of the entire Congress or the people as a whole. Certainly, there were members who sought to incorporate an armed self-defense right. However, there is historical evidence suggesting many did not intend to override state sovereignty on the “keeping” of arms outside of a “well-regulated militia.” While this article does not seek to provide an exhaustive look into this historical debate, it does seek to illuminate that there is overwhelming evidence to suggest that the ratifiers of the Fourteenth Amendment would have only agreed to incorporate the Bill of Rights as the founding fathers understood it²⁵⁹ in the spirit of 1776, when the Declaration of Independence was adopted.²⁶⁰ In other words, the ratifiers sought to

259. N.Y. TRIBUNE, Feb. 3, 1866, at 12, col. 1 (statement of Sen. Stevens) (“The time has come when we can make the Constitution what our fathers desired to make it. The time has come when through blood every stain has been washed out unless we choose to reestablish it.”); 40 CONG. GLOBE, THIRD SESSION 1004 (1869) (statement Sen. Yates) (“[T]he surest way by which we shall accomplish our purpose [of restoring the Union] will be to assert that which the Constitution of the United States meant to assert. It meant to assert the principles in the Declaration of Independence. The Constitution of the United States was made and framed by the men who framed and made the Declaration of Independence; and if they did not in the Constitution of the United States carry out the principles contained in the Declaration of Independence.”); 42 CONG. GLOBE, SECOND SESSION 844 (1872) (statement Sen. Sherman) (“There may be sometimes dispute and doubt as to what is the right, immunity, or privilege conferred upon a citizen of the United States . . . look first at the Constitution of the United States as the primary foundation of authority. If that does not define the right they will look for the unenumerated powers to the Declaration of Independence, to every scrap of American Independence, to every scrap of American history, to the history of England, to the common law of England . . . There they will find the fountain and reservoir of the right of American as well as English citizens.”).

260. 39 CONG. GLOBE, FIRST SESSION 2510 (1866) (statement of Rep. Miller) (“[T]hat no State shall deprive any person of life, liberty, or property without due process of law, nor deny equal protection of the laws, [is] so clearly within the spirit of the Declaration of Independence . . . that no member of this House can seriously object to it.”); *id.* at 2539 (statement of Rep. Farnsworth) (“I want some principle embodied in a constitutional amendment that the southern States will accept. I intend to vote for this amendment . . . for I am not without hope that Congress and the people of the several States may yet rise above a mean prejudice and do equal and exact justice to all men, put putting in practice that ‘self-evident truth’ of the Declaration of Independence, that Governments ‘derive their just powers from the consent of the governed,’ . . . So far as [Section 1] is concerned there is but one clause in it which is not already in the Constitution, ‘the Equal Protection Clause’; 40 CONG. GLOBE, SECOND SESSION 1967 (1868) (statement of Rep. Stevens) (affirming the purpose of the Reconstruction Congress is to restore the Constitution to “the principles of government which were intended by the fathers when in 1776 they laid the foundations of the Government on which the nation was built.”).

maintain the States' traditional sovereign powers concerning the possession, use, and ownership of arms for private purposes.

Moving forward under this approach, the individual use of arms, for purposes outside of a militia, would have been protected under the Equal Protection Clause—an interpretation that is supported by the speeches of John Bingham.²⁶¹ For instance, in a 1867 speech delivered to ratify the Fourteenth Amendment, Bingham stated the Fourteenth Amendment “would remain intact the powers of the national and State governments—the one for general defense and protection, the other for local administration and personal security[.]”²⁶² A similar speech was delivered when Bingham was facing heavy opposition to the inclusion of the Privileges or Immunities Clause. He calmed states' rights and “state sovereignty” advocates by stating that all rights and privileges as the “result of positive local law,” such as the right to vote, would not be affected by the Privileges or Immunities Clause.²⁶³ Bingham viewed local rights and privileges as being protected by the Equal Protection Clause, for it “established equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights, and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.”²⁶⁴ Arguably, the right or privilege to possess, use, and operate firearms outside of a militia circa 1866 would fall within a “positive local law” to which Bingham referred.

Bingham²⁶⁵ was not the only person to assuage states' sovereignty advocates in this fashion. James Garfield not only repeated Bingham's words verbatim, but stated, “[T]his amendment takes from no State any right that ever pertained to it.”²⁶⁶ Meanwhile, William Lawrence stated, “it must be clear that this bill creates no new right, confers no new privilege, but is declaratory of what is already the constitutional rights of every citizen in every State, that equality of civil rights is the

261. For an analysis that many members of Congress and legal commentators shared Bingham's views on the applicability of the Privileges or Immunities Clause, see Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, *supra* note 230, at 74-94.

262. THE CINCINNATI DAILY GAZETTE, September 2, 1867, at 1, col. 5. See also THE CINCINNATI DAILY GAZETTE, Aug. 26, 1869, at 1, col. 4 (speech of John Bingham) (“Was it because the [Fourteenth] amendment took from any State any right reserved to the several States under the Constitution? If so, what right?”).

263. 39 CONG. GLOBE, FIRST SESSION 2766 (1866).

264. *Id.*

265. Writing after the adoption of the Fourteenth Amendment, Bingham stated, “God forbid” that the Fourteenth Amendment “would strike down the rights of the State” because he “believ[ed] our dual system of government essential to our national existence.” 42 CONG. GLOBE, SPECIAL SESSION 84 (1871).

266. 39 CONG. GLOBE, FIRST SESSION 2542 (1866).

fundamental rule that pervades the Constitution and controls all State authority.”²⁶⁷

In an 1871 report drafted for the Committee of the Judiciary, John Bingham would reiterate his stance that the Privileges or Immunities Clause does not impede on what were always considered to be traditional matters of state sovereignty. The report stated that the Fourteenth Amendment “did not change or modify the relations of citizens of the State and notation as they existed under the original Constitution.”²⁶⁸ It is a point of emphasis that Bingham was seeking to restore the founders’ Constitution. This is confirmed in his speeches. On August 24, 1869, Bingham stated the purpose of the Fourteenth Amendment’s Privileges or Immunities Clause was to restore the “original and declared purpose of the Constitution,” and “lost justice shall be established in the land[.]”²⁶⁹ Similarly, in a speech defending the Fourteenth Amendment against political opponents, Bingham stated:

These gentlemen say they are for the Constitution, the great Constitution which our fathers gave us. Let them read in the forefront of that instrument, those words that should be written this day upon the lintels of ever door in the land: “We the people of the United States, in order to establish justice, do ordain this Constitution,” etc. I am for the Constitution, too; and equal political rights amongst all natural born citizens, in every station of life, is simple justice. Therefore I am for it, and in standing for it I but imitate the great majority of the people, who, in 1787, formed the Constitution of the Government, and handed it down to us as a nation.²⁷⁰

To be precise, not even the Fourteenth Amendment’s chief architect viewed Section 1 as impacting federalism any more than the founding fathers intended. Senator Morrill agreed with this interpretation, stating that the Fourteenth Amendment did not change “an iota of the Constitution, as it was originally framed.”²⁷¹

267. 42 CONG. GLOBE, SPECIAL SESSION 151 (1871).

267. This fear was repetitively asserted during the 1866 Civil Rights Bill. *See* 39 CONG. GLOBE, FIRST SESSION 478, 1121, 1270 (1866). *See also* 42 CONG. GLOBE, FIRST SESSION 189 (1871) (statement of Rep. Willard) (the Fourteenth Amendment constitutes “the great and solemn guarantees of liberty and equal rights, the truths of the grand Declaration of Independence made facts in our history, and made sure by our fundamental law. But we should never forget that, with the exception of such limitations as have been created by the new amendments, the States exist with the same exclusive powers, the same sovereignty within their spheres, as before.”).

268. H.R. Rep. No. 41-22, at 1 (1871).

269. THE CINCINNATI DAILY GAZETTE, Aug. 26, 1869, at 1, col. 3.

270. THE CINCINNATI DAILY GAZETTE, Aug. 26, 1867, at 1, col. 5.

271. 42 CONG. GLOBE, FIRST SESSION 577 (1871).

Others viewed Section 1 similarly by stressing the significance of the Equal Protection Clause. As John Farnsworth eloquently stated:

So far as this section [1 of the Fourteenth Amendment] is concerned, there is but one clause in it which is not already in the Constitution, and it might as well in my opinion read, “No State shall deny to any person within its jurisdiction the equal protection of the laws.”²⁷²

Given that many members of Congress did not seek to alter the traditional spheres of government, this strengthens the claim that the Equal Protection Clause that was meant to apply to the individual possession, use, and operation of arms—what many members in the Reconstruction Congress would have viewed as Article IV Section 2 privileges. In the words of John Bingham, privileges that fell under “article 4, section 2” were to be enforced equally “as an express limitation upon the powers of the States.”²⁷³

Naturally, there were varying interpretations as to what the Privileges or Immunities Clause encompassed.²⁷⁴ Senator Poland saw it as “securing nothing beyond what was intended” by Article IV Section 2, ensuring the states equally protected the “doctrine of State rights,” and that Congress had the power to “enforce this provision throughout the country and compel its observance.”²⁷⁵ Meanwhile, Senator Morrill saw the two clauses as “equivalent at best,” with the Fourteenth Amendment’s as a means to enforce the Article IV Section 2 clause.²⁷⁶ However, if the two clauses were distinct as they imply, Morrill thought the Fourteenth Amendment’s “privileges and immunities” as “not the full extent of citizenship, or the rights and privileges of citizenship in a particular State, by any means[.]”²⁷⁷

In the end, the threshold interpretational question boils down to this: “Did the ratifiers, as a whole or majority, view personal arms ownership, use, and operation as purely an issue of State sovereignty or

272. 39 CONG. GLOBE, FIRST SESSION 2539 (1866).

273. H.R. Rep. No. 41-22, at 1 (1871).

274. See 41 CONG. GLOBE, THIRD SESSION 4 (1871); 42 CONG. GLOBE, SPECIAL SESSION 87 (1871) (Congressman Storm interpreted it as follows: “The privileges and immunities of citizens of the United States had already been secured by article four, section two, clause one of the Constitution, which provides that ‘the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.’”); 42 CONG. GLOBE, SECOND SESSION 763 (1872) (Mr. Davis stated: “The fourteenth amendment guarantees to every citizen of the United States who may change his residence from one State to another all the privileges and immunities which a citizen of the State, to which he removes may enjoy . . . The prohibition is in very plain language.”).

275. 39 CONG. GLOBE, FIRST SESSION 2961 (1866).

276. 42 CONG. GLOBE, SECOND SESSION 3 (1872).

277. *Id.* at 4.

was this too intended to be protected as a privilege of United States citizenship?” This article does not seek to provide a definitive answer. However, if one takes Bingham’s 1871 speech verbatim, the Privileges or Immunities Clause was only intended to apply the Second Amendment to the States as a means to protect “the right to bear arms for the Union and the Constitution”²⁷⁸—nothing more, nothing less. All other privileges or rights to arms for private purposes would have fell in the category of “positive local law,”²⁷⁹ and would not be affected by the Privileges or Immunities Clause because it “did not change or modify the relations of citizens of the State and notation as they existed under the original Constitution.”²⁸⁰

Bingham’s words still leave us with one more question: “How did the ratifiers understand the Second Amendment as binding the States under the original Constitution?” One way to answer this question is to look to the constitutional writings of Timothy Farrar, whom interpreted the Constitution with this question in mind. The work of Farrar is particularly appropriate because his understanding of the Fourteenth Amendment has been frequently used to support the argument that the Privileges or Immunities Clause applies the Bill of Rights to the States.²⁸¹ More importantly, for the *McDonald* decision, it was one of the two treatises cited by the plurality as expounding the “fundamental nature” of possessing a handgun for personal self-defense.²⁸²

A former law partner of Daniel Webster, judge of the New Hampshire Court of Common Pleas, and president of the New England Historical and Genealogical Society, Farrar was a well-respected legal figure in the nineteenth century.²⁸³ The author of *Manual of the Constitution of the United States of America*,²⁸⁴ Farrar’s treatise was described by Charles Sumner as correcting “false interpretations” of the Constitution and should be “generally accepted now.”²⁸⁵ *The*

278. THE CINCINNATI DAILY GAZETTE, Sept. 15, 1871, at 2, col. 4.

279. 39 CONG. GLOBE, FIRST SESSION 2766 (1866).

280. H.R. Rep. No. 41-22, at 1, (1871).

281. See Aynes, *Ink Blot or Not*, *supra* note 233, at 1321-22; Curtis, *supra* note 224, at 1172 n.345; Kopel, *supra* note 96, at 1470-72; Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 31 (2007).

282. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010).

283. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, *supra* note 230, at 84-85.

284. TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (1867) (1st ed., Boston, Little, Brown & Co. 1867).

285. 9 THE NEW ENGLAND HISTORICAL GENEALOGICAL REGISTER 231 (Henry Fitz-Gilbert Waters ed., 1875).

Philadelphia Inquirer reported that Farrar's treatise was "exceedingly useful . . . at the present time; one that no student of the Constitution, no lawyer and, above all no legislator should be without."²⁸⁶ The *Daily Evening Bulletin* described it as "ably written," "pervaded by a spirit of candor," and that there "was never a time when there was more need of an intelligent study of the great charter of our Republic."²⁸⁷ The *Cincinnati Daily Gazette* thought it "especially timely," "a crushing refutation of State right theories," and a "well nigh exhaustive treatise on Constitutional Law."²⁸⁸

Farrar's *Manual of the Constitution of the United States of America* is of particular significance in our constitutional jurisprudence because it was one of the first treatises to analyze the Fourteenth Amendment contemporaneous with its adoption. It was a work made to be "accessible and useful to the multitudes[.]"²⁸⁹ As *The American Presbyterian Review* reported, Farrar was "Widely known as a sound lawyer" and his treatise was intended for "popular use, and not almost addressed exclusively to the members of" the legal profession.²⁹⁰

Concerning the application of the Fourteenth Amendment's Privileges or Immunities Clause to the States, the pertinent sections of Farrar's manual read as follows:

In respect to the powers of the government, it is of the same general character as the last. It re-affirms some pre-existing power, but adds no new ones . . . No State shall make or enforce any law which shall abridge the privileges or immunities of the United States . . . This will scarcely be claimed by anybody to delegate any thing new to the government, or to prohibit the States from doing any thing which otherwise they might rightfully do . . . Thus, it will appear, by a minute analysis of the fourteenth Amendment, that it contains no augmentation of the powers of the [State or federal] government.²⁹¹

286. THE PHILADELPHIA INQUIRER, Sept. 9, 1867, at 2, col. 2.

287. DAILY EVENING BULLETIN, Oct. 19, 1867, at 1, col. 3.

288. THE CINCINNATI DAILY GAZETTE, Oct. 23, 1867, at 1, col. 3. See also NEW HAMPSHIRE SENTINEL, Apr. 3, 1873, at 1, col. 2 (describing Farrar's treatise as a "valuable work"). For the most detailed review, see 26 NEW ENGLANDER 725-40 (New Haven, CT, October 1867). Of course, not all reviews of Farrar's treatise were positive. See 9 AMERICAN LITERARY GAZETTE AND PUBLISHERS' CIRCULAR 268 (Philadelphia, PA, Sept. 16, 1867) (describing Farrar's treatise as "the anti-state-right doctrine"); 87 CHRISTIAN EXAMINER 99-104 (New York, NY, July 1869) (recommending John Pomeroy's *An Introduction to Constitutional Law in the United States* over Farrar's treatise).

289. 2 THE AMERICAN PRESBYTERIAN REVIEW 459, 467 (Philadelphia, PA, July 1870).

290. *Id.*

291. FARRAR, *supra* note 284, at 401-02, 408.

Regarding the application of the Second Amendment to the States, in light of the Fourteenth Amendment, Farrar's treatise does not give a detailed analysis. In multiple instances he lays the claim that the Second Amendment is a right of the people, which binds the States as well as the federal government.²⁹² However, Farrar gives no indication that the Second Amendment binds the States as to prevent state and municipal governments from regulating the possession, use, and operation of arms for private purposes.²⁹³ It can be assumed that Farrar did not see the Fourteenth Amendment as prohibiting "the States from doing any thing which otherwise they might rightfully do,"²⁹⁴ such as regulating the private possession, use, and operation of arms, but the *Manual of the Constitution of the United States of America* leaves much unanswered.

Perhaps the answer lies with the fact that Farrar's interpretation of the Constitution was in line with John Bingham. Like Bingham, Farrar had always viewed the Bill of Rights as applying to the States.²⁹⁵ In an 1862 article entitled *States Rights*, Farrar disagreed with the holding in *Barron v. Baltimore*, writing:

The first ten amendments are in the nature of a "*Bill of Rights*," and it is a matter of history that they were proposed by some of the State Conventions, recommended by the first Congress, and adopted by the Nation . . . They enunciate certain abstract principles, and recognize certain personal rights, as inherent in every man under the protection of the Government. The first only is an express negation of power in Congress. The other no more deny the power of Congress than of everybody else. They deny the power of everybody, only by implication, because the existence of the power would be inconsistent with the security of the recognized right. They prescribe no duty. This, also is left to implication. Is the duty wholly upon the General Government of the United States? And is it well performed when they abstain from violating the right themselves, though they allow it to be violated by every municipal corporation in the land? The people of the United States claim these rights, and inserted their recognition of them

292. *Id.* at 59, 145, 295, 396, 513.

293. Farrar's second and third editions did not add or take away from his analysis of the Second Amendment. See TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 59, 145, 286, 396, 513, 561 (2d ed., Boston, Little, Brown & Co. 1869); TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 59, 145, 286, 396, 513, 563 (3d ed., Boston, Little, Brown & Co. 1872).

294. FARRAR, *supra* note 284, at 402.

295. See Timothy Farrar, *State Rights*, 21 *NEW ENGLANDER* 695 (Oct. 1862). Naturally, Farrar was not the first constitutional commentator to apply the Bill of Rights to the States. See RAWLE, *supra* note 134, at 114-37.

in their fundamental law, for the purpose of holding their own Government responsible for the protection and enjoyment of them.²⁹⁶

It is here that Farrar provides his most detailed analysis of the Second Amendment, and its application to the States. What stood out to Farrar in particular was the Second Amendment's use of "shall not be infringed." He queried, "May it still be infringed by everybody except Congress, and Congress not bound to protect it?"²⁹⁷ But what Second Amendment right was Farrar referring to? Was it a right to personal self-defense or was it a right to participate in a "well-regulated militia" in defense of the Union?

Purely taking into account Farrar's *Manual of the Constitution of the United States of America*, one could argue either way. One argument would claim that Farrar makes no mention of a "well-regulated militia," and describes the "right to keep and bear arms" as an individual right.²⁹⁸ Thus, the only logical conclusion is that Farrar believed the Second Amendment was applicable to the States as ensuring individuals have a right to "keep and bear arms" against private violence. The counter-argument to this would read that Farrar lists "the right to keep and bear arms" as being protected under the "general powers of the government to provide for the common defence,"²⁹⁹ thus Farrar clearly understood the Second Amendment as applicable to the States in a purely "well-regulated militia" context.

The tipping point may rest with Farrar's 1862 article entitled *State Rights*, for he observed the Second Amendment as being applicable "to the states by [its] terms."³⁰⁰ To be precise, Farrar viewed the Second Amendment's use of "free State" as the implication that bound the "right to keep and bear arms" to the States. He wrote "If a well regulated militia is necessary to a free state, it is certainly as necessary that the right to bear arms should not be infringed by the state itself, as by any body else."³⁰¹ From this statement it can be ascertained that Farrar viewed the Second Amendment in its "well-regulated militia" context rather than just as a "right to keep and bear arms" for any and all purposes as others have asserted.³⁰²

296. Farrar, *supra* note 293, at 711.

297. *Id.* at 712.

298. FARRAR, *supra* note 284, at 59, 145, 295, 396, 513.

299. *Id.* at 286.

300. Farrar, *State Rights*, *supra* note 293, at 712.

301. *Id.*

302. See Kopel, *supra* note 96, at 1471 ("Farrar believed that the Bill of Rights, including the enumerated right of a person to keep and bear arms, was enforceable against the states even without

Again, this article does not seek to answer the historical question as to whether the Reconstruction Congress agreed with John Bingham's 1871 speech and Timothy Farrar as to the application of the Second Amendment to the States. Many historical questions regarding "public understanding" remain unanswered. However, what this article does set forth to illuminate is Justice Stevens' point that accepted historical methodologies can only take us so far in understanding what the Fourteenth Amendment ratifiers, as a whole, intended. Whether this historical analysis would have shifted the outcome of *McDonald* is unclear. However, if one views the primary legal issue in *McDonald* as the right to "keep arms," this historical evidence may have caused the Justices to rethink their judicial approach. Naturally, the legal community can only speculate.

IV. CONCLUSION

There are two important historical aspects that legal commentators, scholars, and historians can take from *McDonald v. City of Chicago*. The first is that the "historical guidepost" standard of review is the proper means to determine the constitutionality of gun regulations. A "historical guidepost" is either a longstanding historical restriction on the "keeping" or "bearing" of arms circa 1791 or a longstanding ideology for regulating or restricting the "keeping" or "bearing" of arms circa 1791. The "historical guidepost" standard of review requires courts to give federal and State governments deference to adopt gun restrictions that fall within traditional and historical areas of regulation as would have been publicly accepted by the founding fathers. This includes restrictions designed to protect the public against injury, and regulations on aliens, hunting, felons and the mentally ill, the carrying of arms in public, concealed weapons, limiting the types of arms individuals may possess, the transportation of arms, and the discharging of arms in public.

With the exception of regulations designed to prevent "public injury," regulations that fall within these traditional restraints should be viewed under a rationale basis standard of review. To put it another way, traditional regulations circa 1791 should be analyzed under the lowest standard of scrutiny unless the challenging party can show that the founding fathers would have thought such regulations were not

the Fourteenth Amendment . . . the right to arms was treated as one of the important individual rights guaranteed by the Constitution.").

constitutionally permissible. It is when the challenging party succeeds that the courts should move to step two.

It must be emphasized that the “historical guidepost” standard of review does not require directly linking the law in question to a 1791 restriction in order to qualify as “publicly accepted.” The question that the courts have to ask is whether the founder’s understanding of the right to arms would have accepted it, for the historical method does not have to be the “*perfect means* . . . but whether it is the *best means available* in an imperfect world.”³⁰³ In other words, the historical issue is whether under “*any* historical methodology, under *any* plausible standard of proof, would lead to the same conclusion.”³⁰⁴

The second important historical aspect that commentators, scholars, and historians can take from *McDonald* is that the history of the “right to keep and bear arms” was not as comprehensively litigated as many thought. The State Second Amendment analogues circa 1789,³⁰⁵ 1803,³⁰⁶ 1820,³⁰⁷ and 1868³⁰⁸ all reveal the right to “keep arms” was not as prominent in the States as the *Heller* majority and *McDonald* plurality has led the legal community to believe. Furthermore, assuming the Privileges or Immunities Clause applied the Bill of Rights to the States, the historical record is unclear as to which interpretation of the Second Amendment its ratifiers as a whole were seeking to apply. Was it an amendment intended to protect the right to bear arms for “public defence,” “private defence,” or both?

In 1874, *The Central Law Journal* published a series of articles set out to answer this question in the constraints of judicial review. Entitled *The Right to Keep and Bear Arms for Private and Public Defence*,³⁰⁹ the articles comprise the first law review article on the Second Amendment. Written anonymously, it sought to answer whether the Second Amendment bound the States as well as the federal government. In particular, the article examined the varying court opinions as to what rights the Second Amendment and corresponding State analogues afforded. The conclusion that *The Right to Keep and Bear Arms for*

303. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058 (2010) (emphasis in original).

304. *Id.* at 3058.

305. *See supra* Part III.A.

306. *See supra* Part III.A.; *see supra* Chart I.

307. *See supra* note 190.

308. *See supra* Part III.A.; *see supra* Chart II.

309. *See The Right to Keep and Bear Arms for Private and Public Defence*, 1 CENT. L. J. 259 (May 28, 1874); *The Right to Keep and Bear Arms for Private and Public Defence*, 1 CENT. L. J. 273 (June 4, 1874); *The Right to Keep and Bear Arms for Private and Public Defence*, 1 CENT. L. J. 295 (June 18, 1874).

Private and Public Defence reached was the opposite of the *McDonald* plurality:

[T]here would seem to remain no doubt that if the question [of the Second Amendment applying to the States] should ever arise in [the Supreme Court] it would be held that the second amendment of the federal constitution is restrictive upon the general government merely, and not upon the states, and that every state has the power to regulate the bearing of arms in such manner as it sees fit, or to restrain it altogether.³¹⁰

In coming to this determination, the authors were following Supreme Court precedent circa 1874, holding that the Bill of Rights did not apply to the States.³¹¹ However, what is significant is that the authors disagreed with this precedent in the constraints of the Second Amendment. Much like the way Timothy Farrar viewed the use of “free State” as the implication that bound the Second Amendment to the States in its “well-regulated militia” context,³¹² the anonymous authors of *The Right to Keep and Bear Arms for Private and Public Defence* took a similar stance:

So in the Arkansas case, *The State v. Buzzard*, 4 Ark. 18,³¹³ all the judges appear to have understood this amendment as applicable to the states; and Judge Dickinson supposes it to pertain to the power possessed by the general government of organizing, arming, and disciplining the militia. He says this provision of the federal constitution “is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force.” This view of Judge Dickinson contains the *only plausible reason* we have met with for supposing that this amendment is binding on the states.³¹⁴

This begets the question: “Why is this first law review on the Second Amendment significant?” The answer is that what constitutes “public understanding” of the Second Amendment circa 1868 is not as

310. *The Right to Keep and Bear Arms*, *supra* note 309, at 296.

311. *Id.* at 295 (citing *Barron v. City of Baltimore*, 32 U.S. 243 (1833); *Fox v. Ohio*, 46 U.S. 410 (1847); *Smith v. Maryland*, 59 U.S. 71 (1855); *Twitchell v. Commonwealth*, 74 U.S. 321 (1869)).

312. Farrar, *supra* note 293, at 711.

313. *State v. Buzzard*, 4 Ark. 18 (Ark. 1842). *See also* *English v. State*, 35 Tex. 473, 475 (18) (“[T]his one seems to be of a nature to bind both the State and National legislatures . . . the right to ‘bear’ arms refers merely to the military way of using them, not to their use in bravado and affray.”).

314. *The Right to Keep and Bear Arms*, *supra* note 309, at 295 (emphasis added).

clear and convincing as the *Heller* majority and *McDonald* plurality would have it. The fact that some members of Congress viewed the Second Amendment as securing a right against private violence does not dictate how Congress or “public understanding” as a whole understood it. The Amendment’s mention of a “well-regulated militia” and a “free State” was often construed as protecting purely a militia right as the 1874 anonymous law review makes clear.

Of course, the matter of Second Amendment incorporation has been settled in *McDonald*, thus leaving what truly constituted 1868 “public understanding” of the Second Amendment moot to much of the legal community. This fact, however, should not disparage historians and legal scholars from definitively finding the consensus of the “right to keep and bear arms” among the Fourteenth Amendment’s ratifiers. While historians like Michael Kent Curtis and Robert J. Cottrol, legal scholars such as Richard L. Aynes and Bryan Wildenthal, and Individual Right Scholars such as Don B. Kates and Stephen P. Halbrook have provided much to this debate, there are still many questions left unanswered to fully appreciate what was the “public understanding” of the right circa 1868.