THE OBSOLETE SECOND AMENDMENT:
HOW ADVANCES IN ARMS TECHNOLOGY
HAVE MADE THE PREFATORY CLAUSE
INCOMPATIBLE WITH PUBLIC POLICY

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[M]odern developments have limited the degree of fit between the 
 prefatory clause and the protected right . . . .
Arma virumque cano . . . .

I. INTRODUCTION

What type of weapons does the Second Amendment protect? If the 
Second Amendment arms the people to defend the freedom of the states, then 
may the people arm themselves with whatever weapons would be necessary to 
defeat oppressors? Or may legislators set an upper limit to ban individuals 
from owning unreasonably dangerous weapons, even if the lack of such 
weapons would render the populace unable to defeat those hypothetical 
oppressors?

In June 2008, the United States Supreme Court handed down the highly 
controversial

D.C. v. Heller, the Court’s first decision interpreting the Second 
Amendment in almost seventy years. Heller gained great attention for its

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Army. I would like to sincerely thank Professors Andrew Morriss and Lawrence Solum for helping me so 
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Also Shane.

the Second Amendment is no longer compatible with modern weapons technology).

man I sing.”).

27, 2008, at A13 (describing Heller as “historic in its implications and exemplary in its reasoning”); Nicholas 
Johnson, Taking This Right Seriously, NAT’L J., Aug. 6, 2008, at 26 (strongly supporting the Heller 
Heller as “questionable in both method and result, and . . . evidence that the Supreme Court, in deciding 
constitutional cases, exercises a freewheeling discretion strongly flavored with ideology.”); Linda Singer, 
Court Missired on Safety Case for Guns, LEGAL TIMES, June 30, 2008, at 1 (“[W]e should be shocked by the 
Heller majority’s willingness to distort the text and history of the Second Amendment and to ignore the 
considered judgment of the District’s local legislature.”).


adoption of the individual rights view of the Second Amendment\(^6\) and its potential impact on the states.\(^7\) But perhaps the most intriguing part of the opinion was its dismissal of the Amendment’s prefatory clause (“[a] well-regulated militia, being necessary to the security of a free state . . .”)\(^8\)—a dismissal necessitated by advances in arms technology.

Author by noted originalist Antonin Scalia,\(^9\) the opinion took great pains to emphasize its textualist underpinnings and to stress the importance of the original public meaning of the operative clause\(^10\) (‘‘. . . the right of the people to keep and bear Arms shall not be infringed.’’).\(^11\) The prefatory clause, however, was virtually annulled—reduced to the role of resolving nonexistent, semantic ambiguities in the operative clause.\(^12\) The opinion itself even stipulated that its construction frustrated the purpose of the prefatory clause.\(^13\)

If the Court’s opinion was inconsistent, then that inconsistency was born out of necessity. The prefatory clause was drafted with the purpose of arming the populace of its time to fulfill a military role.\(^14\) To fulfill that military role, a populace requires contemporary military weapons.\(^15\) At the time of the

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of Columbia v. Heller was the first U.S. Supreme Court case in nearly 70 years to consider the validity of firearms regulation under the Second Amendment.”).

6. See Linda Greenhouse, Justices, Ruling 5-4, Endorse Personal Right to Own, N.Y. TIMES, June 27, 2008, at A1 (“The Supreme court on Thursday embraced the long-disputed view that the Second Amendment protects an individual right to own a gun for personal use . . .’’); Singer, supra note 4 (“Few were surprised by the Supreme Court’s decision to overturn the District’s 30-year-old ban on handguns and its holding that the Second Amendment guarantees an individual’s right to bear arms.”).

7. Federal circuits dispute whether Heller impacts state governments. Compare Nat’l Rifle Ass’n of Am. v. Chicago, 567 F.3d 856 (7th Cir. 2009) (declining to usurp the U.S. Supreme Court’s authority to apply the Second Amendment to the states through the Fourteenth Amendment) and Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2009), with Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) (applying the Second Amendment to the states through the Fourteenth Amendment, but finding that local governments could still exclude weapons from public buildings and parks). As of publication, Nat’l Rifle Ass’n of Am. v. Chicago been argued before the United States Supreme Court but has not yet been decided. McDonald v. City of Chicago, Ill., 130 S.Ct. 48 (Sep. 30, 2009) certiorari granted.

8. U.S. CONST. amend. II.


11. U.S. CONST. amend. II.

12. Heller, 128 S. Ct. at 2789 (“But apart from [clarifying the operative clause], a prefatory clause does not limit or expand the scope of the operative clause.”); see also Lawrence B. Solum, District of Columbia v. Heller and Originalism, 103 NW. U. L. REV. 923, 955 (2009) (discussing how Heller limits the prefatory clause’s role to that of resolving ambiguities in the operative clause).

13. See Heller, 128 S. Ct. at 2817 (explaining that if “weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause” but that “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right”).


15. See Heller, 128 S. Ct. at 2817 (“It may be well true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks.”); See also Richard A. Allen, What Arms? A Textualist’s View of the Second Amendment, 18 GEO. MASON U. CIV. RTS.
framing, firearms were rudimentary enough that there was little danger of a lone madman or terrorist wreaking massive havoc with them. But times have changed and weapons technology has advanced, while jurisprudence has lolled behind. Meanwhile, influential opinions interpreting the Second Amendment in light of advances in arms technology have been virtually non-existent.

Today almost all would agree that modern policy requires restrictions on military-grade weapons like machineguns. But the militaristic prefatory clause remains, insisting that the people be armed for the task of defending the states. The Court’s outright dismissal of the prefatory clause in *Heller* is merely the latest in a series of flawed constructions by the courts and scholars to reconcile the prefatory clause with necessary restrictions on modern arms. Although the authors of these constructions did not lack genius, all have fallen short in some way because they have been trying to square a circle—protecting the rights embodied in the Second Amendment while eliminating the dangers they cause.

Jurisprudence on the Second Amendment has utterly failed to keep pace with advances in weapons technology, and as a result, America’s highest law on arms possession has become completely incompatible with the statutes necessary to regulate those arms. Having outlived its purpose, the prefatory clause has become obsolete and should be excised. As radical as an amendment to the Bill of Rights may sound, the Court’s attempt to resolve the situation by ignoring the prefatory clause is no more respectful, and violates the precedent that no part of the Constitution is to be treated as extraneous.

Part II of this Note will explore the background of the limited jurisprudence on the Second Amendment in light of advances in arms technology. Part III will examine the militaristic prefatory clause, the *Heller* Court’s justification for eviscerating it, and the various failed constructions that

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L.J. 191, 205–8 (2008) (pointing out that the weapons most useful to the militia would be those that are the most dangerous and destructive); See also Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAML. L. REV. 69, 95 (1986) (“If one takes seriously the contention that private arms should stand as a credible threat in case of federal tyranny, then it follows that the people must be allowed to have those arms necessary to offset the considerable military capability of the federal government. Today this would include such things as machine-guns, flamethrowers, light artillery, and much more.”); Contra Don Kates, *Of Genocide and Disarmament*, 86 J. CRIM. L. & CRIMINOLOGY 247, 250–56 (1995) (arguing that a population armed only with limited small arms presents a greater obstacle to a tyrannical occupation than a completely disarmed society, but failing to address the fact that such a society would be unlikely to successfully defend its borders with those weapons alone).


17. *See infra* notes 28–63 and accompanying text.

18. *See, e.g.*, Allen, *supra* note 15, at 203–04 (discussing the consensus on the view that military weapons should not be widely available for private ownership); Levinson, *supra* note 14, at 654–55 (characterizing arguments in favor of legalizing such weapons as “extreme”); Beschle, *supra* note 15, at 95 (“No one would seriously contend that the federal government cannot regulate [machineguns, flamethrowers, light artillery, etc.]”).

19. *See infra* Part III.C (discussing different approaches on whether some arms should be permitted and others banned under the Second Amendment).


21. *See* Marbury v. Madison, 1 Cranch 137, 174, 2 L.Ed. 60 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect.”).
have been posited to resolve the prefatory clause with public policy. Finally, part IV will suggest that the conflict between the prefatory clause and the dictates of sound public policy require the most radical of solutions: an amendment to the Second Amendment.

II. BACKGROUND

A. Weapons Advances and the Collective Right to Bear Arms

When the Second Amendment was drafted, no distinction existed between arms suitable for personal ownership and those reserved for military use; the same muskets and rifles used by the militias were also privately owned. For the militia to achieve its purpose in defending the state, it was essential that the citizenry arm themselves with weapons sufficient to fight off a contemporary military.

Today, allowing private ownership of military weapons would be disastrous, but the most advanced firearms available at the time of the framing were perfectly appropriate for individual ownership.

The principal shoulder weapon of the Revolutionary War was the smooth bore flintlock musket. Most of the battles were fought by two or three lines of men armed with this musket, and standing shoulder to shoulder. The men could load and fire three of four times a minute, and could hope to hit the enemy with accuracy up to about fifty feet. In a typical engagement, each side exchanged two, or at most three, volleys before deciding the issue in hand-to-hand bayonet fighting. (By way of comparison, the M240B machinegun currently favored by U.S. Army Infantry units is capable of firing 200 armor-piercing 7.62mm rounds per minute at a range of 3,725 meters). With such crude firearms available, there was no need for the Framers to create a military use/personal use distinction. As Jack Rakove put it, “anyone wanting either to murder his family or protect his home in the eighteenth century would have been better advised (and much more likely) to grab an axe or knife than to load, prime, and discharge a firearm.” Since that time, arms technology has made significant technological leaps, but the sparse jurisprudence on the Second Amendment has largely failed to keep pace.

The century following the ratification of the Constitution saw a myriad of advances in weapons technology: the percussion cap, the cylindro-conoidal

22. United States v. Miller, 307 U.S. 174, 179 (1939) (discussing how the militias armed themselves with privately-owned weapons “of the kind in common use at the time.”).
23. Id. at 178 (discussing how the Second Amendment must be interpreted with the purpose of “render[ing] possible the effectiveness” of the militias).
27. Developed in 1807 by the Reverence Alexander Forsyth, the percussion cap replaced the more
bullet,\textsuperscript{28} and the rotating cylinder\textsuperscript{29} to name a few. But it was not until \textit{United States v. Cruikshank}\textsuperscript{30} in 1876 that the U.S. Supreme Court heard its first significant case on the Second Amendment—nearly 90 years after the ratification of the Constitution.

\textit{Cruikshank} was one of the first U.S. Supreme Court cases after the passage of the Fourteenth Amendment\textsuperscript{31} to apply the Bill of Rights to the states. It was an appeal by members of a white mob charged under the Enforcement Act of 1870 with conspiring to violate the Constitutional rights of several African Americans.\textsuperscript{32} One of the rights that the defendants were charged with violating was the right to “bear[] arms for a lawful purpose.”\textsuperscript{33} The Court denied that any such right existed and declared that the Second Amendment was only a restriction on actions by Congress.\textsuperscript{34} Although the \textit{Cruikshank} decision defined the scope of the Second Amendment,\textsuperscript{35} it did not interpret of the meaning of the text. The Court would not delve into the interpretation until it decided \textit{U.S. v. Miller}\textsuperscript{36} in 1939—after the advent of bolt-action, clip-fed magazine rifles,\textsuperscript{37} the modern machinegun,\textsuperscript{38} and the tank.\textsuperscript{39}

\textit{Miller}, the Supreme Court’s only extensive analysis prior to \textit{Heller} into the meaning of the Second Amendment, almost seemed to suggest that military weapons were protected to the exclusion of self-defense weapons.\textsuperscript{40} \textit{Miller} was a 1939 appeal by defendants Jack Miller and Frank Layton, who had been charged with transporting a sawed-off shotgun across state lines and with failure to have a written order for the same, both of which constituted violations of the National Firearms Act.\textsuperscript{41} The Court dismissed the defendants’ challenge that the Act violated the Second Amendment, writing that the short-

\begin{footnotesize}
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\item [\textsuperscript{28}] Introduced in the 1850s, the cylindro-conoidal bullet expanded when fired, allowing the firer to have the accuracy and range of a rifle without the difficulty in reloading that had previously plagued rifle-users. \textsc{Albaugh supra} note 27, at 191.
\item [\textsuperscript{29}] Introduced in the 1820s, the revolving cylinder allowed for multi-shot firearms, although it was not until Samuel Colt’s revolver design in 1836 that the revolver became truly widespread. \textsc{Albaugh supra} note 27, at 87–90
\item [\textsuperscript{30}] United States v. Cruikshank, 92 U.S. 542 (1876).
\item [\textsuperscript{31}] U.S. CONST. amend. XIV.
\item [\textsuperscript{32}] \textsc{See Leanna Keith, The Colfax Massacre: The Untold Story of Black Power, White Terror and the Death of Reconstruction} (Oxford University Press 2008) (describing the subsequently named “Colfax Massacre”).
\item [\textsuperscript{33}] \textit{Cruikshank}, 92 U.S. at 553.
\item [\textsuperscript{34}] \textit{Id.}
\item [\textsuperscript{35}] \textit{Cruikshank} was later reaffirmed by the Court. \textsc{See Presser v. Illinois, 116 U.S. 252, 264–65 (1886); Miller v. Texas, 153 U.S. 535, 538 (1894) (reaffirming \textit{Cruikshank}).}
\item [\textsuperscript{36}] United States v. Miller, 307 U.S. 174 (1939).
\item [\textsuperscript{37}] \textsc{See Dupuy, supra} note 27, at 214 (discussing weapons introduced in WWI).
\item [\textsuperscript{38}] \textsc{See Kenneth Macksey, Technology in War 40–44, 85–86 (Prentice Hall Press, 1986) (discussing the impact of the modern machinegun).}
\item [\textsuperscript{39}] \textsc{See id. at 91–100 (discussing the advent of the tank).}
\item [\textsuperscript{40}] \textit{Miller} has been criticized for the fact that it was submitted solely on the government’s brief, meaning that the Court neither read a brief from Miller’s attorney, nor heard him in oral arguments. Brian L. Frye, \textit{The Peculiar Story} of United States v. Miller, 3 N. Y. U. J.L. & Liberty 48, 65–68 (2008). The case was nonetheless the controlling pre-\textit{Heller} precedent on the Second Amendment.
\item [\textsuperscript{41}] 26 U.S.C. § 1132c-d (1934).
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barreled shotgun in question was not protected.

In the absence of any evidence tending to show that possession or use of a [short-barreled shotgun] . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary equipment that its use could contribute to the common defense.\(^{42}\)

By excluding the weapon in question because it was not an ordinary piece of military equipment, the Miller opinion seemed to suggest that possession of standard-issue military weapons would receive greater protection under the Second Amendment than possession of other weapons.\(^{43}\)

In reaction to Miller, the courts adopted what became known as the collective right theory of the Second Amendment.\(^{44}\) The collective right theory asserts that the Second Amendment merely protects the right of the states to maintain militias, and that an individual citizen has no personal right to bear arms.\(^{45}\) Because the individual has no right to bear weapons, collective right advocates see no Constitutional prohibition of laws that regulate private ownership of weapons.\(^{46}\)

**B. The Individual Right to Bear Arms**

For the forty years following Miller, the federal courts and legal scholars seemed in agreement that the decision had settled the dispute, and that the Second Amendment was essentially a dead letter.\(^{47}\) However, in the 1980s,

\(^{42}\) Miller, 307 U.S. at 178. Whether or not sawed-off shotguns have been used by the militias, critics of Miller have pointed out that the U.S. Army has made use of shotguns. Nelson Lund, The Second Amendment, Political Liberty, and the Right to Self-Preservation, 39 ALA. L. REV. 103, 109 (1987); Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942) cert. denied, 319 U.S. 770 (1943).

\(^{43}\) See Levinson, supra note 14, at 654–55 (“Ironically, Miller can be read to support some of the most extreme anti-gun control arguments, e.g. that the individual citizen has a right to keep and bear bazookas, rocket launchers, and other armaments that are clearly relevant to modern warfare, including, or course, assault weapons.”). Contra District of Columbia v. Heller, 128 S. Ct. 2783, 2815–16 (2008) (“We therefore read Miller to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996) (“The Miller court assigned no special importance to the character of the weapons itself, but instead demanded a reasonable relationship between its ‘possession or use’ and militia-related activity. [Appellant] has not demonstrated that his possession of the machineguns had any connection with militia-related activity.”).

\(^{44}\) See Adam Small, Reviving “Law Office History”: How Academic and Historical Sources Influence Second Amendment Jurisprudence, 45 AM. CRIM. L. REV. 1213, 1217–19 (2008) (explaining how courts have used Miller to embrace the collective rights model).


\(^{46}\) Id.

\(^{47}\) See, e.g., Quilici v. Village of Morton Grove 695 F.2d 261, 270 (7th Cir. 1982), cert. denied, 695 F.2d 261 (“The right to bear arms is inextricably connected to the preservation of a militia . . . [and] extends only to those arms which are necessary to maintain a well-regulated militia.”); United States v. Oakes, 564 F.2d 384 (6th Cir. 1977), cert. denied, 435 U.S. 926 (1977) United States v. Warin, 530 F.2d 103 (6th Cir. 1976), cert. denied, 426 U.S. 948 (1976); Cody v. United States, 460 F.2d 34 (8th Cir. 1972), cert. denied, 409 U.S. 1010 (1972); Stevens v. United States, 440 F.2d 144 (6th Cir. 1971); see also Jennifer Ray, Department
influential scholarship espousing an individual right theory of the Second Amendment began to appear.\footnote{48}

Individual right theorists argued that the Constitution does protect the individual’s right to own weapons, in the same way that it protects the individual’s right to freedom of speech or freedom from unreasonable searches and seizures.\footnote{49} Individual rights proponents thus believe that the Second Amendment provides far more protection from gun restrictions.\footnote{50}

Perhaps the most seminal individual right essay was Don Kates’s \textit{Handgun Prohibition and the Original Meaning of the Second Amendment},\footnote{51} which sharply criticized the collective right interpretation. Following Kates’s article, the individual right point of view continued to gain ground with publications in support by influential scholars such as Sanford Levinson in his 1989 essay, \textit{The Embarrassing Second Amendment},\footnote{52} and Laurence Tribe with his acceptance of the individual rights view in his 2000 constitutional law treatise.\footnote{53}

The Fifth Circuit Court of Appeals became the first federal appellate court to adopt the individual right model in 2001 when it handed down \textit{United States v. Emerson}.\footnote{54} The case involved an appeal from Timothy Joe Emerson, who had been charged with possession of a handgun in violation of a federal law\footnote{55} which criminalized gun possession for individuals under a restraining order. The Fifth Circuit ultimately found against Emerson, ruling that the Second Amendment permitted the government to subject the right to bear arms to “limited, narrowly tailored exceptions or restrictions for particular cases that

\footnote{48} See Small, supra note 44, at 1213–14 (discussing the evolution of the individual rights theory of the Second Amendment); William G. Merkel, The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism, 13 Lewis & Clark L. Rev. 349, 350 (2009) (noting that for many years the Miller interpretation prevailed but that a private right to arms was gaining proponents in the 1980’s and thereafter).

\footnote{49} See Dupree, supra note 45, at 429 (“[T]he people’ refers to individual rights in the First, Second, Fourth, Ninth, and Tenth amendments to the United States Constitution)."

\footnote{50} See id. at 427 (comparing the interpretations of the term “the people” as used in the First, Second, Fourth, Ninth, and Tenth amendments to the United States Constitution).


\footnote{52} Levinson, supra note 14.


\footnote{54} See Ray, supra note 47, at 111 (“[T]he Fifth Circuit became the first federal appellate court to interpret the Second Amendment as granting an individual right to bear arms.” (citing United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001))).

\footnote{55} 18 U.S.C. § 922(g)(8) (1994) (“It shall be unlawful for any person . . . who is subject to a court order that . . . by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).
are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.”

But despite the ultimate judgment, the Fifth Circuit’s analysis of the Second Amendment wholeheartedly endorsed the individual right theory. The court acknowledged the large body of cases standing in opposition to the individual right model, but boldly declared that “all or almost all of these opinions [were decided] on the erroneous assumption that Miller resolved that issue or without sufficient articulated examination of the history and text of the Second Amendment.”

Although the court decided against Emerson, the opinion represented federal judicial endorsement of the individual right model and heralded an awakening for Second Amendment issues that had lain dormant since Miller.

Shortly after Emerson was handed down, United States Attorney General John Ashcroft distributed a memo in support of the decision to all United States Attorneys. “In my view, the Emerson opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment.” This support of the individual right view represented a reversal of previous Department of Justice (“DOJ”) policy. The reversal also created an awkward situation for federal prosecutors pursuing gun-related charges, given that they were required to argue in favor of upholding federal gun regulations while promoting a view of the Second Amendment which would suggest striking them down. Nonetheless, the DOJ reaffirmed its position in 2004 when the Office of Legal Counsel issued an opinion reaffirming the individual right to bear arms.

56. United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001).
57. Id.
58. Id. at 227.
59. Cf. Silveira v. Lockyer, 312 F.3d 1052, 1065-66 (9th Cir. 2002) (“In the view of the Emerson court, the Supreme Court’s opinion in Miller adopted the government’s second argument, and not its first, which is not an unreasonable conclusion. That conclusion does not, however, lead to the result the Fifth Circuit then reaches. In our view, the government’s second argument supports either the collective rights view or the limited individual rights view, but not the traditional individual rights doctrine that the Fifth Circuit adopts. Moreover, in an attempt to reconcile its position with Miller, the Fifth Circuit modifies that doctrine by asserting that certain undefined types of arms are excluded from the amendment’s coverage. Miller suggests that the arms protected by the amendment, if any, are those related to militia service, but Emerson strays far from that view. While it is unclear precisely what types of arms the Fifth Circuit would deem included or excluded, Emerson’s conclusion that the Second Amendment protects private gun ownership so long as the weapons have ‘legitimate use in the hands of private individuals,’ represents a far different approach from that stated in Miller. In our view, the Fifth Circuit’s decision is incompatible with the Supreme Court ruling.”) (citations omitted).
61. Id.
62. See Ray, supra note 47, at 105 (“Soon after Emerson was decided, Attorney General John Ashcroft, ignoring other federal court precedent and prior Department of Justice policy, officially switched the Department of Justice’s stance on the Second Amendment, agreeing with the Fifth Circuit that the Second Amendment more broadly protects the rights of individuals.”).
63. See id. (“Government lawyers have been put in a conflicted position since, when prosecuting a conviction under a gun law, they have to essentially argue against themselves, promoting the individual rights view of the Justice Department, while at the same time arguing to uphold federal gun laws.”).
64. Memorandum from the Office of Legal Counsel of the Department of Justice to the Attorney General, Whether the Second Amendment Secures an Individual Right (Aug. 24, 2004), available at
C. District of Columbia v. Heller

Sensing opportunity, attorneys with the Institute for Justice (a libertarian public interest firm) prepared to try a test case: Parker v. District of Columbia.\(^{65}\) Washington, D.C. was chosen because it was one of the few circuits that had not yet interpreted the Second Amendment.\(^{66}\) The case was dismissed by the district court and subsequently went onto appeal before the D.C. Circuit.\(^{67}\)

Although the D.C. Circuit found that five of the appellants lacked standing, the Court ruled in favor of Dick Heller, a security guard who had attempted to register a handgun and had been denied.\(^{58}\) With this ruling, the D.C. Circuit became the first federal appellate court in American history to invalidate a firearm regulation for being in violation of the Second Amendment.\(^{69}\) The opinion firmly supported the individual right theory and declared that handguns were protected by the Second Amendment because they were a “lineal descendant” of founding-era weapons.\(^{70}\)

Judge Henderson dissented from Parker, stating her belief that the District of Columbia is excluded from the Second Amendment because the militia is “necessary to the security of a free State,”\(^{71}\) and as a non-state, the District of Columbia is unaffected by the dictates of the Second Amendment.\(^{72}\) Such a contention was essentially a modified form of the collective right theory. Like collective right theorists, Judge Henderson denied that the Second Amendment grants rights to all Americans, but whereas collective right advocates assigned rights to the state militias, Judge Henderson assigned it to the collection of citizens of the various states, leaving out Americans with no state residency.

After the District of Columbia appealed the decision, the U.S. Supreme Court granted certiori, at which time the retitled D.C. v. Heller set a new record for amicus briefs at 68.\(^{73}\) Justice Scalia’s majority opinion omitted any reference to the D.C. Circuit’s “lineal descendant” construction.\(^{74}\) Instead, the Court focused on the original public meaning of the Amendment—\(\text{\textit{i.e.}}\) what the text would have meant to the public at large at the time of the framing.\(^{75}\) Under this approach, the operative clause (“the right of the people to keep and bear arms, shall not be infringed”) became the focus of the Court’s analysis, and the prefatory clause, (“A well-regulated militia, being necessary to the

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\(^{65}\) Parker v. District of Columbia, 478 F.3d 370, 401 (D.C. Cir. 2007).


\(^{67}\) Id.

\(^{68}\) Id.

\(^{69}\) See Small, supra note 44, at 1216.

\(^{70}\) Parker, 478 F.3d, at 398.

\(^{71}\) U.S. CONST. amend. II (emphasis added).

\(^{72}\) Parker, 478 F.3d, at 402–04 (Henderson, J., dissenting).

\(^{73}\) See Neily, supra note 66, at 143.


\(^{75}\) Solum, supra note 12, at 933–39.
security of a free state . . .”) was relegated to the meager role of clarifying semantic ambiguities in the operative clause. 76 Because the Court saw no semantic ambiguities in the text, the analysis paid little heed to the prefatory clause, concentrating almost exclusively on the operative. 77

Free from the moorings of the prefatory clause, the opinion turned to what was required by the proscription, “the right of the people to keep and bear arms shall not be infringed.” 78 The Court dismissed the notion that the phrase “keep and bear arms” had a purely military context, instead concluding that the phrase also referred to possession of weapons for self-defense. 79 The Court then determined that the right protected was not absolute, but subject to reasonable restrictions. 80 Therefore, the Court deemed restrictions on certain types of weapons acceptable so long as the state does not trample so far upon the right as to constitute an infringement. 81

Having settled the question of interpretation, the Court turned to forming a construction as to what would constitute an infringement. 82 The Court did not draw a bright line as to what would constitute an infringement, 83 but concluded that a ban on handguns would certainly do so, given that “the American people have considered the handgun to be the quintessential self-defense weapon.” 84 Essentially, the Court seemed to imply that infringements would largely be judged on popularity.

The Court’s interpretation was consistent with Justice Scalia’s original public meaning philosophy, but the construction rather deliberately ignored the prefatory clause. 85 That is, the Court based its interpretation on what the

76. Id. at 955 (quoting U.S. CONST. amend. II).
77. Id. quoting Heller, 128 S. Ct. at 2789).
78. Id. (quoting Heller, 128 S. Ct. at 2789 (quoting (U.S. CONST. amend. II)).
79. Heller, 128 S. Ct. at 2818. “The phrase ‘keep arms’ was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to ‘keep Arms’ as an individual right unconnected with militia service. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to ‘keep arms in their houses.’ 4 Commentaries on the Laws of England 55 (1769) (hereinafter Blackstone); see also 1 W. & M., c. 15, § 4, in 3 Eng. Stat. at Large 422 (1689) (‘[N]o Papist . . . shall or may have or keep in his House . . . any Arms . . .’); 1 Hawkins, Treatise on the Pleas of the Crown 26 (1771) (similar).” Id.
80. See Heller, 128 S. Ct. at 2816–17 (describing how the “right secured by the Second Amendment is not unlimited” and it does not violate the amendment to ban “felons and mentally ill” from possessing firearms).
81. See id. at 2822 (noting that the decision does not alter prior decisions that the Amendment permits states to issue laws preventing the possession of firearms from “sensitive areas such as schools, or government buildings . . .”).
82. The Court did not technically adopt a construction, intimating that it would do so another day. See id. at 2821. But the ruling and dicta of Heller suggest that such a construction would have to protect the right to bear “popular” weapons such as handguns (see id. at 2818), while prohibiting “dangerous” weapons such as tanks (see id. at 2817).
83. See de Leeuw and Ho, supra note 5 (“Despite noting that ‘dangerous and unusual weapons,’ such as ‘M-16 rifles and the like’ may be banned, the court did not say what ‘and the like‘ meant and gave no guidelines as to which weapons are so dangerous that they fall outside of the amendment’s scope.”) (citing Heller, 128 S. Ct. at 2817).
84. Heller, 128 S. Ct. at 2818.
85. Ironically, this disregard for the prefatory clause stands in stark contrast to the methods of Professor Levinson, whose work was so instrumental in reviving the debate on the Second Amendment. See Levinson, supra note 14, at 644 (“It would be impossible to make sense of the Constitution if we did not engage in the ascription of purpose.”).
average citizen would have understood the text to mean, but crafted a construction that was completely inconsistent with the understanding such a citizen would have had of the prefatory clause. The Court can be forgiven for this contradiction, as consistency would have required the Court to adhere to the militaristic dictates of the prefatory clause, leading to a calamitous repeal of restrictions on the most dangerous weapons. Nonetheless, the inability of the U.S. Supreme Court to craft a practicable construction of the Second Amendment that is consistent with the prefatory clause should be a red flag that the clause is no longer applicable to the modern world.

III. ANALYSIS

While there is still a great deal of controversy on the point, this Note presumes that the Heller Court was correct in its adoption of the individual right theory and focus on the Court’s construction. To wit: if Americans have an individual right to keep and bear arms, to which arms do they have such a right? To answer that question, this section will examine the military purpose of the prefatory clause, the Heller Court’s excision of the clause, and several alternative constructions that have been used or proposed to resolve the prefatory clause with public policy.

A. The Prefatory Clause

The Court needed to curtail the impact of the prefatory clause because the clause would have prevented the exclusion of more militaristic weapons from the protection that had been rediscovered for handguns. At the time the Bill of Rights was drafted, the Framers had no need to draw a distinction between military arms and self-defense arms, so as the Framers and the public understood it, the right to bear arms would have been an omnibus inclusion of all arms. As the Court wrote, the militias were armed with the weapons “commonly possessed at the time,” therefore there was no need or intent to ban military weapons. On the contrary, the language of the prefatory clause demonstrates an expectation that the weapons protected would have military applications.

Today, public policy requires a distinction between weapons for personal

86. See supra text accompanying note 3.
87. But see Adam Liptak, Ruling on Guns Elicits Rebuke From the Right. N.Y. TIMES, Oct. 21, 2008, http://www.nytimes.com/2008/10/21/washington/21guns.html (quoting Chief Justice Warren E. Burger referring to the individual rights theory as “one of the greatest pieces of fraud—I repeat the word ‘fraud’—on the American public by special interest groups that I have ever seen.”).
88. In his dissent to Staples v. United States, 511 U.S. 600 (1994), Justice Stevens addressed this distinction, albeit not in a Second Amendment context. The Staples majority had declined to apply the “public welfare doctrine” (which imposes a form of strict criminal liability to cases where public health, safety, or welfare are threatened, thus giving the defendant notice that such conduct is likely to be heavily regulated) to unlawful possession of automatic weapons under the National Firearm Act, fearing that doing so could chill the innocent conduct of gun ownership. Id. at 606–12. In his dissent, Justice Stevens argued that the AR-15 possessed by the defendant was far more dangerous than the type of guns common amongst Americans and rejected lumping such weapons together into a single category. Id. at 624.
89. Heller, 128 S. Ct. at 2818 (quoting United States v. Miller, 307 U.S. 174, 178 (1939)).
use and military weapons, lest a madman arm himself with a machinegun. But such a danger would not have been foreseen given the weapons technology at the time of the Framers. As Jack Rakove put it:

Theirs was a rhetoric of public liberty, not public health; of the danger from standing armies, not that of casual strangers, embittered family members, violent youth gangs, freeway snipers, and careless weapons keepers. Guns were so difficult to fire in the eighteenth century that the very idea of being accidentally killed by one was itself hard to conceive.  

The weapons employed by the militia in defense of the nation and those employed for the defense of the home were one in the same. Without the benefit of foresight into the destructive advances of weapons technology, the Framers could not have anticipated the need for restrictions on certain types of weapons. As such, no exception for military weapons can reasonably be read into the protections of the Second Amendment.

In justifying the creation of such a distinction, the Court referred to constructions of the First and Fourth Amendments, which subject those rights to reasonable restrictions. Unlike the restrictions placed on the First and Fourth Amendments, however, restrictions banning military weapons would run directly afoul of the purpose of the Amendment as laid out in the prefatory clause. Because the militias were intended to obviate the need for a standing army, it stands to reason that the militias would have been required to keep and bear the weapons that the U.S. Army currently deems necessary. To ban military weapons would be to ban the very arms required by the militia to achieve its purpose, and thus defeat the Amendment’s ultimate purpose.

The Framers would likely have intended such an exception if they had realized the devastating power that weapons technology would unleash, but that type of constitutional speculation is dangerous ground. While such an assumption would almost undoubtedly be true in this case, relying upon it would open the gate to a tidal wave of conjectural arguments about what the Framers would have espoused given prescience into the modern world. (e.g. “The Framers would have written an exception into the First Amendment if they knew you’d say that!”) As such, reliance on what the Framers would have intended is invalid, leaving the Court with the choice between applying

90. Rakove, supra note 26, at 110.
91. See supra Part II.A.
92. Heller, 128 S. Ct. at 2826–27 (describing the limitation on the Second Amendment).
93. Id. at 2800–01 (describing the Framers’ intention for the militia to render a standing army unnecessary).
94. See United States v. Miller, 307 U.S. 174, 178 (1939) (“With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.”) (emphasis added). While this argument would permit ownership of dangerous small arms (e.g. machineguns, flamethrowers, rocket launchers, etc.), it would not necessarily lead to the reductio ad absurdum conclusion that individual citizens have the right to tasks and fighter aircraft if one interprets that the right to “bear” arms as limiting the Second Amendment’s protection to those weapons which an individual could physically carry. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 161 (3d ed. 1992) (defining “bear” as “1. To hold up; support. 2. To carry on one’s person; convey. . . .”) Even with this limitation, individual ownership of dangerous small arms would be perilous enough to merit great concern. See sources cited supra note 19.
the purpose recorded in the prefatory clause or else ignoring it entirely.

The *Heller* decision represents the latter choice and stands as the latest in a series of failed attempts to resolve the militaristic purpose of the prefatory clause with sound public policy. The inability of both the courts and scholars to resolve the prefatory clause with modern technology highlights the obsolescence of the Amendment and the need for constitutional revision.

### B. *Heller’s Originalism*

Explaining the method of constitutional interpretation applied in *Heller*, Justice Scalia wrote:

[W]e are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.\(^95\)

The *Heller* opinion applied what has been called “Original Public Meaning Originalism.”\(^96\) According to this theory of interpretation, the Court should refrain from drawing upon the Framers’ intent, focusing instead on the “conventional semantic meaning that the words and phrases had at the time the provision was framed and ratified.”\(^97\) A faithful interpretation of this theory would then de-emphasize the importance of the Federalist Papers or minutes of the Constitutional Convention (to the extent that they elucidate the drafters’ intentions) and focus instead on how a reasonable man-on-the-street at the time would have understood the clause.

As applied to the Second Amendment, the Original Public Meaning approach drastically reduces the interpretive role of the prefatory clause to the mere resolution of semantic ambiguities in the operative clause.\(^98\) Given that the Court saw no semantic ambiguities in the operative clause,\(^99\) this method effectively removed the prefatory clause entirely from any interpretation of the Amendment.

Having essentially limited the Second Amendment to the operative clause, the Court began to examine what is meant by “the right of the people to keep and bear arms shall not be infringed.”\(^100\) The notion that any restriction on arms would constitute an infringement was quickly dismissed; just as the rights guaranteed by First and Fourth Amendments are not without exception, the Court explained that reasonable restrictions on the right to bear arms are equally permissable.\(^101\) Therefore, laws restricting the time, place, and manner

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95. *Heller*, 128 S. Ct. at 2788 (internal citations omitted).
96. *See* Solum, supra note 12, at 926.
97. *Id.*
98. *Id.* at 955.
99. *Id.* at 2792–93.
100. U.S. CONST, amend. II.
(and apparently type) of weapons ownership are permissible so long as they do not infringe on the right itself.

How great a restriction is required to constitute “an infringement” on the right to bear arms? This question shifted the Court from an interpretation of the Amendment to a construction of its application. 102 Clearly an omnibus ban on all weapons would be an infringement, as it would swallow up the right entirely. Short of that, would any restrictions be permissible, so long as the people still had some weapons left? Would a ban on all weapons save slingshots be an infringement, or would it be acceptable because it left the people with some arms, however weak? According to the Court’s reasoning, such a ban would be an infringement, and the Court’s construction of the Second Amendment recognized a core category of weapons, the deprival of which would represent infringement. 103 The Court did not articulate the boundaries of this core, 104 but was clear that an outright ban on handguns was beyond those boundaries, due to the weapon’s popularity among the American people. 105

Given the Court’s reliance on the Amendment’s original public understanding, it is all the more striking that the construction adopted by Heller discards the military purpose that the original public would have understood the Amendment to have had. 106 In fact, the Court acknowledged that its construction violated the public understanding of the military purpose of prefatory clause. 107 But rather than resolve this discrepancy, the opinion merely said that “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.” 108 It may seem startling that an opinion so grounded in original understanding would concede that its construction was a

102. See Solum, supra note 12, at Section IV.F. (discussing implications for the 2nd Amendment).
103. Interview with Professor Lawrence Solum, Associate Dean for Faculty and Research, John E. Cribbet Professor of Law, and Professor of Philosophy, University of Illinois, in Champaign, IL (Nov. 3, 2008); Philip J. Cook, Jens Ludwig, Gun Control After Heller: Threats and Sideshows From a Social Welfare Perspective, 56 UCLA L. Rev. 1041, 1061 (2009) (“Whatever else it might be made to include in the future, the majority’s core right involves self-defense with a typical handgun in one’s home.”).
104. See Heller, 128 S. Ct. at 2846 (Steven, J. dissenting) (“The Court’s announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. . . . I fear that the District’s policy choice may well be just the first of an unknown number of dominos to be knocked off the table.”).
105. Id. at 2818 (“It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. . . . Whatever the reason, handguns are the most popular weapons chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).
106. See Reva B. Siegel, Dead or Alive: Originalism as Popular Constitutionalism in Heller, 122 Harv. L. Rev. 191, 193 (2008) (“Heller holds that government cannot deprive citizens of traditional weapons of self-defense, but may ban civilian use of military weapons, even if this means that the right to bear arms may no longer be effectively exercised for the republican purpose of resisting tyranny that the ‘prefatory clause’ discusses. It is to say the least, striking that an originalist interpretation of the Second Amendment would treat civic republican understandings of the amendment as antiquated, and refuse to protect the arms a militia needs to defend against tyranny.”) (footnotes omitted).
107. Heller, 128 S. Ct. at 2817 (conceding that the small arms protected by the opinion would not be sufficient to allow militias to fulfill their purpose).
108. Id.
poor fit for that understanding, but such inconsistency is necessary to allow the Court to justify upholding necessary restrictions on dangerous weapons.

Such a dismissal of the prefatory clause may not be constitutional. As Justice Stevens noted in his dissent, “The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” In an opinion supposedly grounded in the public understanding of the text, the Court completely flouted text that the public would have understood as protecting their right to possess military weapons. The next subsection will show that this opinion merely represents the latest in a chain of failed constructions of a Second Amendment that has grown incompatible with the laws necessary to govern modern arms technology.

C. Failed Constructions of the Second Amendment

Which arms are protected by the Second Amendment? Several constructions have been posited to draw a line between those weapons that are protected and those that are prohibited. But each has come up short, either misconstruing the prefatory clause, failing to permit necessary regulation of military arms, or simply lacking logical coherence.

Since the Framing, arms technology has raced along at a tremendous pace, but courts and scholars have until fairly recently been silent on the Second Amendment’s meaning in light of those advances. Unfortunately, the two seem directly at odds; policy requires a cap on the destructive firepower one citizen may possess, but the prefatory clause was intended to arm citizens to the level of professional soldiers. The construction adopted by Heller obviates the need to resolve policy with the prefatory clause, but reduces a constitutional guarantee to a popularity contest, and a rigged contest at that. The Miller construction—although faithful to the prefatory clause—is utterly impracticable from a public policy standpoint. The “lineal descendent” construction advanced by the D.C. Circuit Court of Appeals is completely arbitrary and does nothing to serve public policy. Don Kates proposed an intriguing mix of the three previous theories, however this combination of constructions fails to resolve the flaws found in each individually. Finally, an “original weapons” construction has attempted to resolve the problems created by the advance of arms technology by limiting the Second Amendment protections to founding-era weapons, but this seems little more than a back-door repeal of the Second Amendment and is not truly practical. This subsection will examine each of the constructions in further detail to explain why they fail to resolve the prefatory clause with public policy concerns regarding modern arms technology.

109. Id. at 2826 (Stevens, J. dissenting) (citing Marbury v. Madison, 1 Cranch 137, 174, 2 L.Ed. 60 (1803)).

110. See supra Part II (exploring the background of 2nd Amendment jurisprudence).
I. Heller’s Construction

As mentioned above, the Heller opinion did not define what would constitute an infringement of the right to bear arms, except that a blanket ban on handguns would do so.\textsuperscript{111} The rationale behind the Court’s protection of handguns essentially boiled down to the popularity of handguns. “Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”\textsuperscript{112} If the criterion for protection under the First Amendment is popularity, this presents several questions. How popular must a weapon be before it is protected? Must the majority of Americans possess a certain type of weapon before it is protected? Certainly this cannot be the standard, given that only one in eight Americans actually owns a handgun.\textsuperscript{113} If less than a majority, what is the percentage? Have pepper spray and tasers achieved enough popularity that a restriction on them would infringe upon the Second Amendment, or do their manufacturers first need to gain a greater share of the weapons-owning marketplace? In short, what metric should the courts use to judge a weapon’s popularity? The Court cited no authority for the assertion that “the American people have considered the handgun to be the quintessential self-defense weapon,”\textsuperscript{114} which leaves open the question of what yardstick the lower courts should use to gauge popularity.\textsuperscript{115} Finally, what happens to weapons that have lost their popularity? The Original Public Meaning of the Second Amendment certainly protected the right to possess a musket, but no modern American would consider using one for defending the home. Does this loss of popularity mean that muskets are no longer protected by the Second Amendment, or once a weapon has become protected, is that protection irrevocable? By the same token, if the handgun were to implausibly lose its popularity, would the right to own handguns no longer be protected?

In addition to being arbitrary, the Court’s reliance on popularity presents a logical fallacy. In relying upon the American popularity of handguns over machineguns, the Court completely ignored the impact that the legality of a thing might have on its popularity amongst law-abiding citizens.\textsuperscript{116} In his...
dissent to *Heller*, Justice Breyer pointed out the circular reasoning in allowing popularity to determine what weapons the government may ban.

According to the majority’s reasoning, if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course and find that the Second Amendment does, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority’s reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular congress will no longer possess the constitutional authority to do so.\(^{117}\)

In fact, Justice Breyer could have taken the Court’s circular reasoning even further. If gun laws were subject to community standards (as with pornography\(^{118}\)) as opposed to national standards, then the D.C. gun ban would have been completely constitutional: virtually no law-abiding citizens in D.C. owned handguns (due to the ban), therefore the resulting unpopularity of handguns in D.C. would have made the ban constitutional according to Court’s popularity rationale.\(^{119}\)

2. *Miller’s Construction*

The most troublesome passage of *Miller* is the statement that in the absence of “any evidence tending to show that possession or use of a [short-barreled shotgun] . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”\(^{120}\) This passage created little stir until recently because *Miller* was for so long seen as an affirmation of the collective right to bear arms. So long as the Second Amendment only protected the states’ collective right to bear arms, it made little difference which arms were protected because the federal and state governments were unfettered from passing restrictions on individual ownership of dangerous weapons.

The rise of the individual right theory made the *Miller* passage problematic. As Professor Levinson wrote in *The Embarrassing Second Amendment*:

> *Miller* can be read to support some of the most extreme anti-gun control arguments, e.g., that the individual citizen has a right to keep and bear bazookas, rocket launchers, and other armaments that are

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118. Miller v. California, 413 U.S. 15, 21 (1973) (holding that one element of pornography is that it “affronts contemporary community standards relating to the description or representation of sexual matters”).

119. Craig S. Lerner & Nelson Lund, *Heller and Nonlethal Weapons*, 60 Hastings L.J. 1387, 1392–94 (arguing that, had the D.C. handgun ban been applied to the entire country and the Court had waited until 2008 until deciding *Heller*, it would have been forced to conclude that handguns were not popular enough to be afforded constitutional protection, given the scarcity of law-abiding citizens who owned them).

clearly relevant to modern warfare, including, of course, assault weapons. Arguments about the constitutional legitimacy of a prohibition by Congress of private ownership of handguns or, what is much more likely, assault rifles, might turn on the usefulness of such guns in military settings.\footnote{Levinson, supra note 14, at 654–55.}

Such an understanding of the Second Amendment would stand in almost direct contrast to sound public policy because only those weapons that were sufficiently deadly to be of use to a modern military would be protected. The \textit{Heller} Court referred to that interpretation as “startling”\footnote{\textit{Heller}, 128 S. Ct. at 2815.} and dismissed it by referring to a later passage in \textit{Miller}: “[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”\footnote{\textit{Id.} (quoting \textit{Miller}, 307 U.S. at 179) (alterations in original).} The Court thus interpreted the two \textit{Miller} passages together to say that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . “\footnote{\textit{Id.} at 2515–16.}

The \textit{Heller} Court’s reinterpretation of \textit{Miller} both defused the troubling passage and helped to lay the groundwork for its popularity construction.\footnote{See supra Part III.C.1 (examining the legal construction of the \textit{Heller} opinion).} Unfortunately, that interpretation was a misreading of \textit{Miller}. To arrive at that result, the Court was forced to ignore a contradictory passage that stood between the two it chose to interpret in tandem:

The Constitution as originally adopted granted to Congress the power-
`To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.’ U.S.C.A. Const. art. 1, s 8. With obvious purpose to assure the continuation and \textit{render possible the effectiveness} of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.\footnote{\textit{Miller}, 307 U.S. at 178 (emphasis added).}

Unlike the \textit{Heller} Court, the \textit{Miller} Court did not disregard the prefatory clause, and read the Amendment as “render[ing] possible the effectiveness” of the militias to “repel [i]nvasions.”\footnote{\textit{Id.}} As discussed above, this task would require contemporary military arms.\footnote{See supra note 15 (highlighting the inability of a civilian militia to repel a tyrannous federal military without sophisticated arms).}

While the \textit{Heller} Court may have erred in its reading of \textit{Miller}, it was certainly correct in asserting that its application would be “startling” in an
individual right context. Combined with the individual right understanding of the Second Amendment, the Miller Court’s preference for military arms—while the most faithful of these approaches to the prefatory clause—would be catastrophic as policy. In theory, it would prevent the federal government from passing laws barring private ownership of assault rifles, machineguns, bazookas, and such because these are the weapons necessary to defend a free state on a contemporary battlefield. The complete implausibility of applying the Miller interpretation despite (or rather because of) its faithfulness to the prefatory clause further demonstrates the clause’s obsolescence and inapplicability to the modern world.

3. Parker’s Lineal Descendants

The D.C. Circuit Court of Appeals briefly referenced another construction in Parker: the “lineal descendants” test. The District had previously claimed that modern handguns did not bear the “reasonable relationship to the preservation or efficiency of a well regulated militia” required by Miller. In response, the court quoted Miller’s passage that the weapons used by the militia were those “of the kind in common use at the time,” and declared that handguns fit that description.

Thus far, the Parker interpretation seemed very similar to the popularity model that would be imminently applied by the U.S. Supreme Court. But the D.C. Circuit went on to add that “[t]he modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes Miller’s standards.” The language suggests that in addition to the handgun’s popularity, its Second Amendment protection is bolstered by its position on some sort of family tree of armaments, like an inheritance from its grandfather, the musket.

The U.S. Supreme Court did not address the lineal descendant justification in Heller, and for good reason: the lineal descendant test is...

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129. Parker v. District of Columbia, 478 F.3d 370, 398 (D.C. Cir. 2007) (“the modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all a lineal descendant of that founding-era weapon, and it passes Miller’s standards.”) (emphasis added).

130. Miller, 307 U.S. at 178.

131. Parker, 478 F.3d at 397 (“The District contends that modern handguns are not the sort of weapons covered by the Second Amendment.”).


133. Parker, 478 F.3d at 398 (“[Pistols] are also in ‘common use’ today, and probably far more so than in 1789.”).

134. See supra, Part III.C.1 (discussing the popularity test’s inability to reconcile the prefatory clause with sane public policy).

135. Parker, 478 F.3d at 398.

neither sensible nor desirable. Given that technology does not have clear-cut predecessors and family lines the way humans and animals do, there is no objective test to determine which weapons are or are not the lineal descendants of revolutionary-era weapons. Unlike the technology trees in strategy games like Civilization or Starcraft, technological advancements do not always have obvious, clear-cut predecessors. Any attempt at adoption of the lineal descendant test would lead to endless pontification over whether a self-loading, multiple shot handgun like the Beretta 92FS was a lineal descendant of manually-loaded, single shot muskets, and if so, what would justify a determination that the Kalashnikov (AK-47) assault rifle was the illegitimate spawn of the family—undeserving of the prima geniture of Second Amendment protection. As Franklin Zimring stated in his criticism of Parker, the D.C. Circuit was “silent on what similarities and differences should carry weight in the determination of ballistic heredity.”

In addition to being arbitrary, the lineal descendant test does not serve any public policy goal. Even if a practicable standard were devised to determine which weapons were lineal descendents of revolutionary-era weapons, using such a standard would not be desirable. Such a test would certainly find that a musket had more in common with a sniper rifle than with a taser or a can of pepper spray, but it would be terrible policy to grant more

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137. See Beschle, supra note 15, at 71 (“[E]ighteenth-century attitudes provide little assistance in the process of twentieth-century line-drawing and the proposed rules which emerge, such as the proposal that government may not restrain the ownership of any type of weapon in use in 1787, on any ‘lineal descendant’ of such a weapon, lack any reasonable rationale and essentially are worthless.”). Cf. Kates, supra note 54, at 259 (“Decisions recognizing that concerns for individual self-protection and for law enforcement also underlie right to arms guarantees involve at once greater historical fidelity and more rigorous limitation upon the kinds of arms protected. These decisions suggest that only such arms as have utility for all three purposes [including use in the militia] and are lineally descended from the kinds of arms the Founders knew fall within the amendment’s guarantee.”) (citing People v. Brown, 235 N.W. 245, 246–47 (Mich., 1931); State v. Kessler, 614 P.2d 94, 98–100 (Or. 1980); State v. Duke, 42 Tex. 455, 458 (1875)).

138. See Allen, supra note 15, at 206 (“[The lineal descendant test] doesn’t provide a non-arbitrary method for distinguishing between hunting rifles, which perhaps most people would probably regard as covered by the Second Amendment, and more powerful weapons, like assault rifles, which many people would put in the category of Stinger missiles and other ‘obviously’ not covered weaponry. . . . Such distinctions would therefore be essentially arbitrary and based solely on the subjective opinions of judges.”); Small, supra note 44, at 1233 (“The ‘lineal descendants’ and common use standard is a somewhat subjective standard and open to significant debate.”).

139. Civilization is a computer game about emerging civilizations, in which the player may not attain more advanced technologies without first acquiring that technology’s immediate predecessor technology. Civilization (MicroProse 1991).

140. Starcraft is a computer game in which a player cannot acquire the technology to build advanced buildings and units before first researching that technology’s immediate predecessor technology. STARCRAFT (Blizzard Entertainment 1998).

141. The term “multiple shot” refers here to the ability to fire multiple shots in succession without reloading (e.g. a machine gun, as opposed to a musket), not to weapons that fire multiple shots simultaneously (e.g. a shotgun).


protection to a weapon used in assassinations than to one designed for non-lethal self-defense.\textsuperscript{145}

4. \textit{Kates Multifactor Construction}

Don Kates became one of the earliest advocates of the individual right interpretation with his seminal work, \textit{Handgun Prohibition and the Original Meaning of the Second Amendment}.\textsuperscript{146} Foreseeing the counterargument that an individual right interpretation would open the floodgates to private ownership of military arms, Kates crafted a three-part construction, each element of which must be met by the weapon before it received protection under the Second Amendment. With this tripartite construction, Kates was attempting to establish a series of nets that would hold back dangerous military arms while allowing handguns to wriggle through into the possession of law-abiding citizens.

Kates posited that the “weapon must be (1) ‘of a kind in common use’ among law abiding people today; (2) useful and appropriate not just for military purposes, but also for law enforcement and individual self-defense, and (3) lineally descended from the kinds of weaponry known to the Founders.”\textsuperscript{147} This Note has already addressed the flaws of the first and third tests,\textsuperscript{148} and combining them together does nothing to improve their shortcomings. But the second test is far more intriguing.

Under the second test of the Kates construction, a weapon must be ubiquitous. Kates recognized that at the time of the ratification, the weapons used for war were the same as those used for self-defense.\textsuperscript{150} Instead of simply rejecting the notion that the Framers intended to protect military weapons, Kates embraced it, and added that only weapons that were useful both for military use and personal defense (and additionally are useful to law enforcement) should be protected.\textsuperscript{151}

At first glance, this test seems like an elegant solution to the problem created by advances in arms technology: it bridges the technological rift that has formed between military-use and personal-use weapons by only protecting weapons that (like those at the time of the Framing) fall into both categories. The flaw is that weapons that are “useful and appropriate” for all three purposes are not necessarily \textit{sufficient} for all three. As discussed above,\textsuperscript{152} the

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\item \textsuperscript{145} For more on the \textit{Heller}’s implications with regard to tasers, pepper spray, and other nonlethal weapons, see generally Craig S. Lerner and Nelson Lund, \textit{supra} note 119.
\item \textsuperscript{146} Kates, supra note 51.
\item \textsuperscript{147} \textit{Id.} at 259.
\item \textsuperscript{148} \textit{See supra} Part III.C.1 (discussing the problems and failings with the court’s popularity standard used for protection of handguns).
\item \textsuperscript{149} \textit{See supra} Part III.C.2 (discussing the problems and failings with the Miller court’s individual right theory standard).
\item \textsuperscript{150} \textit{See supra} note 15 (discussing the failed constructions of the second amendment).
\item \textsuperscript{151} One could ask what would happen if and when arms technology branches out such that the military, law enforcement, and private citizens no longer use any of the same weapons in common, but that is not currently the case, and so that issue by itself is not enough to invalidate Professor Kates’s construction.
\item \textsuperscript{152} \textit{See supra} notes 114–16 and accompanying text (citing the shortcomings with the court’s rationale regarding the popularity standard as applied to national and community contexts).
\end{itemize}
Second Amendment was intended to protect weapons that would “render possible the effectiveness” of the militias to “repel Invasions.”\(^\text{153}\) A citizenry armed with nothing more than handguns would be no match for even a modest invading force equipped with modern military weapons.\(^\text{154}\)

The Kates construction deserves credit for recognizing the rift modern technology has created between military- and personal-use arms and the quandary it has created. But the prefatory clause protects the right to own weapons that are sufficient to protect the state, and any construction that would restrict weapon ownership to arms that are inadequate for that purpose still violates the Second Amendment.

5. **Original Arms Construction**

The Original Arms construction is often raised to be subsequently dismissed out of hand.\(^\text{155}\) Like the Kates test, this construction attempts to resolve the rift that has emerged between personal- and military-use weapons, but suggests that the resolution to this problem is to protect only those weapons that were in use when the constitution was ratified.\(^\text{156}\) If adopted, this construction would essentially reduce Second Amendment protections to the right to bear muskets and blunderbusses.

Justice Scalia did not exaggerate when he described this construction as “bordering on the frivolous.”\(^\text{157}\) This construction completely ignores the courts’ role in interpreting the Constitution to apply to modern issues.\(^\text{158}\) Weapons technology has evolved tremendously since the ratification of the Constitution\(^\text{159}\) and the original arms construction would effectively void the Second Amendment by limiting its meaning to the protection of useless relics.

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\(^{154}\) See supra note 15. Professor Kates refers to the success of insurgent groups to suggest that small arms would be sufficient to defend the freedom of the state, but it is the position of this Note (based on the author’s three years at the Army’s premier counterinsurgency training center at the Joint Readiness Training Center & Fort Polk (see http://www.jrtc-polk.army.mil/) that Professor Kates’s stance reflects a fundamental misunderstanding of the nature of insurgency. Because an insurgency is a group that operates in an area occupied and controlled by its enemy, any group operating as an insurgency has by definition failed in defending the freedom of the region in which it operates. Even if the insurgency is eventually successful in driving out its occupiers, the insurgency failed to defend the region’s freedom during the period that the region was controlled by its enemy (i.e. the period during which the insurgency was forced to operate as an insurgency). In sum, any group forced to operate as an insurgency has failed to defend its home from being controlled by its enemy, and thereby failed to defend the freedom of that home.

\(^{155}\) See, e.g., Heller, 128 S. Ct. at 2791 (dismissing the original arms interpretation out of hand); Parker v. District of Columbia, 478 F.3d 370, 398 (D.C. Cir. 2007) (“[I]t has been suggested by some that only colonial-era firearms (e.g. single-shot pistols) are covered by the Second Amendment. But just as the First Amendment free speech clause covers modern communications devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversations for a ‘search,’ the Second Amendment protects possession of the modern-day equivalents of the colonial pistol.”).

\(^{156}\) See Allen, supra note 15, at 208, (“[T]he only objective and non-arbitrary interpretation that is consistent with the Framer’s original understanding of the term ‘arms’ is one that confines its definition to the weapons in existence when the Constitution was adopted.”).

\(^{157}\) Heller, 128 S. Ct. at 2791.

\(^{158}\) See, e.g. Kyllo v. United States, 533 U.S. 27, 31–41 (interpreting the Fourth Amendment as it related to thermal imaging technology).

\(^{159}\) See supra Part II.A (discussing weapons advances and the right to bear arms).
IV. RECOMMENDATION

The inability to find a construction that resolves the prefatory clause with practical public policy demonstrates that the two have become irreconcilable. But what of it? Even if this Note’s premise is correct that the prefatory clause is diametrically opposed to the restrictions necessitated by modern weapons technology, Justice Scalia was correct in stating that it is “not the role of this Court to declare the Amendment extinct.”160 That is the Legislature’s role.161

It is easy for a legal note to suggest amending the Constitution as if it were no more challenging than striking an item from a grocery list. In reality, only one constitutional amendment has ever been repealed162 and the concept of tinkering with the Bill of Rights would strike most Americans as heresy on par with revising the Ten Commandments. But the alternatives are to continue laboring under a series of failed constructions, or else to follow the Heller Court in willfully refusing to acknowledge inconvenient portions of the Constitution. While altering the Second Amendment may seem to border on sacrilege, is it any more reverent to keep the text as is and willfully violate it? Through adoption of the Heller construction, the Court has already refused to adhere to the dictates of the prefatory clause, so why not excise it entirely and give truth to the lie that that section of the constitution is being followed faithfully?

Any proposal to alter the Second Amendment would likely draw tremendous opposition from gun advocates, but such a revision could actually be a boon to these parties. Constructions favoring gun-ownership have long stood on a precarious footing due to the conflict discussed above.163 The Heller opinion based the right to own handguns on popularity,164 while the Miller opinion based it on the perceived connection to non-existent militias.165

161. U.S. CONST. art. V. (“The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.”).
162. U.S. CONST. amend. XXI. (repealing the 18th Amendment to the U.S. Constitution, which banned the sale of alcohol).
163. See supra Part III.C (discussing failed constructions of the Second Amendment).
164. See supra Part III.C.1 (discussing Heller’s construction of the Second Amendment).
165. See supra Part III.C.2. Several commentators have been quick to declare that the National Guard is the modern incarnation of the militias, see, e.g., Allen, supra note 15, at 206, Posner, supra note 4, at 32; see also Glenn H. Reynolds & Brannon P. Denning, Heller’s Future in the Lower Courts, 102 Nw. U. L. REV. 2035, 2036–37 (2008) (detailing the rationale behind this theory), but this comparison is inapt for two reasons. First, the militias included every able-bodied man in the community, whereas the National Guard is a volunteer organization which only a small percentage of the population joins, and which may exclude applicants for a number of factors. See Rakove, supra note 26, at 108–09 (arguing that the National Guard is more akin to a then-detested “select militia” than the universal militias envisioned under the Second Amendment); see also Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 TENN. L.REV. 461, 475–78 (1995) (enumerating other logistical differences between militias and the National Guard). Second, the militias owed their allegiance to their individual states, whereas the modern National Guard is under the control of the federal government. This second distinction creates an obvious conflict to the extent
While these opinions did not strip gun-owners of their rights, the reasoning behind them hardly gave the impression that the right to own handguns was set in stone. On the contrary, any gun-owner should have felt anxious that his rights were contingent upon the continued popularity of handguns, or upon their hypothetical connection to defunct organizations.

A revised constitutional amendment could theoretically place the right to bear arms on more solid ground. This Note will not presume to suggest the text of such an amendment, but the new version could declare that the right to own reasonable weapons for hunting and self-defense shall not be infringed. Alternatively, the amendment could specifically defend the right to own handguns and rifles, leaving the Legislature to revise it again as technological developments require. Such a revision would protect the right to bear weapons appropriate for personal use while obviating need for tortured constructions that allow restrictions on military weapons. Gun advocates could unambiguously secure their rights by abandoning the military purpose of the prefatory clause and the shaky constructions that accommodate it.

V. CONCLUSION

Since Heller was handed down, the lower courts have split on what impact it has on the states. Some courts have held that the Fourteenth Amendment applies the protections of the Second Amendment to the state governments, while others have held that only the U.S. Supreme Court may make that determination. But, whether the scope of Heller’s protection extends to all fifty states or only to the District of Columbia, the Court will eventually have to clarify which weapons are entitled to that protection, and that task will not become any simpler as technology continues to advance.

It is impossible to predict exactly what form the weapons of the future will take, but it is unlikely that further advances will resolve the rift between the prefatory clause’s requirement to protect military weapons and the public policy need to ban the same. Given the historical trend, it is likely that weapons will only continue to become more lethal as the technology progresses. As that happens, the need for change in the nation’s supreme law on the right to possess these weapons will only grow more pronounced. And yet despite the Court’s acknowledgement that technological advances have

that the militias were intended to protect the freedom of the states from a tyrannical federal government.


166. See supra note 7.

167. Id.

168. One might wonder what role the Second Amendment might play in the right to bear fictitious weapons from science fiction works such as Star Trek (NBC television broadcast 1966–69) (featuring a handheld laser gun (“phaser”) capable of burning through metal at a distance), Earth: Final Conflict (CTV television broadcast 1997–99) (featuring a bioengineered symbiotic organism (“Skrifl”) that grafted onto a human forearm and allowed the host to fire energy bolts), or Men in Black (Columbia Pictures 1997) (featuring a weapon (“Noisy Cricket”) smaller than a plum but as powerful as a bazooka).

169. Cf. Futurama: A Head in the Polls (Fox television broadcast Dec. 12, 1999) (asking a representative from the National Ray-Gun Association, “[s]o, what are you doing to protect my constitutional right to bear doomsday devices?”).
already made the prefatory clause a poor fit to the modern world, the clause continues to dangle off the Second Amendment like a useless, rotting limb. Continuing the anatomical analogy, it is time to make the grave but sensible decision to amputate.