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What the Heller?: An Originalist Critique of Justice Scalia's Second Amendment Jurisprudence

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WHAT THE *HELLER*?: AN ORIGINALIST CRITIQUE OF JUSTICE SCALIA'S SECOND AMENDMENT JURISPRUDENCE

*Enrique Schaerer**

In District of Columbia v. Heller, *Justice Scalia construed the Second Amendment based on sound textualist principles, as guaranteeing an individual right to keep and bear arms. But to the extent he defined the scope of this right indeterminately, he failed to abide by his originalist principles. This Article argues that the Second Amendment should protect, as a threshold, weapons that can be fairly traced back to weapons in common use at the time of the Framing, rather than, as Justice Scalia suggested, weapons in common use at some ever-changing "present" time. To subject the Second Amendment right to a present-day popularity contest, as Justice Scalia appears to do, is to put this right on ground that is forever uncertain, unstable, and ultimately nonoriginalist.*

I. Introduction 796
II. The Individual Nature of the Right to Keep and Bear Arms 801
  A. The Operative Clause of the Second Amendment 803
  B. The Prefatory Clause of the Second Amendment 808
III. The Indeterminate Scope of the Right to Keep and Bear Arms 810
  A. Presumptively Lawful Regulatory Measures 811
  B. Weapons in Common Use at the Time 813
  C. An Alternative, More Originalist Approach 821
    1. Whether the Weapon Is a "Bearable Arm" 822
    2. Whether the Weapon Is a "Lineal Descendant" of One in Common Use When the Second or Fourteenth Amendment Was Adopted 823
      a. Whether the Weapon Is a "Lineal Descendant" of a Framing-Era Weapon 824
      b. Whether the Framing-Era Equivalent Was in Common Use When the Second or Fourteenth Amendment Was Adopted 826
    3. Whether Regulation of the Weapon Passes Constitutional Scrutiny 826
IV. Conclusion 829

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I. INTRODUCTION

Justice Antonin Scalia is a textualist. In his own words, he "look[s] for meaning in the governing text, ascribe[s] to that text the meaning that it has borne from its inception, and reject[s] judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences."[1] His interpretive philosophy includes not only general principles of textualism, such as the supremacy-of-text principle,[2] but also specific canons associated with originalism, such as the fixed-meaning canon.[3] Justice Scalia explains: "Textualism, in its purest form, begins and ends with what the text says and fairly implies."[4] Originalism, as part of this process, gives effect to the original meaning of the text, rather than a new meaning that may shift unpredictably, even radically, over time.[5]

Textualism is Justice Scalia's preferred interpretive philosophy because, in a democracy, "[i]t is the *law* that governs, not the intent of the lawgiver"[6]—much less the policy preference of a particular judge or panel of judges.[7] For Justice Scalia, textualism is far from perfect,[8] but

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1. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxvii (2012); *see also id.* at 16 ("Men may intend what they will; but it is only the laws that they enact which binds us.").

2. *Id.* at 56–58 (discussing the supremacy-of-text principle, i.e., that the meaning of a law depends on its text).

3. *Id.* at 78–92 (explaining the fixed-meaning canon, i.e., that a legal text means what it was understood to mean at the time it was enacted).

4. *Id.* at 16. "Textualism should not be confused with so-called strict constructionism . . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23 (Amy Gutmann ed., 1997).

5. To understand just how radical the shift may be, consider an example. In the 18th century the words "awful, artificial, and amusing" meant "awe-inspiring, highly artistic, and thought-provoking," respectively, whereas in the 21st century the three words have a very different, mostly negative connotation. SCALIA & GARNER, *supra* note 1, at 78. Thus, to apply contemporary meaning to those words, as they were used centuries ago, would be to misapprehend their meaning entirely. *Id.*

6. Scalia, *supra* note 4, at 17.

7. *Id.* at 22 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."); SCALIA & GARNER, *supra* note 1, at 83 ("This corrosion of democracy occurs even when law-revising judges are elected, as they are in many states. The five or seven or nine members of a state supreme court, lawyers all, can hardly be considered a representative assembly.").

8. SCALIA & GARNER, *supra* note 1, at xxix ("Textualism will not relieve judges of all doubts and misgivings about their interpretations. Judging is inherently difficult, and language notoriously slippery."). Textualism, of course, has its detractors. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 348 (1990) (raising several objections to textualism); David H. Souter, *Text of Justice David Souter's Speech*, HARVARD GAZETTE (May 27, 2010), *available at* http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/ (criticizing the "fair reading model" of interpretation); *see also* SCALIA & GARNER, *supra* note 1, at 18–28 (surveying purposivism, consequentialism, and other nontextualist

it is nonetheless the best way to preserve democracy and uphold the worthwhile American ideal to have a "government of laws, not of men."[9] And originalism, properly understood, is a vital ingredient in this democratic recipe: "When government-adopted texts are given a new meaning, the law is changed; and changing written law, like adopting written law in the first place, is the function of the [legislative and, less so, executive] branches of government . . . ," not the judicial branch.[10]

Of course, that the meaning of enacted law remains constant does not mean that originalism cannot account for new phenomena. "Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances that they could not possibly envision . . . ."[11] So courts do not hesitate to apply the law to novel situations over time. An originalist judge merely asks how a new phenomenon or technology fits within the original meaning of the law.[12] Sometimes "there will be disagreement regarding the original meaning" or "as to how that original meaning applies to new and unforeseen phenomena," but "the originalist at least knows what he is looking for: the original meaning of the text."[13] With the Constitution, this search for original meaning entails a careful historical inquiry, in which an originalist will often consult the writings of "intelligent and informed people of the time" when relevant constitutional provisions were adopted, as those writings "display how the text of the Constitution was originally understood."[14] This, in broad strokes, is how originalism fits within the broader framework of textualism.

Textualism has definite implications for Justice Scalia's interpretation of the Second Amendment. The Second Amendment provides: "A well

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approaches to constitutional and statutory construction). These critiques of textualism, as well as the ongoing debate over the merits of textualism, are beyond the scope of this Article.

9. Scalia, *supra* note 4, at 17; *see also* Frank H. Easterbrook, *Foreword* to SCALIA & GARNER, *supra* note 1, at xxi, xxvi n.10 ("Although the origin of this phrase is lost to time, it states a goal common to this nation's founding generation and those alive today.").

10. SCALIA & GARNER, *supra* note 1, at 82–83; *see* U.S. CONST. art. I, § 7 (enacting a statute requires bicameral approval by Congress and, in most cases, signature by the President); U.S. CONST. art. V (amending the Constitution usually requires a two-thirds vote of both houses of Congress and ratification by three fifths of the state legislatures).

11. SCALIA & GARNER, *supra* note 1, at 86.

12. *Id.* ("The meaning of rules is constant. Only their application to new situations presents a novelty."). Justice Scalia endorses a version of originalism that, true to textualism, looks to "*original meaning*, as opposed to *original intention* . . . ." *Id.* at 92.

13. Scalia, *supra* note 4, at 45.

14. *Id.* at 38. For this reason, Justice Scalia "will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example"—but will "give equal weight to Jay's pieces in *The Federalist*, and to Jefferson's writings, even though neither of them was a Framer." *Id.*

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."[15] Even before the Supreme Court had occasion to interpret the Second Amendment, Justice Scalia hinted in a published essay that he read the Second Amendment to secure an individual right to have arms for self-defense:

> [W]e value the right to bear arms less than did the Founders (who thought the right of self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this shows that the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights.[16]

More than a decade later, when the Supreme Court finally weighed in on the Second Amendment in *District of Columbia v. Heller*,[17] Justice Scalia delivered the opinion of the Court.[18] And, not surprisingly, he adopted a textualist reading. His majority opinion in *Heller* carefully parsed the language of the Second Amendment as guaranteeing an *individual* right to keep and bear arms—"the right of the people"—rather than a *collective* right conditioned on eligibility for or service in a state militia.[19] In a clear nod to originalism, he also adopted a historical approach,[20] recognizing that the Second Amendment right to keep and bear arms, much like the First Amendment right to free speech,[21] has

15. U.S. CONST. amend. II.

16. Scalia, *supra* note 4, at 43.

17. 554 U.S. 570 (2008).

18. *Id.* at 573–636. Justice John Paul Stevens, in dissent, articulated the view that Justice Scalia had long feared the Court would adopt: that the Second Amendment protects nothing more than organized state militia activities. *Id.* at 636–80 (Stevens, J., dissenting). In a separate dissent, Justice Stephen Breyer argued that, even if the Second Amendment secured a personal right to handguns for self-defense in the home, the challenged laws could be upheld under an interest-balancing test. *Id.* at 681–723 (Breyer, J., dissenting).

19. *Id.* at 579–95.

20. *Id.* at 605–26. Originalists, when interpreting the Constitution, look for original meaning at (or around) the time a relevant constitutional provision was *adopted*—that is, when it was enacted by Congress and ratified by the states. *See, e.g.*, Stuart Buck, *The Nineteenth-Century Understanding of the Establishment Clause*, 6 TEX. REV. L. & POL. 399, 429 (2002) (endorsing "a search for the original meaning of the text as enacted and ratified"); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) (declaring that originalism "is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment"); *cf. Heller*, 554 U.S. at 605 (offering as another tool for constitutional interpretation the examination of various "legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification" (emphasis omitted)).

21. In *Heller*, Justice Scalia drew several parallels between the First and Second Amendments. *Heller*, 554 U.S. at 595 (noting that "the Second Amendment . . . right [to keep and bear arms] was not

never been treated as absolute and has long been subject to important limitations.[22]

One such limitation, noted Justice Scalia, is on the *types* of weapons that are protected under the Second Amendment.[23] For this, he relied primarily on the Court's 1939 decision in *United States v. Miller*,[24] which, among other things, rejected a Second Amendment challenge to an indictment charging two men with violating federal restrictions on the possession of short-barreled shotguns.[25] According to Justice Scalia, *Miller*'s holding that "the sorts of weapons protected were those 'in common use at the time'"[26] finds support in "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[27] He thus affirmed that, per *Miller*, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[28]

With this background, Justice Scalia turned to the Second Amendment challenge at issue in *Heller*, in which a special police officer sought to enjoin enforcement of a handgun ban and trigger-lock requirement in the District of Columbia.[29] Justice Scalia, writing for the *Heller* majority, held that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[30] Declining to establish a test for the constitutionality of gun laws, he reasoned that such "severe" restrictions ran afoul of the Second Amendment under *any* standard of

unlimited, just as the First Amendment's right of free speech was not"); *id.* ("[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*."); *see also id.* at 582 ("Just as the First Amendment protects modern forms of communications, . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." (citations omitted)).

22. *Id.* at 626–28.

23. *Id.* at 627–28. Justice Scalia noted another limitation, explaining that "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." *Id.* at 626–27.

24. 307 U.S. 174 (1939).

25. *Id.* at 178–83.

26. *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179).

27. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49 (1769) [hereinafter BLACKSTONE], and citing 19th-century treatises, cases, and other sources).

28. *Id.* at 625.

29. *Id.* at 574. At oral argument, Heller withdrew a request to enjoin the enforcement of a separate licensing requirement. *Id.* at 630–31.

30. *Id.* at 635.

constitutional scrutiny.[31] Notably, he relied in part on the inquiry in *Miller*—whether a weapon is "in common use at the time"—to arrive at the holding in *Heller*: "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."[32]

This suggests that the relevant time in the common-use inquiry, as articulated in *Miller* and adopted by *Heller* (i.e., whether a weapon is "in common use *at the time*"), is *the present time*—rather than the time the Second Amendment (for federal gun laws) or the Fourteenth Amendment (for state and local gun laws) was adopted.[33] In other words, Justice Scalia's discussion in *Heller* strongly implies that, to determine whether a particular weapon merits Second Amendment protection in the first place, a court must ask whether that weapon is in common use for self-defense at the time the court is considering the issue, rather than whether it was in common use for self-defense (or is similar to what was in common use for self-defense) at the time the Second and Fourteenth Amendments were adopted in 1791 and 1868, respectively.[34] Several courts have interpreted *Heller* to establish this present-time inquiry of what weapons are in common use for lawful purposes.[35] As have some commentators.[36] Even Justice Stephen

31. *Id.* at 628–29.

32. *Id.* at 629; *see also id.* at 628 ("The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [self-defense].").

33. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3038–42 (2010) (plurality opinion) (incorporating the Second Amendment against the States via the Fourteenth Amendment's Due Process Clause). Justice Thomas, in a concurrence, argued that such incorporation should be through the Fourteenth Amendment's Privileges or Immunities Clause. *Id.* at 3084–88 (Thomas, J., concurring).

34. *See id.* at 3038–42; Ezell v. City of Chicago, 651 F.3d 684, 710 (7th Cir. 2011) ("*McDonald* confirms that when state—or local—government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified.").

35. *See, e.g.*, Heller v. Dist. of Columbia (*Heller II*), 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("[B]ased on the record as it stands, we cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting and therefore whether the prohibition of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms."); United States v. Tagg, 572 F.3d 1320, 1326 (11th Cir. 2009) ("Unlike the handguns in *Heller*, pipe bombs are not typically possessed by law-abiding citizens for lawful purposes."); United States v. Fincher, 538 F.3d 868, 874 (8th Cir. 2008) ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."). *But see, e.g.*, United States v. Pruess, 703 F.3d 242, 246 n.2 (4th Cir. 2012) (reading *Heller* to state "that 'the sorts of weapons' the Amendment protects are 'those in common use at the time' of ratification" (quoting *Heller*, 554 U.S. at 627)).

36. *See, e.g.*, Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 712 (2012) ("If a weapon was widely used and originally understood to be within the scope of the right to keep and bear arms, why should it lose its constitutional protection merely because the number of its users dwindles over the years? In addition, Scalia's approach gives governments an incentive to ban new types of weapons as soon as they appear, so that

Breyer's dissent in *Heller* understood Justice Scalia's discussion in this way.[37]

This Article has two main parts. The first part argues that Justice Scalia persuasively interpreted the Second Amendment, based on sound textualist principles, to secure an *individual* right to keep and bear arms. The second part argues that Justice Scalia defined the limited scope of this right in too indeterminate a manner to square with his originalist principles. The Second Amendment should protect weapons that can be fairly traced back to those weapons in common use at the time relevant constitutional amendments were adopted—that is, the Second Amendment should protect the "lineal descendants" of commonly used Framing-era weapons—rather than, as Justice Scalia suggested, weapons in common use at some ever-changing "present" time. To subject the right to keep and bear arms to a present-day popularity contest, as Justice Scalia appears to do, is to put this right on ground that is forever uncertain, unstable, and ultimately nonoriginalist.

II. THE INDIVIDUAL NATURE OF THE RIGHT TO KEEP AND BEAR ARMS

In *District of Columbia v. Heller*, Justice Scalia interpreted the Second Amendment to guarantee an *individual* right to keep and bear arms (i.e., a right that could be "exercised individually" for self-defense purposes),[38] rather than a *collective* right (i.e., a right that could be "exercised only through participation in some corporate body," such as a state-organized militia for military purposes).[39] True to his interpretive philosophy, Justice Scalia began his majority opinion with a persuasive textual analysis that carefully parsed the language of the Second Amendment.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[40] As Justice Scalia observed in *Heller*, this constitutional provision is "naturally divided" into two parts:

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they never become common enough to receive constitutional protection.").

37. *Heller*, 554 U.S. at 720–21 (Breyer, J., dissenting) ("The majority says that that Amendment protects those weapons typically possessed by law-abiding citizens for lawful purposes. . . . 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. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning." (internal quotation marks omitted)).

38. *Id.* at 581; *id.* at 592 (holding that the words in the Second Amendment "guarantee the individual right to possess and carry weapons in case of confrontation").

39. *Id.* at 579. Justice Stevens, in dissent, took the view that the Second Amendment secures only a collective right to have arms for militia participation. *Id.* at 645 (Stevens, J., dissenting).

40. U.S. CONST. amend. II.

a prefatory clause ("A well regulated Militia, being necessary to the security of a free State") and an operative clause ("the right of the people to keep and bear Arms, shall not be infringed").[41] He explained that the prefatory clause merely announces a nonexclusive reason for securing the right set forth in the operative clause[42]: to prevent elimination of the militia.[43] Although this stated purpose in the prefatory clause could resolve any ambiguity that may (or may not) exist in the operative clause, he noted that the "prefatory clause does not limit or expand the scope of the operative clause" grammatically.[44] This comports with the well-established principle, which he and others have recognized, that "an expression of specific purpose in the prologue will not limit a more general disposition that the operative text contains."[45] This makes sense given that "legislative remedies often go beyond the specific ill that prompted the [law]."[46]

In *Heller*, Justice Scalia thus gave effect to the Second Amendment's operative clause as an operative clause and the prefatory clause as a prefatory clause (that provided a reason for, but did not otherwise limit, the right secured in the operative clause).[47] As a prefatory clause is only relevant to resolve any ambiguity in the operative clause, Justice Scalia looked to the operative clause first.[48] He reasoned that it *unambiguously* secured an individual right held by all law-abiding, responsible Americans to keep and bear arms for lawful purposes (not just militia members for military purposes).[49] Thus, according to Justice Scalia,

41. *Heller*, 554 U.S. at 577. Justice Stevens's dissent also acknowledges this grammatical division in the Second Amendment between a prefatory clause and an operative clause. *Id.* at 640–44 (Stevens, J., dissenting).

42. *Id.* at 577.

43. *Id.* at 599.

44. *Id.* at 577–78.

45. SCALIA & GARNER, *supra* note 1, at 219; *cf.* 2A NORMAN J. SINGER & J.D. SAMBIA SINGER, STATUTES & STATUTORY CONSTRUCTION § 47.4, at 292 (7th ed. 2007) (noting that, in the related field of statutory interpretation, "the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms"). On an originalist note, Justice Scalia pointed out in *Heller* that when the Second Amendment was adopted in 1791, the rule in both America and England was that "the preamble could not be used to restrict the effect of the words used in the purview." *Heller*, 554 U.S. at 578 n.3 (internal quotation marks omitted).

46. SCALIA & GARNER, *supra* note 1, at 219.

47. *Heller*, 554 U.S. at 598–600; *see id.* at 578 n.3. In so doing, Justice Scalia persuasively dispensed with Justice Stevens's criticism that his treatment of the prefatory clause violated the canon against surplusage. *Id.* at 643 (Stevens, J., dissenting) (citing the general rule that every clause in a statute must have effect).

48. *Id.* at 578 n.4 ("[I]f a prologue can be used only to clarify an ambiguous operative provision, surely the first step must be to determine whether the operative provision is ambiguous.").

49. *Id.* at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."); *see also id.* at 581 ("[T]he Second Amendment right is exercised individually and belongs to all Americans."); *id.* at 625 ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful

there simply was no ambiguity in the operative clause for the prefatory clause to resolve. But, in *Heller*, he nevertheless interpreted both the operative clause and the prefatory clause, and then explained how the two clauses fit together—all according to sound principles of textualism, as discussed below.

A. The Operative Clause of the Second Amendment

Justice Scalia first discussed what, for a textualist, is the "most salient feature" of the Second Amendment's operative clause: that it codifies a "right of the people."[50] This is strong textual evidence that the Second Amendment guarantees not a collective right, but an individual right.[51] This is so because, as Justice Scalia correctly noted, "[n]owhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right."[52] The phrase "right of the people" in the First Amendment's Assembly-and-Petition Clause and the Fourth Amendment's Search-and-Seizure Clause, along with similar terminology in the Ninth Amendment, refer to individual rights.[53] Justice Scalia carefully distinguished these analogous constitutional provisions from nonanalogous provisions that may refer to "the people" acting collectively—but only with respect to "the exercise or reservation of *powers*, not *rights*."[54] This is precisely the type of close reading that textualism prescribes. And it also vindicates the canon of constitutional interpretation that presumes a phrase bears the same meaning throughout a legal text.[55] What is more, given that the first ten amendments were drafted contemporaneously, it makes good sense to

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purposes . . . ."); *id.* at 635 (stating the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

50. *Id.* at 579; *see* U.S. CONST. amend. II ("right of the people to keep and bear Arms").

51. *See supra* notes 38–39 and accompanying text.

52. *Heller*, 554 U.S. at 580.

53. *Id.* at 579; *see* U.S. CONST. amend. I ("right of the people peaceably to assemble, and to petition the Government"); U.S. CONST. amend. IV ("right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); *see also* U.S. CONST. amend. IX (providing that the enumeration of constitutional "rights" shall not be construed to deny or disparage others retained by "the people"); *cf. Heller*, 554 U.S. at 580 n.5 (noting that "the right to assemble cannot be exercised alone, but it is still an individual right, and not one conditioned upon membership in some defined 'assembly'").

54. *Heller*, 554 U.S. at 579–80 (emphases added); *see* U.S CONST. preamble ("We the people"); U.S. CONST. art. I, § 2 (providing that "the people" will choose members of the House); U.S. CONST. amend. X (providing that those powers not given to the Federal Government remain with "the States" or "the people").

55. SCALIA & GARNER, *supra* note 1, at 170. *But see id.* ("[T]his [canon] assumes a perfection of drafting that, as an empirical matter, is not often achieved. . . . [D]rafters more than rarely use the same word to denote different concepts . . . .").

interpret similar phrases in those amendments in a like manner.[56]

Having discussed how to interpret the "right of the people" in the Second Amendment, Justice Scalia next interpreted the substance of the right: "to keep and bear Arms." In so doing, he applied the ordinary-meaning canon of textualism,[57] noting 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.'"[58] What matters most is the ordinary meaning, not at the present time but at the time a constitutional provision was adopted[59]—although, in some cases, contemporary meaning is the same or similar.[60] From this originalist perspective, Justice Scalia interpreted "Arms" as weaponry,[61] "keep" as to have,[62] and "bear" as to carry.[63] When he unpacked the ordinary meaning of these words, he showed how they supported his reading of the Second Amendment, as guaranteeing an individual right to keep and bear arms for self-defense.

First, in construing "Arms," Justice Scalia rejected a near-frivolous argument that the Second Amendment protects only those arms that existed in the 18th century.[64] This argument, he explained, misapprehends originalism entirely[65]: Just as the First Amendment protects modern forms of communication,[66] and the Fourth Amendment

56. Patton v. United States, 281 U.S. 276, 298 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia."), *overruled on other grounds by* Williams v. Florida, 399 U.S. 78 (1970); *cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (reasoning that "'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community").

57. SCALIA & GARNER, *supra* note 1, at 69 (explaining the ordinary-meaning canon, i.e., that "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense").

58. *Heller*, 554 U.S. at 576 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931), and citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824)).

59. *See id.*; United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 539 (1944) ("Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of *the times in which the Constitution was written*." (emphasis added)).

60. *See, e.g.*, *Heller*, 554 U.S. at 581 ("The 18th-century meaning [of 'Arms'] is no different from the meaning today."); *id.* at 584 ("At the time of the founding, as now, to 'bear' meant to 'carry.'").

61. *Id.* at 581.

62. *Id.* at 582.

63. *Id.* at 584.

64. *Id.* at 582.

65. *Id.* ("We do not interpret constitutional rights that way."); *see also supra* notes 11–12 and accompanying text.

66. *Heller*, 554 U.S. at 582 (citing Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849 (1997), which applied the First Amendment to the Internet); *see also, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637–38 (1994) (applying the First Amendment to television).

applies to modern forms of search,[67] the Second Amendment likewise extends to modern forms of weaponry.[68]

Next, Justice Scalia showed that the phrases "keep arms" and "bear arms," which phrases arise from or appear in the text itself ("to keep and bear Arms"), were not limited to having or carrying arms for militia purposes. Indeed, the word "keep" is an embarrassment to any attempt to imbue every word in the Second Amendment's operative clause with an exclusively military connotation. Ordinarily, "keep" arms during the Framing era meant to have, including to possess at home.[69] And, historically, "keep" was the word legislatures in England and America used in a purely individual sense to disarm certain minorities, such as Roman Catholics, Scottish Highlanders, and blacks; legislatures forbade them from "keeping" arms, quite apart from any military consideration.[70] Justice Scalia made this same point in *Heller*—not only in his majority opinion,[71] but also during oral argument.[72]

Even the phrase "bear arms," by itself, has no primary or exclusive military connotation.[73] Although that phrase can connote military service, "it *unequivocally* bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities" (e.g., to bear arms *against* a foreign country).[74] This, plainly, is not how the phrase is used in the Second Amendment,

67. *Heller*, 554 U.S. at 582 (citing Kyllo v. United States, 533 U.S. 27, 31–36 (2001), which applied the Fourth Amendment to a thermal-imaging search); *see also, e.g.*, United States v. Jones, 132 S. Ct. 945 (2012) (holding that the use of a GPS tracking device on a vehicle was a search within the meaning of the Fourth Amendment).

68. *Heller*, 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.").

69. *See, e.g.*, Mallock v. Eastly, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744) ("[A] man may keep a gun for the defence of his house and family.").

70. *See, e.g.*, 1 W. & M., SESS. 1, ch. 15, § 4, *in* 3 ENG. STAT. AT LARGE 422 (1689) ("[N]o papist . . . shall or may have or keep in his House . . . any Arms . . . ."); Act of May 1723, ch. 4, § 14, *in* 4 STATUTES AT LARGE OF VIRGINIA (W. Hening ed., 1820) ("[N]o negro, mulatto, or Indian . . . shall hereafter presume to keep, or carry any gun, powder, shot, or any club, or other weapon whatsoever . . . ."); *cf.* 9 GEO. I, ch. 26 (1724), *in* 15 ENG. STAT. AT LARGE 246–47 (1765) (forbidding Scottish Highlanders to "use or bear . . . side-pistols, or guns, or any other warlike weapons, in the fields, or in the way coming or going to, from or at any church, market, fair, burials, huntings, meetings, or any occasion whatsoever . . . .").

71. *Heller*, 554 U.S. at 582–83.

72. Tr. of Oral Arg. at 17–18, Dist. of Columbia v. Heller, No. 07-290 (U.S. Mar. 18, 2008), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf.

73. *See Heller*, 554 U.S. at 584–90; *id.* at 584–85 (citing "numerous instances" in which "bear arms" was unambiguously used in the 18th century to refer to the carrying of weapons outside an organized militia, as in self-defense); *see also* Parker v. Dist. of Columbia, 478 F.3d 370, 384 (D.C. Cir. 2007) ("[T]he word 'bear' in this context is simply a more formal synonym for 'carry,' i.e., 'Beware of Greeks bearing gifts.'").

74. *Id.* at 586 (citing a similar example from the Declaration of Independence).

which says the "right . . . to . . . bear Arms, shall not be infringed."[75] So Justice Scalia looked to a more analogous linguistic context, in which nine state constitutions from the Framing era likewise protected an arms-bearing right—that of citizens to "bear arms in defense of themselves and the state."[76] These state constitutional provisions have long been understood to secure, in relevant part, a natural right to defend one's self and home.[77] Justice Scalia therefore reasoned that the ordinary meaning of the phrase "bear arms" suggests the carrying of a weapon for "offensive or defensive action" but "in no way connotes participation in a structured military organization."[78] After all, a civilian may bear arms in self-defense, as when he carries a gun to protect his home against a burglar.[79]

In any event, because the Second Amendment protects the right to "keep and bear Arms," the phrase "bear Arms" cannot be viewed in isolation but must be interpreted in relation to the word "keep." This is a basic principle of textualism: that words and phrases should be read in proper context.[80] In *Heller*, the respondent's brief neatly illustrated how

75. U.S. CONST. amend. II.

76. *Heller*, 554 U.S. at 584–85 n.8 (citing Framing-era constitutions of Pennsylvania, Vermont, Kentucky, Ohio, Indiana, Mississippi, Connecticut, Alabama, and Missouri).

77. *Id.* at 585 (citing 18th- and 19th-century commentators).

78. *Id.* at 584. Justice Stevens, in dissent, concluded that a conscientious-objector clause in James Madison's original draft of the Second Amendment is proof that the Framers intended "bear Arms" to refer only to military service. *Id.* at 659–61 (Stevens, J., dissenting). Justice Scalia, noting the perils of attempting to divine meaning from a provision deleted during drafting, countered that, in any event, the most natural reading of Madison's deleted text did not support the dissent's sweeping conclusion. *Id.* at 590; *cf.* Lockhart v. United States, 546 U.S. 142, 147 (2005) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation . . . ." (internal quotation marks and brackets omitted)). Moreover, other evidence from the drafting history—still questionable as an interpretive aid—reinforces the individual nature of the arms-bearing right in question. Madison, who drafted the Second Amendment, proposed it not as an amendment to Article I, Section 8, clauses 15 and 16—the so-called militia clauses—but to Article I, Section 9, which secures *individual* rights to habeas corpus and against bills of attainder and *ex post facto* laws. 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1026 (1971); Harold S. Herd, *A Re-Examination of the Firearms Regulation Debate and Its Consequences*, 36 WASHBURN L.J. 196, 207 (1997). This suggests that Congress contemplated that the Second Amendment would protect an individual right that went beyond the militia context. What is more, the Senate specifically rejected a proposal to qualify "the right of the people to keep and bear Arms" with the phrase "for the common defense." 2 SCHWARTZ, *supra*, at 1038; *see also* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 55 (1984); Herd, *supra*, at 207–08.

79. *Heller*, 554 U.S. at 629 (noting a handgun "can be pointed at a burglar with one hand while the other hand dials the police"). Relatedly, before James Madison drafted the Second Amendment, he introduced in the Virginia Assembly a hunting bill, written by Thomas Jefferson, that used the phrase "bear a gun" in a non-military sense. *A Bill for Preservation of Deer* (1785), in 2 PAPERS OF THOMAS JEFFERSON 443–44 (J. Boyd ed., 1950) ("[I]f, within twelve months after the date of the recognizance he shall *bear a gun* out of his inclosed ground, *unless whilst performing military duty*, it shall be deemed a breach of the recognizance, . . . and every such bearing of a gun shall be a breach of the new recognizance . . . ." (emphases added)).

80. *See* SCALIA & GARNER, *supra* note 1, at 167 ("Context is a primary determinant of meaning.

this interpretive canon applies to the full phrase "keep and bear Arms" in the Second Amendment:

> [E]ven if "bear arms" had a purely military connotation, that idiomatic meaning would itself be transformed by inclusion of the word "keep." For example, "Mary knows how to stir the pot" conveys a meaning (i.e., cause trouble) very different from, "Mary knows how to hold and stir the pot" (i.e., cook).[81]

Justice Scalia made a similar point in the *Heller* opinion, arguing that the dissenters were attempting to cram an idiomatic meaning at the end of the phrase "keep and bear Arms" that "would be rather like saying 'He filled and kicked the bucket' to mean 'He filled the bucket and died.'"[82]

Such a reading would offend textualism, which looks for the most natural reading based on proper context. Justice Scalia read the phrase "keep and bear Arms" most naturally to provide two *interrelated* guarantees—one to keep arms, another to bear them.[83] Even though the Second Amendment refers to a singular "right," he explained that this reading makes sense given that "[s]tate constitutions of the founding period routinely grouped multiple (related) guarantees under a singular 'right,' and the First Amendment protects the 'right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances.'"[84] Indeed, reading the Second Amendment to include two guarantees under a singular "right" comports with textualism.[85]

Justice Scalia then put all these textual elements together to arrive at the meaning of the Second Amendment's operative clause: a constitutional imperative not to infringe upon "the individual right to

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A legal instrument typically contains many interrelated parts . . . ."); Scalia, *supra* note 4, at 37 ("In textual interpretation, context is everything, and the context of the Constitution tells us . . . to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.").

81. Brief for Resp't, Dist. of Columbia v. Heller, No. 07-290, 2008 WL 336304, at *14 (U.S. Feb. 4, 2008).

82. *Heller*, 554 U.S. at 587 (dismissing as "[g]rotesque" any attempt to read the word "Arms" to have "two different meanings at once: 'weapons' (as the object of 'keep') and (as the object of 'bear') one-half of an idiom" related to military service).

83. *See id.* at 582 (considering "the phrases 'keep arms' and 'bear arms'" separately); *id.* at 591 (rejecting the dissenters' view that "keep and bear" is a unitary phrase).

84. *Id.* at 591 (citing the Pennsylvania and Ohio constitutions, and quoting the First Amendment). The Sixth Amendment "right to a speedy and public trial" offers another useful analogy in this respect. U.S. CONST. amend. VI; *see* Doggett v. United States, 505 U.S. 647, 648 (1992) (considering the speedy-trial guarantee); Waller v. Georgia, 467 U.S. 39, 49–50 (1984) (elaborating on the public-trial guarantee).

85. SCALIA & GARNER, *supra* note 1, at 129 (noting that, under the number canon, "the singular includes the plural"); *see id.* at 130 (explaining how, as a general matter, "the proposition that one includes multiple ones" is "logically inevitable").

possess and carry weapons in case of confrontation."[86] He recognized that the operative clause did not grant this right but declared only that it "shall not be infringed," meaning the Second Amendment, like the First and the Fourth Amendments, enshrines a "*pre-existing* right."[87] This close reading is thoroughly textualist. To determine the content of this pre-existing right, he consulted in particular the writings of William Blackstone, to whom the Framers were devoted.[88] Significantly, Blackstone described the right *not* as one limited in any way to military service, but as "'the natural right of resistance and self-preservation,'"[89] and "'the right of having and using arms for self-preservation and defence.'"[90] This historical approach is, as explained in the Introduction, also textualist—more precisely, originalist. Thus, based on "both text and history," Justice Scalia in *Heller* read the Second Amendment's operative clause to confer an individual (not collective) right to keep and bear arms.[91]

B. The Prefatory Clause of the Second Amendment

Justice Scalia next interpreted the Second Amendment's prefatory clause, which reads: "A well regulated Militia, being necessary to the security of a free State . . . ."[92] He showed how the prefatory (dependent) clause fits comfortably with his interpretation of the operative (independent) clause. Once again relying on textual elements and historical aids, he construed words and phrases in the prefatory clause as they would have been understood during the Framing era: "Militia" as all able-bodied males within a certain age range acting in concert for the common defense;[93] "well regulated" as properly

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86. *Heller*, 554 U.S. at 592.

87. *Id.*; *see also* United States v. Cruikshank, 92 U.S. 542, 553 (1876) ("This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ."); *cf.* U.S. CONST. amend. I ("Congress shall make no law . . . abridging" enumerated rights); U.S. CONST. amend. IV (enumerated right "shall not be violated").

88. *Heller*, 554 U.S. at 593–94; *see also* Alden v. Maine, 527 U.S. 706, 715 (1999) (recognizing that Blackstone's works "constituted the preeminent authority on English law for the founding generation").

89. *Heller*, 554 U.S. at 594 (quoting 1 BLACKSTONE *139 (1765)).

90. *Id.* (quoting 1 BLACKSTONE *140; 3 BLACKSTONE *2–4 (1768)).

91. *Id.* at 595.

92. U.S. CONST. amend. II.

93. *Heller*, 554 U.S. at 595 (citing United States v. Miller, 307 U.S. 174, 179 (1939), a Framing-era dictionary, and the writings of Madison and Jefferson); *id.* at 580 (noting that "the 'militia' in colonial America consisted of a subset of 'the people'"). *But see* AKHIL AMAR, THE BILL OF RIGHTS 51 (1998) (arguing that the "militia" was identical to "the people" during the founding era). Justice Scalia distinguished the militia from the *organized* militia: "Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them." *Heller*, 554 U.S. at 596. Today,

disciplined and trained;[94] and "security of a free State" as the safety of a free country.[95] For the Framing generation, an effective militia was indispensable to freedom because history had taught them, as Justice Scalia noted in *Heller*, "that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents."[96] Thus, the Second Amendment's prefatory and operative clauses fit together "perfectly"[97]: Given that the Framing generation needed a militia to preserve freedom, the individual right to have and carry arms shall not be infringed.[98]

This reading of the Second Amendment's whole text makes good sense from a textualist perspective.[99] As does Justice Scalia's originalist emphasis on Blackstone and other historical sources, which led him to conclude that "the *central component*" of the Second Amendment right is "individual self-defense."[100] He also relied on such historical sources

the militia comprises all able-bodied males from age 17 to 45 who are or intend to become citizens, and female citizens who are members of the National Guard. 10 U.S.C. § 311 (2006).

94. *Heller*, 554 U.S. at 597 (citing a Framing-era dictionary, treatise, and state declaration of rights). *But see* Patrick J. Charles, Essay, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U. L. REV. 1821, 1822 (2011) (arguing "'well regulated militia' does not merely equate to 'well-trained'"); *id.* at 1836 (suggesting a "'well regulated militia' was a state-sanctioned constitutional body of citizens" (footnote omitted)).

95. *Heller*, 554 U.S. at 597 (noting that the phrase "security of a free state" appears to have been a term of art in 18th-century political discourse, and that "other instances of 'state' in the Constitution . . . show[] that the word 'state' did not have a single meaning in the Constitution"). This is an instance where, contrary to the general rule, a term is not used consistently in a legal text. *See supra* note 55.

96. *Heller*, 554 U.S. at 598. This is precisely what happened in England under the Stuart Kings, prompting codification of the right of Protestants to have arms in the English Bill of Rights. *Id.* at 592–95 (surveying English history).

97. *Id.* at 598.

98. *Id.* at 599 (observing that "[t]he prefatory clause does not suggest that preserving the militia was the only reason" to secure the individual right to keep and bear arms); *see also id.* ("It was understood across the political spectrum that the right [to keep and bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."); *cf.* Silveira v. Lockyer, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) ("The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances . . . where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees.").

99. *See* SCALIA & GARNER, *supra* note 1, at 167 ("The text must be construed as a whole."). From a textualist perspective, if the Framers had wanted to secure *only* a collective right to arms for the common defense, they could have done so more directly, for example, by providing that "Congress shall pass no law disarming the state militias," or "States have a right to a well-regulated militia." Parker v. Dist. of Columbia, 478 F.3d 370, 379 (D.C. Cir. 2007).

100. *Heller*, 554 U.S. at 599; *see id.* at 582–83, 592–629 (relying heavily on historical references); *see, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3036–44 (2010) (plurality opinion) (following *Heller*'s originalist approach and holding that the Second Amendment is incorporated against the States); *id.* at 3050–58 (Scalia, J., concurring) (rebutting Justice Stevens's critique of the majority's

to make the related point that the Second Amendment's "core protection" is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[101] Up until this point in *Heller*, Justice Scalia was in his approach to the Second Amendment thoroughly and persuasively textualist–originalist. He was less so, however, when he defined the scope of the Second Amendment right in a rather indeterminate manner, as discussed in the next part.

III. THE INDETERMINATE SCOPE OF THE RIGHT TO KEEP AND BEAR ARMS

In *District of Columbia v. Heller*, Justice Scalia rightly recognized that the Second Amendment right to keep and bear arms is not absolute.[102] It has never been unlimited, not at the time of the Framing and thus not today.[103] The Second Amendment, Justice Scalia explained, enshrined a pre-existing right that was subject to "important limitation[s]";[104] it plainly was *not* a right to have and carry *any weapon* in *any manner* for *any purpose*.[105] That is, in colonial times, one had a right to keep and bear only certain weapons in certain manners for certain purposes. And Justice Scalia emphasized that the same weapon-manner-and-purpose limitations that applied in the Framing era still apply today.[106] This reasoning from *Heller* reflects his longtime originalist understanding that constitutional provisions enshrine *not* the "*current* meaning" but the "*original* meaning" of a right, as understood by the Framing generation.[107] So far, so good.

But, at this point in *Heller*, Justice Scalia strayed somewhat from originalism, which is an integral part of his textualist interpretive philosophy.[108] He did so, arguably, when he articulated two important limitations on the Second Amendment right: (A) "presumptively lawful

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theory of interpretation).

101. *Heller*, 554 U.S. at 635; *see also* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89 (2d Cir. 2012) ("Second Amendment guarantees are at their zenith within the home.").

102. *Heller*, 554 U.S. at 626 (emphasis added). Justice Scalia drew a useful analogy with the First Amendment: "[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." *Id.* at 595.

103. *See id.* at 626–28; *id.* at 634–35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.").

104. *Id.* at 627.

105. *Id.* at 626 (stating that the right to have arms "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose").

106. *See id.* at 626–28.

107. Scalia, *supra* note 4, at 38 (noting "the Great Divide with regard to constitutional interpretation is . . . that between *original* meaning . . . and *current* meaning").

108. *See supra* notes 10–14 and accompanying text.

regulatory measures" on the general exercise of the right;[109] and (B) the right to keep and bear only those weapons "'in common use at the time.'"[110] The first limitation can be easily reconciled with originalism, the second not so much. What follows is a discussion of how the first limitation squares with originalism and how, by contrast, the second offends Justice Scalia's originalist view that constitutional rights generally should not be left open-ended.[111]

A. Presumptively Lawful Regulatory Measures

The first limitation broadly pertains to *who* can have arms, *where* they can carry them, and *how* they can carry and buy them. Nothing in the *Heller* opinion, Justice Scalia said, "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."[112] He described these as "presumptively lawful regulatory measures" and clarified that the list was merely illustrative, not exhaustive.[113] Although he characterized these regulatory measures as "longstanding," many do not date back to the Framing era. Several courts and commentators have recognized this fact,[114] some noting that, for this

109. *Heller*, 554 U.S. at 627 n.26; *accord id.* at 626–27.

110. *Id.* at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

111. Arguably, as seen in the text below, both limitations on the Second Amendment right were dicta in *Heller*, as neither necessarily affected the outcome of that case. In *Heller*, the Supreme Court invalidated regulations that prevented a police officer from having and using handguns for self-defense in his home. *Id.* at 629. Thus, unlike regulations on gun ownership by felons or gun possession in schools, the regulations in *Heller* were not presumptively valid; and, regardless whether the Second Amendment protects weapons in common use for self-defense at the present time, or weapons that can be traced back to those in common use for self-defense at the time of the Framing, handguns would likely be protected either way (both as popular weapons for self-defense today and as "lineal descendants" of the colonial pistol). However, even if these limitations are dicta in *Heller*, they are Supreme Court dicta that lower courts cannot simply ignore and will generally adopt. *See, e.g.*, Peterson v. Martinez, 707 F.3d 1197, 1210 (10th Cir. 2013) ("[W]e are bound by Supreme Court dicta almost as firmly as by the Court's outright holdings . . . ." (internal quotation marks omitted)).

112. *Heller*, 554 U.S. at 626–27 (emphasis added).

113. *Id.* at 627 n.26. *Heller* did not specify whether these regulatory measures were presumptively lawful because they target conduct categorically outside the Second Amendment's scope, because they would pass some level of means-end constitutional scrutiny, or both. Most courts have held that they are "presumptively lawful because they regulate conduct outside the scope of the Second Amendment." United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010); *see also, e.g.*, *Peterson*, 707 F.3d at 1201; Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 203 (5th Cir. 2012).

114. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); 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, 1493–1549 (2009); Carlton F.W. Larson, *Four Exceptions in Search of A Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS

reason, "an originalist argument that proceeded by identifying *specific* eighteenth-century analogues to modern . . . regulations would be extremely difficult to make."[115] Fair enough, but this does not conflict with Justice Scalia's originalist approach.

For Justice Scalia, an originalist "must follow the *trajectory* of the [Second] Amendment, so to speak, to determine what it requires—and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment."[116] Although Justice Scalia in *Heller* declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment . . . ,"[117] the longstanding (albeit not Framing-era) regulatory measures he identified in that opinion appear to fall well within the "trajectory" of the Second Amendment.[118] Over the past two centuries, courts have upheld such regulatory measures under the Second Amendment and state analogues.[119] On a related note, Justice Scalia specifically noted that prohibitions on carrying concealed weapons were likewise upheld as far back as the 19th century.[120]

What is more, the absence of "specific" 18th-century analogues to modern regulations should not prevent an originalist from reasoning by *general* analogies to history and tradition.[121] For example, prohibitions on the possession of firearms by felons and the mentally infirm broadly comport with provisions in the English Bill of Rights that guaranteed arms to English subjects but *only* as "'Suitable to their condition and as

L.J. 1371, 1376–80 (2009).

115. *See, e.g.*, Larson, *supra* note 114, at 1379 (referring specifically to commercial gun regulations) (emphasis added); *see also id.* at 1376 ("[F]elon disarmament laws significantly postdate both the Second Amendment and the Fourteenth Amendment. An originalist argument that sought to identify 1791 or 1868 analogues to felon disarmament laws would be quite difficult to make.").

116. *See* Scalia, *supra* note 4, at 45 (initially offering this explanation in the related First Amendment context) (emphasis added).

117. *Heller*, 554 U.S. at 626–27.

118. Relatedly, Justice Scalia surveyed how courts and commentators viewed the Second Amendment from the post-ratification to post-Civil War periods. *Id.* at 605–19.

119. *See, e.g.*, Volokh, *supra* note 114, at 1524–33, 1538–49 (collecting cases on regulations related to sensitive places and commercial sales); *see also* Lewis v. United States, 445 U.S. 55, 65 & n.8 (1980) (upholding prohibition on the possession of firearms by felons, as such "legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties").

120. *Heller*, 554 U.S. at 626; *see* Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897) (upholding prohibitions on carrying concealed weapons, because "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . .").

121. *See Heller II*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[W]hen legislatures seek to address . . . new gun regulations because of conditions that have not traditionally existed, . . . the proper interpretive approach is to reason by analogy from history and tradition."); *cf.* Larson, *supra* note 114, at 1379 ("The absence of commercial regulation in the eighteenth century does not necessarily mean, of course, that the original public meaning of the Second Amendment precluded such regulation.").

allowed by Law.'"[122] Thus, these prohibitions generally adhere to Justice Scalia's originalist understanding that the Second Amendment protects the rights of "law-abiding, responsible citizens."[123] For this reason, originalists like Judge Frank Easterbrook "take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791," when the Second Amendment was adopted.[124] Judge Easterbrook also noted: "It would be weird to say that [a newer gun law] is unconstitutional in 2010 but will become constitutional by 2043, when it will be as 'longstanding' as [an older gun law] was when the Court decided *Heller*."[125] For an originalist, a right should not be so indeterminate as to permit dramatic shifts in the constitutionality of regulations over time. Time should not be the decisive factor.

Accordingly, because the "presumptively lawful regulatory measures" listed in *Heller* track the trajectory of the Second Amendment and approximate general (albeit not specific) regulatory analogues from the Framing era, this first limitation on the right to keep and bear arms squares with broad principles of originalism.

B. Weapons in Common Use at the Time

The second limitation that Justice Scalia identified in *Heller* is on *what* weapons qualify for constitutional protection. He said that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . ."[126] He derived this limitation on the right to keep and bear arms from the Court's 1939 decision in *United States v. Miller*,[127] which had rejected a Second Amendment challenge to federal regulations on short-barreled shotguns.[128] In *Heller*, Justice Scalia relied on *Miller* for the proposition that "the sorts of weapons protected were those 'in common use at the time,'"[129] and affirmed this limitation as "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[130] He cautioned against overreliance on *Miller*, which he described as "an uncontested and virtually unreasoned case,"[131] but he

122. *Heller*, 554 U.S. at 664 (quoting L. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 295, 297 (1981)).

123. *Id.* at 635.

124. United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

125. *Id.*

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

127. 307 U.S. 174 (1939).

128. *Id.* at 178.

129. *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179).

130. *Id.* (quoting 4 BLACKSTONE *148–49 and citing other sources).

131. *Id.* at 624 n.24 (criticizing Justice Stevens for reading too much into *Miller*).

nonetheless took a noteworthy lesson from it: "The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense."[132] This, he suggested, is why *Miller* had refused Second Amendment protection for short-barreled shotguns: "'the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] *at this time* has some reasonable relationship to the preservation or efficiency of a well regulated militia . . . ,'"[133] presumably because such a weapon was not in common use at the time *Miller* was decided in 1939.[134]

This second limitation, unlike the first one, cannot be reconciled with originalism quite so easily. The reason is that the relevant time in the common-use inquiry, as articulated in *Miller* and adopted by *Heller* (i.e., whether a weapon is "in common use *at the time*"), appears to be *the present time*—rather than the time the Second Amendment (for federal gun laws) or the Fourteenth Amendment (for state and local gun laws) was adopted.[135] In other words, Justice Scalia's discussion in *Heller* strongly implies that, to determine whether a specific weapon merits Second Amendment protection, a court must ask whether that weapon is in common use at the time the court is considering the issue, rather than whether it was in common use (or is similar to what was in common use) at the time the Second and Fourteenth Amendments were adopted in 1791 and 1868, respectively.[136]

In *Heller*, Justice Scalia apparently adopted this present-time inquiry. He noted, in dictum, that the Second Amendment would not protect sophisticated arms not in common use for lawful civilian purposes at the time *Heller* was decided in 2008—even if "[i]t may well be 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."[137] He also appeared to adopt *Miller*'s present-time inquiry when he struck down the handgun ban at issue in *Heller*: "[H]andguns *are* the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."[138] This statement is

132. *Id.* at 624 (quoting *Miller*, 307 U.S. at 179).

133. *Id.* at 622 (quoting *Miller*, 307 U.S. at 178) (emphasis added by author).

134. *Id.* at 625 (reading *Miller* to hold that the Second Amendment does not protect weapons, "such as short-barreled shotguns," that are not typically possessed by law-abiding citizens for lawful purposes).

135. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3038–42 (2010) (plurality opinion) (incorporating the Second Amendment against the States via the Fourteenth Amendment).

136. *Id.*; *see* Ezell v. City of Chicago, 651 F.3d 684, 702 (7th Cir. 2011) ("*McDonald* confirms that when state—or local—government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified.").

137. *Heller*, 554 U.S. at 627–28 (emphasis added).

138. *Id.* at 629 (emphasis added); *see also id.* at 628 ("The handgun ban amounts to a prohibition

vague as to time, but almost certainly refers to the popularity of handguns at the time *Heller* was decided. Not surprisingly, the Eighth, Eleventh, and D.C. Circuits have all interpreted *Heller* to establish a present-time inquiry of what weapons are in common use for lawful purposes.[139] Among the Federal Courts of Appeals, only the Fourth Circuit has, in a footnote and as dictum, read *Heller* to protect weapons in common use at the time of the Framing, setting the stage for a circuit split as to the proper scope of the Second Amendment right announced in *Heller*.[140] Commentators have adopted the view of the majority of courts, reading *Heller* to require a present-time inquiry (instead of a Framing-era inquiry).[141] Even Justice Breyer's dissent in *Heller* understood Justice Scalia's discussion as setting forth a present-time inquiry.[142]

Did, it is fair to ask, Justice Scalia betray originalism by adopting a present-time inquiry of what weapons are protected "Arms" within the meaning of the Second Amendment? There are reasons to believe he did.[143] First, the present-time inquiry is at odds with Justice Scalia's

of an entire class of 'arms' that *is* overwhelmingly chosen by American society for [self-defense]." (emphasis added)). Here, the use of the present tense is rather telling.

139. *Heller II*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("[B]ased upon the record as it stands, we cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting and therefore whether the prohibition of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms."); United States v. Tagg, 572 F.3d 1320, 1326 (11th Cir. 2009) ("Unlike the handguns in *Heller*, pipe bombs are not typically possessed by law-abiding citizens for lawful purposes."); United States v. Fincher, 538 F.3d 868, 874 (8th Cir. 2008) ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.").

140. United States v. Pruess, 703 F.3d 242, 246 n.2 (4th Cir. 2012). In *Pruess*, the court relied primarily on *Heller*'s discussion of presumptively lawful regulations to hold that the application of a felon-in-possession prohibition did not violate the Second Amendment. *Id.* at 245–47. As an aside, the court noted that the particular felon's arsenal of military-grade weapons and explosives counseled against finding his conduct to be within the scope of the Second Amendment, "based on the statement in *Heller* that 'the sorts of weapons' the Amendment protects are 'those in common use at the time' of ratification—not 'dangerous and unusual weapons,' which there is a 'historical tradition of prohibiting.'" *Id.* at 246 n.2 (4th Cir. 2012) (quoting *Heller*, 554 U.S. at 627).

141. *See, e.g.*, Rostron, *supra* note 36, at 712.

142. *Heller*, 554 U.S. at 720–21 (Breyer, J., dissenting).

143. Of course, Justice Scalia insisted that he had construed the Second Amendment as it would have been understood by "ordinary citizens in the founding generation." *Id.* at 576–77; *see also* United States v. Chester, 628 F.3d 673, 675 (4th Cir. 2010) (stating that *Heller* took an originalist approach); *cf.* William G. Merkel, Essay, The District of Columbia v. Heller *and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 349 (2009) (dismissing *Heller* as "a garden variety case of originalism manqué, i.e. an effort to pin point a single original understanding when in fact meaning was hotly contested at the time constitutional text was created"). But some have suggested that the *Heller* opinion reflects a compromise, in which Justice Scalia made certain doctrinal concessions to win Justice Anthony Kennedy's vote, so that the opinion would "speak for a united majority of five Justices rather than a mere plurality of four." *See* Rostron, *supra* note 36, at 713 (noting speculation over this point).

own originalist view that the scope of constitutional rights generally should not be left to the whims of future generations. Long before *Heller*, Justice Scalia pointed out this basic principle of constitutionalism:

> It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—*to embed certain rights in such a manner that future generations cannot readily take them away.* A society that adopts a bill of rights is skeptical that 'evolving standards of decency' always 'mark progress,' and that societies always 'mature,' as opposed to rot.[144]

The present-time inquiry defies this originalist understanding; it creates a right that later generations *can* easily take away. It does so by subjecting the right to keep and bear arms to a present-day popularity contest, by which a court will extend Second Amendment protection only if the weapon at issue is in common use at the time in question—that is, at some ever-changing "present" time. This means that the Second Amendment right is not fixed (and extended by analogy to new technologies over time) but forever depends on the behavior of current and future generations. If, for example, a generation of Americans were to stop buying, having, and using handguns for self-defense—such that even handguns were no longer typically used by law-abiding citizens for lawful civilian purposes—then the right to use handguns for self-defense would therefore be extinguished for that generation.[145] That is, any generation could at any time simply nullify the right that Justice Scalia recognized in *Heller*. In this way, the present-time inquiry essentially imports "evolving standards of decency"—which Justice Scalia so eschews—through the backdoor.[146]

Justice Scalia should be the first to object to the present-time inquiry on this ground. Well before *Heller*, he described the Second Amendment as a constitutional guarantee against later generations who,

144. Scalia, *supra* note 4, at 40–41 (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)) (emphasis added). Notably, Justice Scalia expressed a similar point in *Heller*: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634–35.

145. *See* Rostron, *supra* note 36, at 712 ("If a weapon was widely used and originally understood to be within the scope of the right to keep and bear arms, why should it lose its constitutional protection merely because the number of its users dwindles over the years?").

146. To be clear, the "evolving standards of decency" that Justice Scalia eschews in constitutional law refer to evolving *normative* standards, not *descriptive* circumstances. Originalism, by Justice Scalia's own account, accepts normative principles enshrined in the Constitution as fixed but fully recognizes that technologies and behaviors change over time. *See supra* notes 11–12 and accompanying text. An originalist simply asks how such changing technologies and behaviors fit within the trajectory of a fixed normative standard—here, the original meaning undergirding a constitutional guarantee. *See id.*

unlike the Framing generation, might undervalue the fundamental right to keep and bear arms for self-defense:

> [W]e value the right to bear arms less than did the Founders (who thought the right of self-defense to be absolutely fundamental) . . . . But this just shows that the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights.[147]

In other words, Justice Scalia specifically acknowledged in his pre-*Heller* writings that future generations may undervalue the Second Amendment right, putting the whole right in jeopardy if its entire existence hinged on whether such generations exercised and thus preserved the right.[148] This understanding makes his adoption of the present-time inquiry in *Heller* all the more bewildering. As an originalist, Justice Scalia should be skeptical of a right that expands or contracts based on a present-day popularity contest—not only because it gives a blank check to later generations, but also because it provides the government with a perverse incentive. Justice Breyer noted this perverse incentive in his dissent from *Heller*:

> 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. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.[149]

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147. Scalia, *supra* note 4, at 43. On a related note, the generation that adopted the Fourteenth Amendment, which incorporated the Second Amendment against the States, valued the right to keep and bear arms less as a bulwark against a tyrannical government and more as a weapon for self-defense. McDonald v. City of Chicago, 130 S. Ct. 3020, 3038 (2010) (plurality opinion) ("By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.").

148. Similarly, the First Amendment right to free speech has not been interpreted to hinge on whether a particular generation voices a given message. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (holding that the First Amendment's "protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered'" (quoting NAACP. v. Button, 371 U.S. 415, 445 (1963))). But the Fourth Amendment right against unreasonable searches has, by contrast, been interpreted to hinge on whether society at the time has a reasonable expectation of privacy in a certain area. *See* Dow Chem. Co. v. United States, 476 U.S. 227, 235 (1986) (holding that "society is [now] prepared to accept" a reasonable expectation of privacy in the curtilage area immediately surrounding a home).

149. *Heller*, 554 U.S. at 721 (Breyer, J., dissenting); *see also* Rostron, *supra* note 36, at 712 ("Scalia's approach gives governments an incentive to ban new types of weapons as soon as they

Next, the present-time inquiry is at odds with the way that Justice Scalia has applied originalism to other constitutional guarantees, including the First Amendment right to free speech, the Eighth Amendment right against cruel and unusual punishment, and the Fourteenth Amendment right to equal protection. This tension is most stark in view of his approach to the First Amendment, for which he has flatly rejected an indeterminate conception of the right to free speech:

> It makes a lot of sense to guarantee to a society that "the freedom of speech you now enjoy (*whatever* that consists of) will never be diminished by the federal government"; it makes very little sense to guarantee that "the federal government will respect the moral principle of freedom of speech, which may entitle you to more, or less, freedom of speech than you now legally enjoy."[150]

Why should it be any different with the Second Amendment right to keep and bear arms? And yet the present-time inquiry essentially does for the Second Amendment what Justice Scalia has said makes "very little sense" for the First Amendment; the present-time inquiry protects only weapons in common use at a given time, which may entitle us to more, or less, of a right to keep and bear arms than we now legally enjoy. By Justice Scalia's own account, it would make far more sense to guarantee whatever gun rights Americans enjoyed against the federal government when the Second Amendment was adopted in 1791, or that they enjoyed against state and local governments when the Fourteenth Amendment was adopted in 1868.[151] In this way, the constitutional guarantee to keep and bear arms would not be diminished over time. And it would be extended to new technologies *only if* they were analogous to longtime protected weapons and *only if* regulation of those technologies failed the proper level of constitutional scrutiny (which should not happen for regulation of the most dangerous, military-grade weapons).[152] This approach is decidedly more originalist than one that decides the content of the Second Amendment based on what weapons are presently in common use for lawful civilian purposes.

As with the First Amendment right to free speech, Justice Scalia has

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appear, so that they never become common enough to receive constitutional protection."). Under the present-time inquiry, one could also imagine taxes used to incentivize would-be gun owners to purchase some weapons over others, such that the other weapons fall out of use and thus lose any Second Amendment protection.

150. Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 148 (Amy Gutmann ed., 1997).

151. Recall that the Second Amendment has been incorporated against the States via the Fourteenth Amendment. *McDonald*, 130 S. Ct. at 3036–44.

152. For more on how, from an originalist perspective, the Second Amendment should be applied to current and future weapons, see *infra* Part III.C.

also rejected an indeterminate conception of the Eighth Amendment right against cruel and unusual punishment. The Eighth Amendment, he has long insisted, "means not . . . whatever may be considered cruel from one generation to the next, but . . . " what the Framing generation considered cruel when the Eighth Amendment was adopted.[153] Otherwise, he explained, the Eighth Amendment "would be no protection against the moral perceptions of a future, more brutal, generation. It is, in other words, rooted in the moral perceptions *of the time*."[154] Justice Scalia believes that a right, if it is to have any effect at all, must not be tethered to the perceptions of some indeterminate time in the future, but must be fixed in the perceptions of the time in which the right was adopted. By extension, unless the Second Amendment protects weapons similar to those in common use in 1791 or 1868, it likewise would offer little (if any) protection against the attitudes of a future generation more skeptical of gun rights.

Similarly, Justice Scalia thinks that the Fourteenth Amendment right to equal protection should be rooted in original meaning. He has long said that he answers questions about what constitutes a denial of equal protection "on the basis of the 'time-dated' meaning of equal protection in 1868," when the Fourteenth Amendment was adopted.[155] Why, then, should he not do the same for the "time-dated" meaning of the right to keep and bear arms? As seen above, his general originalist approach to constitutional interpretation lends itself *not* to the *Heller* inquiry of what weapons are in common use at the present time, but to an inquiry that asks what weapons were in common use at two decisive moments in time: 1791 for the Second Amendment right to keep and bear arms vis-à-vis the federal government, and 1868 for the Fourteenth Amendment right to keep and bear arms vis-à-vis state and local governments. Thus, the present-time inquiry that Justice Scalia apparently adopted in *Heller* renders the Second Amendment right far too indeterminate to square with his originalist interpretive philosophy.

In rebuttal, Justice Scalia may insist that *Heller*'s present-time inquiry indeed reflects the original, Framing-era understanding of the Second Amendment right to keep and bear arms. He said so in *Heller*, noting that the Court was "adopt[ing] . . . the original understanding of the Second Amendment."[156] If this were so, however, the Second Amendment right would itself have to be indeterminate: an open-ended

153. Scalia, *supra* note 150, at 145 (internal quotation marks omitted).

154. *Id.*

155. *Id.* at 148–49.

156. Dist. of Columbia v. Heller, 554 U.S. 570, 625 (2008); *see also id.* at 576–77 (claiming to interpret the Second Amendment as it would have been understood by "ordinary citizens in the founding generation").

right that was understood to vary from generation to generation, depending on what weapons were in common use for each generation. Given what Justice Scalia has said about the purpose behind the Bill of Rights—to guarantee a minimum baseline of fundamental rights that future generations could not readily take away—this seems rather unlikely. But it is possible. Originalism, Justice Scalia has explained, recognizes that a term in a written law can "clearly connote[] a category that changes from decade to decade," such as, for example, the term "endangered species" in an environmental statute.[157] But he gave this example to draw an important contrast, specifically noting that the term "cruel punishments" in the Eighth Amendment does not connote such an ever-changing category.[158] And he does not interpret other constitutional rights to be so open-ended, as the moral principles that undergird those rights, "most of us think, are permanent."[159] He thus should not have suggested in *Heller* that the Second Amendment protects only those weapons in common use at the present time. By doing so, he rendered the right indeterminate.

Alternatively, Justice Scalia may have *meant*, but failed to *clarify*, that the Second Amendment protects weapons in common use not at the present time but at the time of the Framing.[160] Justice Scalia may well insist that this is what he meant to say in *Heller*. But even if we were to assume that this is what he in fact meant to say, his discussion in *Heller* suggests otherwise and, as noted above, is fairly read to establish a

157. Scalia, *supra* note 150, at 146.

158. *Id.* (noting that "Americans of 1791 . . . were embedding in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to nought").

159. *Id.* Justice Scalia eschews moral indeterminacy as a basis for interpreting constitutional rights. *Id.* at 148. Still, he might argue that the moral principle behind the Second Amendment right *is* permanent, the principle being simply to allow law-abiding citizens in each generation to keep and bear whatever weapons they typically used for lawful purposes. Put another way, Justice Scalia may argue that, while referencing weapons used today, he is still employing the categorization envisioned by the Framing generation. On this basis, he could argue that his conception of the Second Amendment right is not *morally* indeterminate, just *empirically* indeterminate (i.e., subject to an empirical, not moral, assessment of the weapons in common use at any given time that would fit within that categorization). But this argument would still leave originalist objections to *Heller*'s present-time inquiry, discussed in the text above, largely unanswered. This may well be an instance where originalism simply admits disagreement about the original meaning and how it applies. *See* Scalia, *supra* note 4, at 45.

160. Another possibility is that Justice Scalia intentionally left this common-use inquiry open for the lower courts to clarify, just as he did with the proper level of scrutiny to be applied depending on whether a challenged regulation infringes a core or non-core right to keep and bear arms. *See Heller*, 554 U.S. at 628–30, 634–35. The lower courts have already begun to diverge as to the common-use inquiry in particular. The Eighth, Eleventh, and D.C. Circuits asked what weapons were in common use at the time each court considered the Second Amendment challenge at issue, *see supra* note 139, whereas the Fourth Circuit asked (albeit in dicta) what weapons were in common use at the time of the Framing, *see supra* note 140. Before this circuit split materializes or deepens, the Supreme Court should weigh in and provide needed clarification.

present-time inquiry.[161] Many courts and commentators—originalists and nonoriginalists alike—have understood *Heller* to adopt such an inquiry.[162] And that inquiry, as demonstrated above, is decidedly nonoriginalist.

C. An Alternative, More Originalist Approach

If, by adopting the present-time inquiry in *Heller*, Justice Scalia strayed from originalism, how then should an originalist apply the Second Amendment to various weapons? Consider an alternative, more originalist inquiry that includes three important questions: (1) whether the weapon at issue is a "bearable arm" (i.e., a weapon that can be carried); (2) whether that weapon is a "lineal descendant" of one that was in common use when the relevant constitutional provisions were adopted (i.e., a weapon that can be traced back to a commonly-used equivalent from the Revolutionary or Reconstruction era, depending on whether a federal or state/local regulation is at issue); and (3) whether regulation of that weapon passes the proper level of means-end constitutional scrutiny (i.e., intermediate or strict scrutiny, depending on whether the regulation intrudes on conduct central or peripheral to the fundamental right to keep and bear arms).[163]

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161. Justice Scalia, of all people, should know that when he writes words down in a judicial opinion, they no longer belong to him. It does not matter what he meant to say in *Heller*; it matters only what he said. *Cf.* Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2187 (2011) (per Roberts, C.J., joined by Scalia, J.) ("Whatever [respondent] thinks the Court of Appeals meant to say, what it said was [something else] .... We take the Court of Appeals at its word. Based on those words, the decision below cannot stand.").

162. *See supra* notes 35–37, 139, 141–142, and accompanying text.

163. Here, the "lineal descendancy" inquiry raises the possibility that, for gun regulation, the normal rules of federalism will be reversed. Normally, state governments have *more* authority than the federal government to regulate guns. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 & n.3 (1995) (holding Congress had no authority under the Commerce Clause to criminalize gun possession in a school zone because, in part, it encroached on areas of public safety and health traditionally subject to state regulation). But under the "lineal descendancy" inquiry, given that the universe of arms was less technologically advanced in 1791 versus 1868, state and local governments may arguably have *less* power than the federal government to regulate or ban firearms (because "lineal descendancy" for modern weapons may be more easily established as to Reconstruction-era weaponry versus Revolutionary-era arms). *See infra* notes 169–171 and accompanying text. But if self-defense weapons in common use in 1868 were merely "lineal descendants" of such weapons in 1791, the scope of the right to keep and bear arms would be roughly the same with respect to both state and federal law. The scope of the right would also be roughly the same if the generation adopting the Fourteenth Amendment sought only to incorporate the arms-bearing right *precisely* as it was understood by the generation adopting the Second Amendment. *See* Ezell v. City of Chicago, 651 F.3d 684, 710 (7th Cir. 2011) ("[T]he Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified." (citing McDonald v. City of Chicago, 130 S. Ct. 3020, 3038–42 (2010) (plurality opinion))); *cf. McDonald*, 130 S. Ct. at 3035 (reaffirming that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal

The second step in particular, with its "lineal descendancy" inquiry, is geared toward originalism and is aimed at tracking the "trajectory" of the Second Amendment protection, from colonial weapons that Americans surely meant to protect at the time of the Framing, all the way to modern-day weapons that clearly did not exist then.[164] As argued below, this three-step, alternative approach draws insights from *Heller* and its progeny, but more closely adheres to originalism.

1. Whether the Weapon Is a "Bearable Arm"

The first step in the three-step approach to a Second Amendment challenge is to ask whether the weapon at issue is a "bearable arm." This insight comes from *Heller* itself, in which Justice Scalia observed that "the Second Amendment extends, prima facie, to all instruments that constitute *bearable* arms, even those that were not in existence at the time of the founding."[165] Just as the First Amendment applies to modern forms of communication, and the Fourth Amendment applies to modern forms of search, the Second Amendment should likewise apply to modern forms of weaponry.[166] But the emphasis here is on the *minimum threshold* for Second Amendment protection: For a weapon to merit any such protection at all, it must at least be *bearable* (in the ordinary sense)—that is, capable of being carried on one's person.[167] This limitation makes good sense given that the Second Amendment guarantees the "right to keep and *bear* Arms," fairly implying that the "Arms" in question must be bearable.

Accordingly, large-scale bombs and missiles, along with modern-day bombers and tanks, are clearly not protected under the Second Amendment because they are not bearable arms.[168]

encroachment'" (quoting Malloy v. Hogan, 378 U.S. 1 (1964)). If anything, the generation adopting the Fourteenth Amendment had a more limited view of the Second Amendment right, also militating against any perversion of federalism. *See McDonald*, 130 S. Ct. at 3038 ("By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense."). A more in-depth discussion of federalism and incorporation doctrines, as they apply in the Second Amendment context, is beyond the scope of this Article.

164. *Cf. supra* notes 116–125 and accompanying text (discussing the "trajectory" of restrictions and prohibitions on gun ownership and use).

165. *Heller*, 554 U.S. at 582 (emphasis added). In other words, as Justice Scalia recognized, this limit on the arms-bearing right appears on the face of the Second Amendment's text.

166. *Id.*

167. This definition comports with the ordinary meaning of "bear" that Justice Scalia endorsed in *Heller*: to carry "'upon the person or in the clothing or in a pocket . . . .'" *Id.* at 584 (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998)).

168. Unlike the word "bear," the word "keep" in the Second Amendment does not furnish a similarly helpful limitation on the right in question. To keep ordinarily means to have in one's custody,

Schaerer: What the Heller?: An Originalist Critique of Justice Scalia's Sec

2. Whether the Weapon Is a "Lineal Descendant" of One in Common Use When the Second or Fourteenth Amendment Was Adopted

The second question in this analysis, like the present-time inquiry in *Heller*, focuses on the *type* of weapon at issue. But, unlike the present-time inquiry, it does not ask whether the weapon is in common use *at the present time*. Instead, it asks whether the weapon was in common use for lawful purposes, or is the "lineal descendant" of a weapon in common use for lawful purposes, *at the time relevant constitutional provisions were adopted*. As noted above, there are two relevant constitutional provisions here: the Second Amendment, adopted in 1791, guarantees the right to keep and bear arms vis-à-vis the federal government; and the Fourteenth Amendment, adopted in 1868, incorporates that right against state and local governments.[169] So the question becomes, in most cases, whether a modern-day weapon qualifies as a "lineal descendant" of a weapon in common use in 1791 (if a federal gun law is being challenged) or 1868 (if a state or local gun law is being challenged).[170]

There are two subparts to this inquiry: (i) a determination of whether the weapon is a "lineal descendant" of a weapon that existed in 1791 or 1868; and (ii) a determination of whether any such Framing-era equivalent was in common use for lawful civilian purposes during that time.[171] Each subpart will be further explained below. For now, the takeaway is that this analysis comports with originalism, which asks how new technologies fit within the fixed, original meaning of a right.[172] In other words, an originalist should ask whether a new weapon has a place within the trajectory of the Second Amendment. This originalist feature of the proposed analysis guarantees, as Justice Scalia has prescribed in the First Amendment context, that the Second Amendment right will not be diminished beyond a minimum baseline enjoyed by the Framing generation.[173]

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as Justice Scalia recognized in *Heller*, 554 U.S. at 582, and anyone could have in custody (at least in theory) even the largest bombers and tanks.

169. *See supra* notes 34 and 136.

170. One would expect few challenges to regulation over colonial pistols and muskets, either because such regulation is not robust, such weapons are not often relied on for self-defense, or both. Most challenges will be to regulation over *modern-day* weaponry.

171. As used here, Framing era can refer to either 1791, when the Second Amendment was adopted, or 1868, when the Fourteenth Amendment was adopted.

172. *See supra* note 11–12 and accompanying text; *see also* SCALIA & GARNER, *supra* note 1, at 78 ("Although courts routinely apply legal instruments to novel situations over time, their meaning remains fixed.").

173. *See supra* text accompanying note 150. Justice Scalia has a similar prescription for other constitutional rights. *See supra* text accompanying notes 153–155 and 158–159.

a. Whether the Weapon Is a "Lineal Descendant" of a Framing-Era Weapon

The first subpart of this inquiry delves into what bearable arms qualify for Second Amendment protection and requires a careful determination of whether a modern-day weapon is a "lineal descendant" of a weapon that existed in the Framing era. Here, the term "lineal descendant" is being used not in its ordinary sense but in a somewhat novel manner. Ordinarily, the term is used in the context of ancestry and inheritance: "A blood relative in the direct line of descent," such that "[c]hildren, grandchildren, and great-grandchildren are lineal descendants."[174] The first court to apply the term "lineal descendant" to weapons in the Second Amendment context appears to have been the D.C. Circuit in *Parker v. District of Columbia*,[175] which the Supreme Court later partly affirmed (under a different case name) in *Heller*.

In *Parker*, the D.C. Circuit held 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."[176] At oral argument in *Heller*, Chief Justice John Roberts picked up on this use of the term "lineal descendant," referring to "lineal descendents of the arms . . . ."[177] Every lawyer who argued *Heller* before the Supreme Court also referred to the term, albeit without much elaboration.[178] And judges have since alluded to the general concept of a "lineal descendant" of a Framing-era weapon, as did Judge Brett Kavanaugh when he endorsed an originalist approach to the Second Amendment:

> [W]hen legislatures seek to address new weapons that have not traditionally existed . . . [t]hat does not mean the Second Amendment does not apply to those weapons . . . . Nor does it

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174. BLACK'S LAW DICTIONARY 476 (8th ed. 2004); *cf. id.* (defining "collateral descendants" as "a blood relative who is not strictly a descendant, such as a niece or nephew").

175. 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.* Dist. of Columbia v. Heller, 554 U.S. 570 (2008).

176. *Id.* at 398 (emphasis added).

177. Tr. of Oral Arg. at 77, Dist. of Columbia v. Heller, No. 07-290 (U.S. Mar. 18, 2008), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf. The Chief also wondered out loud whether "there are lineal descendents of [gun] restrictions as well." *Id.* As far as *specific* 18th-century analogues go, this may not be the case. *See supra* notes 114–115 and accompanying text.

178. Tr. of Oral Arg. at 22, Dist. of Columbia v. Heller, No. 07–290 (U.S. Mar. 18, 2008), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf (Mr. Dellinger commenting on protection for "lineal descendants"); *id.* at 47 (General Clement discussing whether "lineal descedants" might, as a threshold, include machineguns); *id.* at 61 (Mr. Gura suggesting that machineguns may not be "'lineal descendent[s]'").

Schaerer: What the Heller?: An Originalist Critique of Justice Scalia's Sec

> mean that the government is powerless to address those new weapons . . . . Rather, in such cases, the proper interpretive approach is to reason by analogy . . . .[179]

All of these jurists (and some of these lawyers) seemed to be suggesting that the relevant inquiry here is whether a newer weapon was derived, somewhat proximately, from an older one. That is, the question of "lineal descendancy" is whether a more modern weapon can be fairly traced back to a Framing-era counterpart. For example, as the D.C. Circuit said in *Parker*, handguns and rifles are the modern-day equivalents of the colonial pistol and musket—that is, their "lineal descendants." Though the question of "lineal descendancy" is not entirely cut-and-dried but requires the exercise of judgment (and perhaps some fact-finding),[180] it lends itself to practical application no less so than questions of whether "governmental entanglement" with religion becomes so "excessive" as to violate the First Amendment,[181] or whether a search is "reasonable" under the Fourth Amendment.[182]

Justice Scalia should agree, as the question of "lineal descendancy" comports with his originalist perspective. Just as he recognizes that the Eighth Amendment applies to "all sorts of tortures quite unknown at the time the Eighth Amendment was adopted,"[183] so too must he acknowledge that the Second Amendment applies to all sorts of weapons unknown when the Second Amendment was adopted.[184]

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179. *Heller II*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). In *McCulloch v. Maryland*, Chief Justice John Marshall endorsed a similar brand of deductive reasoning for constitutional interpretation, explaining that a constitution, unlike a statute, requires that "only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). Justice Scalia has relied on this passage from Chief Justice Marshall to explain that with constitutional interpretation, unlike statutory interpretation, the "usual principles [of interpretation] are being applied to an unusual text." Scalia, *supra* note 4, at 37.

180. Admittedly, the less cut-and-dried the question of "lineal descendancy" is, the greater the risk that this new inquiry is itself indeterminate. For example, to be a "lineal descendant" of a Framing-era weapon, must a firearm be muzzle-loading? Must it not use cartridges? Must it have no optics for sighting? Must it have no magazine and no attachment points for lights or optics? If magazines are included, are belt-fed weapons included? If expanding bullets are protected, are exploding munitions or M203 grenade launchers also protected? Textualism, including originalism, does not pretend to have all the answers. As Justice Scalia and other textualists readily admit, "[t]extualism will not relieve judges of all doubts and misgivings about their interpretations. Judging is inherently difficult . . . ." SCALIA & GARNER, *supra* note 1, at xxix.

181. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (discussing the test for "excessive government entanglement with religion" (internal quotation marks omitted)).

182. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) (discussing the standard for "Fourth Amendment reasonableness").

183. Scalia, *supra* note 150, at 145.

184. Relatedly, if a weapon bears less resemblance to a Framing-era equivalent but is nonetheless held to qualify for Second Amendment protection, it may for this reason be reviewed under a lower standard of constitutional scrutiny, such as intermediate scrutiny, depending on the circumstances.

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Indeed, he did so in *Heller*.[185]

b. Whether the Framing-Era Equivalent Was in Common Use When the Second or Fourteenth Amendment Was Adopted

If a weapon at issue is the "lineal descendant" of a Framing-era weapon, the analysis moves to the next subpart of the inquiry into what bearable arms are protected under the Second Amendment: a careful determination of whether that Framing-era weapon was in common use for lawful civilian purposes in 1791 or 1868. Courts can determine what was in "common use" through fact-finding, by which they can receive and consider evidence on how a weapon was used by law-abiding citizens during Revolutionary or Reconstruction times. Then the inquiry becomes a line-drawing exercise: How common is common enough? Or, put another way, what is "common"? This last question is a categorical one, similar to the question courts routinely ask to decide what constitutes "religion"[186] or "speech"[187] under the First Amendment, or "search"[188] or "seizure"[189] under the Fourth Amendment. For example, as Justice Scalia observed in *Heller*, the colonial pistol was typically used by law-abiding citizens for lawful self-defense.[190] Thus, the colonial pistol and its "lineal descendants" (certain handguns) are protected bearable arms within the meaning of the Second Amendment.

3. Whether Regulation of the Weapon Passes Constitutional Scrutiny

If a weapon is both bearable and a "lineal descendant" of a Framing-

185. Dist. of Columbia v. Heller, 554 U.S. 570, 582 (2008) ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.").

186. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 176 (1965) (interpreting "religion" in the First Amendment context as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God").

187. *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011) (holding that "the creation and dissemination of information are speech within the meaning of the First Amendment").

188. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 951 n.3 (2012) (holding that "a 'search' within the original meaning of the Fourth Amendment" occurs "[w]here . . . the Government obtains information by physically intruding on a constitutionally protected area").

189. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (holding that "a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment").

190. *See Heller*, 554 U.S. at 629. Notably, the colonial pistol was also a standard-issue militia weapon that would have served the militia-participation purpose announced in the Second Amendment's prefatory clause. Second Militia Act of 1792, ch. 33, 1 Stat. 271, 273 § 4 (providing that artillery and cavalry members shall furnish themselves with, among other things, "a pair of pistols"). The Continental Congress likewise reported pistols as acceptable militia weapons, 25 JOURNALS OF THE CONTINENTAL CONGRESS 741–42 (1922), as did the various states, *see, e.g.*, ACTS AND LAWS OF THE STATE OF CONNECTICUT 150 (1784); STATUTES OF THE STATE OF NORTH CAROLINA 592 (1791).

era weapon in common use for lawful civilian purposes in 1791 or 1868, the third and final step in the proposed Second Amendment analysis is to ask whether a challenged regulation passes the proper level of constitutional scrutiny. In *Heller*, Justice Scalia declined to establish a test for the constitutionality of gun laws; instead, he held that the handgun ban and related trigger-lock requirement at issue in *Heller* were so "severe" that they would violate the Second Amendment "[u]nder *any* of the standards of scrutiny that we have applied to enumerated constitutional rights . . . ."[191] Other than clarifying that Second Amendment claims could *not* be subject to mere rational-basis scrutiny,[192] he left it to the lower courts to develop the proper approach.[193]

Justice Scalia did, however, point to the First Amendment (and, to a lesser extent, the Fourth Amendment) as instructive.[194] And the lower courts have generally applied either strict or intermediate scrutiny under the Second Amendment, "depend[ing] on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[195] As the Federal Courts of Appeals have begun to observe, "a 'severe burden on the core Second Amendment right of armed self-defense should require a strong justification,' but 'less severe burdens on the right' and 'laws that do not implicate the central self-defense concern of the Second Amendment may be more easily justified.'"[196]

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191. *Heller*, 554 U.S. at 628–29 (emphasis added).

192. *Id.* at 629 n.27 (noting "separate constitutional prohibitions on irrational laws").

193. *See id.* at 635 ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . .").

194. *Id.* at 579, 582, 591, 595, 635. Courts and commentators agree that the First Amendment, in particular, is a useful guidepost in developing Second Amendment jurisprudence. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("Categorical limits on the possession of firearms would not be a constitutional anomaly. Think of the First Amendment, which has long had categorical limits: obscenity, defamation, incitement to crime, and others."); United States v. Marzzarella, 614 F.3d 85, 89 n.4 (3d Cir. 2010) (reading *Heller* to imply that "the structure of First Amendment doctrine should inform our analysis of the Second Amendment"); Glenn Harlan Reynolds, Essay, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 248, 251 (2012); *cf.* Mark Tushnet, Essay, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 419 (2009) (explaining that "the analogies [*Heller*] draws between the First and Second Amendments" may cabin Second Amendment jurisprudence).

195. United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010); *see also, e.g.*, Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 194 (5th Cir. 2012) (collecting cases from Third, Fourth, Sixth, Seventh, Tenth, and D.C. Circuits). *But see Skoien*, 614 F.3d at 641–42 (en banc panel of the Seventh Circuit resisting "'levels of scrutiny' quagmire" but nonetheless applying, in essence, intermediate scrutiny to a federal law prohibiting possession of firearms by those convicted of a domestic-violence misdemeanor).

196. *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 195 (Fifth Circuit quoting the Fourth Circuit in *Chester*, 628 F.3d at 682) (brackets omitted). In *Chester*, the Fourth Circuit quoted the Seventh Circuit for this same proposition. *Chester*, 628 F.3d at 682 (quoting United States v. Skoien, 587 F.3d 803, 813–14 (7th Cir. 2009), *vacated on other grounds by rehearing en banc*, 614 F.3d 638 (7th Cir. 2010)).

This analytical framework fits well within the three-step approach to Second Amendment challenges proposed here.

Although an exhaustive review of how the above three-step approach would apply to various modern-day weapons is beyond the scope of this Article, suffice it to say that many of the most dangerous, military-grade weapons could be regulated or banned under this approach. Some of those weapons would clearly fall outside the scope of the Second Amendment because they are not bearable, such as missiles, bombers, and tanks. Most (if not all) of the others either would not qualify as "lineal descendants" of Framing-era weapons, or would be so dangerous that robust regulations and outright bans may well pass even the most exacting standards of constitutional scrutiny. For example, bazookas and mortars (perhaps even machineguns) may trace their descent from cannons, which almost certainly were not in common use for lawful civilian purposes during the Framing era, neither in 1791 nor 1868 (nor even today).[197] Furthermore, regulations and bans on bazookas, mortars, grenades, pipe guns, and machineguns[198] may well pass constitutional muster, given how dangerous they are and how attenuated (or gratuitous) their use may be for the core Second Amendment purpose of self-defense.[199]

In sum, the three-step approach endorsed here is not only workable but also more originalist (and thus more textualist) than Justice Scalia's present-time inquiry. The lower courts can and should move Second

197. This inquiry into what weapons were in common civilian use comports with what Justice Scalia, relying on Blackstone, described in *Heller* as a historical prohibition on "the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627 (quoting 4 BLACKSTONE *148–49 and citing other sources); *see* 4 BLACKSTONE *148–49 ("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."). Though Blackstone did not specify which weapons were considered "dangerous and unusual" in the 18th century, courts could make a related determination—i.e., whether a particular weapon, such as a cannon, was in common civilian use at that time—through fact-finding.

198. Staples v. United States, 511 U.S. 600, 600 (1994) ("The National Firearms Act criminalizes possession of an unregistered 'firearm,' 26 U.S.C. § 5861(d), including a 'machinegun,' § 5845(a)(6), which is defined as a weapon that automatically fires more than one shot with a single pull of the trigger, § 5845(b)."); *see generally* National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (codified as amended in scattered sections of 26 U.S.C. (2006)).

199. In *Heller*, Justice Scalia hinted that federal statutes regulating machineguns are constitutional. *See Heller*, 554 U.S. at 624 (stating it would be "startling" to read the Second Amendment in a way that would render unconstitutional federal statutory restrictions on machineguns). Several courts have reached a similar conclusion. *See, e.g.*, United States v. Henry, 688 F.3d 637, 640 & n.3 (9th Cir. 2012) ("We agree with the reasoning of our sister circuits that machine guns are 'dangerous and unusual weapons' that are not protected by the Second Amendment." (collecting cases)); *cf.* United States v. Tagg, 572 F.3d 1320, 1326 (11th Cir. 2009) (holding concealed weapons could be prohibited because of their tendency to be used in violent crimes on unsuspecting victims); United States v. Upton, 512 F.3d 394, 404 (7th Cir. 2008) (likening sawed-off shotguns, for which federal statutory restrictions were affirmed in *Miller*, to "other dangerous weapons like bazookas, mortars, pipe bombs, and machine guns").

Amendment jurisprudence toward this three-step approach, at least with respect to the first step (i.e., bearable weapons) and the third step (i.e., level of constitutional scrutiny).[200] *Heller* not only permits but also invites them to do so. In *Heller*, Justice Scalia said that the Second Amendment extends, on its face, to all "bearable" weapons.[201] He declined to establish a test for the constitutionality of gun laws, leaving the lower courts free to apply a proper level of constitutional scrutiny based on the specific conduct and gun law in question.[202] In other words, adopting the three-step approach outlined above would not require a radical departure from *Heller*, only a modest refinement to its flawed, not-quite-originalist discussion. Ultimately, however, the Supreme Court may well have to clarify the correct approach and provide the proper guidance.

IV. CONCLUSION

In *District of Columbia v. Heller*, Justice Scalia adopted a persuasive textualist reading of the Second Amendment—as securing an individual, nonabsolute right to keep and bear arms. But he misapplied the textualist principle of originalism when he held that the right protects only those weapons in common use *at some ever-changing "present" time*. Instead, the right should extend to weapons that are "lineal descendants" of weapons in common use *at the time the Second or Fourteenth Amendment was adopted*. This approach is more originalist. It would better ensure that the right to keep and bear arms cannot be so easily diminished over time based on the behavior of current and future generations. And it would permit reasonable gun regulations and, in some cases, even outright bans on certain classes of weapons.[203] Thus, by this approach, we can both respect our constitutional commitments

200. Lower courts have begun to develop a test for the constitutionality of gun laws. *See supra* notes 195–196 and accompanying text. But no court, apparently, has held that a weapon is unprotected on the ground it was not "bearable," perhaps because no litigant has been so bold as to assert a constitutional right to have missiles, bombers, tanks, and the like.

201. *Heller*, 554 U.S. at 582.

202. *See id.* at 628–29.

203. *See supra* notes 194–199 and accompanying text. This should allay, at least somewhat, the "fear that altogether plausible, perhaps even 'winning,' interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation." Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989); *see also* ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 295–96 (2011) ("As the history of the right to bear arms and gun control shows, there is a middle ground in which gun rights and laws providing for public safety from gun violence can coexist."); *cf.* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764) (decrying the "false utility" of laws that disarm only those neither inclined nor determined to commit crimes). Indeed, one may read *Heller* to suggest that most gun laws may well be upheld. *See Heller*, 554 U.S. at 629 ("Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban.").

University of Cincinnati Law Review, Vol. 82, Iss. 3 [2018], Art. 3

and work within them to help solve the vexing problem of gun violence in America. Anything less would offend the rule of law and, in so doing, betray our longtime goal to have a "government of laws, not of men"—a worthy goal at the very heart of Justice Scalia's jurisprudence.[204]

204. *See* Scalia, *supra* note 4, at 25 ("The rule of law is *about* form. . . . Long live formalism. It is what makes a government a government of laws and not of men.").