

## Gun Rights and the New Lochnerism

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The analysis here demonstrates that the recently revised doctrine regarding the Second Amendment and gun rights is driven by the current Supreme Court (“Court”) hostility towards government regulation in a manner that is akin to what was seen during the *Lochner* Era.<sup>3</sup>

Regrettably, this Article is timely and is expected to continue to be so in light of ongoing gun violence and mass shootings that continue to plague the United States, including the recent mass shooting in Orlando, Florida. The Court’s decisions have cast a long legal shadow, which has resulted in states and the federal government becoming justifiably fearful of running afoul of the Court’s latest Second Amendment limitations espoused in *District of Columbia v. Heller* and *McDonald v. City of Chicago*.<sup>4</sup> This is a legitimate fear, given that the current Second Amendment limits are grounded in neither the text of the Constitution nor precedent, which makes it difficult for lawmakers to accurately predict what the Court will next deign to be impermissible.<sup>5</sup>

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*Education*, 22 U. FLA. J.L. & PUB. POL’Y 45 (2011); Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467 (2014).

<sup>3</sup> See Brief of Law Professors Erwin Chemerinsky and Adam Winkler, as Amici Curiae Supporting Petitioner, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157186, at \*12–13, \*15 (demonstrating inconsistency within the position adopted by the Court in the *Lochner* era); PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 4, 198 (1998) (*Lochner* remains essential to the battles over the Court’s role in the ideological conflict which pits the free market against the duty of the regulatory state); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 877 (1987).

<sup>4</sup> *McDonald*, 561 U.S. at 742; *Heller*, 554 U.S. at 570.

<sup>5</sup> See Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1134–35, 1162 (2011) (discussing the well-established state and federal court precedent regarding the Second Amendment prior to *Heller* and *McDonald*, and how the Courts’ departure from precedent gives subsequent courts a legitimate fear of overstepping constitutional limits); Kyle Hatt, *Gun-Shy Originalism: The Second Amendment’s Original Purpose*, in *District of Columbia v. Heller*, 44 SUFFOLK U. L. REV. 505, 506 (2011) (discussing how the Court’s current interpretation of the Second Amendment is contrary to the amendment’s original purpose, which was to protect Americans’ ability to resist the tyranny of their federal government). *Heller*, through holding that the Second Amendment protects one’s individual rights to bear arms for self-defense, led to limitations on the type of arms one could possess, which made the original purpose of the Second amendment “unachievable.” See also *District of Columbia v. Heller*, 554 U.S. 570, 637–38 (2008) (Stevens, J., dissenting) (adopting an Originalist approach towards interpreting the Second Amendment, and arguing that the majority was wrong in adopting the individual rights argument and for ignoring the clear precedent set forth in *Miller*); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 10, 11, 14–15 (1993); Saul Cornell & Nathan Kozuskanich, *Introduction: The D.C. Gun Case*, in *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER I* (Saul Cornell & Nathan Kozuskanich eds., 2013) (explaining that the Supreme Court

Although not the sole cause of regulatory paralysis in the face of widespread gun violence and mass shootings, the Court's gun rights decisions have certainly contributed to the reluctance of state and federal law makers to pass meaningful gun regulations. The Court's decisions to limit the ability of government to regulate firearms has real consequences that cannot be ignored and should not be dismissed as collateral to individual rights or as in tension with those rights. This Article suggests that public safety is a right; a positive right that is fundamental under the Constitution.

This discussion begins in Part II by introducing the *Lochner* Era and its regulatory goals of protecting liberty, limiting government regulation, and protecting federalism and states' rights.<sup>6</sup> Part III examines how the Court has once again privileged liberty over duty through its radical reinterpretation of the Second Amendment in *District of Columbia v. Heller* and *McDonald v. City of Chicago*.<sup>7</sup> The Court has applied its libertarian bias and lost sight of the constitutional duties of government.<sup>8</sup> In the specific context of the Second Amendment and gun rights, the Court has lost sight of the duty to protect the public safety.<sup>9</sup> Part IV examines the pre-*Heller* interpretation of the Second Amendment and suggests that this meaning was more consistent with the text of the Constitution, the intent of the founders, and the constitutional duty of government to protect the public safety.

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struck down the District of Columbia's gun control laws as a violation of the Second Amendment and consequently reversed almost seventy years of settled precedent); Enrique Schaerer, *What the Heller?: An Originalist Critique of Justice Scalia's Second Amendment Jurisprudence*, 82 U. CIN. L. REV. 795, 797 (2014) (showing that fear of overstepping the constitutional limitation established by the Court in *Heller* is well founded, because Justice Scalia did not base his decision on the text of the Constitution or intent of the founders); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 379 (2003) (explaining that *Lochner* was wrongly decided because the Court engaged in judicial activism and that a problem arises when judges enforce rights that they created themselves).

<sup>6</sup> See KENS, *supra* note 3, at 4 (discussing how the *Lochner* era was concerned with protecting liberty and was constantly battling with the government's regulatory duty).

<sup>7</sup> See generally *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>8</sup> See Paul Kens, *Lochner v. New York: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 404–05 (2005) (explaining that the Court lost sight of its constitutional duties as it usurped power that properly rested in the Legislature, and ultimately the people, in order to implement its own "political philosophy into fundamental law of the land"). Furthermore, the judiciary's decision has been called an "anti-canon of constitutional law" and a "paradigmatic example of judicial failure."

<sup>9</sup> See Cornell & Kozuskanich, *supra* note 5, at 3–4 (arguing that the Court lost sight of the government's duty to provide safety when it ruled the way it did in *Heller* and *McDonald*).

## II. IMPLEMENTING A *LOCHNER* ERA IDEAL: REDUCED REGULATORY POWER

The *Lochner* Era, which historians and legal scholars largely agree stretched from 1887 to 1937,<sup>10</sup> was a period when the Supreme Court overruled more cases on constitutional grounds than ever before in American history.<sup>11</sup> The period is of particular relevance because the *Lochner* Era's jurisprudential theory holds that the Constitution mandates little to no government regulatory power.<sup>12</sup> The public policy problems that resulted are prominent in the most recent gun rights decisions.

### A. *Lochnerism's* Regulatory Goals

The *Lochner* Era regulatory goals that are most obviously reflected in the modern gun rights cases are its ostensible goals of preserving liberty, limited government, and states' rights.<sup>13</sup> These goals are visible in the modern gun rights cases of *Heller* and *McDonald*.<sup>14</sup> These are ostensible goals, because, as the literature demonstrates, they were not consistently pursued, and ultimately served as rhetorical cover for implementing a libertarian legislative agenda through the judiciary.<sup>15</sup>

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<sup>10</sup> See KENS, *supra* note 3, at 194 (acknowledging that in 1937 the case *West Coast Hotel v. Parrish* marked the end of the *Lochner* era as the Court upheld a Washington statute for minimum wages and also rejected liberty of contract as a doctrine); Strauss, *supra* note 5, at 374 (acknowledging 1937 as marking the end of the *Lochner* era, evidenced by the case *West Coast Hotel Co. v. Parrish*).

<sup>11</sup> See Strauss, *supra* note 5, at 373 (explaining that it was during the *Lochner* era "in which the Supreme Court invalidated nearly two hundred social welfare and regulatory measures, including minimum wage laws, laws designed to enable employees to unionize, and a federal statute establishing a pension system for railway workers").

<sup>12</sup> See KENS, *supra* note 3, at 71–74.

<sup>13</sup> See generally KENS, *supra* note 3, at 71, 74 (discussing how the *Lochner* era was concerned with protecting liberty and constantly battled with the government's regulatory duty, as well as how government regulation is limited).

<sup>14</sup> See generally *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>15</sup> See GILLMAN, *supra* note 5, at 10, 11, 14–15; Strauss, *supra* note 5, at 375–76 (explaining why *Lochner* was wrongly decided: first, the Court engaged in judicial activism; second, the Court chose to create rights not expressly granted by the Constitution; and third, the Court used freedom of contract to protect class interests and the laissez-faire economic capitalist system); see also Brief of Law Professors Erwin Chemerinsky and Adam Winkler as Amici Curiae Supporting Petitioners, *supra* note 3, at \*12–13, \*15 (demonstrating the constitutional inconsistency in the position adopted by the Court in the *Lochner* era, and now repeated in its *Heller* and *McDonald* decisions); Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 490, 492–94, 499–500 (arguing that the Supreme Court's conservative majority is troubling, because it is imparting its own policy choices through its opinions).

### 1. Liberty

Protecting individual liberty was one of the avowed goals of *Lochner* Era jurisprudence.<sup>16</sup> While this goal is not necessarily inconsistent with the Constitution in the abstract, the concept of liberty was distorted by *Lochnerism* in order to preserve the rights of the economically and socially empowered to the detriment of the poor and powerless.<sup>17</sup>

In the book *Lochner v. New York: Economic Regulation on Trial*, Paul Kens quotes the famous Darwinian principle “survival of the fittest” in connection with the mentality of the *Lochner* Era’s ideologies and goals.<sup>18</sup> This is particularly relevant because “the fittest” that he is referring to are the wealthy, empowered, business owners who, through applied *Lochner* ideologies such as laissez-faire economics and Darwinian principles, furthered their power and wealth at the expense of the working class, who are powerless and poor. Here, what is being argued for is individual liberty: the freedom to contract, free exchange, and no government interference.<sup>19</sup> Freedom of contract and other constitutional law-based doctrines were applied to bolster common law doctrines such as caveat emptor—“let the buyer beware”—and undermine the ability to prevent the exploitation of workers or consumers.<sup>20</sup>

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instead of following precedent).

<sup>16</sup> See Kens, *supra* note 8, at 411 (arguing that the *Lochner* court’s decision was based on “individualism,” which focuses on individual liberty).

<sup>17</sup> See KENS, *supra* note 3, at 71–74. There is a competing view of *Lochner* Era jurisprudence that frames it as being motivated by “a fear of government protective monopolistic behavior.” GILLMAN, *supra* note 5, at 10, 11, 14–15. However, as David E. Bernstein suggests in his article, “Gillman’s discussion of the police powers jurisprudence of the U.S. Supreme Court during the *Lochner* era . . . exaggerates the role that concerns about class legislation played in that jurisprudence. Rather . . . the basic motivation for *Lochnerian* jurisprudence was the Justices’ belief that Americans had fundamental unenumerated constitutional rights, and that the Fourteenth Amendment’s Due Process Clause protected those rights.” David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12 (2003).

<sup>18</sup> KENS, *supra* note 3, at 75.

<sup>19</sup> *Id.* at 74.

<sup>20</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (concerning a federal law which prohibited the interstate shipment of products made by mixing milk with any fat, other than milk fat, to create a product imitating milk or cream). *Carolene Products* violated the statute by mixing milk and coconut oil. Although the law was challenged as an unconstitutional interference by Congress, the Supreme Court found that the federal government had legitimate interests in protecting the public from fraud and health threats and that Congress was not obliged to ignore evidence about the danger of a product. The law was upheld. This case is significant for Footnote 4, in which the Court recognized boundaries for the deference given the legislature: 1) if a law appears to violate the Bill of Rights on its face, 2) interference with political

This ideology was evident in the 1897 case *Allgeyer v. Louisiana*, which was the first case in which the United States Supreme Court recognized and emphasized the individual liberty to engage in free contract.<sup>21</sup> *Allgeyer* concerned an act that prohibited citizens of the state, under open policy of marine insurance, from acquiring insurance from an out-of-state insurance company that had failed to comply with the state's laws.<sup>22</sup> The law prohibited anyone in the state from sending mail or telegraphs of any notice that described the property that was in the state. The Court found that individual liberty encompasses the liberty of contract and held the act unconstitutional.<sup>23</sup> The Court continued applying this libertarian ideology throughout the *Lochner* Era to overrule government legislation and exploit the disempowered.

Another example, which encompasses these *Lochner* ideologies that favor individual liberty to bolster the empowered at the expense of the disempowered, is the 1923 case of *Adkins v. Children's Hospital*.<sup>24</sup> In *Adkins*, the Supreme Court overruled a federal statute that created a minimum wage for women and children working in the District of Columbia.<sup>25</sup> The federal statute contained "language that could have served little purpose other than to help it along the legal gauntlet."<sup>26</sup> That specific language was found in section twenty-three of the statute, which declared that "the purposes of the act are to protect women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain a decent standard of living."<sup>27</sup> Despite this statute being enacted for the protection and well-being of women and children, which were vulnerable groups that needed protection at the time, the Court held that the freedom to contract was more important and would prevail.<sup>28</sup> Once again, the rights and interests of those in power, the wealthy and the employers of the workers, prevailed, and the empowered maintained their ability to exploit the vulnerable.

The most infamous case displaying the *Lochner Era* ideologies of

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process, and 3) considerations into whether the law affected discrete and insular groups. If a law breached these boundaries, the Court might step in. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

<sup>21</sup> See KENS, *supra* note 3, at 191.

<sup>22</sup> *Allgeyer*, 165 U.S. at 578.

<sup>23</sup> *Id.* at 593.

<sup>24</sup> *Adkins*, 261 U.S. at 525.

<sup>25</sup> See *id.* at 562; KENS, *supra* note 3, at 194.

<sup>26</sup> KENS, *supra* note 3, at 174.

<sup>27</sup> *Id.*

<sup>28</sup> *Adkins v. Children's Hosp.*, 261 U.S. 525, 561 (1923).

allowing powerful employers' liberty of contract to supersede the needs of disadvantaged workers is the case that gave the era its name, *Lochner v. New York*.<sup>29</sup> The case involved a man named Joseph Lochner, whose legal problems occurred when New York enacted the Bakershop Act, which limited the number of s per day and per week that employees could work.<sup>30</sup> The limit was ten hours per day and sixty hours per week.<sup>31</sup> Some of Lochner's business practices were in violation of this Act. "Mr. Lochner had coerced or allowed one of his bakers, Aman Schmitter to work more than 60 hours in a week or more than ten hours a day."<sup>32</sup> If Mr. Lochner had been convicted, he would have faced fines or imprisonment.<sup>33</sup> This was not Lochner's first violation of the law and he disliked the effects that the Act had on how he could lawfully conduct business, so he challenged the Act, claiming that it infringed on his liberty of freedom of contract.<sup>34</sup> While the lower courts held that he had violated the law, the Supreme Court reversed their decisions and found the Act unconstitutional.<sup>35</sup> This controversial ruling allowed for employers to continue exploiting vulnerable workers who had unequal bargaining power based on a libertarian ideology of freedom of contract.

This same distorted application of liberty can be seen in the context of gun rights. The *Lochner* Era goal of preserving the rights of the economically and socially empowered is acknowledged by Cornell throughout his book.<sup>36</sup> For instance, in Nelson Lund's description of the case, he emphasizes that the Plaintiffs came from "respectable backgrounds" and that the case was brought by a "group of libertarian lawyers."<sup>37</sup>

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<sup>29</sup> See KENS, *supra* note 3, at 88–94.

<sup>30</sup> *Id.* at 89.

<sup>31</sup> *Id.*; *Lochner v. New York*, 198 U.S. 45, 52 (1905).

<sup>32</sup> KENS, *supra* note 3, at 88–89.

<sup>33</sup> *Id.* at 89.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 91–110.

<sup>36</sup> See generally SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006).

<sup>37</sup> Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, in *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* 148 (Saul Cornell & Nathan Kozuskanich eds., 2013).

## 2. Federalism: States' Rights

Protecting principles of federalism by limiting the power of the national government is a core aspect of *Lochner* Era jurisprudence<sup>38</sup> that is mirrored in the current Court's recent Second Amendment decisions.<sup>39</sup> During the *Lochner* Era, the Court would frequently reference Tenth Amendment concerns to justify limiting the federal government's power to regulate.<sup>40</sup> These concerns were based on views of federalism that suggest that the national government cannot act most of the time.

Today's new *Lochnerism* uses the Second Amendment in a manner similar to how the Tenth Amendment was used in the *Lochner* Era as a basis for limiting the federal government's power,<sup>41</sup> and the Fourteenth Amendment of the Due Process Clause as a basis for limiting state governments' power.<sup>42</sup> This same limiting of state power was seen in *Lochner v. New York* when the Court used the Due Process Clause of the Fourteenth Amendment to overrule New York's state law that limited how many hours bakers could work per day and per week.<sup>43</sup>

This limitation of the state's power through the use of the Due Process Clause of the Fourteenth Amendment was also seen in the case *Morehead v. New York ex rel. Tiplado*, in which the Court held a New York minimum wage law unconstitutional based on the Due Process Clause of the Fourteenth Amendment.<sup>44</sup> The Court used the Constitution to limit both federal and state governmental powers.

## 3. Limited Government

Limiting government's overall regulatory power was another goal of the *Lochner* Era.<sup>45</sup> The activist courts of the *Lochner* Era were able to

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<sup>38</sup> See Strauss, *supra* note 5, at 376 ("During the *Lochner* era, the only constitutional principles that the Supreme Court enforced regularly and systematically were those that the New Deal discredited: freedom of contract, as in *Lochner*, and federalism-based limits on Congress's power.").

<sup>39</sup> See *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (holding that the Second Amendment applied to the states and not just the federal government); KENS, *supra* note 3, at 3.

<sup>40</sup> See Strauss, *supra* note 5, at 376; KENS, *supra* note 3, at 3.

<sup>41</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 598–99 (2008).

<sup>42</sup> See *McDonald*, 561 U.S. at 744.

<sup>43</sup> See *Lochner v. New York*, 198 U.S. 45, 52 (1905).

<sup>44</sup> See *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587, 603 (1936).

<sup>45</sup> See KENS, *supra* note 3, at 4, 71–74 (arguing that the values of the *Lochner* Era and cases, which involved substantive due process and liberty of contract, forced lawmakers to tailor reform statutes to meet the Court's constricted definition of police powers). The *Lochner* Era supported limiting government's regulatory power. Furthermore, these *Lochner* cases gave the Court a veto power over state legislation that

limit the government's power by continually holding government legislation unconstitutional. By doing this, the Court is able to "bypass the ballot and seek to press their political agenda in the courts."<sup>46</sup> The Court, by "usurp[ing]" the legislative function and the power of the people, has significantly limited government's overall regulatory power.<sup>47</sup> During the *Lochner* Era the concept of the "negative state" emerged as a mechanism to convince people that less government regulatory power was better. The "negative state" referred to the government's regulations in a negative perspective and connotation to promote the *Lochner* Era's ideology that the government's regulatory power should be very narrow and limited.<sup>48</sup> The Court in the *Lochner* Era felt that any government interference with private property, free exchange, and liberty of contract were "pollutants" and, additionally, were ineffective at resolving problems.<sup>49</sup>

Similar to the *Lochner* Era Court, the current Court's specific limitation on the federal government is an attempt to mask a broader goal of limiting government regulatory power at every level of government.<sup>50</sup>

#### B. *Lochnerism's Problems*

The *Lochner* Era's goal of advancing liberty was a rhetorical cover for advancing the interests of those who aligned with the Court's values.<sup>51</sup> The value-based decision-making that characterized the *Lochner* Era is at odds with the concept of judicial restraint, which is an essential limitation on unelected judges. As Alexander Bickel and others have described, the countermajoritarian difficulty that is inherent in a system that vests ultimate decision-making power as to "what the law is" in an unelected branch of government, requires fidelity to neutral principles.<sup>52</sup> Simply espousing those neutral principles—liberty, limited government, and federalism—is insufficient in the face of inconsistent application.

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it had not had in the past.

<sup>46</sup> See J. Harvie Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, in *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* 189 (Saul Cornell & Nathan Kozuskanich eds., 2013).

<sup>47</sup> KENS, *supra* note 8, at 412.

<sup>48</sup> See KENS, *supra* note 3, at 71–72.

<sup>49</sup> *Id.* at 74.

<sup>50</sup> See *id.* at 73–74.

<sup>51</sup> See Stone, *supra* note 15, at 485, 490, 492–94, 499–500 (arguing that the Supreme Court's conservative majority is troubling because it is imparting its own policy choices through its opinions instead of following precedent).

<sup>52</sup> See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

### 1. Ignores Governmental Duty

One hallmark of Lochnerism was its laissez-faire approach to justice that ignored the duties of government in favor of liberty.<sup>53</sup> This is often discussed in the context of jurisprudence that is driven by laissez-faire economic theory.<sup>54</sup> A broader laissez-faire approach to justice can be seen in Lochnerism's general approach towards governmental duties. The basic philosophy of reduced governmental regulations was applied in more than just the context of governmental regulation of the economy.<sup>55</sup> During the *Lochner* Era, the Court struck down state and federal laws involving child labor, the insurance industry, the transportation industry, maximum hour limits on working, and the rights of laborers.<sup>56</sup> Lochnerism's broader laissez-faire approach to the role of government can be seen as an allegiance to a form of anarchy where government's role is to validate already existing power relations without concerning itself with enhancing justice.<sup>57</sup>

### 2. Inconsistent, Value Based Decisions

The inconsistent values that characterize Lochnerism can be seen in its failure to follow precedent.<sup>58</sup> Although the Court espoused

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<sup>53</sup> See generally *Adkins v. Children's Hosp.*, 261 U.S. 525, 545 (1923) ("The statute . . . under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question."); KENS, *supra* note 3, at 70–74.

<sup>54</sup> See *Adkins*, 261 U.S. at 560.

<sup>55</sup> See Stone, *supra* note 15, at 490.

<sup>56</sup> *Id.* at 490–91.

<sup>57</sup> William L. Taylor, *Equality as a Constitutional Concept*, 47 MD. L. REV. 38, 41 (1987). Taylor argues that the notion that laws cannot change or correct for human behavior, recognized by President Eisenhower's famous quote that "law cannot change the hearts and minds of men," is an ideology that is consistent with the *Lochner* Era, because it means the law is ineffective at changing reality. This view of law and justice was pervasive during the *Lochner* Era. President Eisenhower's quote is consistent with this *Lochner* Era view and resistance to the changes in the Civil Rights Era illustrate how this idea has continued to be applied long after the official end of Lochnerism.

<sup>58</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 637–38 (2008) (Stevens, J., dissenting); GILLMAN, *supra* note 5, at 10, 11, 14–15 (arguing that the motivations of the current Court majority are often obscure and that the Roberts Court is deviating from precedent and revising the meaning of the Constitution to satisfy its own political agenda); Kiehl, *supra* note 5, at 1134–35 (discussing the established precedent of the state and federal courts regarding the Second Amendment prior to *Heller* and *McDonald* and arguing that those courts departed from precedent); Hatt, *supra* note 5, at 514 (arguing that the Court's current interpretation of the Second Amendment is contrary to the amendment's original purpose, which was to protect Americans' ability

neutral principles of liberty, limited government, and federalism,<sup>59</sup> it made rulings grounded in ideological beliefs and contrary to precedent.<sup>60</sup>

Friedman pointed to the Court's struggle with this countermajoritarian difficulty when he wrote, "[D]uring the *Lochner* Era, Supreme Court Justices failed to adhere to constitutional norms requiring deference to majoritarian decisions and inappropriately struck down laws by substituting their own views for those of legislative bodies."<sup>61</sup>

Thus, simply espousing neutral principles—here, liberty, limited government, and federalism<sup>62</sup>—is insufficient in the face of inconsistent application by the Court. Friedman also described this problem in his article regarding the countermajoritarian difficulty and *Lochner*, where he quoted Dean William Trickett's "extremely strongly worded attack on the courts,"<sup>63</sup> which read:

These nine men can quash the legislation of the representatives of ninety millions of people. The time is at hand when they will be able to quash the legislation of the representatives of two hundred millions of people, though that legislation were unanimously enacted and unanimously approved by the people.<sup>64</sup>

Justice Brandeis warned judges and justices that "we must be ever on our guard, lest we erect our prejudices into legal principles."<sup>65</sup> However, judicial activism and the deviation from precedent continued. This was seen in *Lochner*, which is now widely viewed as incorrect and a disgrace because, as Brandeis warned, the Justices could not claim adequate legal support for their conclusion and actually were entrenched in their own controversial view of public policy.

In a series of cases involving wages and work-hour laws, the Court

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to resist the tyranny of their federal government). *Heller*, through holding that the Second Amendment protects one's individual rights to bear arms for self-defense, led to limitations on the type of arms one could possess, which made the original purpose of the Second Amendment "unachievable." This individual rights self-defense argument is one which is predicated on the inconsistent values of *Lochnerism*. See also Schaefer, *supra* note 5, at 797–98; Strauss, *supra* note 5, at 375–86.

<sup>59</sup> Strauss, *supra* note 5, at 376.

<sup>60</sup> *Id.* at 376, 383, 386.

<sup>61</sup> Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1383 (2001).

<sup>62</sup> Strauss, *supra* note 5, at 37.

<sup>63</sup> Friedman, *supra* note 61, at 1443.

<sup>64</sup> *Id.*

<sup>65</sup> Wilkinson, *supra* note 46, at 190 (internal quotations omitted).

initially indicated concern that an important liberty—freedom to contract—was at stake and therefore such laws would be unconstitutional. The “Brandeis Brief,” introduced by then-attorney and later Supreme Court Justice Louis Brandeis, included extensive social science data and became the vehicle through which the Court was willing to create exceptions to its general rule.<sup>66</sup> If it were limited to the context of overwhelming scientific evidence, this sort of inconsistency might be seen as jurisprudentially acceptable. However, the Court’s further inconsistencies have nothing to do with the challenges of legal application and everything to do with the limits of Lochnerism’s laissez-faire philosophy of liberty when up against right-wing social and political theory.<sup>67</sup>

This practice of applying ideology regardless of precedent has also emerged in *Heller*, which is seen as “the modern incarnation of *Lochner v. New York*,” where the “Court overrode democratic judgments in favor of a dubious understanding of the Constitution.”<sup>68</sup> In applying the Lochnerism characteristics, the Supreme Court struck down the District of Columbia’s gun control laws as a violation of the Second Amendment, and in doing so it reversed almost seventy years of settled precedent.<sup>69</sup>

### 3. Hostile to Public Safety and Welfare Regulations

Lochnerism consistently devalues public welfare in favor of flawed theories of liberty.<sup>70</sup> Liberty under this perspective is forever in tension with public welfare, so that anything that is done to enhance the public welfare is viewed as eroding personal liberty.<sup>71</sup> The previously

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<sup>66</sup> *Muller v. Oregon*, 208 U.S. 412, 419–23 (1908).

<sup>67</sup> Strauss, *supra* note 5, at 386.

<sup>68</sup> Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, in *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* 256 (Saul Cornell & Nathan Kozuskanich eds., 2013).

<sup>69</sup> Cornell & Kozuskanich, *supra* note 5, at 1. *See generally* *United States v. Miller*, 307 U.S. 174 (1939); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875) (holding that the Second Amendment limits the power of the federal government and does not protect the right to keep and bear arms from interference by other individuals, and that the Second Amendment does not afford individuals rights to bear arms for purposes of self-preservation or defense that is not related to the militia or the common good).

<sup>70</sup> *See generally* *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (overruling a federal statute that created a minimum wage for women and children working in the District of Columbia); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating a federal law aimed at prohibiting child labor); *Lochner v. New York*, 198 U.S. 45 (1905). These cases focus particularly on economic liberty and freedom of contract and are perfect examples of times when public welfare was devalued in favor of liberty.

<sup>71</sup> *See* KENS, *supra* note 3, at 71 (“To laissez faire theorists, the chief threat to the

discussed 1923 case of *Adkins v. Children Hospital*, is one example of the Court ignoring the duties of the government and leaving the vulnerable susceptible to exploitation and hardships.<sup>72</sup> Another *Lochner* Era example that demonstrates the Court upholding these laissez-faire economic ideologies at the expense of governmental duties, particularly the duty to protect children, is the case *Hammer v. Dagenhart*.<sup>73</sup> Here, the Court invalidated a federal child labor law by resting its decision on a narrow reading of the Commerce Clause, which was based on the idea of the negative state and laissez-faire social Darwinism.<sup>74</sup>

Recognizing the consistent devaluation of the public welfare at once reconciles the federalism-based inconsistencies of *Lochnerism*. *Lochnerism* was hostile to federal regulations because they undermined the Tenth Amendment rights of the States. It was simultaneously hostile to state regulations, because they undermined freedom of contract, substantive due process, and related liberty concerns.<sup>75</sup>

In sum, the *Lochner* Era Court superimposed libertarian philosophy onto constitutional law, and in so doing, failed to recognize and allow government to fulfill its constitutional duties.

#### 4. Liberty as Justification for Reduced Regulatory Power

Under the *Lochner* Era approach, government regulations to improve the public welfare are in tension with liberty, so that there is a zero-sum binary relationship between liberty and welfare.<sup>76</sup> Kens, in his book, explains that government regulations in the *Lochner* Era were seen as “pollutants” and that efforts to resolve economic problems through legislation were ineffective because they infringed on individuals’ liberty.<sup>77</sup> Thus, there is a notion that freedom requires fewer regulations and laws; however, this is an overly simplistic view.

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pursuit of individual self-interest and consequently the progress of society was economic legislation.”).

<sup>72</sup> See *id.*

<sup>73</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918); see KENS, *supra* note 3, at 172.

<sup>74</sup> KENS, *supra* note 3, at 71–73 (discussing *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

<sup>75</sup> See *id.* (“To laissez-faire theorists, the chief threat to the pursuit of individual self-interest and consequently the progress of society was economic legislation.”). Such theorists believed that the role of government should be what is sometimes referred to as the “negative state,” and they additionally envisioned a very limited governmental role from both the federal and state government leading to minimal government regulation. See also Strauss, *supra* note 5, at 375–76.

<sup>76</sup> See KENS, *supra* note 3, at 71.

<sup>77</sup> *Id.* at 71–74.

One flaw in this theory is that a basic function of law is to structure institutions and frameworks for recognizing and protecting liberty. We do not trade freedom for safety, but rather, we derive freedom from safety. Government regulatory power can go further by way of enhancing liberty through regulations.<sup>78</sup>

For example, Kens examines how liberty and freedom from oppression can be enhanced through government regulation. Kens explains that when a person works fourteen-hour workdays they are too tired to read, worry about social or political issues, or have a proper family life.<sup>79</sup> He says:

[W]orking from sunrise to sunset was incompatible with the responsibilities of citizenship. Long hours left no time for necessary mental improvement and cultivation, especially given that the vast majority of industrial laborers began working as children. Furthermore, long workdays left even educated workers insufficient time to consider public questions or gather with others for discussion of the issues of the day.<sup>80</sup>

Thus, Kens explains that while government regulations on employees' work hours, conditions, and pay can enhance the worker's life immeasurably, removing those regulations in exchange for a liberty that they otherwise would never have creates the threat of unemployment, a very "tangible disaster."<sup>81</sup> Furthermore, Kens explains that when employees and workers were left with such unequal bargaining power, the disabling effects of unemployment meant they did not truly have the liberty to contract. Rather, the contract between the employer and an employee was really a sham because:

Even in legal theory a contract occurs only when the parties reach agreement by bargaining "at arm's length"—that is, to some extent each party possesses a similar amount of bargaining power. But now when a worker takes a job . . . the employer sets the terms. Testifying before the Massachusetts legislature, one advocate observed that "an empty stomach can make no contracts. The workers assent but they do not consent." From this some were able to conclude that without a legal limit on the length of the workday, employees simply delivered themselves into bondage for a day's wages.<sup>82</sup>

As a result, American society holds an ideology and belief that

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<sup>78</sup> See *id.* at 173–74.

<sup>79</sup> See *id.* at 16–17.

<sup>80</sup> *Id.* at 19.

<sup>81</sup> *Id.* at 16–17.

<sup>82</sup> See KENS, *supra* note 3, at 19.

pulls it between living in a world of theory and another in practice.<sup>83</sup> We cherish this belief that we live in a world where liberty is fundamental, where everyone's liberty is protected; however, without government protection through law, discrete and insular minorities and other classes of people who are not wealthy or otherwise powerful, will not enjoy liberty.<sup>84</sup> Thus, minimum wage and employee work hours are just a few examples of areas where informational discrepancies and disparities in bargaining power are corrected by way of regulation to enable citizens to make informed choices in areas such as employment, services, and products they purchase.

#### 5. *Stare Decisis*: Inconsistent with Precedent

Violating *stare decisis* is a hallmark of Lochnerism and was instrumental to its ultimate failure.<sup>85</sup> In explaining why *Lochner* was wrong and what led to the demise of its interpretation, David Strauss emphasizes that *Lochner* is one of the great anti-precedents of the twentieth century, a characteristic for which it is well known.<sup>86</sup> When *stare decisis* is not followed and inconsistent constitutional decisions are made, the Court's institutional legitimacy erodes.<sup>87</sup>

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<sup>83</sup> *Id.* at 20.

<sup>84</sup> *See generally id.*

<sup>85</sup> *See* District of Columbia v. Heller, 554 U.S. 570, 637–38 (2008) (Stevens, J., dissenting); Kiehl, *supra* note 5, at 1134–35; Hatt, *supra* note 58, at 506 (arguing that *Heller*, through holding that the Second Amendment protects one's individual rights to bear arms for self-defense, led to limitations on the type of arms one could possess, which made the original purpose of the Second amendment "unachievable"); Schaerer, *supra* note 5, at 797; David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588, 589–90, 613, 615–16, 617 (2000) (explaining the pre-*Heller* view that individual rights to bear arms are not derived from the Constitution and that the new approach ignores the prefatory clause and is implausible); John Zulkey, *The Obsolete Second Amendment: How Advances in Arms Technology Have Made the Prefatory Clause Incompatible With Public Policy*, 2010 U. ILL. J.L. TECH. & POL'Y 213, 213–14, 218 (explaining that the prefatory clause establishes a collective right for a well-regulated militia: these propositions were endorsed by *Miller*, and the Roberts Court's reinterpretation left this clause as a nullity); Amanda C. Dupree, Comment, *A Shot Heard 'Round the District: The District of Columbia Circuit Puts a Bullet in the Collective Right Theory of the Second Amendment*, 16 AM. U. J. GENDER SOC. POL'Y & L. 413, 415–18 (2008) (arguing that the collective rights theory was established precedent and that the Court departed from it in *Heller* when it held it was an individual right); Brief of NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157192 \*6–7 (arguing that the Second Amendment does not protect an individual right to possess or use arms outside of the context of a lawfully organized militia, and that finding otherwise departs from longstanding tradition).

<sup>86</sup> Strauss, *supra* note 5, at 373.

<sup>87</sup> *See* KENS, *supra* note 3, at 148 (arguing that decisions like *Lochner* ultimately erode respect for courts and the law); Thomas W. Merrill, *Can Originalism be Reconciled with Precedent?: A Symposium on Stare Decisis: Originalism, Stare Decisis, and the Promotion of*

Wilkinson's essay in Saul Cornell's book warns that caution should be taken when the judiciary is engaging in their "interpretive task" because they are unelected, and he explains that this is "periodically forgotten . . . at the expense of long-term institutional respect."<sup>88</sup> This erosion of legitimacy is a very real concern that is also recognized by Kins when he discusses this very phenomenon occurring in *Lochner*.<sup>89</sup> The post-2008 gun rights decisions of *District of Columbia v. Heller* and *McDonald v. City of Chicago* also overrule past precedent.<sup>90</sup> Cornell highlights that the Supreme Court overruled almost seventy years of settled precedent when it ruled on the Second Amendment gun rights involving the District Court of Columbia's gun control laws in *Heller*.<sup>91</sup>

### III. POST-HELLER SECOND AMENDMENT GUN RIGHTS

The *Heller* decision of 2008 and the *McDonald* decision of 2010 reframed Second Amendment doctrine as primarily a self-defense concern—an individual liberty.<sup>92</sup> This libertarian perspective on the right to bear arms recasts it as a freedom with virtually no relationship to the Second Amendment's prefatory clause.<sup>93</sup> Individual liberty thus

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*Judicial Restraint*, 22 CONST. COMMENT. 271, 275–79, 281, 287 (2005) (explaining the importance of *stare decisis* and its impact on judicial restraint).

<sup>88</sup> Wilkinson, *supra* note 46, at 190.

<sup>89</sup> See KINS, *supra* note 3, at 148–49.

<sup>90</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Stevens, J., dissenting); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). See Kiehl, *supra* note 5, at 1134–35; Hatt, *supra* note 5, at 506 (discussing the Court's departure from precedent and *stare decisis*); Schaerer, *supra* note 5, at 797; Strauss, *supra* note 5, at 378–79. See also GILLMAN, *supra* note 5, at 10–11, 14–15.

<sup>91</sup> Cornell & Kozuskanich, *supra* note 5, at 1.

<sup>92</sup> See LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION (2014); CRAIG R. WHITNEY, LIVING WITH GUNS: A LIBERAL'S CASE FOR THE SECOND AMENDMENT ix–x (2012) (noting that the conservative majority of the Supreme Court held that the Second Amendment protects an individual's right to bear and keep firearms for purposes of self-defense and other limited legal purposes); Kiehl, *supra* note 5, at 1132–34 (noting that the Supreme Court endorsed the collective rights view of the Second Amendment for nearly a century, given that in *Heller* and *McDonald* the Supreme Court held for the first time that the Second Amendment protects an individual's right to keep and bear arms, and that the Second Amendment applies against the states through the doctrine of incorporation); Lewis M. Wasserman, *Gun Control on College and University Campuses in the Wake of District of Columbia v. Heller and McDonald v. City of Chicago*, 19 VA. J. SOC. POL'Y & L. 1, 6–7 (2011) (noting that *Heller* established for the first time that the Second Amendment protects an individual's right to possess a firearm and use it for lawful purposes such as self-defense within the home, striking down longstanding precedent, and for the very first time invalidating a federal firearm regulation).

<sup>93</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (“The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it was even more important for self-defense and hunting. But the threat that the new Federal Government would

becomes the rhetorical vehicle, the euphemism for reduced government regulatory power.<sup>94</sup>

The scope of federal power to regulate guns is narrowed by these decisions, but there remains space for significant gun control.<sup>95</sup> The problem is that given the major shift away from government regulatory power, federal gun control advocacy has been chilled. This chilling of gun control advocacy can be seen as undermining public safety, even as the Court claims to champion individual rights.<sup>96</sup> In the face of mass shootings and targeted killings of Blacks and other minorities, some troubling questions arise regarding whose rights matter to the Court.

State power to regulate guns suffers from a similar chilling effect through the *McDonald* decision. Subsequent decisions have redefined the scope of the Second Amendment limitations on state gun control laws.<sup>97</sup> While, just as in the context of the federal regulatory limits, the Court proclaims a protection of individual rights in the form of liberty, this once more raises the question of whose liberty is protected and why. The public safety consequences of the new limitations on state gun control laws are perhaps of even greater consequence given that, traditionally, most gun control regulation has been done by the states.

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destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.”); Zulkey, *supra* note 85, at 213–14, 218; Yassky, *supra* note 85, at 589–90, 613, 615–17.

<sup>94</sup> See Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 251 (2014) (contending that the Conservative-Libertarian majority of the Supreme Court interprets the Constitution as a charter of negative rights that limits the welfare state and that as a result individuals have no affirmative rights to public services or benefits). Heyman cites to Judge Richard A. Posner: “the Constitution is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.” *Id.*

<sup>95</sup> See Kiehl, *supra* note 5, at 1132, 1138 (explaining that the majority in *Heller* and the plurality in *McDonald* did not automatically invalidate all gun regulations, but limited their holdings to the individual right to self-defense (presumptively only at home), recognizing that many longstanding and traditional gun regulations will remain valid).

<sup>96</sup> See *id.*

<sup>97</sup> *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1148, 1179 (9th Cir. 2014); *Moore v. Madigan*, 702 F.3d 933, 935–36, 942 (7th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 689–90 (7th Cir. 2011); *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1126 (N.D. Ill. 2012); Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Individual Rights to Bear Arms*, 39 FORDHAM URB. L.J. 1449, 1466–67 (2012) (noting that in the wake of *Heller* the federal government has been involved in extensive litigation related to its gun-control regulations, despite Justice Scalia's assertion that “long-standing” regulations were presumptively reasonable; the lack of a definite judicial review standard has opened the floodgates of litigation).

*A. Reinterpretations of Doctrine*

Before 2008, the Court's interpretation of the Second Amendment did not include an individual right to bear arms, but rather a collective right.<sup>98</sup> This collective right was framed in terms of the "well-regulated militia" that is referenced in the first few words of the Amendment.<sup>99</sup> This portion of the Amendment, which is frequently referred to as the prefatory clause, was universally recognized as important.<sup>100</sup> It was so well-recognized that even outlaws and domestic terrorist organizations sought to legitimize themselves by clothing themselves in the language of the prefatory clause's qualified protection by claiming to be "militia" or militia groups.<sup>101</sup>

The Court has now reinterpreted the prefatory clause of the Second Amendment so that the collective militia right is no longer part of the framework for the right to bear arms.<sup>102</sup> According to Michael

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<sup>98</sup> See *United States v. Miller*, 307 U.S. 174, 179 (1939); *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897) (noting that the Bill of Rights embodies certain guarantees and immunities that are subject to well-recognized exceptions; for example, the right of the people to keep and bear arms enshrined in the Second Amendment is not infringed by laws prohibiting the carrying of concealed weapons); *Miller v. Texas*, 153 U.S. 535, 539 (1894) (holding that a state law forbidding the carrying of dangerous weapons was not an unconstitutional violation of the Second Amendment); *Presser v. Illinois*, 116 U.S. 252 (1886) (holding that a state's Military Code forbidding all able-bodied men, except military members, from associating or parading with arms without a license from the governor does not violate the Second Amendment); *United States v. Cruikshank*, 92 U.S. 542 (1875) (holding that the individual right to bear arms is not granted by the Constitution and that the purpose of the Second Amendment is to restrict the powers of the national government from infringing upon the collective-militia state rights); CORNELL, *supra* note 36, at 202, 204 ("The emphasis in *Miller* was on bearing arms in the militia, not on the right of the states to maintain their militias. One thing was clear, the Court rejected the lower court's anomalous individual rights reading of the amendment. . . . Subsequent federal court decisions interpreted *Miller* through the same lens as contemporary law reviews used to understand the case. The Second Amendment protected a collective right tied to participation in the militia."); Kiehl, *supra* note 5, at 1134; Zulkey, *supra* note 85, at 213–14, 218.

<sup>99</sup> U.S. CONST. amend. II. See also Zulkey, *supra* note 85, at 213–14, 218.

<sup>100</sup> Joyce Lee Malcolm, *Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent*, in *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* 50–51 (Saul Cornell & Nathan Kozuskanich eds., 2013) (discussing the prefatory clause and its importance); Jack Rakove et al., *Brief of Amici Curiae Jack N. Rakove, Saul Cornell, David T. Konig, Lois Schwoerer et al. in Support of Petitioners*, in *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* 62 (Saul Cornell & Nathan Kozuskanich eds., 2013); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, in *THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER* 83, 85 (Saul Cornell & Nathan Kozuskanich eds., 2013).

<sup>101</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 229 (2008).

<sup>102</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 637–38, 642–43 (2008) (Stevens, J., dissenting); MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END*

Waldman, Justice Scalia in his effort to explain the Framers' original intent completely ignored the prefatory clause of the Second Amendment.<sup>103</sup>

Scalia does not seek to explain the Framers' original intent . . . . The Second Amendment, he begins, "is naturally divided into two parts: its prefatory clause and its operative clause." But he has a surprising way to deal with that prefatory clause, the homage to the "well regulated militia being necessary to the security of a free state," so important to the Framers. *He skips right over it.* Scalia simply lops off the first half of the amendment, just as in the bowdlerized quote in the NRA headquarters lobby. What counts is the second half. This is the right way to read the amendment, Scalia's opinion explains, because that is the way people in the past used to read constitutional provisions.<sup>104</sup>

In doing so, the Court has created an individual right to bear arms, and only limited that right with the phrase "weapons in common use," a phrase that appears nowhere in the Constitution.<sup>105</sup> The Court has also indicated a distinction between the scope of this expanded Second Amendment right under federal as compared to state law.

The new reinterpretation of the prefatory clause uses liberty as the facial justification for what is actually a non-constitutionally based agenda to reduce the regulatory power of government. The prefatory clause reinterpretation is a departure from precedent that is unacceptable in light of concepts of *stare decisis*, as well as pragmatic concerns regarding safety. In so doing, the Court undermines a necessary component to liberty: public safety.

### 1. The Prefatory Clause Departed from Precedent

The Court's recent decisions are a significant departure from precedent.<sup>106</sup> Prior to 2008, gun rights were viewed as collective—a

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THE BATTLE OVER GUNS 164 (2007) (explaining how the reinterpreted prefatory clause of the Second Amendment no longer pertains to a collective militia but to individual rights, which follows a libertarian perspective on the right to bear arms and invalidates the existence of the prefatory clause); Zulkey, *supra* note 85, at 213–14, 218; Yassky, *supra* note 85, at 589–90, 613, 615–16, 617 (explaining the pre-*Heller* view that an individual right to bear arms is not derived from the Constitution and that the new approach ignores the prefatory clause and is implausible).

<sup>103</sup> See MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 121 (2014).

<sup>104</sup> *Id.* (emphasis in original).

<sup>105</sup> See *Heller*, 554 U.S. at 618–26.

<sup>106</sup> See *Heller*, 554 U.S. at 637–38 (Stevens, J., dissenting); *United States v. Miller*, 307 U.S. 174, 179 (1939); *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897); *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875); Cornell & Kozuskanich, *supra* note 5, at 1 (explaining

militia right.<sup>107</sup> Zulkey suggests that the prefatory clause creates a collective right for a well-regulated militia, but *Heller* and *McDonald* reinterpreted the Second Amendment to instead confer an individual right unconnected to the militia, and in doing so left the prefatory clause without any meaning.<sup>108</sup> Yassky explains that the pre-*Heller* view does not confer an individual right to bear arms, and that a right unconnected to the militia is not derived from the Constitution.<sup>109</sup>

For instance, in *Miller*, the Supreme Court held that the Second Amendment did not protect guns unrelated to military purposes.<sup>110</sup>

Until *Heller*, *Miller* was the only Supreme Court decision discussing the Second Amendment in detail.<sup>111</sup> In *Miller*, the defendants were indicted for violating the National Firearms Act of 1934 by possessing a sawed-off shotgun.<sup>112</sup> The Supreme Court unanimously upheld the statute.<sup>113</sup> The Court reasoned as follows:

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.<sup>114</sup> Certainly, it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>115</sup>

This militia-based concept of the right to bear arms tied the Second Amendment to a governmental duty—the creation and

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that the Supreme Court struck down the District of Columbia’s gun control laws as a violation of the Second Amendment and that doing so reversed almost seventy years of settled precedent); Kiehl, *supra* note 5, at 1134–35 (discussing the established precedent of the state and federal courts regarding the Second Amendment prior to *Heller* and *McDonald* and arguing that because those holdings departed from precedent, it is therefore evident that subsequent courts do have a legitimate fear of overstepping constitutional limits).

<sup>107</sup> See *United States v. Miller*, 307 U.S. 174, 178–79 (1939); Cornell & Kozuskanich, *supra* note 5, at 7–9 (explaining that for most of the twentieth century the dominant judicial and scholarly view of the Second Amendment was that it was a collective right of the states to maintain a well-regulated militia and a right of citizens to keep and bear those arms needed to meet their civic obligation to participate in a well-regulated militia).

<sup>108</sup> Zulkey, *supra* note 85, at 213–14, 218.

<sup>109</sup> Yassky, *supra* note 85, at 589–90, 613, 615–17.

<sup>110</sup> *Miller*, 307 U.S. at 178.

<sup>111</sup> Cornell & Kozuskanich, *supra* note 5, at 7–9.

<sup>112</sup> *Miller*, 307 U.S. at 175.

<sup>113</sup> *Id.* at 183.

<sup>114</sup> *Id.* at 177.

<sup>115</sup> *Id.* at 178.

maintenance of a well-regulated militia for the protection of a *free state*.<sup>116</sup>

In *Heller*, the plaintiffs brought suit to challenge the District of Columbia's restrictive gun control regulations involving both a handgun ban and a safe-storage regulation.<sup>117</sup> The Supreme Court recognized for the first time that the Second Amendment conferred an individual right to bear arms that was unconnected to the militia or military service.<sup>118</sup>

As a result, the Supreme Court held that the Washington, D.C. regulations violated the Second Amendment.<sup>119</sup> In coming to this holding the Court "failed to respect legislative judgments; and reject[ed] the principles of federalism."<sup>120</sup> The Supreme Court disregarded precedent, and imputed its own goals of establishing and preserving liberty and limiting government power. As of this writing, since *Heller*, there have been over 1,090 challenges to gun laws or gun prosecutions that have undermined lawmaker's ability to regulate guns.<sup>121</sup>

As Stephen Kiehl summarizes, in *McDonald v. City of Chicago*, the plaintiffs challenged a Chicago ordinance that prohibited possession of a firearm unless there was a valid registration certificate, and the ordinance forbade the issuance of such a certificate for most handguns.<sup>122</sup> Here, the Court held that the scope of the handgun prohibitions amounted to an effective ban on handgun possession and that the ban was unconstitutional.<sup>123</sup> The Court incorporated *Heller's* Second Amendment holding that there is an individual right to bear arms for self-defense.<sup>124</sup> However, here the court extended the right's application to the state and local governments.<sup>125</sup> This effectively

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<sup>116</sup> See generally U.S. CONST. amend. II.

<sup>117</sup> District of Columbia v. Heller, 554 U.S. 570, 574–76 (2008); see also Lund, *supra* note 37, at 148–49.

<sup>118</sup> Heller, 554 U.S. at 619–20; Lund, *supra* note 37, at 148.

<sup>119</sup> Heller, 554 U.S. at 635; Lund, *supra* note 37, at 149.

<sup>120</sup> Heller, 554 U.S. at 679 (Stevens, J., dissenting); see also Wilkinson, *supra* note 46, at 190.

<sup>121</sup> *Protecting Strong Gun Laws: The Supreme Court Leaves Lower Court Victories Untouched*, L. CTR. TO PREVENT GUN VIOLENCE (Aug. 2, 2016), <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/>. See Heller, 554 U.S. at 679 (Stevens, J., dissenting); Cornell & Kozuskanich, *supra* note 5, at 1.

<sup>122</sup> Kiehl, *supra* note 5, at 1139 (summarizing *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010)).

<sup>123</sup> *Id.*

<sup>124</sup> *McDonald*, 561 U.S. at 791.

<sup>125</sup> Cornell & Kozuskanich, *supra* note 5, at 3.

limited regulatory power. *McDonald* upheld the ruling in *Heller*, which departed from precedent, and supported the same ideologies and goals of promoting individual liberty at the expense of unjustifiably limiting government power. The scope of federal power to regulate guns is narrowed by these decisions, but there remains space for significant gun control.<sup>126</sup>

## 2. Weapons in Common Use

While weapons in common use cannot be barred completely, some regulation appears to still be possible even under today's expanded protection of gun rights.<sup>127</sup> The "weapons in common use" limitation allows the government to continue to enforce laws regarding rocket launchers, bazookas, and other weapons that are not in common use.<sup>128</sup>

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<sup>126</sup> See Kiehl, *supra* note 5, at 1138–39.

<sup>127</sup> See Schaerer, *supra* note 5, at 800, 828 (explaining that there are many dangerous military-grade arms that can be regulated and prohibited, because they would fall outside the protection of the Second Amendment and were not "bearable" or would not be considered as lineal descendants from weapons of the Framers era when the Amendment was implemented). 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 that the Second Amendment (for federal gun laws) or the Fourteenth Amendment (for state and local gun laws) was adopted. Even Justice Breyer understood Scalia's holding to be mistaken because he construed the Second Amendment this way: "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." *Id.* at 801. See also *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015) (recognizing that the Second Amendment does not automatically imperil every law regulating firearms, and holding that a city ordinance prohibiting the possession, sale, or manufacture of semi-automatic assault weapons and large-capacity magazines did not violate the Second Amendment), *cert. denied*, 136 S. Ct. 447 (2015); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (applying intermediate scrutiny and upholding laws prohibiting possession of certain semiautomatic weapons, assault rifles with military-style features, and large-capacity magazines), *cert. denied*, 136 S. Ct. 2486 (2016); *Drake v. Filko*, 724 F.3d 426, 431–32 (3d Cir. 2013) (holding that a state law requiring applicants to establish a "justifiable need" to be allowed to carry a handgun in public for purposes of self-defense did not violate the Second Amendment because it is a "presumptively lawful," "longstanding" regulation); *People v. Garvin*, 994 N.E.2d 1076, 1080, 1085 (Ill. App. Ct. 2013) (holding that a state statute prohibiting possession of ammunition for unlawful use of weapons by felons did not violate the Second Amendment); *State v. Craig*, 807 N.W.2d 453, 461–62 (Minn. Ct. App. 2011) (applying intermediate scrutiny and upholding a state law prohibiting persons convicted of a crime of violence from possessing a firearm); Kiehl, *supra* note 5, at 1138.

<sup>128</sup> See *Friedman*, 784 F.3d at 406–07; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 269; *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) (upholding

The Court currently recognizes that other weapons that do not qualify as being in common use include armor-piercing bullets and assault weapons.<sup>129</sup> However, the use of this phrase begs the question of what the legal standard is for whether a weapon should be recognized as being in common use, and whether it is possible for a weapon to transition into that category.<sup>130</sup>

A notable criticism of the “weapons in common use” premise endorsed by Justice Scalia in *Heller*, comes from Allen Rostron, who states that:

Justice Scalia also indicated that the Second Amendment’s protection does not extend to all types of guns. Instead, the Amendment merely guarantees a right to have the types of weapons commonly used by Americans for lawful, nonmilitary purposes such as self-defense . . . . Applying the “common use” requirement, Justice Scalia unequivocally found that handguns qualify for protection because they “are the most popular weapon chosen by Americans for self-defense in the home. Moreover, Scalia suggested that machine guns are also outside the scope of the Second Amendment’s protection because they are not in common use among American civilians. At the oral argument in the *Heller* case, Justice Scalia stated even more clearly that he thinks machine guns are too unusual to qualify for Second Amendment protection. Even if more than one hundred

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prohibition on semi-automatic rifles and large-capacity magazines because the intermediate scrutiny test was met when the district court demonstrated the existence of a substantial relationship between such a prohibition and achieving the important governmental interest of protecting public safety); Schaerer, *supra* note 5, at 828 (discussing bazookas and machine guns and how they may trace their lineal descendants to cannons which were not in common use by individuals for lawful purposes during the era when the Second Amendment was enacted).

<sup>129</sup> See Cornell & Kozuskanich, *supra* note 5, at 13–14 (explaining that, according to the holding in *Heller*, legislatures may ban military style assault weapons because they do not fall in the “weapons of common use” category; however, legislatures cannot ban handguns). It is essential to see the problematic distinction from how the Framers meant weapons of common use and initially applied it to the Second Amendment and how that changed as a result of the radical holdings in *Heller* and *McDonald*. If Congress applied this notion to the Founding era it would have meant that Congress could have prohibited the militia’s muskets but not dueling pistols. This is very “hard to reconcile with the preamble’s reference to a well-regulated militia or the era’s history.” *Id.* Surely what should be protected are the lineal descendants of weapons used for militia purposes and, an example may be found in the Federal Militia Act of 1792, which required citizens to own muskets not handguns. *Id.*

<sup>130</sup> See Schaerer, *supra* note 5, at 800; Allen Rostron, *Justice Breyer’s Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012) (analyzing Justice Breyer’s dissent and criticizing the “weapons in common use” argument of the majority and how the dicta regarding presumptively valid regulations contradicts the heart of the Court’s reasoning).

thousand Americans legally own machine guns, they still represent only a small fraction of the Nation's population, and therefore Scalia believes those weapons are "quite unusual" and too uncommon to receive the Second Amendment's protection. Many logical objections to Justice Scalia's common use approach spring readily to mind. Although it makes good sense not to recognize a right to possess extraordinarily dangerous weapons, it is more difficult to see why a gun should fall outside the scope of the right to keep and bear arms merely because it is uncommon. 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 they never become common enough to receive constitutional protection.<sup>131</sup>

While Scalia's approach does allow for limitations of some weapons, his standard of "common use" or popularity of a weapon, is troubling.

#### B. Federal Regulatory Limits

Despite the purported limitations of *Heller*, its language regarding gun rights has public policy consequences that resound beyond the core constitutional issue. The public ethos regarding rights has now shifted to be more liberty-oriented rather than duty bound.<sup>132</sup> Federal, state, and local governments are now reluctant to pass new gun regulations for fear of running afoul of what is effectively the Court's revised Second Amendment.<sup>133</sup>

The reluctance to address gun control flows from confusion regarding what can be regulated by the federal government, and an unrecognized or ignored tension regarding individual rights. The tension involves the right to bear arms versus the right of individuals

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<sup>131</sup> Rostron, *supra* note 130, at 710–12.

<sup>132</sup> See Heyman, *supra* note 94, at 251.

<sup>133</sup> See Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1042 (2009) ("Second Amendment doctrine might deter innovative regulatory responses to the problem of gun violence. The threat of litigation may inhibit useful policy experimentation ranging from personalized firearms technology and the microstamping of shell casings, to pre-market review of gun design, social-cost taxation, gun-owner insurance requirements, and beyond.").

to safety in their “persons, houses, papers, and effects.”<sup>134</sup> The confusion regarding the scope of constitutionally legitimate federal regulation and the Court ignoring the constitutional duty of the federal government to protect public safety have also compromised individual liberty.

This section will proceed to first examine what is currently regulated, then consider the question of individual rights that are protected, and finally will address the consequences to public safety flowing from the current Court doctrine and federal reluctance to enact meaningful gun control in the shadow of the actual and perceived doctrine.<sup>135</sup>

### 1. What Can Be Regulated by Federal Government

*Heller* held that the federal law in Washington, D.C. was unconstitutional because it unduly burdened a newly recognized Second Amendment right of an individual to keep and bear firearms for lawful purposes.<sup>136</sup> The Court held that a statute that banned handgun possession and that required that firearms kept in homes be unloaded and disassembled, violated the Second Amendment.<sup>137</sup> The Court limited the scope of this rule to allow complete regulation of weapons that are not in common use.<sup>138</sup> Justice Scalia wrote for the majority as follows:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today

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<sup>134</sup> U.S. CONST. amend. IV.

<sup>135</sup> See Cook et al., *supra* note 133, at 1042 (“Second Amendment doctrine might deter innovative regulatory responses to the problem of gun violence. The threat of litigation may inhibit useful policy experimentation ranging from personalized firearms technology and the microstamping of shell casings, to pre-market review of gun design, social-cost taxation, gun-owner insurance requirements, and beyond.”); TRIBE & MATZ, *supra* note 92, at 158 (“Until late 2012, a combination of partisan politics and pro-gun public opinion thwarted many efforts to pass laws that sought to reduce violence by limiting access to guns.”).

<sup>136</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 627.

of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>139</sup>

Despite this freedom to regulate weapons not in common use, federal laws fall far short of establishing total bans on guns and ammunition that fall under the category of assault weapons.

While some states have very stringent gun regulations, other states favor a less strict firearm regulation scheme. These variations create conflict, specifically when the federal government attempts to pass meaningful national firearms regulations.<sup>140</sup>

Stephen Kiehl asserts that according to Justice Scalia's reasoning, not all traditionally upheld gun regulations will meet constitutional muster. However, the door as to their validity remains open, and the Court appears to suggest something less than a strict scrutiny test.<sup>141</sup> Kiehl asserts that:

[Justice Scalia's] extraordinary admission suggests that much of the twentieth century case law on gun regulations remains valid precedent, even under an individual rights interpretation of the Second Amendment. In the cases Justice Scalia referred to, the courts upheld regulations that ban the possession of machineguns made after 1986, firearms by people subject to a domestic violence order, pipe bombs and sawed-off shotguns, as well as regulations requiring the registration of guns, requiring a permit to carry a concealed weapon, and banning felons from possessing firearms.<sup>142</sup>

The problem is that given the major shift away from government regulatory power, federal gun control advocacy has been chilled.<sup>143</sup>

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<sup>139</sup> *Id.* at 626–27 (internal citations omitted).

<sup>140</sup> See TRIBE & MATZ, *supra* note 92, at 159; Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL'Y 489, 509 (2012) ("A number of court decisions have analyzed presumptively valid regulations concerning felons, mentally ill individuals, and sensitive places. Some courts hearing cases involving felons' firearms rights have utilized specific standards of review, while others have used the categorical exemptions of *Heller* and *McDonald* to dispose of the cases based on the felony status of the individual asserting their Second Amendment right.")

<sup>141</sup> Kiehl, *supra* note 5, at 1132, 1138.

<sup>142</sup> *Id.* at 1162.

<sup>143</sup> See De Leeuw, *supra* note 97, at 1466–67 (noting that, in the wake of *Heller*, the federal government has been involved in extensive litigation related to its gun-control regulations, despite Justice Scalia's assertion that "long-standing" regulations were

This can be seen as undermining public safety even as the Court proclaims to champion individual rights. For example, in the district court case of *Brady Campaign to Prevent Gun Violence v. Brownback*, an organization advocating for reducing gun violence nationwide, challenged the constitutionality of the Kansas Second Amendment Act, which prohibited the application of some federal firearm regulations within the state of Kansas.<sup>144</sup> Defendants argued that the organization lacked standing and moved to dismiss.<sup>145</sup> The District Court agreed, holding that absent an immediate harm or impending injury, based on hypothetical increased risk of future gun violence, the declaratory action lacked merit, and granted defendant's motion.<sup>146</sup> Although, this decision was ostensibly based in a justiciability concern, in light of mass shootings and targeted killings, this begs some troubling questions regarding whose rights matter to the Court.<sup>147</sup>

## 2. Individual Rights Protected, but Whose?

The Court's hostility to federal gun control laws has been building for some time, but was initially viewed as purely based in federalism concerns.<sup>148</sup> The conservative-libertarian majority of the Supreme Court advocated for protecting individual liberties by imposing limits on the federal government. For instance, in *United States v. Lopez*, the Rehnquist Court struck down a federal law that banned the possession of a gun within 1,000 feet of a school.<sup>149</sup> The Court, using the

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presumptively reasonable; the lack of a definite judicial review standard has opened the floodgates of litigation); Kiehl, *supra* note 5, at 1132–33 (explaining that after *Heller* and *McDonald* the courts became flooded with litigation, but courts and even seasoned judges were uncertain how to interpret these landmark cases). This demonstrates that there is now much confusion regarding the Second Amendment and the Constitution. In addition, law enforcement officers are left to address the issue of gun violence with these poorly defined guidelines, and as a result of the confusion, people are finding more causes of action to litigate.

<sup>144</sup> *Brady Campaign to Prevent Gun Violence v. Brownback*, 110 F. Supp. 3d 1086 (D. Kan. 2015).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See De Leeuw, *supra* note 97, at 1466–67.

<sup>148</sup> See Rakove et al., *supra* note 100, at 55 (“Federalist supporters of the Constitution dominated the First Congress that met in the spring of 1789. In framing the Second Amendment, they simultaneously sought to assuage the expressed Anti-Federalist concern about the maintenance of the militia while preserving congressional authority over its organization, arming, and discipline.”).

<sup>149</sup> *United States v. Lopez*, 514 U.S. 549 (1995); Leonard M. Niehoff, *The Remarkable Demise of the Gun-Free School Zones Act: Is it Possible That the Commerce Clause Actually Means Something?*, 75 MICH. B.J. 1196 (1996) (noting that the Supreme Court did something unusual in *Lopez*: it held that Congress had exceeded its authority under the Commerce Clause). The case arose when Alfonso Lopez, a senior at a San Antonio

“substantial effects” doctrine, held that Congress’ power to legislate under the Commerce Clause applied only to economic activity, not to noneconomic conduct such as gun possession.<sup>150</sup>

While the *Lopez* Court avoided the Second Amendment question by holding a federal gun control regulation as an unconstitutional use of Congress’ Commerce Clause powers, it is worth noting who was affected by the ruling.<sup>151</sup>

The Gun Free School Zone Act at issue in *Lopez* was passed to address an epidemic of gun violence and fatalities that was popularly viewed as disproportionately killing Black youths in inner cities.<sup>152</sup> The Court’s decision to value federalism concerns over the lives of these young people is consistent with the generalized disregard for Black

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high school, showed up to school with a concealed and loaded handgun. *See* United States v. Lopez, 514 U.S. 549, 551 (1995). Lopez was charged with violating a state statute barring gun possession in school premises. *Id.* at 551. Lopez was subsequently charged and convicted for violation of the federal Gun-Free School Zones Act and the state criminal prosecution was dismissed. *Id.*

<sup>150</sup> *Lopez*, 514 U.S. at 559–61, 565–67 (holding that there was not a sufficient nexus between the possession of a gun within a school zone and interstate commerce); Victoria Davis, *A Landmark Lost: The Anemic Impact of United States v. Lopez*, 115 *S. Ct.* 1624 (1995), *on the Federalization of Criminal Law*, 75 NEB. L. REV. 117, 118–19 (1996) (noting that *Lopez* was the first time since 1936 that the Supreme Court invalidated a federal statute because Congress had exceeded its Commerce Clause powers).

<sup>151</sup> *See Lopez*, 514 U.S. at 602–03 (Stevens, J., dissenting) (“I therefore agree entirely with Justice Breyer’s explanation of why Congress has ample power to prohibit the possession of firearms in or near schools—just as it may protect the school environment from harms posed by controlled substances such as asbestos or alcohol. I also agree with Justice Souter’s exposition of the radical character of the Court’s holding and its kinship with the discredited, pre-Depression version of substantive due process . . . . Congress’ power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets. The market for the possession of handguns by school-age children is, distressingly, substantial.”); *id.* at 617 (Breyer, J., dissenting) (“Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce.”). Further, Congress made an *explicit* finding when it amended this law in 1994 that violent crimes in school zones affect the quality of education, which directly affects interstate commerce. *See id.* at 618 (Stevens, J., dissenting). Justice Breyer included in his dissent an appendix detailing the statistics for violent and gun-related crime in American schools. *Id.* at 632–44. *See also* Carl W. Chamberlin, *Johnny Can’t Read ‘Cause Jane’s Got a Gun: The Effects of Guns in Schools, and Options After Lopez*, 8 CORNELL J.L. & PUB. POL’Y 281, 281–82 (1999) (using statistics to show the detrimental effects of guns in schools and the troubling public policy problem Congress faces after the Supreme Court’s holding in *Lopez*).

<sup>152</sup> *Lopez*, 514 U.S. at 549, 551–52. *See Children Carrying Weapons: Why the Recent Increase?: Hearing Before the S. Comm. on the Judiciary*, 102nd Cong. 1–3 (1992) (statement of Joe Biden, Chairman, H. Comm. on the Judiciary).

lives that we continue to see in law enforcement and society at large.<sup>153</sup> As Cook et al., noted,

In 2005, the gun homicide victimization rate for Hispanic men ages 18–29 was six times the rate for non-Hispanic white men of the same age. The gun homicide rate for black men in this age group—99 per 100,000—was a remarkable twenty-four times the rate for white males in the same age group. In addition, there appears to be considerable overlap between the populations of potential offenders and victims: the large majority of both groups have prior criminal records.<sup>154</sup>

The rate of firearm homicide for children between the ages of five to fourteen is thirteen times higher than in other similarly developed nations, and the rate of homicide overall is three times higher in the United States than in other developed countries.<sup>155</sup> Further, during the period of 2000 to 2010, approximately 675 Americans lost their lives per year as a result of accidental gunfire; two-thirds of such deaths occurred at the person's home, and about half of such victims were under twenty-five years of age.<sup>156</sup>

American youth today are confronted with more violence and prone to more fatalities than any previous generation. Many young people are killed by gunfire, and the statistics show that a child is shot every thirty-six minutes, and many of these episodes take place at schools across the nation.<sup>157</sup> Carl W. Chamberlin further states as follows:

[W]ell-publicized tragedies are just the tip of the iceberg. Over a third of all high school students are regularly threatened with harm, and more than ten percent are actually attacked. A surprising twenty percent of all urban high school students have been threatened with guns. In 1993 alone, over a third of urban school districts reported a shooting or knifing. Furthermore, students are not the only ones in danger at school. Thousands of secondary school teachers are physically attacked each year, and thousands more are threatened with harm every day. A 1994 Gallup poll ranked school violence as America's primary concern in education.<sup>158</sup>

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<sup>153</sup> Cook et al., *supra* note 133, at 1048.

<sup>154</sup> *Id.* See also Chamberlin, *supra* note 151.

<sup>155</sup> Matthew Miller et al., *Firearms and Violent Death in the United States*, in REDUCING GUN VIOLENCE IN AMERICA 3–5 (Daniel W. Webster et al. eds., 2013).

<sup>156</sup> *Id.* at 5.

<sup>157</sup> Chamberlin, *supra* note 151, at 283–88.

<sup>158</sup> *Id.* at 282–83.

Furthermore, gun ownership is proven to be concentrated in the hands of few. Based on comprehensive data and statistics, Philip J. Cook and Jens Ludwig, amongst others, observe the following:

Our best estimate is that there are 200–250 million firearms in private circulation, meaning that there are nearly enough guns for every adult to have one. But about 75 percent of all adults do not own any guns. Recent survey data suggests that about 42 percent of males, 9 percent of females, and 35 percent of all households have at least one gun. . . . [M]ost people who own one gun own many. In 1994, about 75 percent of all guns were owned by those who owned four or more, and this slice of gun owners amounted to only 10 percent of the adult population.<sup>159</sup>

The right of ten percent of the adult population to individually keep and bear arms is essentially being reframed as being an equivalent right that is in tension with the real public safety concerns that inspired gun control regulations.

### 3. How Public Safety Concerns are Devalued

Protecting individual rights is a hallmark of our modern era of constitutional interpretation. The concept that an individual's rights would ever be held subordinate to a collective goal seems to be anathema to basic precepts of justice. This viewpoint can be observed in the rejection of mantras such as “the good of the many outweighs the good of the few,” in favor of the idea that it is better that many criminals be set free than for a single innocent person to be wrongfully convicted of a crime.<sup>160</sup>

However, the Second Amendment, as written, is not framed as an individual right, but as a collective right.<sup>161</sup> The majority that has

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<sup>159</sup> Cook et al., *supra* note 133, at 1045–46.

<sup>160</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 474 (23d ed. 1854). Leonard Nimoy, as the character Spock, once stated, “logic clearly dictates that the needs of the many outweigh the needs of the few.” Captain Kirk replied, “Or the one.” STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982). This reasoning reflects a utilitarian ethical perspective.

<sup>161</sup> See TUSHNET, *supra* note 102, at 48 (“Gun-control proponents offer instead something usually called the ‘collective rights’ view . . . . The Second Amendment protects the right of states to organize their own militias—roughly, the state-organized National Guard we have today. On this interpretation, the licensing-test proposal poses no constitutional problems whatever. Owning a gun is indeed just like driving a car—not a personal right protected by the Constitution, but a privilege that legislatures can regulate as much as we the voters are willing to tolerate.”); TRIBE & MATZ, *supra* note 92, at 160 (noting that, in *United States v. Miller*, the Supreme Court unanimously upheld a federal firearm regulation, explaining that the purpose of the Second Amendment was to “assure the continuation and render possible the

chosen to recast the right to bear arms as an individual right is a majority whose self-avowed jurisprudential philosophy is based in originalism, or in giving credence to the original meaning of words.<sup>162</sup>

Scalia's holding has been duly criticized even by conservative scholars, including Judge Richard Posner. Posner writes that Scalia cheated originalism principles, using instead "faux originalism."<sup>163</sup> Posner explains that Justice Stevens' dissent was a better argument because "[t]he motivation for the Second Amendment was only to protect the state militias from being disarmed by the federal government," and the text of the Amendment as drafted does not enshrine an individual's right to possess a gun for recreational or self-defense purposes.<sup>164</sup>

The federal government has a constitutional affirmative duty to ensure domestic tranquility, and the founding fathers expressly imposed a duty on the federal government to protect the safety and security of the citizens of the newly formed nation.<sup>165</sup> The consequences of the *Heller* and *McDonald* decisions include the reshaping of the police power in the context of gun rights so that it is now reactionary and thus less effective at protecting the public safety than a preventative approach.<sup>166</sup> Lawmakers must now consider a poorly defined and unclear constitutional encumbrance whenever they attempt to address issues of gun violence.<sup>167</sup> Not only does the constitutionality of gun regulation raise questions about what laws will pass constitutional muster, but it also has political ramifications for lawmakers who could be perceived as having regulated guns too strictly.<sup>168</sup>

The political concerns for lawmakers are further discussed by

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effectiveness of [state militias]"). This understanding endorses the "collective rights" interpretation of the Second Amendment, which has nothing to do with self-defense rights, but instead with protecting the newly formed nation against tyranny.

<sup>162</sup> See TRIBE & MATZ, *supra* note 92, at 164–66.

<sup>163</sup> ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 283 (2011).

<sup>164</sup> *Id.* at 283–84 (internal citations omitted).

<sup>165</sup> See Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535, 653–54 (1996).

<sup>166</sup> Cornell & Kozuskanich, *supra* note 5, at 4–6. Much of society's views towards gun dynamics have since changed, and Americans feel that more stringent gun controls are necessary to deal with the problem of gun violence.

<sup>167</sup> See Kiehl, *supra* note 5, at 1132–33.

<sup>168</sup> Frederic Lemieux, *Effect of Gun Culture and Firearm Laws on Gun Violence and Mass Shootings in the United States: A Multi-Level Quantitative Analysis*, 9 INT'L J. CRIM. JUS. SCI. 74, 76 (2014).

Lemieux, who acknowledges that “the United States lawmakers have approached gun control cautiously due to the profound difference of opinion among the voters . . . [and because] politicians are facing a strong firearms lobby through gun enthusiast associations that fund and endorse political candidates.”<sup>169</sup> While there has always been a difference of opinion on gun regulation among voters, strong firearm lobbies, through gun activists such as the NRA, have gained political influence and have been strengthened in the wake of *Heller* and *McDonald*.<sup>170</sup>

As a result of *Heller* and *McDonald*, there has been less gun regulation, more gun accessibility, and a shift from preventative legislation and policing to reactive policing.<sup>171</sup> The role of government is not just to arrest people once they do harm but also to limit the harm from happening in the first place. Weaker gun regulations and laws have devastating effects on public safety, and consequently the government is failing to fulfill its duties of protecting the public and providing public safety.<sup>172</sup> Lemieux has written on the effects between less government regulation on firearms, weaker gun laws, more gun accessibility, and their correlation to gun violence, deaths, and mass shootings.<sup>173</sup> Lemieux found that gun violence and mass shootings are more prevalent as a result of lax and weaker gun regulations.<sup>174</sup>

This problem of deregulating firearms is acknowledged by scholars in many areas including medicine.<sup>175</sup> Garen Wintemute, a medical doctor and scholar, explains that as a part of the medical field, doctors have seen many innocent people shot with guns that were purchased legally and recently.<sup>176</sup> Wintemute explains that more than eighty percent of shooting victims are pronounced dead at the scene or in the emergency department, and the fatality rate for gun-related injuries is eighteen times higher than those resulting from motorcycle injuries.<sup>177</sup> Wintemute stresses the need for preventative regulation and action when he says, “society must prevent the shootings from occurring in the first place.”<sup>178</sup> He emphasizes that lawmakers have

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*; Kiehl, *supra* note 5, at 1132–33.

<sup>171</sup> *See* Kiehl, *supra* note 5.

<sup>172</sup> Lemieux, *supra* note 168, at 76.

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> *See* Garen J. Wintemute, *Guns, Fear, the Constitution, and the Public's Health*, N. ENG. J. MED. 1 (2008).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 2.

misguidedly implemented a radical deregulation of gun use.<sup>179</sup>

Wintemute notes that thirty-five states now issue concealed weapon permits to anyone who can legally own guns, and some states do not require concealed carry permits at all.<sup>180</sup> Furthermore, some states have broadened self-defense laws through statutes that expand the circumstances under which guns may be used in self-defense.<sup>181</sup> It is no longer just in one's "castle," but out in public where there is now no duty to retreat if possible before shooting. Shooters are granted immunity from prosecution, and sometimes are not even liable, when bystanders are injured.<sup>182</sup> Wintemute says:

Policies limiting gun ownership and use [government regulations on gun control] have positive effects [that are wide ranging], whether those limits affect high-risk guns such as assault weapons or Saturday night specials, high-risk persons such as those who have been convicted of violent misdemeanors, or high-risk venues such as gun shows.<sup>183</sup>

When gun ownership and availability rise as a result of government deregulation and lack of government regulation, so does gun violence; they rise and fall together.<sup>184</sup> For example, in 2007, both New York and Chicago had strict regulations and restrictions on firearms ownership and use. Both cities experienced fewer homicides than any other time in their history, but this ended after the Court handed down *Heller*.<sup>185</sup>

This apparent, post-*Heller* libertarian reframing of rights has failed to consider the right to public safety. The preamble of the Constitution itself raises this aspect of freedom as an important part of the Constitution's purpose: "We the people of the United States, in order to form a more perfect union, establish justice, insure *domestic tranquility*. . . , provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."<sup>186</sup>

One question raised is: Whose rights are protected and whose rights are left unprotected? If an individual has a right to bear arms,

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Wintemute, *supra* note 175, at 2.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> U.S. CONST. pmb. (emphasis added).

under what circumstances can government make access to guns more cumbersome? Specifically, when can government deny or largely curtail gun access for those who have demonstrated themselves to be violent or otherwise a threat to the public safety and domestic tranquility?<sup>187</sup>

Article IV, Section 4 of the Constitution provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.<sup>188</sup>

Scholars, such as Nicholas Johnson, suggest gun rights have consistently been recognized as a right of access for whites, and that whenever Blacks have sought to access weapons, action has been taken to limit that access.<sup>189</sup> One argument in favor of the Court's post-*Heller* approach is that they have actually breathed a more inclusive meaning to the Second Amendment that has the potential to empower racial minorities.<sup>190</sup>

Johnson argues that the Second Amendment is consistent with the primary and most basic right of self-preservation recognized by the African-American tradition.<sup>191</sup> Johnson criticizes firearm control

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<sup>187</sup> See *id.*

<sup>188</sup> U.S. CONST. art. IV, § 4.

<sup>189</sup> See Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991) (supporting the individual rights view of the Second Amendment that states that citizens have a right to protect themselves and fight tyranny, and arguing that the firearm tradition historically deprived Blacks, Indians, and minorities of gun possession). See generally Joseph Blocher, *New Approaches to Old Questions in Gun Scholarship*, 50 TULSA L. REV. 477 (2015); AKINYELE OMOWALE UMOJA, WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT (2013) (contending that armed resistance was essential to pursue Southern freedom and dismantle segregation, and that Black communities overcame intimidation and oppression by arming themselves; pointing out that as the civil rights movement grew, armed self-defense and resistance were the means by which African-Americans were empowered to develop different political and social relationships between Black and White Mississippians); NICHOLAS JOHNSON, NEGROES AND THE GUN, THE BLACK TRADITION OF ARMS (2014) (arguing that there is a long-standing yet underappreciated Black tradition of bearing arms for the purpose of self-defense). Johnson cites examples from the pre-Civil War era to illustrate how Black individuals had to use firearms to protect themselves, their families, and communities. He argues that though firearms were a necessary means to obtain freedom from slavery and oppression, this reality has been submerged, because it is hard to reconcile with the nonviolence narrative of the civil rights era. Johnson reconciles this apparent tension by showing how the Black tradition of bearing arms for private self-defense is quite different from views regarding political violence.

<sup>190</sup> See Moncure, *supra* note 189, at 592.

<sup>191</sup> JOHNSON, *supra* note 189, at 297.

advocacy saying as follows:

The black tradition of arms evokes heroic image like Hartman Turnbow repelling Klansmen with rifle fire. The modern orthodoxy (referring to pro-regulation advocates) responds to the tragic scene of swaggering neighborhood tyrants warring over turf, their gunfire piercing the kitchens and bedrooms of innocent people. . . . Supply control policies at the heart of modern orthodoxy rest on the straight-forward logic that no guns equals no gun crime. But fuller consideration raises a litany of questions that reveal the modern orthodoxy as more reflex than considered policy.<sup>192</sup>

In addition, minorities have been historically denied their full citizenship right to bear arms through complex and targeted regulations that included expensive licensing requirements and firearms training.<sup>193</sup>

Adam Winkler states that the ability to carry a firearm in public is one of the rights protected by the Second Amendment and, consequently, giving a public official unfettered discretion to deny permits is akin to a constitutional violation.<sup>194</sup> Moreover, throughout American history public officials have used their discretion to discriminate against minorities. An example of this was the denial of Martin Luther King Jr.'s request for a concealed carry permit during the beginning of the civil rights movement.<sup>195</sup>

However, one problem with the Court's application of the conclusions drawn from these arguments is that, unlike Johnson and Winkler, the Court fails to fully account for those same communities' elected leaders' current calls for expanded gun regulation based on public safety concerns. For them, the argument for more guns in the hands of the right people rings hollow in the face of both random and

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<sup>192</sup> *Id.*

<sup>193</sup> See T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 8 J. CRIM. L. & CRIMINOLOGY 764, 794 (1995) (arguing that gun control in America has a long-standing history of discrimination against the poor and minorities; in fact, keeping guns away from Blacks has always been a concern and started as early as 1644 when Virginia barred free Blacks from owning firearms); Moncure, *supra* note 189, at 593; David Babat, *The Discriminatory History of Gun Control* (2009) (unpublished Senior Honors Project, University of Rhode Island), <http://digitalcommons.uri.edu/srhonorsprog/140> (alleging that gun control in the United States is based on a long history of discrimination that still continues to this day). Blacks were the first but not the only minorities deprived of firearms access, and even the poor have to face the challenge of economically burdensome restrictions. The paper argues that firearm control has been historically used as a way to control specific demographic groups of the population, such as Blacks and immigrants. *Id.*

<sup>194</sup> See WINKLER, *supra* note 163, at 290.

<sup>195</sup> *Id.*

calculated gun-related killings by white supremacists, criminals, and accidental shootings.<sup>196</sup> In this context at least, the Court appears to be suggesting it knows best what is in the public's best interest—that thing is more, not less access to firearms.

### C. State Regulatory Consequences and Public Safety

*McDonald v. City of Chicago* similarly relies on a view of gun rights as an individual right and not a collective right.<sup>197</sup> In so doing, *McDonald* has contributed to a shift in the public ethos regarding rights to be more liberty-oriented rather than duty bound.<sup>198</sup> In the context of state regulation, the Court has managed to accomplish this even as it has paid lip service to the majority's avowed support of federalism as

<sup>196</sup> In Charleston, SC, a massive church shooting took place on June 15, 2015. Dylann Roof, identified as the main suspect of the massacre, is a 22-year-old, white supremacist responsible for the killing of nine African Americans during a prayer service at Emanuel African Methodist Episcopal Church. Dylann Roof pled not guilty in federal court, though he later confessed. His trial is still ongoing. Kristine Guerra, 'Well, I killed them, I guess': Jury watches Dylann Roof's confession to church massacre, WASH. POST (Dec. 10, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/12/10/well-i-killed-them-i-guess-jury-watches-dylann-roofs-confession-to-church-massacre/?utm\\_term=.8ab41fa28ea6](https://www.washingtonpost.com/news/post-nation/wp/2016/12/10/well-i-killed-them-i-guess-jury-watches-dylann-roofs-confession-to-church-massacre/?utm_term=.8ab41fa28ea6). Trayvon Martin, a 17-year-old African American was fatally shot by George Zimmerman, who was acting as a volunteer of a neighborhood watch. Zimmerman considered Trayvon Martin a prospective criminal. Despite being advised by the 911 operator to wait for police officers to arrive to the scene, Zimmerman decided to use his privately-owned gun and shot the teenager. Zimmerman faced jury trial and was acquitted of the crime based on his self-defense claim. Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html>. Thirty-two people died on April 16, 2007, at the hands of a mentally-disturbed gunman at Virginia Tech in Blacksburg, Virginia. N. R. Kleinfield, *Before Deadly Rage, a Life Consumed by a Troubling Silence*, N.Y. TIMES (Apr. 22, 2007), <http://www.nytimes.com/2007/04/22/us/22vatech.html>. On December 14, 2012, a mentally disturbed individual named Adam Lanza fatally shot twenty children between six and seven years old, as well as six adult staff members at Sandy Hook Elementary School. Prior to arriving at the school, Lanza shot and killed his mother. Before getting caught by the police, Lanza committed suicide. Stav Ziv, *Report Details Adam Lanza's Life Before Sandy Hook Shootings*, NEWSWEEK (Nov. 25, 2014), <http://www.newsweek.com/report-details-adam-lanzas-life-sandy-hook-shootings-286867>. On July 20, 2012, James Eagan Holmes, dressed in tactical clothing, attended the premiere of the film *Batman: The Dark Knight Rises*, and set off tear gas grenades and proceeded to shoot into the audience with multiple firearms. As a result, twelve people were killed and seventy were wounded. Holmes' defense attempted and failed to prove mental insanity. Holmes faced trial and a jury sentenced him to life prison without the possibility of parole. Steve Almasy et al., *James Holmes Sentenced to Life in Prison for Colorado Movie Theater Murders*, CNN.COM (Aug. 8, 2015), <http://www.cnn.com/2015/08/07/us/james-holmes-movie-theater-shooting-jury/>.

<sup>197</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010); Sobel, *supra* note 140, at 509.

<sup>198</sup> Heyman, *supra* note 94, at 251.

a system that protects states' rights.

What follows is first an examination of what rights may be regulated by state governments in light of *McDonald v. City of Chicago*. Next to be considered in the context of states is whose individual rights are protected. Third and finally, this section will address the consequences to public safety coming from the current Court doctrine and the reluctance of states to make full use of their currently recognized regulatory power to enact meaningful gun control in the shadow of the actual and perceived constitutional doctrine.

### 1. What Can Be Regulated by State Government

*McDonald v. City of Chicago* is the incorporation case for the Second Amendment—meaning, it provides the extent to which the Second Amendment limits states' ability to regulate weapons.<sup>199</sup> As in some other areas where the Fourteenth Amendment has been incorporated to apply amendments to the states, the *McDonald* Court announced that the Second Amendment applies to state gun regulations.<sup>200</sup>

In 2010, the Supreme Court, in a plurality decision written by Justice Alito, held that the Fourteenth Amendment incorporates to the states the Second Amendment right to keep and bear arms for self-defense.<sup>201</sup> In *McDonald*, plaintiffs challenged a Chicago municipal law that banned individuals from possessing firearms unless they had a valid registration certificate. The law also prohibited the registration of most handguns, and it effectively banned handguns in the city. The Supreme Court struck down these laws by finding a Second Amendment violation.<sup>202</sup>

According to the Court, an individual's right to keep and bear arms is "deeply rooted in this Nation's history and traditions," and in light of its significance,<sup>203</sup> a plurality of the Court held that the Second Amendment right is a "fundamental" right that should be incorporated to the states under the Fourteenth Amendment Due Process Clause.<sup>204</sup>

Adam Winkler suggests that gun rights advocates have in fact been

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<sup>199</sup> *McDonald*, 561 U.S. at 791.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> See Caroline L. Moran, *Under the Gun: Will States' One-Gun-Per-Month Laws Pass Constitutional Muster After Heller and McDonald?*, 38 SETON HALL LEGIS. J. 163, 170 (2013).

<sup>203</sup> *Id.* at 171–72; *McDonald*, 561 U.S. at 746.

<sup>204</sup> Moran, *supra* note 202, at 171–72; *McDonald*, 561 U.S. at 748–49.

greatly favored by *Heller*'s list of exceptions. For Winkler:

The threat of a lawsuit alone will force many lawmakers to reconsider ineffective or overly burdensome gun control laws currently on the books. They used to be confident that nearly any gun law would survive a Second Amendment challenge in the courts, but now they must be a bit more careful. In the wake of the Supreme Court's decision, New York City, for example, revised its permitting laws to make it somewhat easier and quicker for applicants to gain approval. Although the mayor, Michael Bloomberg, is one of the nation's leading gun control advocates, his administration didn't want to make the same mistake as D.C. Mayor Adrian Fenty and cling to a law likely to be overturned—and risk creating new precedents that further undermine gun control.<sup>205</sup>

Once the Supreme Court declared that the Second Amendment was incorporated into the Fourteenth Amendment's Due Process Clause, the Second Amendment became enforceable against the states. The Second Amendment may now limit state power in the same manner that the First Amendment and other incorporated amendments restrict state actions. Stacey L. Strobel has noted that as a result of this development:

A number of court decisions have analyzed presumptively valid regulations concerning felons, mentally ill individuals, and sensitive places. Some courts cases involving felons' firearms rights have utilized specific standards of review while others have used the categorical exemptions of *Heller* and *McDonald* to dispose of the cases based on the felony status of the individual asserting their Second Amendment right.<sup>206</sup>

This means that, at least theoretically, *McDonald* and subsequent cases<sup>207</sup> recognize that the states' ability to regulate guns is broader

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<sup>205</sup> WINKLER, *supra* note 163, at 291.

<sup>206</sup> Sobel, *supra* note 140, at 509.

<sup>207</sup> See *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2486 (2016); *Drake v. Filko*, 724 F.3d 426, 431–32 (3d Cir. 2013) (holding that a state law requiring applicants to establish a “justifiable need” to be allowed to carry a handgun in public for purposes of self-defense did not violate the Second Amendment, because it is a “presumptively lawful,” “longstanding” regulation); *City of San Diego v. Boggess*, 216 Cal. App. 4th 1494 (2013) (holding that a statute authorizing destruction of firearms belonging to a patient detained for psychiatric evaluation is not facially invalid under the Second Amendment); *Williams v. State*, 10 A.3d 1167 (Md. 2011) (holding that a statute prohibiting wearing, carrying, or transporting a handgun without a permit outside of one's home was outside of the

than that of the federal government. In practical terms, this means that states have the power to control and regulate firearms in exercise of their police powers.

In *Moore v. Madigan*, the Federal Court of Appeals for the Seventh Circuit, extending the holding of *McDonald*, struck down two Illinois state statutes: the Illinois Unlawful Use of Weapons (Uuw) law and the Illinois Aggravated Unlawful Use of a Weapon (AUuw) law, which prohibited the carrying of guns in public; the court found that these statutes violated the Second Amendment right to bear arms for self-defense outside the home.<sup>208</sup> In *Moore*, Circuit Judge Posner wrote for the court as follows:

We are disinclined to engage in another round of historical analysis to determine whether eighteenth-century America understood the Second Amendment to include a right to bear guns outside the home. The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside. . . . Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden. The Supreme Court's interpretation of the Second Amendment therefore compels us to reverse the decisions in the two cases before us and remand them to their respective district courts for the entry of declarations of unconstitutionality and permanent injunctions.<sup>209</sup>

Further, in *Ezell v. City of Chicago*, the Seventh Circuit reversed the lower court's decision denying a preliminary injunction in favor of the challengers of a Municipal Ordinance, which mandated one hour of range training as a prerequisite to lawfully obtaining a gun and prohibited all firing ranges within the city limits.<sup>210</sup> The Seventh Circuit agreed with the challengers, finding that the Ordinance conditioned an inalienable right to possess firearms for self-defense, and that the total ban of firing ranges in the city was a core violation of the Second Amendment.<sup>211</sup>

In *Peruta v. County of San Diego*, the Federal Court of Appeals for the Ninth Circuit recognized a violation of the Second Amendment right to bear arms and struck down a county regulation requiring individuals to show a sufficiently pressing need for self-protection

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scope of the Second Amendment right to bear arms).

<sup>208</sup> *Moore v. Madigan*, 702 F.3d 933, 935–36, 942 (7th Cir. 2012).

<sup>209</sup> *Id.* at 942.

<sup>210</sup> *Ezell v. City of Chicago*, 651 F.3d 684, 689–90 (7th Cir. 2011).

<sup>211</sup> *Id.*

before being allowed to carry a concealed weapon.<sup>212</sup> The Ninth Circuit reasoned that the “good cause” requirement constituted a complete destruction of the right to bear arms and therefore failed judicial review under any level of scrutiny.<sup>213</sup>

In *Gowder v. City of Chicago*, the District Court for the Eastern District of Illinois invalidated another local gun regulation ordinance, holding that the ordinance barring nonviolent misdemeanants from lawfully obtaining a gun was a violation of the Second Amendment.<sup>214</sup>

Just as in the context of the federal regulatory limits, the Supreme Court proclaims a protection of individual rights in the form of liberty. Yet, the result of the *McDonald* holding has been the undermining of public safety legislation that is also designed to protect liberty. This again raises the question of whose liberty is protected and why.

## 2. Individual Rights Protected, but Whose?

The public safety consequences of the new limitations on state gun control laws are perhaps of even greater consequence given that, traditionally, most gun control regulation has been done by the states. The question remains as to whose rights are protected by the combination of *Lopez* and *McDonald*, which together have quashed regulatory authority to regulate guns and protect the public safety, especially in urban Black communities.

The answer should be that everyone now enjoys greater individual liberty, but given the increased gun-related deaths in the urban areas targeted by the regulations that the Court has struck down, this seems to be a dubious benefit.<sup>215</sup>

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<sup>212</sup> *Peruta v. County of San Diego*, 742 F.3d 1144, 1148, 1179 (9th Cir. 2014). See generally Darrell A. H. Miller, *Peruta, The Home-Bound Second Amendment, and Fractal Originalism*, 127 HARV. L. REV. F. 238 (2014).

<sup>213</sup> Reed Harasimowicz, *The Comfort of Home: Why Peruta v. County of San Diego’s Extension of Second Amendment Rights Goes Beyond the Scope Envisioned by the Supreme Court*, 56 B.C. L. REV. E-SUPPLEMENT 51, 51–52 (2015).

<sup>214</sup> *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1126 (N.D. Ill. 2012).

<sup>215</sup> See Michael B. de Leeuw et al., *Ready, Aim, Fire? District of Columbia v. Heller and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133 (2009) (arguing that, given the high rates of violence linked to firearms in many urban areas, what constitutes a reasonable regulation becomes a major concern to civil rights activists and attorneys). De Leeuw additionally asserts that legislatures are better suited than the courts to make public policy and enact meaningful regulations after *Heller*. It is common that the larger cities with more populated municipalities possess more stringent firearms regulations, because of the legislature’s response to the needs of the community. Thus, local governments should enjoy broad discretion to enact these types of regulations. African Americans particularly are the main victims of gun violence. For instance, in the District of Columbia, in 2004, half of the 137 gun-related homicide victims were Blacks. Minorities and communities of color will be harmed by loosening

Skepticism towards laws of general applicability is typically warranted only where the costs imposed by such laws are disproportionately borne by minorities who have little influence in the political process. By contrast, where a minority community supports and enacts a firearms regulation—as was the case with the handgun ban in the District—the presumption should be that the community has adequately weighed the civil liberties costs and possibly racially disproportionate effects of the regulation at issue against its benefits to public safety. To assume otherwise is essentially to privilege the viewpoints of libertarian theorists and Second Amendment enthusiasts over those of the very citizens who live daily with the civil liberties costs of firearms regulations and the risk of victimization by firearms-related violence.<sup>216</sup>

Lemieux found that gun violence and mass shootings are more prevalent as a result of weaker gun regulations.<sup>217</sup> Lemieux found through his studies that the “law’s effectiveness is more due to the reduced access and availability of firearms[, preventative regulations,] rather than the deterrence measures through severity of criminal sentences[, which are reactive regulations.]”<sup>218</sup> Lemieux explains that “a study on homicide and geographical access to gun dealers in the United States shows that the prevalence of federal firearms licensee stores is strongly correlated with homicide rates in major cities.”<sup>219</sup>

Lemieux has based his analysis on an international comparison between twenty-five developed countries, a national comparison between the fifty states of the United States, and a case study comparison between public mass shootings.<sup>220</sup> In the cross-national analysis it was found that “the number of mass shootings and related casualties in the United States far surpass<sup>221</sup> any of the other individual countries included in this study during that same period of time.”<sup>222</sup> There is a strong nexus between the amount of mass shootings in each country and firearm ownership, which evidences that easier access to firearms and fewer firearm regulations directly relate to mass

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firearms regulations. *Id.* at 133.

<sup>216</sup> *Id.* at 134.

<sup>217</sup> Lemieux, *supra* note 168, at 77.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 79.

<sup>221</sup> In fact, the number of mass shootings and related casualties more than double the mass shootings for the U.S. than all other twenty-four countries combined in the same period.

<sup>222</sup> Lemieux, *supra* note 168, at 81.

shootings.<sup>223</sup> Furthermore, it was found that seventy-one percent of the shooters had legal and direct access to the firearms.<sup>224</sup> It was also found that among the twenty-five countries included in the study, the United States stood out for the large number of deaths by firearms, gun ownership rates, and the highest number of mass shootings.<sup>225</sup> The studies found that states with more restrictive regulations and more government regulation had fewer gun-related deaths, and the opposite finding was true for states that have fewer government regulations and more permissive gun regulations—there was a trend of more deaths as a result of guns.<sup>226</sup> It was found that, both internationally and nationally, gun control regulation reduces overall fatalities.<sup>227</sup> This was seen when the United States, which has less government gun regulation, was compared to other countries such as Canada and Australia, which have more government gun regulations.<sup>228</sup> This was evident as well through comparing the various states to each other.<sup>229</sup> Therefore, based on the above statistics and findings, we can see how the public safety can be significantly impaired due to the lack of government firearm regulations, which was exacerbated in the wake of *Heller* and *McDonald*.

Since *Lopez*, Chicago has experienced a steady increase in gun-related casualties, and the death rate of Black youths has reached genocidal levels.<sup>230</sup> Yet the Court doubled down on its anti-regulation philosophy, ignored the public safety, and found the regulations in

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 84.

<sup>226</sup> *Id.* at 85–86.

<sup>227</sup> *Id.* at 90.

<sup>228</sup> Lemieux, *supra* note 168, at 90.

<sup>229</sup> *Id.*

<sup>230</sup> See Kari Lydersen & Carlos Javier Ortiz, *More Young People are Killed in Chicago Than in Any Other American City*, THE CHI. REP. (Jan. 25, 2012), <http://chicagoreporter.com/more-young-people-are-killed-chicago-any-other-american-city/> (“In Chicago, more than 530 people under the age of 21 have been killed since 2008, and many more have been shot or have otherwise suffered violence—often at the hands of their peers, particularly in the city’s African-American and Latino communities. Nearly 80 percent of youth homicides occurred in 22 Black or Latino communities on the city’s South, Southwest, and West sides—even though just one-third of the city’s population reside in those communities. The rate of youth homicide in West Englewood on the city’s South Side, for instance, was nearly five times higher than the citywide mark.”); Megan Cottrell, *Chicago’s Homicide Epidemic is a Youth Homicide Epidemic* (Jan. 30, 2013), <http://www.chicagonow.com/chicago-muckrakers/2013/01/chicagos-homicide-epidemic-is-a-youth-homicide-epidemic/> (noting that, from 2008 through 2012, nearly half of Chicago’s 2,389 homicide victims were killed before their 25th birthday). See generally *United States v. Lopez*, 514 U.S. 549 (1995).

*Heller* to be unconstitutional.

Specifically, for the city of Chicago, official statistics from the Chicago Police Department show that there is an overall increasing trend from 1991 to 2011 of homicides occurring in public places such as streets and parking lots.<sup>231</sup> This is consistent with another statistical finding that shows an increasing trend in the percentage of murders occurring in the public way.<sup>232</sup> Further, the numbers show that for the year of 2011, 83.4% of the homicide victims were shot and nearly all of those shootings involved a handgun.<sup>233</sup> In 2011, 351 out of 436 reported homicides involved the use of handguns.<sup>234</sup>

In Chicago, most of the homicide victims are males between seventeen and thirty-five years old.<sup>235</sup> Throughout the twenty-year study period, Blacks represent the overwhelming majority of homicide victims, at a rate of seventy percent to eighty percent of the overall homicide victims in Chicago.<sup>236</sup>

Michael B. de Leeuw asserts that despite the holding in *Heller*, “[T]here are many different measures that a community could take to address concerns about firearms. These will necessarily depend largely on the particular community and the specific concerns that the community is trying to address.”<sup>237</sup> The legislature, being the voice of the people, should determine the reasonableness of firearms regulations. Democratic principles dictate that local communities “should have broad authority to determine what constitutes a reasonable firearms regulation within its own boundaries.”<sup>238</sup>

### 3. How Public Safety Concerns are Devalued

The shift in the concept of rights is towards a view of individual gun owner rights being in tension with measures intended to protect the public safety.<sup>239</sup> As a result of *Heller* and *McDonald* there has been less gun regulation. Weaker gun regulations and laws have devastating effects on public safety, and consequently the government is failing to

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<sup>231</sup> 2011 Chicago Murder Analysis, CHI. POLICE DEP’T, 6 (2011), <http://4abpn833c0nr1zvwp7447f2b.wpengine.netdna-cdn.com/wp-content/uploads/2014/12/2011-Murder-Report.pdf>.

<sup>232</sup> *Id.* at 8.

<sup>233</sup> *Id.* at 22.

<sup>234</sup> *Id.* at 22–23.

<sup>235</sup> *Id.* at 32–34.

<sup>236</sup> *Id.* at 38–39.

<sup>237</sup> de Leeuw et al., *supra* note 215, at 136.

<sup>238</sup> *Id.* at 136–137.

<sup>239</sup> *Id.*

fulfill its duties of protecting the public and providing public safety.<sup>240</sup>

In 2011, there were a total of 14,612 homicides reported in the United States; 993 of them were firearm-related.<sup>241</sup> The Congressional Research Service (CRS) reported that mass shooting incidents have steadily increased over the past fifteen years.<sup>242</sup> For the 2009–2013 period, there were 22.4 incidents as compared to 20.2 incidents during the previous five-year period. However, one should note that the number of victims killed and wounded considerably increased, with total casualties rising from 118.4 to 162.4.<sup>243</sup>

The CRS concluded that from 1999–2013, twenty-one mass shootings occurred on average each year, and the motivation of such incidents falls into the following patterns:

Four (4.4) [per year on average] were “mass public shootings” in which four or more victims were shot to death in one or more public locations, such as a workplace, school, restaurant, house of worship, or neighborhood, and the murders *were not* attributable to any underlying criminal activity or commonplace circumstance . . . . Eight (8.5) [per year on average] mass shooting were “familicides” in which a parent, former intimate partner, or less often a child (progeny), shot four or more victims to death . . . . Eight (8.3) [per year on average] mass shootings could be characterized as “other felony mass murders” in which victims were shot to death, and the murders *were* attributable to an underlying criminal activity or commonplace circumstance . . . .<sup>244</sup>

For the 1999–2013 period, the Congressional Research study shows that there were sixty-six public shootings with 446 victims killed and 329 wounded; 127 familicide shootings killing 576 people and wounding thirty-seven; and 124 other felony mass shootings with 532 victims killed and seventy-five wounded.<sup>245</sup>

As Lemieux has indicated, and based on his extensive research, gun violence and mass shootings are more prevalent as a result of weaker gun regulations.<sup>246</sup> For instance, Lemieux explains that “a study

<sup>240</sup> Lemieux, *supra* note 168, at 75–76.

<sup>241</sup> William J. Krouse, *Gun Control Legislation*, CONG. RES. SERV., 10 (Nov. 14, 2012), <https://fas.org/sgp/crs/misc/RL32842.pdf>.

<sup>242</sup> William J. Krouse, *Mass Murder with Firearms: Incidents and Victims 1999-2013*, CONG. RES. SERV., 11 (July 30, 2015), <https://fas.org/sgp/crs/misc/R44126.pdf>.

<sup>243</sup> *Id.* at 13.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 14.

<sup>246</sup> Lemieux, *supra* note 168, at 76.

on homicide and geographical access to gun dealers in the United States shows that the prevalence of federal firearms licensee stores is strongly correlated with homicide rates in major cities.<sup>247</sup> The statistics suggest that there is a strong nexus between the amount of mass shootings and firearm ownership, which evidences that easier access to firearms and fewer firearm regulations are directly related to mass shootings.<sup>248</sup> With more restrictive regulations, fewer deaths by guns occurred, and the opposite finding was true for states that have fewer government regulations and more permissive gun regulations—a trend of more deaths as a result of guns appeared.<sup>249</sup>

Based on the above statistics and findings, one can see how the public safety can be significantly impaired due to the lack of government firearm regulations, which was exacerbated in the wake of *Heller* and *McDonald*.<sup>250</sup> This is a silent devaluing of public safety concerns by way of omitting them from the constitutional rights conversation. While public safety remains part of the debate, it is now relegated to the sidelines, and is not framed at all as an affirmative constitutional duty. Instead, public safety is viewed as a policy concern that must now be treated as subordinate to higher order liberty concerns.

#### IV. PRE-*HELLER* MEANING OF SECOND AMENDMENT WAS MORE CONSISTENT WITH CONSTITUTION

The 200 years of American history and legal precedent before *Heller* provides an excellent alternative approach to Second Amendment law.<sup>251</sup>

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<sup>247</sup> *Id.* at 77.

<sup>248</sup> *Id.* at 82.

<sup>249</sup> *Id.* at 85–86.

<sup>250</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Protecting Strong Gun Laws: The Supreme Court Leaves Lower Court Victories Untouched*, L. CTR. TO PREVENT GUN VIOLENCE (Aug. 2, 2016), <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/>.

<sup>251</sup> See *Heller*, 554 U.S. at 637–38 (Stevens, J., dissenting); Kiehl, *supra* note 5, at 1133 (explaining that, prior to *Heller*, the Court used an alternative approach to the Second Amendment, rather than that of the court in *Heller*). The alternative approach that the Court used was that the Second Amendment right to keep and bear arms was a collective right, not an individual right as *Heller* held. Kiehl explains that throughout the nineteenth and twentieth centuries both the state and federal courts held a collective rights view of the Second Amendment, which was that the states had rights to organize militias and individuals had rights to keep weapons only connected to militia service and it did not provide individuals with weapons for self-defense. Kiehl additionally discusses the established precedent of the state and federal courts regarding the Second Amendment prior to *Heller* and *McDonald* and how those holdings departed from precedent. See also U.S. CONST. art. IV, § 4; U.S. CONST.

This part begins by first examining Second Amendment gun rights as they existed before the doctrine was changed by *District of Columbia v. Heller* in 2008.<sup>252</sup> This section will consider the earlier rule as well as public policy concerns animating from the rule.<sup>253</sup> This section ends by considering both the theoretical and pragmatic advantages of the pre-*Heller* doctrine.

#### A. Pre-*Heller* Policy and Theory

Before *Heller*, the government experienced fewer limitations on its ability to regulate guns.<sup>254</sup> As discussed above, this was because the Second Amendment was interpreted with fidelity to its prefatory clause, which led to an interpretation that respected both the constitutional freedom from government action that was enshrined by the text, as well as the simultaneous and explicitly recognized constitutional obligation to protect the public's safety.<sup>255</sup> Gun regulations were viewed as part of a constitutionally permissible policy mix whose appropriate goal was to protect public safety in accordance

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amend. II; Brief of NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157192 \*6-7; WINKLER, *supra* note 163, at 283-84; WALDMAN, *supra* note 103, at 120-22; Hatt, *supra* note 5, at 514; Yassky, *supra* note 85, at 589-90, 613, 615-17; Zulkey, *supra* note 85, at 213-14, 218; Dupree, *supra* note 85, at 415-18 (arguing that the collective rights theory was precedent and that the Court departed from it in *Heller* when it held that it was an individual right); Tushnet, *supra* note 102, at 164; Rostron, *supra* note 130, at 710-12.

<sup>252</sup> See generally *United States v. Miller*, 307 U.S. 174, 179 (1939). See also *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897); *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875); Kiehl, *supra* note 5, at 1134; David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 1-2 (1987) (arguing that the Second Amendment protects a collective right, which is enshrined under the prefatory clause of the Amendment).

<sup>253</sup> Siegel, *supra* note 100, at 83-85 (explaining how the earlier rule was based on a collective right to bear arms for a well-regulated militia and that its purpose and policy objective was to protect society by providing the states and citizens with the ability to resist tyranny). Furthermore, the "Second Amendment . . . was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of several states." *Heller*, 554 U.S. at 637 (Stevens, J., dissenting). Siegel also discusses the prefatory clause and how it was undermined by *Heller* and *McDonald*.

<sup>254</sup> Cornell & Kozusnak, *supra* note 5, at 5-7 (explaining that the founders encouraged ownership of military type arms, but they regulated them closely; furthermore, it discusses many of the various regulations on firearms, such as who was eligible to own guns, what type of guns, travelling with weapons, inspection laws, maintenance of weapons regulations, and much more).

<sup>255</sup> See *id.* (explaining that while politics and the modern debate over guns offer only two choices—pro-gun or pro-regulation—the founders were actually both pro-gun and pro-regulation).

with the constitutional obligation to protect both the public welfare and safety.<sup>256</sup>

1. Public Policy: Basis for Rule in Terms of Pragmatic Concerns and Public Policy

One of the reasons for recognizing a public concern regarding a Second Amendment that is not overbroad is to ensure the ability of the government to engage in gun regulation that prevents violence and unnecessary death.<sup>257</sup> To put it another way, one of the policies driving the pre-*Heller* jurisprudence was a recognition that arms needed to be regulated, but that there was a right of a free people to rise up against tyranny.<sup>258</sup> By enshrining a collective right to bear arms, the Constitution was viewed as explicitly balancing the governmental obligation to provide for public safety alongside the people's corresponding constitutional right to remain capable of armed insurrection should it become necessary.<sup>259</sup> This collective right recognition is based in both an originalist interpretation of the Constitution as well as a policy concern regarding the relevance of individual versus group insurrection.<sup>260</sup> Individual insurrection is simply not plausible.<sup>261</sup>

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<sup>256</sup> See U.S. CONST. pmbl.; U.S. CONST. amend. IV.

<sup>257</sup> Lemieux, *supra* note 168, at 76 (explaining that we need governmental policies, regulations, and laws on gun control, because they prevent violence and unnecessary deaths; also demonstrating, through studies, the strong correlation between gun regulation, or the lack thereof, and violence as a result of guns).

<sup>258</sup> Malcolm, *supra* note 100, at 50–51; Rakove et al., *supra* note 100, at 62; Hatt, *supra* note 5, at 514; Siegel, *supra* note 100, at 83, 85 (looking at the earlier rule as being based on a collective right to bear arms for a well-regulated militia, and explaining that its purpose and policy objective was to protect society by providing the states and citizens with the ability to resist tyranny as indicated in the prefatory clause). In the Federalist Papers, Publius argued that the existence of a well-armed population that was organized into state militias would guarantee that America never slipped into tyranny. Furthermore, “[a] well-armed militia controlled by the states was necessary to provide the states the ultimate check on potential federal despotism.” *Id.*

<sup>259</sup> U.S. CONST. amend. II; see also WALDMAN, *supra* note 103, at 121 (explaining that the prefatory clause, the “homage to the ‘well-regulated militia being necessary to the regulation of a free state,’” was important to the Framers).

<sup>260</sup> See Hatt, *supra* note 5, at 505–06, 514; Yassky, *supra* note 85, at 588–90, 613, 615–617.

<sup>261</sup> See Hatt, *supra* note 5, at 505–06, 514, 518 (stating that the Court’s interpretation “creates a disparity between the firearms that citizens may legally own, and those possessed by the federal government” and that “the Court effectively ensures that the federal government will enjoy the very monopoly of armed force against which the Second Amendment guards. Such laws deny citizens firearms that they would find most useful if compelled to defend their liberty against the federal government”).

## 2. Constitutional Theory: Reasons for the Rule Based on Constitutional and Democratic Theory

Constitutional interpretative theories and democratic theory both support the interpretation of the Second Amendment as a collective and not an individual right.<sup>262</sup> As has been stated, the actual text of the Second Amendment expresses in the prefatory clause that the right to bear arms is qualified as a militia right.<sup>263</sup>

The new interpretation of the Second Amendment fails under both an originalist constitutional theory and under a theory of a living constitution.

Under an originalist approach to constitutional interpretation, the goal is to apply the original meaning of the words used in the Constitution in order to limit the power of unelected judges to rewrite law based on their own personal value preferences.<sup>264</sup> At the heart of the *Lochner* Era-inspired suspicion of activist, unelected judges, is concern that such judges will apply unprincipled or personal views rather than public value-based interpretations of the Constitution to nullify democratically passed laws. Hence, the concern from an originalist perspective is to limit the Court's power by requiring it to interpret the Constitution based on its original meaning.<sup>265</sup> Competing approaches towards originalism were on display in the Court's gun rights cases.

With regard to a textualist approach to originalism, as previously stated, the prefatory clause clearly acknowledges "a well-regulated militia, being necessary to the security of a free state."<sup>266</sup> Hence, the earlier interpretation of this individual right was consistent with the text of the Constitution. Here, the prefatory clause's framing of a collective right rather than an individual right was seen as consistent with a textually based interpretation of the Second Amendment's original meaning.<sup>267</sup>

Another approach to originalist constitutional interpretation, which is frequently referred to as the "framer's intent" approach, the

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<sup>262</sup> See Schaerer, *supra* note 5, at 795–96.

<sup>263</sup> U.S. CONST. amend. II.

<sup>264</sup> See Schaerer, *supra* note 5, at 795, 796, 798.

<sup>265</sup> See *id.* at 795–96.

<sup>266</sup> U.S. CONST. amend. II.

<sup>267</sup> *Id.*; Zulkey, *supra* note 85, at 213–14, 218; see Malcolm, *supra* note 100, at 50–51 (discussing the prefatory clause); Rakove et al., *supra* note 100, at 62; Siegel, *supra* note 100, at 83, 85.

meaning of any ambiguous words in the text would be interpreted based on the perceived intent of the framers in crafting the text. Following a framer's intent approach, there is extensive historical support showing that the intention of the framers was clearly not to allow for broad individualized access to guns outside of a "well-regulated militia."

Considering the history of that moment indicates that Shays' Rebellion led many to question the value of the Articles of Confederation as well as broad access to weapons outside of the control and regulation of the state government or some sort of well-regulated militia.<sup>268</sup>

Framer's intent would continue to support the holding of the pre-*Heller* era that the Second Amendment concerned a collective-right. The framer's intent theory of constitutional interpretation is similar to its corollary in contract law as well as statutory interpretation. Here the meaning is clear, and hence a textualist approach would suggest that the Second Amendment should be given its clear meaning—to protect the rights of collective bodies, which the text defines as militia.<sup>269</sup>

When the Second Amendment was drafted, the American Revolution was recognized, not as a series of individual fights against tyranny, but as a coordinated collective effort organized by what were termed as local, regional, and state militia.<sup>270</sup> The right to bear arms was protected as a collective right.

History shows that even after Shays' Rebellion there were some who wanted to see broad individual access to guns.<sup>271</sup> These people ultimately helped to consolidate passage of a Second Amendment that

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<sup>268</sup> CORNELL, *supra* note 36, at 36, 58 ("Despite the quick collapse of Shay's Rebellion, [it] did have an important impact on American constitutional development. It provided additional impetus for a growing movement to reform the Articles of Confederation. . . . While elites on both sides of the constitutional struggle were divided on many issues, leading Anti-Federalists and Federalists were in accord on one thing . . . Amendment, not armed resistance, was the appropriate remedy to any lingering problems with the Constitution.").

<sup>269</sup> U.S. CONST. amend. II.

<sup>270</sup> See CORNELL, *supra* note 36, at 50–51, 62, 82–85. To garner support for the Constitution, Publius argued in the Federalist pages that the existence of a well-armed population that was organized into state militias would guarantee that America never slipped into tyranny. Furthermore, "[a] well-armed militia controlled by the states was necessary to provide the states the ultimate check on potential federal despotism." Danger of a standing national army and its threat to state militia were a more significant concern in Virginia's debates than others. A decade earlier, Lord Dunmore had attempted to seize the colony's gunpowder and vandalize their muskets. Virginians were also aware that disarmament could occur in more subtle ways.

<sup>271</sup> See *id.*

did not grant an individual right to bear arms. The Carlisle riots of western Pennsylvania exemplify the radical pro-individual rights approach used to undermine stability in the country, and in a way that led many Anti-Federalists, who initially supported broader gun rights, to instead join the Federalists in supporting the Second Amendment.<sup>272</sup>

Opposition to the Constitution was generally peaceful, except for in the backcountries of Pennsylvania and Massachusetts, as well as in parts of the Carolinas.<sup>273</sup> The Carlisle riots of western Pennsylvania give a glimpse into how the Constitution was understood by the most radical Anti-Federalists. Much like the followers of Daniel Shays, the Carlisle militia “rejected the states’ rights theory of the militia that mainstream Anti-Federalists had championed throughout ratification . . . [and] instead championed a more radical populist conception of democracy, rooted in the will of the local community, not the states.”<sup>274</sup> William Petrikin was their spokesman.<sup>275</sup> The irony is that the backcountry people were so radical and potentially destabilizing for the young republic, that their actions persuaded their fellow Anti-Federalists of the need to actually ratify the new Constitution. Even these Anti-Federalists feared mob rule and anarchy.<sup>276</sup>

Hence, the concept of an individual right is completely at odds with both the text and the history surrounding the adoption of the Second Amendment.<sup>277</sup> Both the textualist and framer’s intent approaches to originalist constitutional interpretation support recognizing a collective rather than an individual right to bear arms, and thus broader authority to regulate guns.

Non-originalist theories of constitutional interpretation, such as the theory known as a living constitution, would similarly support recognizing a collective right to bear arms. The current Second Amendment interpretation is also inconsistent with a living constitution approach. It has been almost fifteen years since the 9/11 attacks. Concerns about public safety and homeland security have increased, and there is a growing need to regulate all kinds of weapons. We have more powerful weapons now than during the period

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 56.

<sup>275</sup> *Id.* at 57–58, 80–81.

<sup>276</sup> CORNELL, *supra* note 36, at 57.

<sup>277</sup> See Hatt, *supra* note 5, at 505, 514; Yassky, *supra* note 85, at 589–90, 613, 615–17; Malcolm, *supra* note 100, at 50–51; Rakove et al., *supra* note 100, at 62; Siegel, *supra* note 100, at 83, 85; Schaerer, *supra* note 5, at 795–96, 798.

surrounding the founding era, when bayonets and cumbersome cannons were the weapons of choice for war. Today, government should have the ability to regulate far more lethal arms.

The departures in *Heller* and *McDonald* are ironic given 9/11 and other ongoing concerns regarding public safety, and in light of significant congressional concerns regarding gun violence. The prevailing view today is, if anything, a fuller embrace of the Revolutionary War Era's perspective on collective versus individualized rebellion. As stated above, individuals were seen as having little to no chance of successfully rebelling against or otherwise overthrowing a tyrannical state because the resources that the state could bring to bear against a single individual or unorganized groups of individuals would render those individuals' efforts futile. Hence, the Second Amendment's recognition was that a well-regulated militia, meaning a well-organized group of people bearing arms, is necessary for a free state. By stronger force of argument, *a fortiori*, this is even truer today. While in the 1700s the state could respond to rebels by sending in troops armed with muskets and perhaps cannons, today's modern state can destroy a rebellion with the awesome force of a standing military unleashed through drones, airplanes, and missiles—the seeds of destruction that no individual can dream of standing against. The modern-day, living constitutionalism concern would suggest that an individual right to bear arms is manifestly less plausible today than it would have been in the 1700s. Thus, only a collective right to bear arms would be consistent with a policy goal of maintaining a state that is free of tyranny by arming the people.

Democratic theory also supports the collective over the individual right. The Constitution was not written by a collection of anarchists, but by patriots who believed in the value of a free nation state. Democracy or, in the case of the United States, representative democracy, can be undermined, and tyranny is possible if demagogues are elected or the will of the people is coopted by those who control the governmental apparatus. When such situations occur, Jefferson and other crafters of the Bill of Rights believed that it was the duty of the people, not the individual, to cast off the shackles of tyranny and liberate themselves.

This idea of a collective obligation to rebel is at the heart of the Declaration of Independence. Democracy, especially representative democracy, is at its very heart a collective, not an individualized, enterprise. Representatives of the people represent a collective will, not a personal one. Laws apply to every person without exception based on social or economic status. Collective rebellion is the cure for

tyranny, not individualized anarchy.

### 3. Minority View Pre-*Heller*

Much like the majority view pre-*Heller*, the minority view applied modes of constitutional interpretation that were grounded in both originalist and non-originalist theories that respected the prefatory clause as qualifying the right to bear arms.<sup>278</sup> Hence, the minority view on the pre-*Heller* Court regarding the scope of Second Amendment gun rights stopped short of recognizing a broad individual right to bear arms. The public policy concern animating most of the dissenting views was not a question regarding an individual right but a concern regarding limiting the scope of the collective right.

Much like the prevailing view pre-*Heller*, the minority's analysis of the Second Amendment applied modes of constitutional interpretation that were grounded in both originalist and non-originalist theories.<sup>279</sup> The originalist interpretation was that the Second Amendment provided for a collective right to bear arms that was undermined by regulations placed on individuals. The dissenters grounded their analysis in the original meaning of the text by suggesting that those affected by gun regulations fell within the original meaning of "militia," or by suggesting that gun regulations were overbroad in going beyond legitimate regulations of individual activities and affecting the ability of people to organize into militia.<sup>280</sup>

### B. *The Regulatory Possibilities and Public Safety*

The pre-*Heller* approach to the Second Amendment is preferable, because it promotes public safety in a manner that respects individual rights and governmental obligation.<sup>281</sup> Before *Heller*, state governments

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<sup>278</sup> See Yassky, *supra* note 85, at 589–90, 613, 615–17; Malcolm, *supra* note 100, at 50–51; Rakove et al., *supra* note 100, at 62; Siegel, *supra* note 100, at 83, 85; Schaerer, *supra* note 5, at 795–96, 798.

<sup>279</sup> See Yassky, *supra* note 85, at 589–90, 613, 615–17; Malcolm, *supra* note 100, at 50–51; Rakove et al., *supra* note 100, at 62; Siegel, *supra* note 100, at 83, 85; Schaerer, *supra* note 5, at 795–96, 798.

<sup>280</sup> See *id.*

<sup>281</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 618–26 (2008) (while using an Originalist approach to interpret the scope of the Second Amendment, Justice Scalia fails to apply the same method of judicial construction to the assertion that the Second Amendment protections are limited to weapons "in common use at the time"). Justice Scalia falls short in finding any textual support in the Constitution for such an assertion and instead draws upon *Miller*—the same case whose ultimate holding he has impliedly but effectively overruled—to find the support he needed: "[M]iller's holding that the sorts of weapons protected are those 'in common use at the time' finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons." See also Miller et al., *supra* note 155, at 1, 4–5, 13; John S. Vernick & Daniel W. Webster,

were able to regulate guns without a concern regarding weapons in common use.<sup>282</sup> The capacity for democratic processes to discern what weapons were appropriate for regulation was respected and deference was paid to the subjects for appropriate regulation.<sup>283</sup> Such deference would be inconsistent with a recognition of a right to bear arms were it not a qualified right. Respecting the prefatory clause allowed courts to defer to the states insofar as their regulations did not undermine the rights of militia.<sup>284</sup> Pre-*Heller* “militia” were defined as state militias to which military use of firearms was granted to protect a free state against tyranny.<sup>285</sup>

The approach before *Heller* was better because of the respect for basic principles of federalism—local control and deference to states as to their own unique needs—as well as because this doctrine respected the state’s duty to protect the public safety.<sup>286</sup> These concerns are

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*Curtailling Dangerous Sales Practices by Licensed Firearms Dealers: Legal Opportunities and Obstacles*, in REDUCING GUN VIOLENCE IN AMERICA 133 (Daniel W. Webster et al., eds., 2013); Lawrence E. Rosenthal & Adam Winkler, *The Scope of Regulatory Authority Under the Second Amendment*, in REDUCING GUN VIOLENCE IN AMERICA 225–234 (Daniel W. Webster et al., eds., 2013) (providing a statistical perspective on the impact guns have had on public safety since *Heller* was decided); Amanda C. Dupree, *A Shot Heard ‘Round the District: The District of Columbia Circuit Puts a Bullet in the Collective Right Theory of the Second Amendment*, 16 AM. U. J. GENDER SOC. POL’Y & L. 413, 431 (2008) (arguing that, before *Heller*, neither the Supreme Court nor the circuit courts held that the Second Amendment is a fundamental right). Dupree further argued that the Second Amendment should not be declared fundamental, because gun owners are neither a suspect class nor have they suffered historical persecution. She also asserts that allowing for intermediate scrutiny would be detrimental to public safety and hinder permissible and effective gun control efforts.

<sup>282</sup> *Heller*, 554 U.S. at 571, 618–62.

<sup>283</sup> de Leeuw et al., *supra* note 215, at 133.

<sup>284</sup> *Heller*, 554 U.S. at 637–38 (Stevens, J., dissenting) (“The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment’s text and the interpretation most faithful to the history of its adoption.”).

<sup>285</sup> David A. Lieber, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment From the Court’s Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1087 (2005) (“Collective right adherents assert that the militia is a state military force, and thus the right under the Second Amendment inures not to its constituent members, but rather to the ‘Militia’ as a collective entity, for the purpose of ensuring the ‘the Security of a Free State.’ That ‘the Security of a Free State’ is to be achieved by the formation of a ‘well-regulated Militia’ suggests that the ‘right of the people to keep and bear arms’ only exists where it effectuates that purpose.”).

<sup>286</sup> See de Leeuw et al., *supra* note 215, at 133. After *Heller*, legislatures are better suited than the courts to make public policy and enact meaningful regulations. It is common that the larger cities, with more populated municipalities, possess more stringent firearms regulations, because the legislatures have responded to the needs of their communities. Thus, ideally, local governments should enjoy broad discretion to enact this type of regulation. African-Americans particularly are the main victims

related, but are deserving of separate treatment.

This section suggests what could be applied from the pre-*Heller* doctrine to today in order to give greater fidelity to the Constitution's liberty values while treating the public safety concerns as also being constitutional rights concerns. Treating public safety as a constitutional right has the benefit of requiring greater appreciation for the pragmatic concerns that government must consider as necessary to protect the public safety.

The section begins by considering the scope of what could be regulated under a revised pre-*Heller* approach to the Second Amendment. Next, the section examines the extent to which individual liberty would be protected by treating the right to bear arms as a collective right. The section ends by examining the advantages of respecting the constitutional duty to protect the public safety by treating the right to bear arms as a collective rather than as an individual right.

### 1. What Government Could Regulate under a Revised Pre-*Heller* Approach

The proposal here for a revised pre-*Heller* approach to the Second Amendment would adopt much of what was seen as relevant during that period with an explicit appreciation for the duty to provide for the public safety. Before 2008, Second Amendment doctrine implicitly respected the constitutional obligation to provide for the public safety. However, the failure of this period to explicitly name public safety as a countervailing constitutional duty that limits the scope of an individual liberty led to the possibility, and today's reality, of jurisprudential confusion.<sup>287</sup> A revised pre-*Heller* approach to the Second Amendment would explicitly name the constitutional duty to provide public safety as the policy reason for the textual limitation on the right to bear arms that is in the text of the Second Amendment's prefatory clause.<sup>288</sup>

Based on an originalist approach, Justice Stevens argued in his

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of gun violence. For instance, in Washington D.C., half of the 137 gun-related homicide victims were Blacks. Minorities and communities of color will be harmed by loosening firearms regulations. Cornell & Kozuskanich, *supra* note 5, at 4.

<sup>287</sup> See *United States v. Miller*, 307 U.S. 174, 179 (1939).

<sup>288</sup> See *Heller*, 554 U.S. at 681 (Breyer, J., dissenting) ("The second independent reason is that the protection the Amendment provides is not absolute. The Amendment permits government to regulate the interests that it serves. Thus, irrespective of what those interests are—whether they do or do not include an independent interest in self-defense—the majority's view cannot be correct unless it can show that the District's regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do.").

dissenting opinion in *Heller* that, “[T]he Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia.”<sup>289</sup> According to Justice Stevens’ originalist analysis of the Second Amendment in his dissenting opinion in *Heller*:

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.<sup>290</sup>

This is a better approach, because it allows states flexibility to customize gun control regulations that appropriately relate to each of their unique needs.<sup>291</sup> The unique needs of the states vary from an interest in preserving a hunting culture that grants broad access to related weapons, to a desire to reduce access to lethal artillery in highly populated urban areas.<sup>292</sup> Deference to state and local governments as to policy decisions of this sort is part and parcel to federalism and indeed is recognized as part of what allows a diverse and

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<sup>289</sup> *Id.* at 646 (Stevens, J., dissenting).

<sup>290</sup> *Id.* at 637 (Stevens, J., dissenting); see also Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551 (2009) (criticizing Scalia’s “originalist” reasoning in *Heller* because the founding fathers’ justifications for the Second Amendment did not include self-defense at home, but instead a desire to preserve the right of the people to fight tyrannical governments, serve in a militia for national defense, or use guns for hunting). “This right envisioned by the founders was anything but homebound.”

<sup>291</sup> See de Leeuw et al., *supra* note 215, at 133.

<sup>292</sup> See *Heller*, 554 U.S. at 682 (Breyer, J., dissenting) (“Even [assuming that the Second Amendment protects the right to possess arms for purposes of self-defense] . . . a legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted. In these circumstances, the District’s law falls within the zone that the Second Amendment leaves open to regulation by legislatures.”).

heterogeneous union of states to remain united.

The concern regarding rights was also balanced by the pre-*Heller* doctrine. The concern that rights ought to trump federalist goals is one that is more frequently opposed by the members of the majority that supported *Heller*.<sup>293</sup> For Justices Scalia, Thomas, Alito, and Roberts, states' rights are generally viewed as central and of greater value than many individual rights, including the right to privacy, freedom of speech, and Fourth Amendment rights.<sup>294</sup> From their perspective, much of the Fourteenth Amendment's incorporation of the Bill of Rights and other fundamental rights is an affront to federalism and principles of states' rights; but this is not so when it comes to the Second Amendment. Here, there is a reversal of their typical adherence to Jeffersonian principles of democracy, which include smaller and more localized government.

The reason for the change is an adherence to an ideology and value judgment that broad access to guns is a public benefit.<sup>295</sup> While this is a plausible policy argument that is appropriate for democratic debate, it was never elevated to the level of constitutional doctrine prior to *Heller*.<sup>296</sup>

A revised pre-*Heller* approach to the Second Amendment would treat the right as a collective right and would define a militia as a group in a manner consistent with the pre-*Heller* meaning.<sup>297</sup> The goal is to

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<sup>293</sup> See Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 SETON HALL L. REV. 851, 853 (2006) (indicating that by looking at constitutional history there is an inverse relationship between the Court's activism on substantive individual rights and the strict enforcement of federalism principles: "The less the Court enforces structural provisions, the more it relies on creating and enforcing substantive individual rights. Consequently, now that the Court is reinvigorating federalism, it should correspondingly lessen its activism on individual rights, such as the right to privacy").

<sup>294</sup> See *Herring v. United States*, 555 U.S. 135 (2009); see also *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>295</sup> See Moncure, *supra* note 189, at 589; Blocher, *supra* note 189, at 477. See generally JOHNSON, *supra* note 189; UMOJA, *supra* note 189.

<sup>296</sup> See TRIBE & MATZ, *supra* note 92, at 155 (noting that, until *Heller*, there was no precedent to limit gun regulation legislation enacted by the federal government). In 2010, the Supreme Court in *McDonald* extended this newly recognized individual right to self-defense against state and local law regulations. Before *Heller*, no federal law had been struck down under the Second Amendment. *Miller* was generally understood as an endorsement of a "collective rights" interpretation.

<sup>297</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 645 (2008) (Stevens, J., dissenting) ("Similarly, the words 'the people' in the Second Amendment refer back to the object announced in the Amendment's preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment

respect both the right to armed resistance against tyranny and the governmental obligation to protect the public safety.<sup>298</sup> Much of the current post-*Heller* approach to the Second Amendment could then be appended to this revised pre-*Heller* approach as limitations on the government's ability to interfere with the access of militias to guns. In this context, proscriptions against barring access to weapons in common use would take on a meaning that is more consistent with the original intent of the framers.

## 2. Individual Rights Protected as Part of a Collective Right?

Treating the right to bear arms as a collective right would also protect the individual right. Collective access to weapons such as guns would include an individual right to join a militia. Individual rights should not be balanced against group or collective rights; rather, the collective rights should be defined as the access point to individual rights.<sup>299</sup>

Through group membership, individuals gain greater freedom. This concept is consistent with *E. Pluribus Unum*—out of many, one. The group by definition is capable of protecting and adding meaning to rights in a way that no single individual is capable. By contrast, providing access first to the individual rather than the group is a recipe for the devolution of public order and anarchy rather than for democratic self-governance. Hence, the notion of a “well-organized

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was to protect the State's share of the divided sovereignty created by the Constitution.”); *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897).

<sup>298</sup> See *Heller*, 554 U.S. at 637 (Stevens, J., dissenting) (“The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms.”).

<sup>299</sup> Joseph Raz, *Rights and Politics*, 71 *IND. L.J.* 27, 32 (1995) (“First, groups as well as individuals possess rights. Group rights, the rights of nations, families, and the like, are based on the interests of these groups. Naturally, there is no intrinsic value in protecting the interests of groups. Their interests merit protection only to the extent that they serve individual interests. Whatever the ultimate justification of group rights, they are the rights of groups and not of individuals. Nor do they derive their justification from individual rights; rather, their proximate justification is in the interest of the group, and their ultimate justification lies in the service to individual interests of advancing the interest of the group.”); JOHN RAWLS, *POLITICAL LIBERALISM* 77–78 (expanded ed., 2006) (“Here I stress that full autonomy is achieved by citizens: it is a political and not an ethical value. By that I mean that it is realized in public life by affirming the political principles of justice and enjoying the protections of the basic rights and liberties; it is also realized by participating in society's public affairs and sharing in its collective self-determination over time.”).

militia” recognizes that being organized as a group is a precursor to the effectiveness of the right to bear arms.<sup>300</sup>

Rights are by definition counter-majoritarian, and the incorporation of the Bill of Rights, again by definition, undermines principles of federalism.<sup>301</sup> However, by individualizing a collective right, the Court has distorted the democratic and federalism concerns. It has created a tension where none needed to exist. The pre-*Heller* approach protected the collective right to rebel against tyrannical government while respecting the public obligation to prevent individualized violence and lethal crimes. Thus, the illusory tension between liberty and community was explicitly resolved by a prefatory clause that clarified both the reason for and scope of the right. Justice Stevens is on point in his dissent in *Heller* when he writes:

The preamble to the Second Amendment [referring to the prefatory clause] makes three important points. It identifies the preservation of the militia as the Amendment’s purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be “well regulated.” . . . It confirms that the Framers’ single-minded focus in crafting the constitutional guarantee “to keep and bear Arms” was on military uses of firearms, which they viewed in the context of service in state militias. The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”<sup>302</sup>

Furthermore, the individual right to oppose tyranny was protected though the possibility of the individual joining a militia

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<sup>300</sup> See Joseph Raz, *Rights and Politics*, 71 IND. L.J. 27, 32 (1995); JOHN RAWLS, *POLITICAL LIBERALISM* 77–78 (expanded ed., 2006).

<sup>301</sup> See Ronald J. Bacigal, *Federalism and the Criminal Justice System*, 98 W. VA. L. REV. 771, 773 (1996) (describing and analyzing the process of incorporation of the Bill of Rights through the Fourteenth Amendment of the Constitution, and the endeavors of the Warren court to achieve those ends, especially in the criminal justice system). The Bill of Rights’ purpose was to limit the powers of the federal government and was aimed to protect the states and individuals from tyranny by the federal government. On the other hand, individual states were seen as guarantors of rights and liberties. However, the fact that the states endorsed slavery demonstrated that they could not be trusted to safeguard the liberty of all citizens. When the Thirteenth and Fourteenth Amendments came into existence, it became necessary to make the Bill of Rights applicable to the states through the gradual incorporation process. This process inherently represents a deviation from principles of federalism.

<sup>302</sup> *Heller*, 554 U.S. at 640, 643 (Stevens, J., dissenting).

group.<sup>303</sup> The Court considered that very possibility in pre-*Heller* cases where, among other things, the right of an individual to join a militia group that provided access to weapons was determined to be constitutionally protected, notwithstanding public safety concerns.<sup>304</sup>

### 3. Public Safety Concerns Not Devalued or Required to be Ignored

A revised pre-*Heller* approach to the Second Amendment would have the added advantage of explicitly recognizing the constitutional duty to protect the public safety. This recognition would help end the problematic *rights versus order* dichotomy that has unnecessarily complicated constitutional law. It would create doctrinal space for developing a more coherent jurisprudence that treats liberty, such as the right to bear arms, as linked to duties like the duty to protect the public safety.

The state's duty to protect public safety is the obvious motivation for gun regulations. This duty is frequently cited in court opinions regarding the Second Amendment as well as in the text of the actual gun control regulations that the court has scrutinized both before and since *Heller*.<sup>305</sup> This Article suggests that, before 2008, the Court

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<sup>303</sup> See *Heller*, 554 U.S. at 570, 644–45 (Stevens, J., dissenting); CORNELL, *supra* note 270, at 50–51 (explaining how, to get support for the Constitution, Publius, in the Federalist Papers, argued that the existence of a well-armed population that was organized into state militias would guarantee that America never slipped into tyranny); Hatt, *supra* note 5, at 514.

<sup>304</sup> See *United States v. Miller*, 307 U.S. 174, 179 (1939); *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897); *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875).

<sup>305</sup> See *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2486 (2016); *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953 (9th Cir. 2014) (holding that gun ordinances enacted in San Francisco survived intermediate scrutiny), *cert. denied*, 135 S. Ct. 2799 (2015); *Drake v. Filko*, 724 F.3d 426, 431–32 (3d Cir. 2013) (holding that state law requiring applicants to establish a “justifiable need” to be allowed to carry a handgun in public for purposes of self-defense did not violate the Second Amendment because it is a “presumptively lawful” and “longstanding” regulation); *Hunters United for Sunday Hunting v. Pa. Game Comm'n*, 28 F. Supp. 3d 340 (M.D. Pa. 2014) (under rational basis test the court upheld a statute which made it unlawful for any person to hunt for any furbearer or game on Sundays because the Second Amendment protections do not extend to recreational hunting); *City of San Diego v. Boggess*, 216 Cal. App. 4th 1494 (2013) (holding that a statute authorizing destruction of firearms belonging to a patient detained for psychiatric evaluation is not facially invalid under the Second Amendment); *Williams v. State*, 10 A.3d 1167 (Md. 2011) (holding that statute prohibiting wearing, carrying, or transporting a handgun without a permit and outside of one's home was outside of the scope of the Second Amendment right to bear arms); *Norman v. State*, 159 So. 3d 205, 210 (Fla. Dist. Ct. App. 2015) (holding that a

recognized this obligation as significant because there was a limitation on the scope of the right through the prefatory clause. The prefatory clause is textual evidence for an original intent to maintain the ability of even the federal government to regulate firearms.<sup>306</sup>

Public safety concerns today are real, yet the Court's decisions with regard to gun control laws appear to consistently relegate them to being a secondary concern in their hierarchy of constitutional rights. This is because of their distorted libertarian perspective, under which jurists follow Justice Kennedy's model for rights that are exclusively framed in negative, libertarian form without appreciation for the very purpose of government.<sup>307</sup> If government is to have any value it must exist to actually do something, and the most obvious something is to protect the public safety.

The rights versus order dichotomy dominates American jurisprudential and political theory. It embraces the linear philosophy that increasing rights decreases the possibility of public order, and that increasing public order decreases individual rights.

The conclusion that rights, when viewed as including both positive rights and negative rights—governmental duties as well as individual liberties—need not require a reduction in public order is an insight that Amartya Sen, Martha Nussbaum, and others have long

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regulation against open carry of firearms did constitute a total ban on the carrying of firearms outside the home for self-defense). Under intermediate scrutiny, the statute in *Norman v. State* was reasonably related to the State's substantial governmental interest in regulating firearms as a matter of public safety. The court stated, "[i]n addressing a Second Amendment challenge to a statute, the court must determine whether the challenged law burdens conduct protected by the Second Amendment based on a historical understanding of the scope of the Second Amendment right, or whether the challenged law falls within a well-defined and narrowly limited category of prohibitions that have been historically unprotected; to answer this question, we ask whether the regulation is a presumptively lawful regulatory measure, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Id.* at 205–06.

<sup>306</sup> See *Heller*, 554 U.S. at 637–38 (Stevens, J., dissenting).

<sup>307</sup> See *Heller*, 554 U.S. at 599; TUSHNET, *supra* note 102, at 164; Zulkey, *supra* note 85, at 213–14, 218; Yassky, *supra* note 85, at 589–90, 613, 615–17; Heyman, *supra* note 94, at 251. See also CHARLES FRIED, *RIGHT AND WRONG* 110 (1978) (explaining the main differences between positive and negative rights). Fried finds the following: "A positive right is a claim to something—a share of material goods, or some particular good like the attention of a lawyer or a doctor, or perhaps the claim to a result like health or enlightenment—while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights, however, the rights not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitation." *Id.*

espoused.<sup>308</sup> This is also the core of the Second Amendment's qualified right to bear arms—a link between liberty and the duty to preserve the public safety.

Creating a doctrinal space that recognizes that rights and order are not part of a zero-sum equation requires a jurisprudence free from the libertarian bias which has limited the scope of constitutional rights protected by the current Court. Liberty is essential to democracy, but government is obligated to do more than “not act.” Government has certain basic duties, among the most obvious being the obligation to provide for and protect the public safety. Failure to fulfill that obligation is itself a breach of the most basic component of the social contract that every government enters into with its people, and ought to be treated as a violation of a basic right of citizenship.

These public relations, public policy, and political theory insights have textual support within the text of the Constitution. The Second Amendment itself describes the well-regulated militia as a precursor to the right to bear arms to protect a free state.

Article I describes the government's obligation to protect the public safety and welfare. It also contains a Privileges and Immunities clause which explicitly recognizes that there are both constitutionally protected privileges of citizenship and constitutionally recognized immunities, or liberties, of citizenship.<sup>309</sup> Finally, the Constitution's most comprehensive and rights-altering amendment, the Fourteenth Amendment, reinforces the recognition of governmental obligations within its Privileges or Immunities Clause.

Public safety concerns would not be devalued by taking the Constitution seriously. It is obvious that public safety would be more easily protected by a revised pre-*Heller* approach to the Second Amendment. Both the federal and state governments would have more space to pass common sense gun regulations that address public safety concerns, while allowing constitutionally sanctioned space for the additional regulation of non-governmental groups that fall within the constitutionally recognized militia. Liberty, duty, and public order would become additive forces that, when properly applied, enhance each other as democratic principles under constitutional law, rather than acting as forces that run in opposition to each other in a tragedy of zero-sum accountability.

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<sup>308</sup> Heyman, *supra* note 94, at 251.

<sup>309</sup> U.S. CONST. art. IV, § 2, cl. 1.

## CONCLUSION

The current Second Amendment doctrine embraces a long abandoned *Lochner* Era jurisprudence that elevates a distorted perspective regarding individual liberty and collective obligation. This proposal to apply a revised, pre-*Heller* approach to the Second Amendment would restore the Constitution's intended recognition of both liberty and governmental duty as part of a unified view of rights, under which the constitutional framework can together enhance public order. Public safety should be respected as a positive fundamental right under the Constitution.