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## Drying Up the Slippery Slope: A New Approach to the Second Amendment

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Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

ABSTRACT

Few issues are as divisive as guns in American society. In 2017, gun deaths in the United States reached their highest level in nearly forty years. The status quo is untenable as many gun rights groups feel that gun regulations are just a first step in a slippery slope of undermining the Second Amendment's right to bear arms for self-defense. Conversely, many gun violence prevention activists insist that reasonable regulations concerning public safety can co-exist with the right to bear arms. This quagmire will never abate because on many levels *both* sides are right. For over 200 years, the courts interpreted the Second Amendment as protecting a right to bear arms for the state militias, called a "collective" right, and not an individual right to bear arms. In 2008, however, the Supreme Court in a 5-4 ruling held for the first time that, based on the Founding Fathers' intent—an approach called originalism—the Second Amendment protects the individual right to self-defense in

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one's home. This was the right decision, but for the wrong reasons. The Second Amendment's language is ambiguous at best, and at worst, favors the militia interpretation that had prevailed for over 200 years. Moreover, the Founding Fathers' intent is as irrelevant as it is indeterminable. An interpretation of the Constitution as a living document that evolves with the values of this country leads to one unmistakable conclusion: individuals should be allowed to use guns for self-defense while the government should be allowed to enact reasonable public safety regulations.

Since the founding of this country, the use of firearms for self-defense has played an integral part in American culture. Yet, so have reasonable gun regulations. This Article will explore three time periods in America's history where either the states, or the federal government enacted reasonable gun regulations to address serious problems plaguing the nation because of guns: violence in the Wild West, gangsters in the 1920's, and urban violence in the 1960's. These regulations were enacted in time periods where the conversation was not so divisive and toxic.

To move forward, we need to look backwards. A study of American history reveals a fundamental truth: the use of firearms for self-defense both inside and outside the home can be coupled with reasonable gun regulations to address public safety. Therefore, the Second Amendment should be amended to explicitly state, "*Every person has the right to keep and bear arms, subject to reasonable regulations for public safety.*" In this way, gun rights groups will not have to feel that every gun regulation is on a slippery slope to banishment of guns while gun violence prevention advocates can feel confident that the conversation will always involve "reasonable" regulations that can evolve with the times. After all, gun rights *and* reasonable regulation *is* what this country has been doing for over 200 years, until the present impasse. We often study history so we don't repeat it, but sometimes we need to study history to remind ourselves that the past is worth repeating.

## INTRODUCTION

Few issues are as divisive as the role of guns in American society. In 2017, gun deaths in the United States reached their highest level in nearly 40 years.[1] An estimated 270 million guns are in America, thirty-four percent of all households have a gun,[2] and approximately twenty-five percent of Americans own a gun.[3] The U.S. has the highest rate of gun ownership of any developed nation and highest rate of gun violence.[4] Although the United States has less than five percent of the world's population, it contains roughly thirty-five to fifty percent of the world's civilian-owned guns.[5] According to a Johns Hopkins study, while the overall crime rate between the U.S. and other high-income countries is the same, the homicide rate in the U.S. is seven times higher than the *combined* homicide rate of twenty-two high-income countries.[6] Assaults and robberies in America are more lethal because they are more likely to be carried out with guns.[7] Approximately one million Americans have died from "homicides, accidents, and suicides involving guns during the last three decades," more than the sum total of

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1. CNN found that 39,773 people died by guns in 2017, which is an increase of more than 10,000 deaths from the 28,874 in 1999. The age-adjusted rate of firearm deaths per 100,000 people rose from 10.3 per 100,000 in 1999 to 12 per 100,000 in 2017. Jacqueline Howard, *Gun deaths in US reach highest level in nearly 40 years, CDC data reveal*, CNN (Dec. 14, 2018, 2:13 PM), https://www.cnn.com/2018/12/13/health/gun-deaths-highest-40-years-cdc/index.html.

2. MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 161 (2014).

3. PHILIP J. COOK & KRISTINA A. GOSS, THE GUN DEBATE, WHAT EVERYONE NEEDS TO KNOW 3 (2014).

4. ADAM WINKLER, GUNFIGHT, THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA xii (2d ed. 2013).

5. Jonathan Stray, *Gun Violence in America: The 13 Key Questions (With 13 Concise Answers)*, THE ATLANTIC (Feb. 4, 2013), https://www.theatlantic.com/national/archive/2013/02/gun-violence-in-america-the-13-key-questions-with-13-concise-answers/272727/.

6. WALDMAN, *supra* note 2, at 162.

7. COOK & GOSS, *supra* note 3, at 41.

combat deaths in every war in U.S. history.[8]

While other developed nations do not face such dire statistics,[9] the United States has the Second Amendment to the Constitution, which states, "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[10] Whether and to what extent this unclear Amendment constrains our ability to regulate guns is a hotly contested issue facing our nation.

The status quo is untenable, as many gun rights groups feel that gun regulations are just a first step in a slippery slope of undermining the Second Amendment right to bear arms for self-defense.[11] Conversely, many gun violence prevention activists insist that reasonable regulations concerning public safety can co-exist with the right to bear arms.[12] This quagmire will never abate because on many levels, *both* sides are right. This Article presents a possible solution to appease both sides: amend the Second

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8. *Id.* at 34.

9. Kara Fox, *How the U.S. gun culture compares with the world in five charts*, CNN (March 8, 2018, 6:58 PM), https://www.cnn.com/2017/10/03/americas/us-gun-statistics/index.html.

10. U.S. CONST. amend. II.

11. This Article uses the term "gun rights groups" to include the National Rifle Association [N.R.A.], which is the nation's leading Second Amendment advocacy group, with over 5.5 million members as of 2019. The term also includes smaller groups that may have more strident positions than the N.R.A. *See* Zusha Elinson & Cameron McWhirter, *NRA Faces a Challenge from Pro-Gun Advocates,* WALL ST. J. (Jan. 25, 2019, 3:16 PM), https://www.wsj.com/articles/nra-faces-a-challenge-from-pro-gun-advocates-11548447389.

12. This Article does not use "gun control" to describe the groups wanting reasonable gun regulations. As Mark Glaze, director of Mayors Against Illegal Guns, has noted, "gun control" implies "big government" telling Americans what to do while "violence prevention" is a less loaded term that more people could support in theory. *See* Ari Shapiro, *Loaded Words*: *How Language Shapes the Gun Debate*, NAT'L PUB. RADIO (Feb. 26, 2013, 3:27 AM), https://www.npr.org/sections/itsallpolitics/2013/02/26/172882077/loaded-words-how-language-shapes-the-gun-debate.

Amendment to resolve the ambiguity by having it explicitly state, "Every person has the right to keep and bear arms, subject to reasonable regulations for public safety." In this way, gun rights activists can feel confident that the right to bear arms for self-defense, hunting and sportsmanship is enshrined explicitly in the Bill of Rights, and does not rely on a 5-4 Supreme Court decision that is focused solely on self-defense.[13] On the other hand, gun violence prevention groups will know that they can focus on what constitutes "reasonable" regulations, which will be context-based and evolve with the nation.

This Article is organized into four sections. The first section discusses the enactment of the Second Amendment in 1791, the background surrounding its ratification, and a brief history of how the courts interpreted the Second Amendment for the subsequent 200 years. The second section discusses the seminal Supreme Court case *District of Columbia v. Heller*, which held correctly, albeit for the wrong reasons, that the Second Amendment protects an individual's right to bear arms for self-defense in the home.[14] This section will explain the flaws in the reasoning of the decision, which *purports* to be based on originalism, but is really based on an understanding of the Constitution as a living document that evolves with the values of this country. The third section discusses how the right to bear arms for self-defense and other lawful purposes *as well as* reasonable gun regulations have *both* played an integral part in American culture since the founding of this country. To this end, this section will explore three time periods in America's history where either the states or the federal government enacted reasonable gun regulations to address serious problems plaguing the nation because of guns: violence in the Wild West, gangsters in the 1920's, and urban violence in the 1960's. Finally, the fourth section analyzes four possible

13. *See infra* Section II.

14. 554 U.S. 570, 635 (2008).

ways to approach the Second Amendment to hopefully move us forward as a nation from the toxic environment that currently exists: (1) the status quo; (2) repealing the Second Amendment; (3) amending it to explicitly state that it applies to the militia; or (4) amending it to explicitly state that it protects an individual's right to bear arms as well as the right to enact reasonable gun regulations. This Article will argue that approach four makes the most sense and urges the states, not Congress to call for a Constitutional Convention to amend the Second Amendment.

## I. ENACTMENT OF SECOND AMENDMENT AND INTERPRETATION

> "To be sure, Americans expected to be able to own a gun, just as they understood they had a right to own property—another cherished freedom subject to regulation and the states' police power. They just did not expect the Constitution to address an issue that clearly had no relevance to federal authority."[15] Michael Waldman

When the Bill of Rights was enacted in 1791, one of the main underlying fears of the Anti-Federalists, who initially opposed the Constitution, was the power of a federal standing army or national government to disarm the state militias.[16] The militias consisted of white men between the ages of sixteen and sixty who were required as a matter of duty to own a musket and participate in the defense of the state.[17] This fear of tyranny and centralized power made eminent sense—the Founding Fathers had just fought the Revolutionary War and finally broke free from England's rule.[18] Therefore, when the Founding Fathers enacted the

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15. WALDMAN, *supra* note 2, at 33.

16. *Id.* at xii.

17. *Id.* at 6. The Dick Act in 1903 eliminated the militias, which are now known as the National Guard, where the federal government trains part-time soldiers. *Id.* at 78.

18. As historian Waldman observed, "[t]o the delegates, fear of standing army was not abstract. The British Army had sailed away just five years before. That dread, and the earnest belief in militias as an alternative, permeated the records of the Constitutional Convention. When it spilled out into public debate, it led

Second Amendment, it clearly was motivated out of a fear and distrust of a central government that could encroach on the state militias, but was it also about the right for individuals to bear arms in self-defense?[19]

Significantly, there was not a single mention about an individual right to bear arms for self-defense in the notes from the Constitutional Convention, or in the record of the ratification debates.[20] Even when the Second Amendment was being marked up on the floor of the House of Representatives, there was no mention of this *individual* right to bear arms.[21] Because many of the colonies' constitutions already protected the individual right to bear arms,[22] and because the overriding sentiment of colonists was an understood inherent right to own guns,[23] it did not arise at the Constitutional Convention where the overriding focus was a worry about tyranny.[24] According to law professor and constitutional expert Adam Winkler, the right to bear arms *independent* of the militia was "one of the oldest, most firmly established rights in America—regardless of Second Amendment."[25] Additionally, the right to own a gun

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directly to the Second Amendment." *Id.* at 23.

19. Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective,* 76 CHI.-KENT L. REV. 195, 205 (2000) ("According to the traditional Whig and Republican ideology of the period, a standing army threatened the liberties of a free people. This argument was rooted in English history . . . .").

20. WALDMAN, *supra* note 2, at xii; *see also* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 111–12 (2000) (intimating that when publicly debating the Second Amendment, the Founding Fathers focused on the militias and not individual rights).

21. WALDMAN, *supra* note 2, at xii.

22. For instance, Virginia, Vermont and Pennsylvania had constitutions that explicitly protected the right to bear arms and did not mention militias. WINKLER, *supra* note 4, at 107.

23. *Id.* at 102-03.

24. WALDMAN, *supra* note 2, at 27.

25. WINKLER, *supra* note 4, at 12.

for self-defense was seen as a *states'* right issue, not one that federal authority had any bearing on.[26] Indeed, between 1790 to 1860, fourteen of the twenty states that joined the Union had state constitutions that protected the right to bear arms as self-defense against criminals.[27]

For the next two hundred years, courts primarily interpreted the Second Amendment as protecting a *collective* right to bear arms relating to the militias and not an individual right to bear arms for self-defense.[28] In 1820, an Arkansas state court ruled that the Second Amendment only protected militias and in 1840 a Tennessee court ruled the same way when upholding a law that prevented concealed weapons.[29] In 1876, the Supreme Court held that the Second Amendment only applied to the federal government, and not the states, meaning that state legislatures could govern the use of firearms pursuant to their own respective constitutions.[30] In 1886, the Supreme Court reaffirmed that the Second amendment did not apply to states by holding that while state legislatures could regulate firearms pursuant to their own constitutions, a state could not ban guns to disrupt the *federal* government's military needs, again adopting a militia understanding of the Second Amendment.[31] Finally, in 1934, the Supreme Court held that a state law prohibiting a criminal defendant from carrying a

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26. *Id.* at 33.

27. *Id.* at 133.

28. JOHN PAUL STEVENS, SIX AMENDMENTS, HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 126 (2014). In 2002, the Fifth Circuit held that the Second Amendment guaranteed the individual a right to bear arms but that people with a history of violence could be restricted. *See* United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001). This case appears to be an aberration from the general trend that limited the Second Amendment to a collective right.

29. WALDMAN, *supra* note 2, at 68.

30. *See* United States v. Cruikshank, 92 U.S. 542, 553 (1876), *overruled in part by* McDonald v. City of Chicago, 561 U.S. 742, 858 (2010).

31. *See* Presser v. Illinois 116 U.S. 252, 266 (1886).

sawed-off shotgun did not violate the Second Amendment, noting that a sawed-off shotgun had no "reasonable relationship to the presentation or efficiency of a well-regulated militia."[32] In 1983, the Supreme Court denied certiorari in a case that had held a city's ordinance banning handguns did not violate the Second Amendment because the possession of handguns by individuals was not part of the right to keep and bear arms.[33] This collective militia understanding of the Second Amendment generally prevailed until the 2008 Supreme Court decision *District of Columbia v. Heller*.[34]

## II. *DISTRICT OF COLUMBIA V. HELLER* DECISION[35]

> "Public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed."[36] Abraham Lincoln

In 1976, Washington D.C. passed the strictest gun control law in the nation, banning all handguns, including in the home for self-defense.[37] While other long guns, such as rifles and shotguns, were allowed in the home, they had to be inoperable with a trigger lock or unloaded and disassembled.[38] In fact, under the D.C. law, residents were precluded from using these long guns for self-defense, even if accosted by a home intruder.[39] A police officer from D.C. challenged the law, arguing that it was a violation of the

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32. United States v. Miller, 307 U.S. 174, 177 (1839).

33. Quilici v. Village of Morton Grove, 695 F.2d 261, 271 (7th Cir. 1982).

34. *But see* United States v. Emerson, 270 F.3d 203, 264 (5th Cir. 2001).

35. 554 U.S. 570 (2008).

36. WALDMAN, *supra* note 2, at 175.

37. *Heller,* 554 U.S. at 575–76,

38. *Id.*

39. *Id.* at 576, 630. The D.C. legislature hoped that its handgun ban would start a nationwide movement, but this did not materialize. After a decade of strict gun law, D.C. became known as "murder capital of America" as criminals would obtain guns in Maryland or Virginia. Indeed, 80 % of guns seized in D.C. crime investigations during this time were purchased in other states. WINKLER, *supra* note 4, at 10, 18.

Second Amendment's right for an individual to bear arms in self-defense.[40] While previous cases had held that the Second Amendment did not apply to the states, Washington D.C.'s laws are federal laws.[41]

The prevailing view of the Second Amendment was that it did not protect an individual's right to bear arms, because each time the Supreme Court had considered it, it found that Second Amendment protected the militia.[42] However, in 1960 some legal scholars who were not historians had started to argue that the Second Amendment protected an individual's right to self-defense.[43] From 1970–1989, twenty-five articles were written on how the Second Amendment protected collective rights, such as for the militia, while twenty-seven were written on how it protected individual rights.[44] As scholar Michael Waldman observes, "[a] militant National Rifle Association combined with a forest's worth of law review articles built inexorable momentum to press the court to change its views of the Second Amendment."[45] Furthermore, public opinion had started to change: in a 2008 Gallup poll, seventy-three percent of Americans believed the Second Amendment "guaranteed the rights of Americans to own guns" outside the militia.[46]

In a 5-4 decision authored by Justice Antonin Scalia, the Court overturned two centuries of precedent to hold that the Second Amendment recognized an individual right to own a

40. *Heller*, 554 U.S. at 575–76.

41. After *Heller*, in McDonald v. Chicago, 561 U.S. 742 (2010), the Supreme Court held that the Second Amendment applies to the states as it is incorporated by the Due Process Clause of the Fourteenth Amendment, striking down Chicago's handgun ban. *See supra* notes 30-31.

42. WALDMAN, *supra* note 2, at 97.

43. *Id.*

44. *Id.* at 97–98.

45. *Id.* at 117.

46. *Id.* at 119.

gun. Scalia stated that "[t]he inherent right of self-defense has been central to the Second Amendment right," and that "[t]he handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."[47] Scalia argued that handguns are the "quintessential self-defense weapon" and that D.C.'s "prohibition extends . . . to the home, where the need for defense of self, family, and property is most acute."[48] Although the majority acknowledged that one of the goals of the Second Amendment was to secure the militias from federal encroachment, they also held that it protected the individual's right to bear a gun for self-defense in the home.[49]

Scalia based the reasoning of his decision on originalism, which is a legal theory interpreting the Constitution by asking what the provisions meant at the time they were written.[50] Scalia felt that the language in the Second Amendment bore a static meaning that did not change: "You either take the original meaning as it was understood then or there is no criterion by which the judge may judge."[51] Scalia emphasized that one cannot diminish a right because of public safety concerns.[52]

Scalia, however, only used originalism for *part* of the decision. After spending forty-five pages discussing the original meaning of the Second Amendment and concluding that the Founding Fathers meant that an individual had a right to bear arms, Scalia then emphasized that the Second Amendment was not unlimited, and that the law could constitutionally still ban felons and the mentally ill from having firearms, or forbid firearms in sensitive places, or

47. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

48. *Id.* at 628–29.

49. *Id.* at 599–600.

50. WALDMAN, *supra* note 2, at 103.

51. WINKLER, *supra* note 4, at 271.

52. *Heller*, 554 U.S at 634-35.

impose conditions and qualifications on the commercial sale of guns.[53] However, as Winkler notes, there was no historical support for the list of these particular exceptions—rather, the laws at time required armed citizenry to report with guns to militia musters, and store gunpowder away from a house, which, ironically, would make it *harder* to load guns for self-defense in a home.[54]

Scalia additionally argued that weapons that are "dangerous and unusual" could be banned, but not those in "common use."[55] In other words, Scalia discussed allowable gun regulation that "reflected a thoroughly modern understanding of gun rights."[56] Thus, the limitations on the Second Amendment were based on modern gun laws, while the inherent right of an individual to own a gun was based on the Founding Fathers' supposed intent.

Justice John Paul Stevens noted in his passionate dissent that based on the historic record, the Founding Fathers did not intend to enshrine the common law right of self-defense into the Constitution.[57] Stevens argued that the majority relied on an interpretation of history rejected by most professional historians.[58] He emphasized that the overriding concern at the time was the risk that a federal standing army would pose to the state militias.[59] Justice Stevens further argued that even if the arguments were evenly balanced between the collective rights militia

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53. *Id.* at 626-27.

54. WINKLER, *supra* note 4, at 286; *see also Heller*, 554 U.S. at 721 (Breyer, J., dissenting).

55. *Heller*, 554 U.S. at 627. There is an ironic "catch 22" here, as the guns that are not in common use, like machine guns, are precisely "not in common use" because of gun regulations in the first place. *See* COOK & GOSS, *supra* note 3, at 101.

56. WINKLER, *supra* note 4, at 287.

57. *Heller*, 554 U.S. at 637 (Stevens, J., dissenting).

58. *Id.* at 672 (Stevens, J., dissenting).

59. *Id.* at 637 (Stevens, J., dissenting).

understanding, which had prevailed for over 200 years, and the individual right understanding, appearing for the first time in 2008, the Court should respect precedent and rule of law.[60] Interestingly, both the majority and Stevens' dissent used originalism, just arguing that each side *misinterpreted* the intent. As some have noted, the Stevens' dissent made a better originalist argument than Scalia.[61]

Justice Stephen Breyer's dissent took a different angle. He questioned how the Court could overturn a legislature's decision to ban handguns when these guns killed or wounded approximately 82,000 Americans each year.[62] Instead of originalism, he employed an interest balancing approach, and did a cost-benefit analysis of the individual right to bear arms for self-defense against the D.C. legislature's ability to address an issue where it had better expertise.[63] He emphasized that the theme of the Constitution is democracy, so the Court had better be careful when overturning decisions by elected officials.[64]

Criticism of *Heller* crossed the political spectrum. As the New York Time's Jeffrey Toobin observed at the time, "Scalia translated a right to military weapons in the eighteenth century to a right to handguns in the twenty-first."[65] Judge Richard Posner argued in the New Republic that the *Heller*

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60. *Id.* at 639 (Stevens, J., dissenting).

61. WALDMAN, *supra* note 2, at 128; Judge Posner characterized Scalia's opinion as "faux originalism" and argued that Stevens' dissent had the better originalist argument as the "motivation for Second Amendment was to protect the state militias from being disarmed by the federal government." WINKLER, *supra* note 4, at 283.

62. *Heller*, 554 U.S. at 696-97 (Breyer, J., dissenting).

63. *Id.* at 704-05 (Breyer, J., dissenting).

64. *Id.* at 705 (Breyer, J., dissenting). Conservative law professor Nelson Lund noted that Scalia really used Breyer's interest balancing approach as handguns did not exist at time of Founding Fathers. WINKLER, *supra* note 4, at 285.

65. WALDMAN, *supra* note 2, at 127.

decision "is questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology."[66] Conservative appellate judge Harvie Wilkenson, a Reagan appointee, noted that "*Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts."[67] Chief Justice Warren Burger, a conservative justice appointed by President Nixon, characterized individual gun rights found in the Constitution to be a "fraud."[68] Hence, while this decision *purports* to be based on originalism, in reality, "[o]riginalism was just an ideological gloss to a politically motivated decision."[69]

There are several inherent flaws with Justice Scalia's reasoning based on originalism. First, despite the lengthy discussion of history in the opinion, the Founding Fathers' intent 200 years ago remains indeterminable as both the majority and dissent marshal facts to support their respective point of view.[70] As Professor Meg Penrose observes, "[a]ll would hopefully admit that we will never be able to discern, with finality or confidence, what the Founders truly meant when crafting this singularly eternal document."[71] Furthermore, even if their intent was clearly

66. *Id.* at 131.

67. WINKLER, *supra* note 4, at 284.

68. WALDMAN, *supra* note 2, at xiii.

69. WINKLER, *supra* note 4, at 284.

70. McDonald v. City of Chicago, 561 U.S. 742, 915 (2010) (Breyer, J., dissenting) ("The Court based its conclusions almost exclusively upon its reading of history. But the relevant history in *Heller* was far from clear: Four dissenting Justices disagreed with the majority's historical analysis. And subsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history. Since *Heller*, historians, scholars, and judges have continued to express the view that the Court's historical account was flawed.").

71. Meg Penrose, *A Return to the States' Rights Model: Amending the*

understood, it is largely irrelevant. Why should the intentions of the Founding Fathers, who were white men and endorsed slavery, bind later generations?[72] *Whose* intention is even relevant—the drafters of the Bill of Rights, the states who ratified the amendments, or the later drafters of the three civil rights amendments banning slavery and calling for equal protection and due process?[73] Former Supreme Court Justice Thurgood Marshall refused to speak at a constitutional bicentennial celebration in 1987 noting that he did not "find the wisdom, foresight and sense of justice exhibited by the Framers particularly profound."[74] He argued that, "[t]o the contrary, the government they devised was defective from the start, requiring several amendments, a civil war and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today."[75] Hence, relying on what the Founding Fathers meant in the late 1700s does not seem prudent or relevant.

There is no need, however, to use originalism to interpret the Second Amendment, especially when the same conclusion can be derived from understanding the Constitution as a living document that reflects the country's values. One can apply the spirit of the law consistent with changing circumstances. Esteemed law professor Cass Sunstein noted at the time that "it can be appropriate for the Court to recognize a right because it reflects a consensus,"[76]

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*Constitution's Most Controversial and Misunderstood Provision*, 46 CONN. L. REV. 1463, 1510 (2014).

72. WALDMAN, *supra* note 2, at 111.

73. *Id.* at 110 (citing Supreme Court Justice William Brennan).

74. Christopher M. Norwood, *Repeal the Second Amendment—it's not a crazy idea,* MIAMI HERALD (Apr. 2, 2018, 9:27 PM), https://www.miamiherald.com/opinion/op-ed/article207762909.html.

75. *Id.*

76. WALDMAN, *supra* note 2, at 129.

but the underlying rationale then is based on living constitution theory—not originalism. Law professor Reva Siegel has argued that fervent public debates of the meaning of the Constitution "endow courts with authority to change the way they interpret its provisions."[77] In 1920, Justice Oliver Wendell Holmes astutely noted, "[t]he case before us must be considered in light of our whole experience, and not merely in that of what was said a hundred years ago . . . . we must decide what the country has become."[78] As Waldman notes, "[a] living Constitution does not discard the spirit of the document, but seeks to apply its timeless principles to modern challenges that could not have been imagined by the Framers or their contemporaries."[79]

Applying this living constitutionalism theory to the Second Amendment, Americans have perennially valued their right to bear arms for self-defense. Historian Saul Cornell notes, "'the common-law right of individual self-defense' was not only well established long before codification of the right to bear arms in American constitutions; it existed *independent* of that right."[80] In the colonial days, Virginia required all men to be armed in response to Native American attacks.[81] The American Revolution in fact was "ignited by a government effort to seize people's firearms."[82] As the country grew and individuals moved to the westward frontier, the government required the frontiersmen to have guns to hunt and protect against wildlife, Native Americans and other

77. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 193 (2008).

78. WALDMAN, *supra* note 2, at 107.

79. *Id.* at 176.

80. Robert Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS., 55, 81-82 (2017) (emphasis added).

81. COOK & GOSS, *supra* note 3, at 159.

82. WINKLER, *supra* note 4, at 105.

"troublemakers."[83] In 1849, the government handed surplus guns to the settlers.[84] In the 1850s, Samuel Colt created affordable firearms that were multi-shot and facilitated the westward expansion of America.[85] As Winkler observed, "[w]hereas the founding fathers emphasized a broader conception of self-defense against the machinations of a tyrant or invading force, personal protection became a more prominent justification for gun rights in the early 1800s."[86]

America's gun culture has continued to the modern era. As of 2014, forty-four states have constitutions explicitly protecting the right to bear arms.[87] And by 2008, seventy-three percent of Americans believed the Second Amendment protected an individual right to bear arms.[88] Renowned political scientist Robert Spitzer defines American gun culture as:

> [T]he long-term sentimental attachment of many Americans to the gun, founded on the presence and proliferation of guns since the earliest days of the country; the connection between personal weapons ownership and the country's early struggle for survival and independence followed by the country's frontier experience; and the cultural mythology that has grown up about the gun in both frontier and modern life, as reflected in books, movies, folklore and other forms of popular expression.[89]

Professors Philip Cook and Kristin Goss additionally note, "[w]e know of no other country where firearms are as plentiful and as inextricably linked to individual identity and popular values as they are in the United States."[90] In other words, the majority in *Heller* could have come to the same

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83. COOK & GOSS, *supra* note 3, at 160.

84. *Id.*

85. *Id.*

86. WINKLER, *supra* note 4, at 168.

87. COOK & GOSS, *supra* note 3, at 104.

88. WALDMAN, *supra* note 2, at 119.

89. COOK & GOSS, *supra* note 3, at 155.

90. *Id.*

conclusion and overturned Washington D.C.'s complete ban on handguns by recognizing that the right to bear arms for self-defense has been a fundamental and important value since even before the country's existence. As Waldman notes, "*Heller* can be justified not as originalism, but as something more rooted in common sense: it reflected a popular consensus won by forced activists."[91] In deciding *Heller*, there was no need to try to determine what was the Founding Fathers' intent. It is as irrelevant as it is indeterminable.

Two years later, in *McDonald v. City of Chicago*, the Supreme Court held again in a 5-4 decision that *state* handgun bans, not just federal ones, are similarly unconstitutional.[92] The Court found that the Second Amendment applies to the states through the due process clause of the Fourteenth Amendment.[93] Hence, as of 2010, both the states and federal government cannot impede on an individual's right to bear arms under the Second Amendment.[94]

Some individuals predicted that the *Heller* and

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91. WALDMAN, *supra* note 2, at 174.

92. 561 U.S. 742, 791 (2010).

93. *Id.*

94. After the *Heller/McDonald* cases, lower courts have struggled to determine what level of scrutiny to apply when deciding whether a law infringes on right to bear arms for self-defense. Read narrowly, *Heller* only applies to self-defense in the home. Justice Scalia also provided numerous examples of acceptable gun regulations. In the first five years after *Heller*, state and federal courts issued more than 700 rulings concerning the Second Amendment, and the judges mostly deferred to existing laws. COOK & GOSS, *supra* note 3, at 95. During this time, the Supreme Court refused to intervene. In fact, in May 2013, the Supreme Court did not grant certiorari in more than sixty firearm cases, allowing the lower court rulings to stand. *Id.* at 97. As professors Cook and Goss have noted, *Heller* only invalidated a "tiny handful of unusually strict laws and appeared to leave plenty of room for lawmakers to regulate guns." *Id.* at 95. In January 2019, the Supreme Court granted certiorari in the first Second Amendment case since *Heller/McDonald*. *See* Mark Joseph Stern, *The Supreme Court Is Preparing to Make Every State's Gun Laws Look Like Texas'*, SLATE (Jan. 22, 2019, 4:27 PM), https://slate.com/news-and-politics/2019/01/supreme-court-new-york-gun-case-heller.html.

*McDonald* cases would ameliorate the tension between gun violence prevention activists and gun rights groups as the Supreme Court clearly held, albeit 5-4, that there was an individual right to bear arms for self-defense while also unambiguously stating that the right was not unlimited, and the government could enact reasonable gun regulations. As the Brady Center's Dennis Henigan predicted at the time,

> By erecting a constitutional barrier to a broad gun ban, the *Heller* ruling may have flattened the gun lobby's 'slippery slope,' making it harder for the N.R.A. to use fear tactics to motivate gun owners to give their time, money and votes in opposing sensible gun laws and the candidates who support those laws.[95]

Even a pro-gun supporter predicted that *Heller* "could help calm the often vociferous conflict over gun policy."[96]

However, these predictions turned out to be erroneous. Even post *Heller*, the National Rifle Association [N.R.A.], the largest Second Amendment lobbying group in America,[97] sees gun regulation as the first step on a slippery slope of banishment of guns. As Winkler stated, "[o]ne side wants guns everywhere and sees any gun control proposal as both an infringement of the Second Amendment and a step down a slippery slope toward total civilian disarmament. The other side dismisses the long history and tradition of gun rights and proposes predictably ineffective reforms that do little to prevent crime but much to anger even law-abiding gun owners."[98] Because *Heller* is a Supreme Court decision that changed over 200 years of precedent, and was decided 5-4, it could be overturned in the future, possibly contributing to the N.R.A.'s opposition to most gun regulations. As explained in the next section, *both* the right to own a gun for self-

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95. WINKLER, *supra* note 4, at 295.

96. *Id.*

97. The N.R.A. is America's leading pro-gun advocacy group. *See* Arica L. Coleman, *When the NRA Supported Gun Control,* TIME (July 29, 2016), http://time.com/4431356/nra-gun-control-history/.

98. WINKLER, *supra* note 4, at xv.

defense coupled with reasonable gun regulations have played a prominent role in this country since its inception. Therefore, it is helpful to look backwards to shed light on a path forward.

## III. HISTORY OF GUN RIGHTS AND REGULATIONS

> "Although the precise equilibrium has always been in flux, changing in response to the times, the story of guns in America is about regulation and right."[99] Adam Winkler

Both gun rights and regulation have been intertwined since the founding of this country. During the colonial era, the colonies implemented gun regulations—not the newly formed federal government—that left policymaking and police power to the states.[100] For instance, Boston, noting public safety concerns, made it illegal to keep a loaded gun in any home or building;[101] New York, Boston and Pennsylvania had regulations stipulating that guns could not be fired in city limits; and Pennsylvania placed limits on who could even own guns.[102] Additionally, there were regulations on the storage of gunpowder, and individuals were precluded from keeping loaded firearms in one's home (hence, undermining Scalia's originalist argument that handguns should be allowed in a home for self-defense).[103] States forced those in the militia to appear in public at musters where the government could inspect weapons and register them.[104]

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99. *Id.* at 12.

100. COOK & GOSS, *supra* note 3, at 89; *see also* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 143 (2007). ("Hundreds of individual statutes regulated the possession and use of guns in colonial and early national America.").

101. WINKLER, *supra* note 4, at 117.

102. WALDMAN, *supra* note 2, at 32. In fact, huge numbers of people were ineligible to bear arms such as slaves, Catholics, and free blacks. WINKLER, *supra* note 4, at 116.

103. WINKLER, *supra* note 4, at 117.

104. *Id.* at 12.

Winkler notes this was an "early version of gun registration."[105] While the colonists may not have understood these regulations to be "gun control" per se, they knew from the outset that gun rights had to be balanced with the needs of the public.[106] Despite all these gun restrictions, no one complained about the "right to bear arms" for self-defense.[107] As political scientist Robert Spitzer notes, "America's early governmental preoccupation with gun possession, storage, and regulation was tied to the *overarching concern for public safety,* even as it intruded into citizens' private gun ownership and habits."[108]

Spitzer has traced the most important gun regulations throughout America's history in his article called *Gun Law History in the United States and Second Amendment Rights*, but a summary of those regulations is beyond the scope of this Article.[109] However, this section will focus on three periods in American history where states and the federal government enacted gun regulations to deal with societal ills. Because the gun debate during these times was not so toxic and divisive, the government was successful in enacting gun regulations.

A. *Wild West*

As frontiersman expanded westward in the 1800s for a new life and economic prosperity, guns, and regulations of those guns, played a large role in hunting and protection.[110] Frontier towns implemented gun regulations in part to attract investors and promote economic growth.[111] As

105. COOK & GOSS, *supra* note 3, at 164.

106. WINKLER, *supra* note 4, at 114.

107. *Id.* at 117.

108. Spitzer, *supra* note 80, at 58 (emphasis added).

109. *Id.*

110. WINKLER, *supra* note 4, at 165.

111. *Id.* at 172.

Waldman noted, "[o]ver time gun ownership and gun control rights evolved with the country's spread west."[112] The media dubbed the west as the "Wild West," and popular entertainment exaggerated the violence and anarchic nature of the time.[113] The Wild West is at the heart of American gun culture and known for dueling, gunfights, and violence.[114] But in reality, the frontier towns had restrictive gun control laws to reduce the violence they were known for. Many towns had laws generally banning the carrying of weapons inside city limits, unless one was law enforcement.[115] In fact, one usually had to check his gun in with authorities before entering the city and get a token to reclaim the weapons later or leave his weapons with his horse at the livery stables.[116] A frontier town called "Dodge City" in Kansas in 1879 had a sign in the middle of the main street saying, "The Carrying of Fire Arms Strictly Prohibited" and Wichita, Kansas had a sign stating "leave your revolvers at police headquarters, get a check."[117] There was also a very low murder and crime rate in frontier towns. For instance, Dodge City, which had a reputation for being violent, only had fifteen murders or one-and-a-half per year between 1877 and 1886.[118]

One societal ill that plagued the Wild West as well as the South was dueling. "When someone insulted you publicly or attacked your honor, you challenged them to a duel."[119] To deal with the problem of dueling, many states passed stringent laws on concealed weapons, and the judges largely

112. WALDMAN, *supra* note 2, at 78.

113. COOK & GOSS, *supra* note 3, at 161-62.

114. WINKLER, *supra* note 4, at 167.

115. COOK & GOSS, *supra* note 3, at 164.

116. *Id.* at 164-65.

117. WALDMAN, *supra* note 2, at 78.

118. WINKLER, *supra* note 4, at 163.

119. *Id.* at 167.

upheld the bans against gun owners' challenges.[120] Governor James Stephen Hogg of Texas stated at the time that the "mission of concealed weapon is murder. To check it is the duty of every self-respecting, law-abiding man."[121] Kentucky and Louisiana banned concealed carrying in 1813.[122] In 1887, Montana banned concealed weapons within the city limits and in 1890 Oklahoma banned concealed weapons in the territory and not just cities.[123] In fact, by 1907, the Washington State Supreme Court noted that nearly all states had enacted laws banning concealed weapons.[124] The problem of dueling is non-existent today. Interestingly, however, the tides have turned, and thirty-six states now have "shall issue" laws allowing almost anyone to get a permit to carry concealed weapon.[125]

B. *Gangsters*

During the Prohibition era of the 1920s, gangsters such as Al Capone, George "Machine Gun" Kelly, and Bonnie and Clyde frequently used "Tommy" guns (easily concealed machine guns) from WWI in their crime sprees.[126] The gangsters during Prohibition were more violent than prior criminals, rendering local law enforcement largely ineffective. Furthermore, gangsters had corrupted some of the local police.[127] After the St. Valentine's Day Massacre of 1929, where seven members of a gang were shot dead by rivals, President Franklin D. Roosevelt knew he needed to enact *federal* gun control legislation; crime by mobsters

120. *Id.*

121. *Id.*

122. COOK & GOSS, *supra* note 3, at 164.

123. WINKLER, *supra* note 4, at 169.

124. *Id.*

125. *Id.* at 170.

126. WALDMAN, *supra* note 2, at 81.

127. WINKLER, *supra* note 4, at 193.

crossed state lines and was truly a national problem.[128]

In enacting federal gun control legislation, the federal government did not feel constrained by the Second Amendment, which during this time was limited to a collective militia understanding. Hence, President Roosevelt and his attorney general implemented a "New Deal for Crime" and won passage of the first federal gun law: the National Firearms Act of 1934.[129] The Act required registration of machine guns, fully automated weapons and sawed-off shotguns, and gun owners had to submit to fingerprinting within sixty days.[130] The Act also placed a heavy two hundred dollar tax ($2,000 in 2010 dollars) each time such guns were transferred or sold.[131] While gangsters could largely afford the tax, they did not want to be fingerprinted and registered.[132] When they were caught with an unregistered gun, they could be punished for up to five years in prison for noncompliance with the law.[133] Within a few years of the National Firearms Act of 1934, civilian ownership of machine guns and sawed-off shotguns was rare.[134] As Cook and Goss observed, "a type of weapon [machine guns] that would likely appeal to modern-day gangsters, as it did to Al Capone, has been for the most part kept out of criminal hands by federal regulation."[135]

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128. *Id.* at 192, 198.

129. *Id.* at 198, 203. Federal laws provide a floor of regulation for public safety, but states can augment such restrictions and pass their own laws. During this time, twenty-eight states enacted anti-machine gun laws. Spitzer, *supra* note 80, at 67.

130. WINKLER, *supra* note 4, at 203.

131. *Id.* The Act did not outright ban gangster weapons like machine guns, but required registration and a tax on transactions. Today such fully automated guns are rare but 500,000 are registered. COOK & GOSS, *supra* note 3, at 136.

132. WINKLER, *supra* note 4, at 203.

133. *Id.*

134. *Id.* at 204

135. COOK & GOSS, *supra* note 3, at 136.

Because of the success of the 1934 federal law, President Roosevelt sought a second gun bill in 1938 called the Federal Firearms Act, which created a national licensing system for gun dealers, manufacturers and importers and placed restrictions on interstate transfers.[136] Significantly, this law also barred selling firearms to felons, fugitives, those under indictment or individuals banned by state law.[137]

Interestingly, the N.R.A., which at this time was largely a sportsmen's group, supported the laws.[138] In fact, a N.R.A. publication boasted that it helped secure the 1934 and 1938 Acts.[139] One N.R.A. lobbyist once told Congress in 1934, "I have never believed in the general practice of carrying weapons."[140] At this time, the N.R.A. did not discuss the Second Amendment.

These laws, coupled with the ending of Prohibition in 1933, resulted in declining violence rates. In sum, when President Roosevelt saw a pressing societal problem with gang-related violence, Congress enacted federal legislation, largely supported by the N.R.A., to successfully address such ills. By comparison, after the horrific school shooting at Sandy Hook in 2012, where twenty elementary school children were brutally murdered, there has not been one significant federal law implemented to address guns.[141]

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136. WINKLER, *supra* note 4, at 204.

137. COOK & GOSS, *supra* note 3, at 99.

138. In 1871, the N.R.A. was established to train men to shoot accurately. It then evolved to hunting and sports shooting, where it focused on marksmanship training and shooting for recreation. WALDMAN, *supra* note 2, at 87-88.

139. WINKLER, *supra* note 4, at 211.

140. WALDMAN, *supra* note 2, at 88.

141. COOK & GOSS, *supra* note 3, at 215. In 2017, Congress passed the Fix NICS Act of 2017, which provides federal agencies with incentives to submit records to the National Instant Criminal Background Check System (something they already are required to do). This legislation did not add any additional categories of prohibited purchasers and did not close the private sale loophole. *See infra* notes 174–76 and accompanying text. In 2018, President Donald Trump took executive action (not legislation) to ban bump stocks, which are accessories that

C. *Urban Violence in the 1960s*

Crime remained low from the 1930s until the urban riots of the 1960s.[142] In the 1950s, there was an influx of cheap and plentiful guns because soldiers were returning from World War II.[143] In the 1960s, the Black Panther Party for Self-Defense, a radical wing of the civil rights movement, "embraced firearms for political empowerment."[144] Economic conditions for blacks were poor, and they faced unemployment at twice the rate of whites. They also felt police abuse was rampant with little justice.[145] The Black Panthers argued that the police were unwilling or unable to protect blacks, so they had to defend themselves, and resorted to the self-help inspired teachings of Malcolm X.[146] A leader of the Black Panthers stated that the "[g]un is only thing that will free us—gain us our liberation."[147] In 1965, a six-day riot resulting in thirty-four dead and over a thousand injured broke out in a neighborhood in Los Angeles after a police confrontation with an intoxicated black driver.[148] On July 8, 1967, forty-one people were killed in a riot in Detroit and 200 square blocks of the city were destroyed.[149] A federal report stated that the reason for the riots was the availability of guns.[150] The import of guns went from 67,000 in 1955 to

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are used to mimic automatic fire. German Lopez, *The Trump Administration just banned bump stocks for guns*, VOX (Dec. 18, 2018, 12:05 PM) https://www.vox.com/policy-and-politics/2018/12/18/18146455/trump-bump-stock-ban-gun-violence

142. COOK & GOSS, *supra* note 3, at 105.

143. WINKLER, *supra* note 4, at 247.

144. COOK & GOSS, *supra* note 3, at 168.

145. WINKLER, *supra* note 4, at 232.

146. *Id.* at 233.

147. *Id.* at 234.

148. *Id.* at 232.

149. *Id.* at 249.

150. *Id.* at 250.

over a million by 1968.[151]

By 1968, urban crime and rioting were skyrocketing and national gun proposals had been debated in Congress for five years with no success.[152] After the assassinations of Martin Luther King and Robert F. Kennedy, however, President Lyndon B. Johnson asked Congress to pass the Omnibus Crime Control and Safe Streets Act, which banned shipments of handguns to people across state lines and prohibited buying handguns outside one's state of residence.[153] Three months later, Congress passed the Gun Control Act of 1968, which set up a federal licensing system for gun dealers and banned the importation of military style weapons.[154] It also extended the ban on interstate shipments of handguns to include rifles, shotguns, and ammunition and expanded the categories of those who could not get guns to those who were "mentally defective," such as those who were committed to mental institutions or drug abusers.[155] As Winkler noted, "[t]he Black Panthers and other extremists of the 1960s inspired some of the strictest gun control laws in American History."[156] Unlike the legislation during the 1930s that the N.R.A. supported, here the N.R.A. assumed a neutral stance,[157] except for blocking a proposed national registry of all guns.[158] One N.R.A. spokesman stated that despite parts of the law appearing "unduly restrictive, the measure as a whole appears to be one that the sportsmen of

151. *Id.*

152. COOK & GOSS, *supra* note 3, at 99-100.

153. *Id.* at 100.

154. WALDMAN, *supra* note 2, at 83.

155. Gun Control Act of 1968, Pub L. No. 90-618, 82 Stat. 1213, 1216-21.

156. WINKLER, *supra* note 4, at 231.

157. WALDMAN, *supra* note 2, at 83.

158. *See* Arica L. Coleman, *When the NRA Supported Gun Control,* TIME, (July 29, 2016) http://time.com/4431356/nra-gun-control-history/.

America can live with."[159] However, by the 1970s, the N.R.A. was hostile to government regulation of guns, which they felt was in response to the urban riots and the Black Panthers.[160]

Starting in 1986, the N.R.A. increased its efforts to loosen gun restrictions. In 1986, the N.R.A. lobbied Congress to pass the Firearm Owner's Protection Act, which loosened some of the gun regulations from the 1968 Act.[161] In 1996, the N.R.A. also lobbied to have the Centers for Disease Control, the primary U.S. agency that studies American injuries and death, precluded from studying gun violence.[162] In 2005, the N.R.A. was instrumental in getting the Protection of Lawful Commerce in Arms Act passed, which gave the gun industry protections from liability.[163]

As one can see, gun regulations have been around since the inception of this country through modern times. Significantly, the states and the federal government did not balk during the Wild West, gangster era of the 1920s, or urban riots of the 1960s at passing necessary legislation to address societal ills. Yet, in 2019, we as a nation seem paralyzed. There has not been any significant federal legislation since 2007 despite numerous mass shootings. In fact, in 2011, Congress passed a law restricting gun violence research by the National Institute of Health and prohibiting any agency from using money "to advocate or promote gun

159. *Id.*

160. WINKLER, *supra* note 4, at 257.

161. The Act banned machine guns except for those already registered, and added illegal immigrants, those dishonorably discharged and those who renounced U.S. citizenship as prohibited purchasers. COOK & GOSS, *supra* note 3, at 101.

162. Stray, *supra* note 5.

163. David Kopel, *The Protection of Lawful Commerce in Arms Act: Facts and policy*, THE VOLOKH CONSPIRACY, (May 24, 2016) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/24/the-protection-of-lawful-commerce-in-arms-act-facts-and-policy/?utm_term=.e5a02a4a3ba2.

control."[164] As political scientist Spitzer observes, "history tells a very different story—that, for the first 300 years of America's existence, gun laws and gun rights went hand-in-hand. It is only in recent decades, as the gun debate has become more politicized and more ideological that this relationship has been reframed as a zero-sum struggle."[165]

The next section suggests ways out of this impasse by analyzing the status quo compared to repealing or amending the Second Amendment.

## IV. ANALYSIS AND PROPOSAL

### A. *Approach 1: Status Quo*

One would think *Heller* would provide security and confidence to both gun rights groups and gun violence prevention activists. After all, the language of the opinion recognizes both an inherent right to own a gun for self-defense as well as reasonable gun regulations.[166] Yet, post-*Heller*, the tension between gun rights groups and gun violence prevention activists has only escalated, as gun rights groups still see most gun regulations as a slippery slope to banishment of all guns.[167] As columnist Michael Scherer observed in 2013,

> For more than three decades, the N.R.A. has consistently argued that pretty much any new regulation of firearms would move the country a step closer to more draconian regulations, like gun registration and confiscation. The slippery slope argument has underscored most of the gun owner lobby's major messaging campaigns, and successfully helped rally a core group of Americans to oppose even the most incremental new measures, and become members of the organization. *In the longtime logic of the Second Amendment activist, all gun regulations are suspect because of what*

164. Stray, *supra* note 5.

165. Spitzer, *supra* note 80, at 56.

166. "Some surmise that, in the long run, *Heller* and *McDonald* will make it easier for gun control advocates, by drawing a sharp line over which they cannot cross." WALDMAN, *supra* note 2, at 159.

167. COOK & GOSS, *supra* note 3, at 215.

*might happen next*.[168]

As explained, since *Heller*, there has been no significant gun legislation at the federal level, even after the atrocities at Sandy Hook, Las Vegas and Parkland.[169] In fact, incredibly, there has been more *deregulation* of guns as more states allow concealed weapons than in the past.[170] One notable example of a gun regulation opposed by the N.R.A. because of this "slippery slope" argument is the issue of background checks and whether they should apply to private gun sales.

In 1993, Congress passed the Brady Handgun Violence Prevention Act [Brady Act], which requires licensed gun dealers to conduct background checks on buyers to prevent prohibited purchasers such as felons and the mentally ill.[171] From 1998 to 2013, there have been approximately 180 million background checks leading to more than two million denials, which is a one-and-a-half percent denial rate.[172] Private party sales, however, are not covered by the background check, which make up about twenty-five to fifty percent of all gun sales at gun shows.[173] Studies show that forty percent of all gun purchases are through private unlicensed sales.[174] This "loophole" means that those with criminal records or mental illnesses can buy firearms from

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168. Michael Scherer, *The NRA's Slippery Slope Strategy To Fight Background Checks*, TIME (Apr. 11, 2013) http://swampland.time.com/2013/04/11/the-national-rifle-associations-slippery-slope-strategy/ (emphasis added).

169. *See supra* note 141.

170. COOK & GOSS, *supra* note 3, at 215.

171. *Id.* at 101. The Act added domestic violence perpetrators and those under a restraining order as additional prohibited purchasers. *Id.* at 102. The Act prevents the federal government from keeping the names submitted for background checks, or using this information to create any sort of registry of gun owners. Scherer, *supra* note 168.

172. COOK & GOSS, *supra* note 3, at 111.

173. *See Id.* at 81.

174. WINKLER, *supra* note 4, at 74.

private dealers, many who are at gun shows. An investigation of gun shows in three states showed that sixty-three percent of private sellers sold guns to buyers who stated that they probably could not pass a background check.[175] Significantly, ninety percent of Americans in 2013 supported an *expanded* background check to private sales.[176]

In fact, after Sandy Hook, in 2013, Congress proposed legislation that would close this private sale "loophole" and require background checks on all sales, but the N.R.A. opposed it.[177] The N.R.A. argued that the Obama administration was "closing in fast on your Right to Keep and Bear Arms."[178] Wayne LaPierre, the N.R.A.'s executive vice president, opposed broadening the background check, arguing it would lead to a universal registry of guns, even though the Brady Act already prohibited a national gun registry, *and* the proposed legislation would have specifically stated that it would be a crime to create a gun registry. [179] One scholar has noted, "it is difficult to imagine any other issue on which Congress has been less responsive to public sentiment for a longer period of time."[180]

Hence, despite some initial optimism after *Heller*, the status quo is untenable as the N.R.A. is opposing measured gun control legislation that ninety percent of the public supports. As Cook and Goss note, "it is politics—not the courts—that serve as the greatest brake on gun control."[181] Given this divisiveness, several scholars and judges have suggested repealing the Second Amendment or amending it to move out of this impasse.

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175. *Id.*

176. WALDMAN, *supra* note 2, at 156.

177. *Id.*

178. *Id.* at 159.

179. Scherer, *supra* note 168.

180. COOK & GOSS, *supra* note 3, at 176.

181. *Id.* at 91.

B. *Approach 2: Repealing the Second Amendment*

Some prominent individuals from across the political spectrum including former Supreme Court justices have suggested repealing the Second Amendment outright. To be clear, repealing the Second Amendment would not necessarily mean that all guns would be banned.[182] Rather, each state legislature would then decide what restrictions were reasonable without gun lobbyists clamoring that a federal constitutional right was being infringed. In fact, until the 2008 *Heller* and 2010 *McDonald* decisions recognized a constitutional right to bear guns for self-defense, all states allowed guns subject to regulations consistent with their own applicable state constitutions.

In a 2018 *New York Times editorial*, retired Supreme Court Justice John Paul Stevens, who had passionately dissented in *Heller*, proposed that the Second Amendment be repealed. He noted that *Heller* "has provided the N.R.A. with a propaganda weapon of immense power. Overturning that decision via a constitutional amendment to get rid of the Second Amendment would be simple and would do more to weaken the N.R.A.'s ability to stymie legislative debate and block constructive gun control legislation than any other available option."[183] Former conservative Chief Justice

182. As law professor Jonathan Turley has noted: "While there are good-faith reasons to oppose a repeal, it is not true that a 28th Amendment repealing the Second Amendment would leave gun owners without protection. First and foremost, citizens are still afforded due process in the exercise of privileges and enjoyments of benefits. The standard would be lower (a rational basis test) but there would still be a process of judicial review. Second, the greatest protection of gun rights has not been constitutional but political. Indeed, until 2008, there was not a recognized individual right of gun ownership but it was still extremely difficult to pass significant gun control." Jonathan Turley, Repealing the Second Amendment isn't easy but it's what March for Our Lives students need, USA Today (Mar. 28, 2018, 3:15 AM), https://www.usatoday.com/story/opinion/2018/03/28/repealing-second-amendment-march-our-lives-students/463644002/.

183. John Paul Stevens, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html.

Warren Burger noted in 1991: "If I were writing the Bill of Rights now, there wouldn't be any such thing as the Second Amendment."[184] Law professor Timothy Waters attests that the cost of the Second Amendment may just be too high, arguing that there "is serious disagreement about whether guns protect liberty or threaten it—disagreement we don't have when it comes to the value of voting or free assembly. That alone is reason enough to reconsider the Second Amendment."[185] The Brookings Institute's Benjamin Wittes notes "[t]o put the matter simply, the Founders were wrong about the importance of guns to a free society."[186] Both the Chicago Tribune and Salon have also argued for repeal of the Second Amendment.[187] Conservative New York Times columnist Bret Stephens argues that "[g]un ownership should never be outlawed, just as it isn't outlawed in Britain or Australia. But it doesn't need a blanket Constitutional protection, either."[188] While he acknowledges the difficulty of repealing the Second Amendment, he notes that, as with gay marriage, "most great causes begin as improbable ones." He ponders:

> I wonder what Madison would have to say about that today, when more than twice as many Americans perished last year at the hands of their fellows [from guns] as died in battle during the entire Revolutionary War. My guess: Take the guns—or at least the presumptive right to them—away. **The true foundation of**

184. Sarah Lynch Baldwin, *Repealing the Second Amendment, is it even possible?*, CBS NEWS (Mar. 28, 2018, 8:44 AM), https://www.cbsnews.com/news/repealing-the-second-amendment-is-it-even-possible/.

185. Tim Waters, *We don't need the 2nd Amendment — we need a real debate about guns*, L.A. TIMES (Oct. 13, 2017, 4:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-waters-second-amendment-constitution-gun-control-20171013-story.html.

186. Benjamin Wittes, *Ditch the Second Amendment*, BROOKINGS INST. (Mar. 19, 2007), https://www.brookings.edu/opinions/ditch-the-second-amendment/.

187. WINKLER, *supra* note 4, at 34.

188. Bret Stephens, *Repeal the Second Amendment*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/opinion/guns-second-amendment-nra.html.

> **American exceptionalism should be our capacity for moral and constitutional renewal, not our instinct for self-destruction.**[189]

While the underlying reasons for repealing the Second Amendment may be well intentioned, such an approach is politically untenable. It would take two-thirds of Congress and three-fourths of the states to repeal the Second Amendment.[190] Given that Congress cannot even pass an expanded background check to close the private sales loophole, a regulation that most of the public supports, it seems impossible for Congress to vote to repeal the Second Amendment. As political science professor Kevin McMahon told CBS News, it is "very unlikely" that the Second Amendment could ever be repealed because "[i]t's hard enough for gun control legislation to be passed now in the Congress which requires simply a simple majority."[191]

Moreover, arguments to repeal the Second Amendment could undermine gun violence prevention activists' agenda because it confirms the gun rights groups' slippery slope argument that the true agenda is a confiscation of all guns instead of reasonable gun safety regulations. Aaron Blake, reporter for The Washington Post, notes that Stevens' op-ed was "'about the most unhelpful thing' for the gun control movement . . . . 'This is playing into the Republican talking point that this is the ultimate goal of gun control advocates, which is to take away guns, to not have gun ownership be a right, to repeal the Second Amendment.'"[192] Similarly, law professor Steve Vladeck has noted that "advocating for [the repeal of the Second Amendment] could unnecessarily undercut the reform movement while distracting from

189. *Id.* (emphasis added).

190. U.S. CONST. art. V.

191. Baldwin, *supra* note 184.

192. *Id.*

measures that are currently feasible."[193] In fact, there is an argument that repealing the Second Amendment could *actually* result in the N.R.A.'s biggest worry: a confiscation of all guns. As Professor Paul F. deLespinasse notes:

> Simply repealing the Second Amendment would allow gun legislation debates to focus entirely on benefits and costs. But repeal is impossible. People who want guns for self-defense or hunting would fear that repeal would "let the camel's nose into the tent." Such "slippery slope" arguments are not unreasonable. **With no Second Amendment, what if legislatures banned *all* guns**?[194]

Additionally, Congress has only repealed the Eighteenth Amendment on Prohibition, which had prohibited the making, transportation and sale of alcohol. An argument can be made that repealing an amendment from the Bill of Rights *itself* could make the other nine amendments more vulnerable to repeal as well. As Harvard law professor Noah Feldman has noted, "[o]pening the Pandora's box of changing our fundamental rights because of a Supreme Court decision we don't like threatens the very structure of the Bill of Rights itself."[195] In other words, there is something sacrosanct about the Bill of Rights that militates against any of its amendments' outright repeal.

Finally, repealing the Second Amendment may not necessarily eliminate the argument that there is no constitutional right to bear arms. Under the Tenth Amendment, the federal government possesses only those

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193. Steve Vladeck, *How calls for a Second Amendment repeal could easily backfire for gun control advocates*, NBC NEWS (Mar. 27, 2018, 5:10 PM), https://www.nbcnews.com/think/opinion/how-calls-second-amendment-repeal-could-easily-backfire-gun-control-ncna860561.

194. Paul F. deLespinasse, *Time to Amend the Second Amendment*, NEWSMAX (Feb. 27, 2018, 11:47 AM), https://www.newsmax.com/paulfdelespinasse/rifles-nra/2018/02/27/id/845705/ (emphasis added).

195. Noah Feldman, *Second Amendment Repeal Would Hurt Constitution*, BLOOMBERG (Mar. 27, 2018, 12:40 PM), https://www.bloomberg.com/opinion/articles/2018-03-27/second-amendment-repeal-suggested-by-justice-stevens-is-a-mistake.

powers delegated to it by the United States Constitution. Importantly, all remaining powers are reserved for the states or the people. Therefore, if the Second Amendment is repealed, an argument can be made that the right to bear arms for self-defense, which was codified in the English Bill of Rights of 1689 and which has been part of this country since its inception, is a natural or inherent right that cannot be encroached on by the federal government.[196]

In sum, repealing the Second Amendment is not realistically feasible in this political climate and could do more harm to the gun violence prevention activists' agenda by confirming the N.R.A.'s slippery slope argument. It is also not clear that, given the Tenth Amendment, it would achieve its main goal of eliminating a constitutional right to bear arms. Finally, it is not clear that its repeal would even result in more reasonable gun regulations as it was not until 2008 that a constitutional right to bear arms was first recognized by the Supreme Court, and prior to 2008 the gun lobby still placed considerable obstacles to implementing gun regulations.

### C. *Approach 3: Amending the Second Amendment to Clarify that it Only Applies to Militias*

Some have argued that the Second Amendment should be amended to clarify its original intent, as it was interpreted prior to *Heller*. As such, the Second Amendment would only concern protecting the state militias from federal tyranny and encroachment, and does not embody any individual right to bear arms.

In 2014, retired Justice John Paul Stevens wrote a book suggesting six changes to the Constitution, including adding

196. *Gun News Daily* argues that the right to bear arms is a "natural right" that should be protected from both state and federal encroachment. Will Ellis, *The Second vs. the Tenth: Does the Right to Bear Arms Contradict States' Rights?*, GUN NEWS DAILY (Dec. 15, 2017), https://gunnewsdaily.com/second-vs-tenth-right-bear-arms-contradict-states-rights/.

five words to the Second Amendment stating that the right to keep and bear arms should be understood only in the context of "a well-regulated militia."[197] In this book, he argued:

> Legislatures are in a far better position than judges to assess the wisdom of such rules and to evaluate the costs and benefits that rule changes can be expected to produce. It is those legislators, rather than federal judges, who should make the decisions that will determine what kinds of firearms should be available to private citizens, and when and how they may be used. Constitutional provisions that curtail the legislative power to govern in this area unquestionably do more harm than good.[198]

Therefore, he argued that to make the Second Amendment "unambiguously conform to the original intent of its draftsmen," he would amend it to read: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms *when serving in the Militia* shall not be infringed."[199] In this way, state legislatures could govern the use of firearms by its citizens and not be constrained by any constitutional right embodied by the Second Amendment.

Amending the Second Amendment to clarify that it only applies to militias would be amending it into obscurity. The militias no longer exist. Furthermore, as discussed with Approach 1, getting Congress to amend the Second Amendment in this way is probably just as politically untenable, if not more, than repealing the Amendment outright. It would also undermine gun violence prevention groups' efforts at reasonable gun regulations by again confirming the gun lobby's biggest fear: that the government wants to confiscate all guns. As Representative David Cicilline from Rhode Island notes, "I think a proposal to amend the Constitution to substantially change the Second

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197. This book was written four years prior to his arguing that the Second Amendment should be repealed. *See* STEVENS, *supra* note 28, at 132.

198. *Id.* at 126.

199. *Id.* at 132.

Amendment would more likely be used by the N.R.A. to galvanize their supporters and maybe even engage less active gun owners."[200] But what if the Second Amendment was amended to provide protections for *both* the gun lobby and gun violence prevention groups? Such an approach is discussed next.

D. *Approach 4: Amending the Second Amendment to Affirmatively Recognize a Right to Bear Arms Coupled with Reasonable Gun Safety Regulations*

Instead of repealing or amending it into obscurity, the Second Amendment should be amended to affirmatively state that it protects an individual's right to own a gun, while subject to reasonable regulations for public safety. Amending the Second Amendment to affirmatively state that it protects an individual's right to own a gun would hopefully eliminate or "dry up" the N.R.A. and other gun rights groups' slippery slope argument. As one commentator notes:

> To achieve a more rational and more robust system of gun regulation, we should consider amending the Second Amendment to clarify the scope of protections it affords United States citizens. Doing so would go a long way to addressing the persistent fear of slippery slopes that underlies virtually all opposition to regulatory proposals.
>
> . . . .
>
> This fear of slippery slopes is why gun-rights advocates seem so unreasonable—they are unwilling to compromise today because they do not trust that the terms of their deal will be honored by the public and by gun-rights opponents in the future.[201]

While the *Heller* and *McDonald* decisions hold that the Second Amendment protects an individual's right to own a gun for self-defense, these decisions were 5-4, and overturned 200 years of precedent. Despite the current makeup of the Supreme Court, these decisions could be overturned in the future. Hence, enshrining that the Second

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200. *Id.* (quoting Representative David Cicilline).

201. Jeb Golinkin, *Why gun owners should want to amend the Second Amendment*, THE WEEK (Jan. 29, 2013), https://theweek.com/articles/468293/why-gun-owners-should-want-amend-second-amendment.

Amendment affirmatively protects an individual's right to own a gun, instead of the current ambiguous language that could be reinterpreted by a later Supreme Court, could provide needed security to the gun rights groups that regulations will not be a slippery slope of infringing on the fundamental right to own a gun for self-defense.

Law professor Penrose notes: "We should seek ways to enshrine those rights more permanently in our Constitution, rather than wait for the fluctuating decisions of the Supreme Court to define a particular right's parameters."[202] Similarly, as constitutional attorney James Lucas from the National Review notes, "the *Heller* and *McDonald* decisions . . . are certain to be the top targets for reversal if the Left ever gets a fifth vote on the High Court."[203] Lucas ponders:

> How do we prevent such an illegitimate judicial amendment repealing, for all practical purposes, the Second Amendment by interpreting it out of existence? I, for one, am not comfortable relying on one-vote majorities on the Supreme Court and extraordinarily narrow Republican presidential victories for the long-term security of my Second Amendment rights. Ironically, Justice Stevens has offered the solution. Rather than amending the Constitution to repeal the Second Amendment, we should amend the Second Amendment to update and clarify it for our times.[204]

While the wording of Lucas's suggestion is cumbersome, arguing that the amendment should allow "regulations restricting possession by persons convicted of a felony, or individually found by due process to be a threat to public or personal safety, or to ensure public safety in the use of firearms," his sentiment is persuasive. He notes, "[h]owever

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202. Penrose, *supra* note 71, at 1467. She also notes, "[s]hould lawful gun owners leave their rights to the chance interpretation of the U.S. Supreme Court? The recent 5-4 and plurality decisions regarding the Second Amendment illustrate how evanescent current case law may be. The change of a single Justice could overturn the entire doctrine." *Id.* at 1480.

203. James W. Lucas, *We Need to Update the Second Amendment*, NAT'L REV. (Apr. 12, 2018, 6:30 AM), https://www.nationalreview.com/2018/04/second-amendment-needs-update-clarify-individual-right/.

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

worded, such restrictions could calm the current bitter argument by reflecting the broad consensus that law-abiding citizens have the right to possess firearms, but allowing limited public-safety controls over their use and who uses them."[205]

Professor Paul F. deLespinasse argues that the Second Amendment should be amended to "protect the right to own hunting rifles and ordinary pistols, subject to reasonable regulations" but not assault weapons or high capacity magazines.[206] He argues that "[a]mending the Second Amendment could not be dismissed as 'anti-gun,' since it would unequivocally protect the right to own pistols and hunting rifles."[207] Yet, intentionally omitting assault weapons and certain ammunition in the amendment is certain to cause uproar with the N.R.A. and other gun rights groups. In fact, a ten-year bill banning assault weapons expired in 2004, and gun rights prevention groups have not been able to reinstate it despite numerous mass shootings.[208] Therefore, amending the Second Amendment to preclude assault weapons when Congress has not been able to pass legislation banning those same guns will certainly be a non-starter. Nonetheless, other commentators have made more persuasive arguments in amending the Second Amendment.

For instance, Dartmouth professor James Heffernan argues in the Huffington Post that the Second Amendment

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205. *Id.*

206. deLespinasse, *supra* note 194.

207. *Id.*

208. The Federal Assault Weapons Ban, which began in 1994 and ended in 2004 due to a sunset clause, was directed at semi-automatic weapons that adopted certain design features from infantry weapons. Manufacturers, however, could change the design to evade the ban. COOK & GOSS, *supra* note 3, at 135. Assault weapons were also rarely used in crime, so the legislation was largely symbolic. WINKLER, *supra* note 4, at 39. Furthermore, over 25 million assault rifles were grandfathered in that were already manufactured. COOK & GOSS, *supra* note 3, at 135. As Cook and Goss observed, there was not enough time to see any change because there were too many existing guns. *See id.*

should be amended to state ". . . the right of the people to keep and bear arms shall not be infringed *except to ensure public safety*."[209] As he explains:

> By themselves, these five new words would not add one new curb on gun rights in America. Any new move to restrict or regulate those rights would still have to be fought out in state or federal legislatures, where the N.R.A. would remain perfectly free to flex its political muscle. But no gun control bill that ran this gauntlet to become law could ever again be overturned on the grounds that it infringed the Constitutional right to bear arms. The added words, therefore, would make one simple point: the people's right to bear arms cannot trump the *government's* right to protect us from gun violence, the government's right to weigh our desire for weapons against public safety, and to strike a reasonable balance between the two.[210]

This Article takes a similar approach and argues that the Second Amendment should be amended to state: "*Every person has the right to keep and bear arms, subject to reasonable regulations for public safety*." By explicitly protecting the right to bear arms in the Amendment itself, gun rights groups do not need to fear a never-ending slippery slope of gun confiscation, and do not need to rely on the Supreme Court's current 5-4 interpretation.

Furthermore, this language affords *more* protection than the *Heller* and *McDonald* decisions, which were limited to self-defense. This proposal protects the right to bear arms for any lawful purpose, such as hunting, sportsmanship and collecting. Similarly, by explicitly stating that right to bear arms is subject to "reasonable regulations for public safety," gun violence prevention groups can feel confident that the conversations will include what constitutes "reasonable" regulations, which will evolve with the values and technology of this country.[211] By comparison, the Fourth Amendment

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209. James Heffernan, *Why Can't We Amend the Second Amendment*?, HUFFINGTON POST (June 23, 2016, 2:27 PM), https://www.huffingtonpost.com/james-heffernan/lets-amend-the-second-ame_b_10599266.html.

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

211. For instance, if thumbprint technology becomes readily available and

protects against "unreasonable searches and seizures," and over time, what has constituted an "unreasonable search and seizure" has evolved with technology and the values of this country.[212]

Amending the Second Amendment, however, is no small feat. According to Article V of the Constitution, a proposed amendment to the Constitution must first be passed by Congress with two-thirds majorities in *both* the House and the Senate. It then must pass three-fourths of the states.[213] Not surprisingly, it has been almost half a century since it was last amended.[214]

There is another alternative to amending the

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effective, that could inform what "reasonable" regulations are going forward. *See* WALDMAN, *supra* note 2, at 165.

212. For instance, under current Fourth Amendment jurisprudence, a "search" only occurs if the person has a reasonable expectation of privacy that society is prepared to recognize. *See* Katz v. United States, 389 U.S. 347 (1967). In *Katz*, the Supreme Court expanded Fourth Amendment protection against "unreasonable searches and seizures" to cover electronic wiretaps and not just physical intrusions. *Id.* at 353. In Kyllo v. United States, 533 U.S. 27 (2001), the Court held that thermal imaging to monitor radiation of heat from a person's home was a "search." *Id.* at 40. Hence, just as the Fourth Amendment has adapted with technology, so can the Second Amendment.

213. Article V reads, in pertinent part, as follows: "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid as to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by the Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress . . . ." U.S. CONST. art. V.

214. Congress amended the Constitution in 1971 with the Twenty-Sixth Amendment lowering the voting age nationwide from twenty-one to eighteen. Technically, Congress ratified the Twenty-Seventh Amendment in 1992, but this amendment had been written and approved by Congress generations ago. It states that a member of Congress who voted for a pay raise could not receive that raise until after the next election for the House of Representatives. *See* Ron Elving, *Repeal the Second Amendment? That's Not So Simple. Here's What It Would Take*, NPR (Mar. 1, 2018, 5:00 AM), https://www.npr.org/2018/03/01/589397317/repeal-the-second-amendment-thats-not-so-simple-here-s-what-it-would-take.

Constitution that is found in Article V of the Constitution: a Constitutional Convention called on by the states that *bypasses* Congress. Two-thirds of the state legislatures would need to call for a Constitutional Convention and then any changes made by such a convention would need to be ratified by three-fourths of the states, just as if the amendments originated from Congress.[215] In other words, 38 states would need to call for a Constitutional Convention to rewrite the Second Amendment.

A Constitutional Convention called forth by the states would be preferable to having this amendment process started by Congress, which has largely been ineffective in getting even bipartisan gun legislation passed that ninety percent of the population supports, such as broadening background checks. States, however, have been at the forefront of gun regulations since the founding of this country. As law professor Penrose notes, "the states are in a far better position . . . to delimit any restrictions placed on gun ownership or usage."[216] In arguing for a Constitutional Convention to amend the Second Amendment, she prefers to keep "the power of regulation at the state level where local democracy is far better suited to meet the unique needs of each local population."[217]

While the states have never called for a Constitutional Convention before, this Article argues that now would be an opportune time to utilize a mechanism provided for by the Founding Fathers to address a serious societal problem with guns. Christopher Norwood, a spokesman for the Democratic Black Caucus of Florida, argues that a Constitutional Convention would be prudent to address the Second Amendment:

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215. *Id.*

216. Penrose, *supra* note 71, at 1467.

217. *Id.* at 1469. While this Article agrees with professor Penrose's argument that the states should take the forefront in amending the Second Amendment, it disagrees with her actual proposed amendment, which is unwieldy and complicated. *See Id.* at 1506-08.

> We've never held an Article V Constitutional Convention. Why not a Constitutional Convention to discuss gun control among other proposed changes? *I think individual states in today's world should decide this issue.* Shootings kill more than 36,000 Americans each year; every day, there is an average of 96 deaths and 222 injuries by gun violence. Of all firearm homicides in the world, 82 percent occur in the United States. African-American children have the highest rates of firearm mortality overall; they are 10 times more likely to be killed by guns in a country where African-Americans make up 14 percent of the population.[218]

While the Founding Fathers made amending the Constitution purposely difficult, they nonetheless provided an instrument to do so. They recognized that unpredictable circumstances could necessitate change.[219] As James Madison explained in The Federalist No. 43, the Framers did not want to make the "Constitution too mutable" but they also did not want to foreclose such changes "which might perpetuate its discovered faults."[220] As Professor Penrose notes:

> [t]he Founders knew that society would change in ways they could never have imagined. Thus, in their great design, they provided us with the means to change the Constitution in a manner that would enable this Constitution to outlive not only their grand vision but, likely, all of us and our vision as well.[221]

The Founding Fathers would want our modern society to address mass shootings, gun suicides and violent gun crimes.[222] They would not want powerful gun lobby groups to

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218. Norwood, *supra* note 74 (emphasis added).

219. *See* Schneiderman v. United States, 320 U.S. 118, 137 (1943) ("The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come. Instead they wrote Article V. . . . Article V contains procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent.").

220. Turley, *supra* note 182.

221. Penrose, *supra* note 71, at 1466.

222. Law professor Penrose notes: "The Founders could never have envisioned the world we live in and our modern conveniences, ranging from travel to communication to weaponry. The political discourse was limited to the Federalist Papers and pamphlets while ours is expanded by Facebook, Twitter, Instagram,

stymie public safety measures based on an erroneous slippery slope argument that can be eliminated by amending the Second Amendment.

## CONCLUSION

A review of American history reveals a fundamental truth: the use of firearms can be coupled with reasonable gun regulations to address public safety. Both gun rights and regulations make up America's gun culture. Whether it is Colonial America, the Wild West and dueling, gangsters in the 1920s, or urban riots in the 1960s, the states and the federal government have historically enacted gun safety laws to address public safety concerns. As political scientist Spitzer notes, "in the seventeenth century no less than in the twenty-first, an abiding concern underlying many, if not most, of these regulations is the *protection of public safety by the government*."[223] Yet, today, we seem paralyzed by the N.R.A.'s insistence that most reasonable gun regulations are just a slippery slope of gun banishment. By amending the Second Amendment to affirmatively and explicitly protect the right to bear arms for any lawful purpose, subject to reasonable gun regulations, the language in the amendment itself can hopefully alleviate and "dry up" the slippery slope that is standing in the way of progress and reasonable gun safety measures.

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and 24-hour news media. Their Second Amendment is not suited for drones, M-4s, and nuclear arms any more than our defense is dependent upon militias, muskets, and flintlocks." *See* Penrose, *supra* note 71, at 1511.

223. Spitzer, *supra* note 80, at 57.