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# Of Arms and the Militia: Gun Regulation by Defining "Ordinary Military Equipment"

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# OF ARMS AND THE MILITIA: GUN REGULATION BY DEFINING "ORDINARY MILITARY EQUIPMENT"

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**ABSTRACT**

Recent mass shootings have placed pressure on Congress and state legislatures to regulate semi-automatic rifles and handguns in the interest of public safety.[1] However, the Second Amendment provides that, "[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."[2] There is no obvious public safety exception.

Semi-automatic rifles, handguns, and other kinds of arms can be regulated more effectively by defining the "ordinary military equipment" militia members are expected to provide. This may be accomplished using the rationale employed by the United States Supreme Court in its 1939 decision of *United States v. Miller*,[3] which

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[1] FED. BUREAU OF INVESTIGATION, ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2020 at 2, 18-19 (2021). The Federal Bureau of Investigation designated forty shootings in 2020 as "active shooter" incidents, which is defined as "one or more individuals . . . killing or attempting to kill people in a populated area." *Id.* at 2. The report notes that "[i]mplicit in this definition is the shooter's use of a firearm." *Id*.

[2] U.S. CONST. amend. II.

[3] 307 U.S. 174, 178 (1939) ("[I]t is not within judicial notice that [a short-barreled shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense." (citing Aymette v. State, 21 Tenn. (2 Humph.) 154, 158 (1840))).

upheld the National Firearms Act of 1934.[4] The Firearms Act regulated automatic weapons, including machine guns, short-barreled shotguns, and short-barreled rifles, by requiring possessors to register them and pay a substantial tax.[5] In its 2008 decision of *District of Columbia v. Heller*,[6] the Supreme Court reaffirmed the holding in *Miller*.[7]

In *Heller*, the Supreme Court found that the Second Amendment protected an individual's right to keep and bear arms.[8] The Court in *Heller* stated that *Miller* "stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons" and that it "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[9] Thus, the rationale employed in *Miller* is still effective and shows how certain types of weapons may be regulated.

## I. UPHOLDING THE NATIONAL FIREARMS ACT

In *Miller*, criminal charges brought against two men found in possession of a short-barreled shotgun were dismissed by the district court on the ground that the National Firearms Act violated the Second Amendment.[10] The Supreme Court reversed the district court's decision and upheld the Firearms Act by ruling that it could not take judicial notice that the Act did not have a "reasonable relation to the preservation or efficiency of a well-regulated militia," and therefore, it could not "say that the Second Amendment guaranteed the right to keep and bear" weapons such as short-barreled shotguns.[11]

The Court's ruling in *Miller* offers Congress and state legislatures powerful tools to ensure their gun regulations are upheld by the courts. It was Congress which determined in 1934 that short-barreled shotguns were "weapons not typically possessed by law-

[4] 26 U.S.C. §§ 5801-62.
[5] *See id.*
[6] District of Columbia v. Heller, 554 U.S. 570 (2008).
[7] *Id.* at 621-22, 624.
[8] *Id.* at 591, 595.
[9] *Id.* at 623, 625.
[10] United States v. Miller, 307 U.S. 174, 176-77 (1939).
[11] *Id.* at 178.

abiding citizens for lawful purposes."[12] Prior to that time short-barreled shotguns were legal to obtain and possess. Furthermore, the Supreme Court indicated that a legitimate object of the National Firearms Act could be Congress's intention to preserve the militia and make it more efficient.

A layperson reading *Miller* might think that the decision merely required the defendants to prove that the military used machine guns and short-barreled rifles and shotguns. The Supreme Court stated in *Heller* that this "would be a startling reading of the [*Miller*] opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939."[13] *Miller*'s reference to "ordinary military equipment," *Heller* explained, meant arms "of the kind in common use at the time."[14] As short-barreled shotguns could legally be purchased and possessed before the 1934 Firearms Act, *Miller* and *Heller* indicate that Congress and state legislatures can define what ordinary military equipment is in common use so long as those legislative bodies are crafting such definitions for the preservation and efficiency of a well-regulated militia.[15]

The United States Constitution gives Congress the power "[t]o raise and support armies."[16] The Constitution also gives Congress the power "[t]o provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions."[17] As the Supreme Court explained in *Heller*, "the militia is assumed by Article I already to be *in existence*."[18] The militia in colonial America was understood to consist of "all able-bodied men."[19] Armies, by contrast, must be created.[20]

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[12] *Heller*, 554 U.S. at 625.
[13] *Id.* at 624.
[14] *Id.* at 624-25.
[15] *See id.* at 622.
[16] U.S. CONST. art. I, § 8, cl. 12.
[17] *Id.*
[18] *Heller*, 554 U.S. at 596 (emphasis in original).
[19] *Id.* at 580-81, 596.
[20] *Id*. at 596.

## II. DESCRIBING "ORDINARY MILITARY EQUIPMENT"

In *Miller*, when upholding the National Firearms Act, the Supreme Court referred to *Aymette v. State*,[21] an 1840 decision of the Tennessee Supreme Court. The court in *Aymette* upheld, against a challenge under the Tennessee Constitution's version of the Second Amendment, the conviction of a man who, while uttering threats against another man for whom he was searching, was found to have violated Tennessee law by concealing a knife under his clothing.[22]

Although *Aymette* was decided 180 years ago, it contains useful legal analysis distinguishing military weapons. Unlike *Miller* in 1939 or *Heller* in 2008, in 1840, the states periodically mustered their militias for the purpose of training them.[23] Volunteers from the militia supplemented the professional army on military expeditions.[24] At the time *Aymette* was decided, the Georgia State Militia was assisting the U.S. Army in the Second Seminole War.[25] Volunteers from the militia "provided the bulk of the manpower to fight the Mexican War, Civil War, and the Spanish-American War."[26] The court in *Aymette* understood what was expected of the militia. Suppressing insurrections and repelling invasions was, in 1840, an imaginable objective for the militia.

The court in *Aymette* specifically held that the legislature had the right "to prohibit the wearing, or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence."[27] In its opinion, the court distinguished between those weapons "which are usually employed in private broils, and which are efficient only in the hands of the robber or assassin," which the court described as "useless

[21] Aymette v. State, 21 Tenn. (2 Humph.) 154 (1840).
[22] *Id.* at 155, 161-62.
[23] *See generally* GIAN GENTILE, MICHAEL E. LINICK, & MICHAEL SHURKIN, THE EVOLUTION OF U.S. MILITARY POLICY FROM THE CONSTITUTION TO THE PRESENT 13-28 (2017) (hereinafter G. GENTILE ET AL., U.S. MILITARY POLICY).
[24] *Id*. at 18.
[25] JOHN K. MAHON, HISTORY OF THE SECOND SEMINOLE WAR 1835-1842 (University Press of Florida ed., 1985).
[26] G. GENTILE ET AL., U.S. MILITARY POLICY at 18.
[27] *Aymette*, 21 Tenn. (2 Humph.) at 159.

in war," and "ordinary military equipment" used "in civilized warfare."[28]

Additionally, the court noted that the militia's military duties could not be accomplished with concealed weapons.[29] Arms for the common defense "must necessarily be borne openly; so that a prohibition to bear them openly, would be a denial of the right altogether."[30]

Accordingly, by using the rationale set out in *Miller*, Congress and each state legislature can use objective military considerations to regulate the "ordinary military equipment" which its militia members are expected to provide when called.[31] Regulation using military considerations can reasonably be attributed to an intent on the legislature's part to preserve and promote the efficiency of its militia.

## III. SUBSEQUENT DISCUSSION OF *MILLER* IN THE FEDERAL COURTS

There is a reasonable explanation as to why Congress or state legislatures did not choose to define "ordinary military equipment" in their legislation earlier. In 1942, soon after *Miller* was decided, the United States Court of Appeals for the First Circuit, in *Cases v. United States*,[32] affirmed the conviction of a man, who, having previously been convicted of a felony, was charged with possessing a revolver in violation of the Federal Firearms Act of 1934.[33] In the course of its opinion the First Circuit criticized the *Miller* holding as "already outdated, in spite of the fact that it was formulated only three and a half years ago, because of the well-known fact that in the so called 'Commando Units' some sort of military use seems to have been found for almost any modern lethal weapon."[34] Instead, the First Circuit found that the man was not a member of any military organization and the Second Amendment did not bar the Firearms Act.[35]

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[28] *Id*. at 158.
[29] *Id*. at 159-60.
[30] *Id.* at 160-61; *see also* Fife v. State, 31 Ark. 455 (1876).
[31] *See* United States v. Miller, 307 U.S. 174, 178 (1939).
[32] 131 F.2d 916 (1st Cir. 1942).
[33] *Id.* at 925.
[34] *Id*. at 922.
[35] *Id.* at 923.

There are at least three problems with the criticism of the *Miller* holding by the First Circuit in *Cases*.[36] The first is that the First Circuit's analysis equated the unorganized militia with a company of the regular army.[37] The militia is a class of individuals who are not organized and are not subject to military discipline, unlike the regular army.[38] The second problem with the First Circuit's analysis is that it equated members of the militia with "Commando Units," which are elite organizations of soldiers within the regular army.[39] Members of the militia cannot be assumed to have any military training, unlike the members of "Commando Units."[40] Finally, the First Circuit noted that there was some military usefulness for "almost any modern lethal weapon."[41] This overlooked the definition of "ordinary military equipment" contained in *Miller*, which excluded from the protection of the Second Amendment certain weapons that have a military use, including machine guns, short-barreled shotguns, and short-barreled rifles.[42]

In his brief in *Miller*, the Solicitor General had argued in the alternative that the Second Amendment was a "collective right."[43] The *Miller* decision did not mention this argument.[44] However, after the First Circuit's decision in *Cases*, the "collective rights" theory was adopted by several circuit courts of appeals in upholding gun

[36] *Id.* at 922.
[37] *Compare* United States v. Miller, 307 U.S. 174, 179 (1939) ("[T]he Militia comprised all males physically capable of acting in concert for the common defense"), *with* CLAYTON R. NEWELL, *REGULAR ARMY*, THE UNITED STATES ARMY, A HISTORICAL DICTIONARY, at 180 (2002) ("[t]hat portion of the army in the full-time service of the federal government.").
[38] *Miller*, 307 U.S. at 179.
[39] EDWARD LUTTWAK AND STUART KOEHL, *COMMANDO*, THE DICTIONARY OF MODERN WAR, at 136 (1991) ("The term ["Commando"] is now applied officially to units of the British Royal Marines, and unofficially to many other elite units trained for special operations.").
[40] *Cases*, 131 F.2d at 922.
[41] *Id.*
[42] *Miller*, 307 U.S. at 178.
[43] District of Columbia v. Heller, 554 U.S. 570, 622 (2008).
[44] *See generally Miller*, 307 U.S. at 174-83.

regulations.[45] The collective rights theory was rejected by the Supreme Court in *Heller*.[46]

Another question is why the Supreme Court did not state in *Heller* that Congress or the state legislatures could use objective military considerations to regulate firearms. The federal courts cannot issue so-called "advisory opinions" or make any decision that would not affect the rights of the litigants before them.[47] Since *Heller* could be resolved without further analysis of the Second Amendment, no further discussion of the right was necessary. The Supreme Court did note that the Second Amendment right "was not unlimited" and that the Court did "not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation."[48]

In its conclusion, the Court in *Heller* stated that, "the Constitution leaves the District of Columbia a variety of tools for combating [the problem of handgun violence], including some measures regulating handguns."[49] The Court referred to its earlier statement that it recognized "another important limitation" in *Miller*'s statement "that the sorts of weapons protected were those 'in common use at the time,'" which the Court considered "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[50]

Finally, there is the question of the militia's usefulness at this time. When the Bill of Rights was ratified in 1791, the United States was confronted with a number of potential enemies, including Britain, France, Spain, and various hostile Indian tribes.[51] Today the United States has no close foreign enemies. The militia is no longer mustered and there does not seem to be any need for it. Nevertheless, the Second

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[45] United States v. Parker, 362 F.3d 1279, 1282-84 (10th Cir. 2004) (collecting cases indicating that the Fourth, Sixth, Seventh, and Ninth Circuit Courts of Appeals had adopted the "collective rights model" of the Second Amendment).

[46] *Heller*, 554 U.S. at 591 ("Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.").

[47] *See, e.g.*, North Carolina v. Rice, 404 U.S. 244, 246 (1971) ("Early in its history, this Court held that it had no power to issue advisory opinions.").

[48] *Heller*, 554 U.S. at 595.

[49] *Id.* at 636.

[50] *Id*. at 627.

[51] *See generally* RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802 at 40-45 (Free Press ed., 1975).

Amendment assumes that the militia is necessary to the security of a free state and the Supreme Court permits legislative regulation of ordinary military equipment, whether or not the militia is needed.

## IV. THE TYPES OF REGULATION *HELLER* AND *MILLER* SUPPORT

To summarize, the findings in *Miller* indicated that the Supreme Court would uphold legislation reasonably related "to the preservation or efficiency of a well-regulated militia."[52] The Court in *Heller* stated that a legislature could not prohibit "an entire class of arms."[53] The protection of the Second Amendment extended to "certain types of weapons" which were "in common use at the time" and which could be classified as "ordinary military equipment."[54] The protection of the Second Amendment did not extend to "dangerous and unusual weapons" of a kind "not typically possessed by law-abiding citizens for lawful purposes."[55] The Court in *Heller* further stated that the weapons could be used for self-protection, though it referred to protection of "the hearth and home," and added that it did not read the Second Amendment as permitting arms to be carried "for any sort of confrontation."[56] The particular restrictions permitted by the decision in *Miller*, and endorsed in *Heller*, affected the type of action the firearms used and the firearms' barrel length.[57]

The United States Constitution, in Article 1, Section 8, reserves to the states the right to appoint officers and train their militias.[58] United States military policy no longer relies on the militia.[59] The militia "is primarily a state institution."[60] Moreover, the United States

[52] United States v. Miller, 307 U.S. 174, 178 (1939).
[53] 554 U.S. at 628.
[54] *Id.* at 623-25.
[55] *Id.* at 627.
[56] *Id.* at 595, 636.
[57] 26 U.S.C. §§ 5801-62 (containing the National Firearms Act of 1934); United States v. Miller, 307 U.S. 174, 175 (1939) (discussing short-barreled shotguns); District of Columbia v. Heller, 554 U.S. 570, 596 (2008) (discussing "machineguns").
[58] *See* U.S. CONST. art. I, § 8, cl. 16.
[59] *See generally*, G. GENTILE, ET AL., U.S. MILITARY POLICY.
[60] S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471, 478 (1917) (A member of U.S. Army Judge Advocate General Corps discusses the militia in the context of writs of habeas corpus brought against the federal government "for

government "has only a limited control over [the militia] for the limited purposes expressed by the Constitution."[61] By making legislative findings concerning the likely composition of its militia, the extent of training its militia members probably have, and the firearms and other weapons best suited for the duties that its untrained militia could be expected to accomplish, Congress or a state legislature could regulate firearms and other weapons with laws that the courts would be reluctant to overturn.[62]

### A. Legislative Findings

As a general matter, courts consider legislative bodies to be better equipped to collect evidence and make determinations about the best way to enact laws to achieve a given objective. This article recommends that legislative bodies make legislative findings to define "ordinary military equipment" in order to preserve and promote the efficiency of a well-regulated militia. [63] When Congress or a state legislature makes legislative findings, the courts are inclined to defer to the legislative intent expressed in those findings.[64]

The inclination to defer to legislative determinations is particularly pronounced in the area of military decision-making. As a matter of policy, courts have been historically reluctant to second-guess military decisions because these decisions require expert knowledge and the courts believe that they do not have the expertise to make military decisions.[65] For example, in its 1972 decision of

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the release of some member of the forces subjected to the call" usually on the ground of minority).

[61] *Id.*

[62] Although this article recommends that the "ordinary military equipment" be defined by the legislature, it is worth noting that *Miller* upheld the 1934 Firearms Act without referring to the Act's legislative history. *Miller*, 307 U.S. at 178 ("[I]t is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use would contribute to the common defense.").

[63] *Id*.

[64] *See, e.g.,* Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (upholding statute authorizing commitment for sexually violent predators and noting that the Supreme Court "ordinarily defer[s] to the legislature's stated intent").

[65] Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence . . . [than] professional military judgments.").

*Gilligan v. Morgan*,[66] the Supreme Court rejected a challenge to "training, weaponry and orders" of the Ohio National Guard following the Kent State shootings, noting that "congressional and executive authority to prescribe and regulate the National Guard . . . clearly precludes any form of judicial regulation of the same matters."[67]

### B. The Preservation and Efficiency of the Militia

The phrase "the preservation or efficiency of a well regulated militia" was not explained and does not appear to be a term of art.[68] Accordingly, the words "preservation" and "efficiency" are entitled to their normal and ordinary meaning.[69]

The normal and ordinary meaning of "preservation" is to save and maintain what already exists and to protect it from destruction or degradation.[70] While the Second Amendment makes no reference to public safety, the use of the word "preservation" suggests that ensuring the safety of militia members would be a reasonable consideration of the legislature.[71]

The normal and ordinary meaning of "efficiency" suggests that an objective is achieved effectively with a minimum of waste, expense, or effort.[72] This, in turn, indicates that in regulating the militia a legislature can examine the militia's history, duties, and accomplishments.

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[66] *Id.*

[67] *Id.* at 7-8 (internal punctuation omitted).

[68] *See* District of Columbia v. Heller, 554 U.S. 570, 622 (2008).

[69] *Cf. id*. at 577 ("[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.").

[70] BLACK'S LAW DICTIONARY 1066 (5th Ed. 1979); *Preserve*, THE AMERICAN HERITAGE DICTIONARY 980 (2d ed. 1985) (defining "preserve" as the ability "to keep safe from injury, peril, or other adversity"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 931 (9th ed. 1988) (defining "preserve" as the ability "to keep safe from injury, harm, or destruction").

[71] United States v. Miller, 307 U.S. 174, 178 (1939) ("[T]he preservation and efficiency of a well regulated militia.").

[72] THE AMERICAN HERITAGE DICTIONARY 440 (2d ed. 1985) (defining "efficient" as "[a]cting or producing effectively with a minimum of waste, expense, or unnecessary effort"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 397 (9th ed. 1988) (defining "efficient" as being "productive without waste").

### C. The Likely Composition of the Militia

A legislature's first step in regulating the militia is to determine the militia's likely composition. There is a tendency today to use the word "militia" as a synonym for any armed gang. However, it is apparent from the language of the Constitution and the Second Amendment that the purpose of the militia in the United States of America is to protect the federal government and the individual states.[73] Individuals or groups cannot organize their own militias.[74] Each state is in control of its own militia.

The founders initially favored militias because they distrusted standing armies.[75] At least some of the founders believed that, to the extent that the United States would need military power, such a need would be intermittent and could be satisfied by the militia.[76] In the Federalist Papers, James Madison predicted that the United States' militia could provide a force "near half a million of citizens with arms in their hands . . . ."[77] By way of comparison, in 1790 the population of the United States was less than 4 million.[78] In 2010, the population of the United States was more than 308 million.[79] Extrapolating from James Madison's number, the United States' total militia would easily number in the millions and, in fact, many individual state militias would number in the millions.[80]

Unfortunately, soon after the Bill of Rights was ratified, it became evident that the militia did not have the discipline or professionalism needed to satisfy the military needs of the new

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[73] U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State . . . .").

[74] District of Columbia v. Heller, 554 U.S. 570, 622 (2008) ("[T]he Second Amendment . . . does not prevent the prohibition of private paramilitary organizations." (citing Presser v. Illinois, 116 U.S. 252 (1886))).

[75] *Id.* at 595.

[76] *Id.*

[77] THE FEDERALIST NO. 46 (James Madison).

[78] *1790 Fast Facts*, U.S. CENSUS BUREAU, (Dec. 17, 2020), https://www.census.gov/history/www/through_the_decades/fast_facts/1790_fast_facts.html.

[79] *2010 Fast Facts*, U.S. CENSUS BUREAU (Dec. 17, 2020), https://www.census.gov/history/www/through_the_decades/fast_facts/2010_fast_facts.html.

[80] THE FEDERALIST NO. 46 (James Madison) (proposing that the militia of the United States could produce a force of "near half a million of citizens . . . .").

country.[81] The United States has had a standing army since soon after the Constitution was ratified. However, the militia itself still exists and each state is in the control of its militia.

Traditionally, the militia included "all subjects and citizens capable of bearing arms, regardless of age or parental authority."[82] The United States Code sets out a subset of the militia by defining it as "all able-bodied males at least 17 years of age. . . and under 45 years of age . . . ."[83] The United States Code divides this subset of the militia into the organized militia, which consists of the National Guard and the Naval Militia, and the unorganized militia, which consists of the members of the militia who are not members of the National Guard or Naval Militia.[84] In 2018, 18 million Americans, or roughly seven percent of the population, were veterans.[85] It can be fairly deduced from these statutory provisions and census numbers that most members of the unorganized militia have no military training.

### D. Likely Duties of the Militia

A legislature's second step in regulating the militia is to determine what kind of duties militia members might be called to undertake. Regular soldiers are full-time paid professional soldiers.[86] Regulars are members of the regular army, or standing army, of a nation.[87] Irregulars are not part of a regular army, or standing army,

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[81] *See generally* WILLIAM HOGELAND, AUTUMN OF THE BLACK SNAKE 123-84 (2017); *see also* G. GENTILE ET AL., U.S. MILITARY POLICY at 9 (regarding the militia's "unpredictability in battle").

[82] S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L. J. 471, 471 (1917).

[83] 10 U.S.C. § 246(a).

[84] *Id.* § 246(b).

[85] JONATHAN VESPA, THOSE WHO SERVED: AMERICA'S VETERANS FROM WORLD WAR II TO THE WAR ON TERROR, U.S. CENSUS BUREAU REP. NO. ACS-43 at 1 (2020).

[86] THE AMERICAN HERITAGE DICTIONARY 1041 (2d ed. 1985) (defining "regular" as "belonging to or constituting the permanent army of a nation …. [a] soldier belonging to a regular army"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 992 (9th ed. 1988) (defining "regular" as "one who is regular: as . . . a soldier in a regular army").

[87] THE AMERICAN HERITAGE DICTIONARY 1041 (2d ed. 1985) (defining "regular army" as "[t]he permanent standing army of a nation or state"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 992 (9th ed. 1988) (defining "regular army" as "a permanently organized body constituting the standing army of a state").

and are raised for a special purpose.[88] Militia members are not part of the standing army and are called only in case of emergency.[89] Accordingly, members of the militia who are called to service are irregular soldiers.

As a historical matter, the performance of militias through United States history has been inconsistent. In 1794 the Whiskey Rebellion in western Pennsylvania was subdued effectively by a force of 13,000 militiamen led by George Washington and provided by Virginia, Maryland, New Jersey, and Pennsylvania.[90] However, the militia were of little use during the War of 1812.[91] As the borders of the United States expanded westward, citizens saw less need for the militia, and musters of the militia waned and eventually expired.[92] For most of the 19th Century, the United States augmented its military expeditions not with militia units themselves, but with volunteers from the militia.[93]

From these facts, certain deductions can be made concerning "the preservation and efficiency of a well regulated militia."[94] If the militia was called, the potential number of members responding would be in the millions. Furthermore, most militia members would have no military training or experience. The most that the government could

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[88] THE AMERICAN HERITAGE DICTIONARY 678 (2d ed. 1985) (defining "irregular" as "[a] soldier, such as a guerrilla, who is not a member of a regular military force"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 640 (9th ed. 1988) (defining "irregular" as "[a] soldier who is not a member of a regular military force").

[89] THE AMERICAN HERITAGE DICTIONARY 796 (2d ed. 1985) (defining "militia" as "the armed citizenry as distinct from the regular army"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 753 (9th ed. 1988) (defining "militia" as "the whole body of able-bodied male citizens declared by law as being subject to call to military service").

[90] G. GENTILE, ET AL., U.S. MILITARY POLICY at 15 ("The militia performed below expectations.").

[91] *Id.* at 19 (explaining that in 1814 the U.S. Army, augmented by the militia, was inadequate to stop a force of 5,000 British regulars from invading Washington, D.C., and burning the White House).

[92] 3 JOHN E. JESSUP, ENCYCLOPEDIA OF THE AMERICAN MILITARY: STUDIES OF THE HISTORY, TRADITIONS, POLICIES, INSTITUTIONS, AND ROLES OF THE ARMED FORCES IN WAR AND PEACE 2074-75 (1994); BARRY M. STENTIFORD, THE AMERICAN HOME GUARD: THE STATE MILITIA IN THE TWENTIETH CENTURY 6-7 (2002) ("The martial enthusiasm needed for an effective militia often waned, however, at the local, state, and federal levels.").

[93] G. GENTILE ET AL., U.S. MILITARY POLICY at 18.

[94] United States v. Miller, 307 U.S. 174, 178 (1939).

expect of those militia members who provided themselves with "ordinary military equipment" would be that they could load, fire, and maintain their own equipment.

### E. Ordinary Military Equipment

Several observations can be made about the term "ordinary military equipment."[95] First, the decisions in *Miller* and *Heller* indicate that individual states can make their own decisions concerning what constitutes ordinary military equipment, given their reliance on *Aymette*, which upheld a Tennessee law concerning concealed weapons.[96] Furthermore, as the court in *Aymette* explained, ordinary military equipment is intended to be carried openly and obviously, rather than concealed.[97] There is no reason for a citizen who is mustered to protect the state to conceal the fact that he or she is bearing arms. This indicates that so-called "concealed carry" statutes[98] have no support in the Second Amendment.[99] Naturally, a state legislature may choose to allow its citizens to carry concealed weapons, but the Second Amendment does not require it.

Another important point is that "ordinary military equipment" means lethal weapons.[100] While this observation may be distasteful, it

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[95] *Id.* at 178.

[96] Aymette v. State, 21 Tenn. (2 Humph.) 154 (1840).

[97] *Id.* at 159 ("[T]he arms the right to keep which is secured are such as are usually employed military equipment …. not . . . those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber or assassin.").

[98] Editorial, *Going National with Concealed Guns*, N.Y. TIMES, Dec. 6, 2017, at A26.

[99] As noted earlier, the Court in *Heller* stated that weapons permitted under the Second Amendment could be used for self-protection. However, *Heller* referred to protection of "the hearth and home," and added that it did not read the Second Amendment as permitting arms to be carried "for any sort of confrontation." District of Columbia v. Heller, 554 U.S. 570, 595, 635 (2008).

[100] The militia is described as "being necessary to the security of a free state . . . ." U.S. CONST. amend. II. The function of the militia is to "execute the laws of the union, suppress insurrections and repel invasions." U.S. CONST. art. I, § 8, cl. 12. The "basic personal firearm of soldiers" is the rifle. EDWARD LUTTWAK & STUART KOEHL, THE DICTIONARY OF MODERN WAR 487 (1991). Soldiers may, on occasion, use non-lethal weapons for specific purposes. DAVID P. FIDLER, THE INTERNATIONAL LEGAL IMPLICATIONS OF NON-LETHAL WEAPONS, 21 MICH. J. INT'L L. 51, 52, 55-60 (1999). Nevertheless, non-lethal weapons are not "ordinary military equipment" in "common use at the time" as described in *Heller* and *Miller*. 554 U.S.

also shows that incapacitating weapons, such as stun guns and chemical sprays, or other kinds of non-military weapons, are not protected by the Second Amendment and may be regulated without violating the U.S. Constitution or federal law.

Finally, not every kind of military weapon is protected by the Second Amendment. Only ordinary military equipment, and in particular, "certain types of weapons" which were "in common use at the time" are protected by the Second Amendment.[101] "[D]angerous and unusual weapons" are not protected.[102] Machineguns, short-barreled shotguns, and short-barreled rifles are not protected by the Second Amendment.[103] Since Congress is given power to organize the militia,[104] and since most of the militia is unorganized,[105] it can be deduced that weapons requiring training and cooperation between or among individuals, such as crew-served weapons, are also not protected by the Second Amendment. Thus, ordinary military equipment means such small arms as an individual could carry into combat, chiefly rifles.[106] To a certain extent, other popular classes of arms, in particular handguns, can be ordinary military equipment.[107]

A legislature would be most knowledgeable about the likely composition of its militia, the duties to which its militia would probably be assigned, and the need to preserve its militia and promote its efficiency. By using this knowledge, a legislature could well determine that other types of weapons were not suitable as ordinary military equipment.

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at 596; 307 U.S. at 178. Suppressing insurrection and repulsing invaders requires "ordinary military equipment" that can be lethal in effect.

[101] *Heller*, 554 U.S. at 623-25.

[102] *Id.* at 627.

[103] 26 U.S.C. §§ 5801-62; *see Miller*, 307 U.S. 174, 175 (1939) (discussing short-barreled shotguns); *Heller*, 554 U.S. 570, 596 (2008) (discussing "machineguns").

[104] U.S. CONST. art. I, § 8, cl. 16 ("The Congress shall have Power . . . [t]o provide for organizing arming, and disciplining, the Militia . . . .").

[105] 10 U.S.C. § 246(b).

[106] *See generally* 25 THE ENCYCLOPEDIA AMERICANA 44 (2000) (defining "small arms" as weapons which could "be carried in the hand in combat"); EDWARD LUTTWAK & STUART KOEHL, THE DICTIONARY OF MODERN WAR 487 (1991) (defining "rifle" as "the basic personal firearm of soldiers").

[107] *See Heller*, 554 U.S. at 629 ("[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").

In connection with this point it is worthwhile to review why the Supreme Court struck down the District of Columbia's handgun regulation. The Court in *Heller* stated that a legislature could not prohibit "an entire class of arms."[108] The Supreme Court noted several considerations that made a handgun useful for self-defense within the home, explaining that handguns were easier to store, may be easier to use than long guns, and that handguns could be operated with one hand.[109] These considerations were suggested by amici.[110]

### F. Classes of Arms

As noted at the beginning of this article, following many well-publicized mass shootings, legislatures have been under pressure to regulate semi-automatic rifles and semi-automatic handguns. An automatic firearm, such as a machine gun, is capable of firing rounds continuously until its ammunition is exhausted, as long as the trigger is depressed.[111] A semi-automatic firearm fires a single round, ejects the spent cartridge, and loads another round with each pull of the trigger.[112] Semi-automatic firearms are distinguished from other types of firearms which require a manual action, such as a bolt action, to eject the spent cartridge and load another round.[113] Semi-automatic handguns are distinguished from revolvers, which are a type of

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[108] *Id.*

[109] *Id.* at 629.

[110] *Id.* at 710 (Breyer, J., dissenting) ("[T]hat a person using one will still have a hand free to dial 911.").

[111] THE AMERICAN HERITAGE DICTIONARY 143 (2d ed. 1985) (defining "automatic" as being "capable of firing continuously until ammunition is exhausted"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 118 (9th ed. 1988) (defining "automatic" as "using either gas pressure or force of recoil and mechanical spring action for repeatedly ejecting the empty cartridge shell, introducing a new cartridge, and firing it").

[112] THE AMERICAN HERITAGE DICTIONARY 796 (2d ed. 1985) (defining "semi-automatic" as "ejecting the shell and loading the next round of ammunition automatically after each shot has been fired"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1069 (9th ed. 1988) (defining "semi-automatic" as "employing gas pressure or force of recoil and mechanical spring action to eject the empty cartridge case after the first shot and load the next cartridge from the magazine but requiring release and another pressure of the trigger for each successive shot").

[113] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 166 (9th ed. 1988) (defining "bolt-action" as "loaded by means of a manually operated bolt").

handgun containing a cylinder with multiple chambers, each of which is rotated into line with the barrel for firing.[114]

### G. Taxing Certain Types of Arms

It is likely that, using the analysis the Supreme Court employed in *Miller*, and which was re-affirmed in *Heller*, a legislature that made appropriate findings could, in effect, regulate semi-automatic rifles, semi-automatic handguns, and extended magazines to the extent that they are not needed for use with the militia, and, accordingly, not needed for non-military purposes. Some politicians have suggested confiscating firearms.[115] A more effective and less controversial way to regulate semi-automatic rifles, semi-automatic handguns, and extended magazines would be to employ registration and a stamp tax of the kind used by Congress in the National Firearms Act of 1934 to regulate machine guns, short-barreled shotguns, and short-barreled rifles.[116] In this manner possession of these kinds of weapons would not be directly banned, but instead be made uneconomical.

## V. REGULATING ORDINARY MILITARY EQUIPMENT

With this background and using the analysis the Supreme Court employed in *Miller* and *Heller*, a legislature could reasonably, effectively, and without controversy, discourage possession of semi-automatic rifles. Assume, for example, that a legislature wishes to regulate rifles to encourage its militia members to equip themselves with rifles with manual actions, such as rifles using bolt actions, which require that the users work the bolt after each shot to chamber another

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[114] THE AMERICAN HERITAGE DICTIONARY 1058 (2d ed. 1985) (defining "revolver" as "[a] pistol having a revolving cylinder with several cartridge chambers"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1010 (9th ed. 1988) (defining "revolver" as a "handgun with a cylinder of several chambers brought successively into line with the barrel and discharged with the same hammer").

[115] *See, e.g.*, Heather Murphy, *Beto O'Rourke and Pete Buttigieg Battle Over Confiscating Assault Weapons*, N.Y. TIMES (Oct. 15, 2019), https://www.nytimes.com/2019/10/15/us/politics/beto-guns.html; Thomas Kaplan, *Cuomo to Press for Wider Curbs on Gun Access*, N.Y. TIMES (Jan. 8, 2013), https://www.nytimes.com/2013/01/09/nyregion/cuomo-to-propose-more-expansive-ban-on-assault-weapons.html.

[116] *See* 26 U.S.C. § 5811 (regarding transfer tax on firearms); *see also* § 5845(a) (defining "firearm").

cartridge. The state legislature could begin by making legislative findings concerning the members of its militia and the militia members' likely level of military training and expertise. As demonstrated earlier, if the militia was mustered, its members could easily number in the millions. Of these members, only a small minority would have any military training and experience. Most of the militia members who had military experience would be out of condition and practice.

The legislature could then make findings by identifying the ordinary military equipment that its militia members could be expected to use effectively. As noted earlier, since the militia would be engaged in military duties, the ordinary military equipment would have to be lethal.[117]

Nevertheless, the fact that militia members need lethal military equipment does not necessarily mean that militia members would need to have semi-automatic weapons. Untrained and inexperienced militia members using semi-automatic rifles could easily fire repeatedly without discipline, waste ammunition, and endanger each other. In fact, the larger the militia force, the more likely that such accidents would occur.[118]

A legislature could reasonably find that, given the large number of militia members and each member's likely level of training, experience, and conditioning, it would be better if militia members were equipped with rifles with manual actions. A militia member who can fire only one shot before working the action could reasonably be expected to choose what target he or she is shooting at, to aim at that target more carefully, and consider what he or she is doing before pulling the trigger. Restricting ordinary military equipment to manual-action rifles may not eliminate accidents, but it would probably reduce those accidents.

The legislature could make findings on several other uncontroversial military considerations, such as the need to standardize kinds of ammunition to make resupply easier, and militia members' need for arms that are reliable and easy to use and maintain. Once these legislative findings are made, the state legislature could

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[117] *See supra* text accompanying note 100.

[118] Sara J. Solnick & David Hemenway, *Unintentional Firearm Deaths in the United States 2005–2015*, INJ. EPIDEMIOLOGY, Sept.–Oct. 2019, at 1, 2, 4 (presenting data concerning unintentional firearm fatalities in sixteen states reporting to the National Violent Death Reporting System).

then make laws that encourage possession of the types of weapons it feels are best suited to the needs of its militia while discouraging other types, such as, in this example, semi-automatic rifles.

In a similar way, a legislature could discourage possession of semi-automatic handguns. These types of handguns frequently have large-capacity magazines, are easily concealed and adapted to criminal purposes. Under *Heller*, a legislature cannot ban an entire class of firearms, such as handguns.[119] It can, however, discourage possession of semi-automatic handguns and encourage possession of revolvers, which chamber cartridges using smaller-capacity cylinders rather than magazines.

Semi-automatic rifles have certain advantages, and manual-action rifles have other advantages.[120] Likewise, semi-automatic handguns have certain advantages, and revolvers have other advantages.[121] After hearings a legislature is unlikely to find a consensus about what type of rifle or handgun would best promote the efficiency of a largely untrained, inexperienced, and unreliable militia. However, making decisions about the best way to accomplish an objective is the function of the legislature.[122]

If a state enacts this type of firearm regulation, supported by legislative findings, a court will probably reject a constitutional challenge to the regulation. The state legislature is not violating the

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[119] District of Columbia v. Heller, 554 U.S. 570, 628 (2008) ("[A] complete prohibition of [handguns] is invalid.")

[120] 10 THE NEW ENCYCLOPEDIA BRITANNICA 65 (1902-1903) ("Bolt-action [rifles are] efficient, reliable, and easy to manufacture and maintain . . . ."). Semi-automatic rifles ordinarily use a gas-operated autoloading system that is more complicated than a manual-action rifle. 25 ENCYCLOPEDIA AMERICANA 46 (2000). However, semiautomatic rifles, which are loaded from a 20- or 30-round magazine, fire at each pull of the trigger, allow a higher rate of fire than do manual-action rifles. *Id.* at 46-47.

[121] Semi-automatic pistols, like semi-automatic rifles, are loaded using magazines which can hold more than ten cartridges. *Id.* at 46. Revolvers, by contrast, use rotating cylinders and normally hold six cartridges. *Id.* at 47. In addition, revolvers can chamber different sizes of cartridges, depending on the caliber of the revolver. Grant Cunningham, *5 Advantages of the Revolver*, GUN DIGEST (Sep. 10, 2013), https://gundigest.com/article/5-advantages-of-the-revolver.

[122] Fed. Commc'n Comm'n v. Beach Commc'n, 508 U.S. 307, 313-14 (1993) ("The Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." (citing Vance v. Bradley, 440 U. S. 93, 97 (1979))).

constitutional right to keep and bear arms. It is merely regulating arms to preserve its militia and promote its efficiency. The regulation would not affect the individual right to self-protection described in *Heller* because any firearm or weapon that has a military purpose can be used for protection "of hearth and home."[123]

## VI. CONCLUSION

Obviously, this type of regulation will not end the likelihood that firearms, whether acceptable for use by the militia or not, will be used for crime. Manual-action rifles and revolvers are deadly weapons. Nevertheless, this type of regulation could reduce the kind of mass shootings perpetrated by single gunmen that the country has seen in recent years.[124] In addition, this type of regulation, to the extent that it sets guidelines for the militia and the right to self-protection, will be considerably easier to reconcile with the language of the Second Amendment than the public safety argument, on which gun regulation currently relies.

[123] *Heller*, 554 U.S. at 595, 635.

[124] FED. BUREAU OF INVESTIGATION, ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2020 at 2-4 (2021).