The Corporate Right to Bear Arms

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THE CORPORATE RIGHT TO BEAR ARMS

ROBERT E. WAGNER

ABSTRACT

The ability of a corporation to exercise constitutional protections has been rife with uncertainty and change since the conception of corporate rights came into existence. The history and rapid development of the corporation, combined with the misapplied and misunderstood “corporate personhood” theory, have resulted in an almost unintelligible hodgepodge of corporate constitutional applications. Similarly, the concept of the right to bear arms has equally been muddled and applied very differently at varying times and locations since before the establishment of the Second Amendment. This Article attempts to clarify how an alternative to the “corporate personhood” theory, namely the “purpose” theory is increasingly relied on by the Supreme Court to more consistently and transparently extend or restrict constitutional rights. Purpose analysis provides a sound legal basis to conclude that the Second Amendment should also be applied to corporations.

In recent years, the Supreme Court has dramatically increased the rights of corporations. Simultaneously the Court has also significantly augmented the right of Americans to possess and publicly carry a vast array of firearms. However, the Court has never said whether this right is one possessed by corporations. Nevertheless, the reasoning in many cases generally dealing with corporate rights and gun rights, including the Court’s most recent Second Amendment case, point to the answer that corporations are entitled to the right to bear arms. While there is an understandable amount of antipathy on the part of many scholars to expanding Second Amendment rights in the manner that the 2022 Supreme Court decision in New York State Rifle & Pistol Association v. Bruen did, a corporate right to bear arms

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does not reflect the same risks discussed in Bruen. Currently, there is a split in whether lower courts have held in favor of corporations (or other collectives) having Second Amendment rights, and this disagreement could and should eventually come before the Supreme Court.

Whether one agrees with the outcome of Bruen or not, purpose analysis, which entails judicial examination of the purpose behind particular constitutional provisions to determine their boundaries, dictates that corporations should have Second Amendment rights. Indeed, corporations’ interests in these rights are rooted in and further the key purposes of the Second Amendment: self-defense, protection of third parties, and defense of property.
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INTRODUCTION

Do corporations have Second Amendment rights? This Article, building on a body of past work,¹ shows why one should apply a purpose analysis to the Second Amendment and answer this question in the affirmative.

The goal or purpose of the Second Amendment is defense.² This concept is judicially framed in multiple ways, including self-defense, defense of hearth and home, and defense of property—rationales all subsumed under the concept of protection.³ This Article shows that recognizing Second Amendment rights for corporations furthers this goal.

The growing desire of diverse groups wanting to exercise the right to bear arms and the contradictory treatment many courts have given them demonstrates the importance of this question. Groups of people, such as local governments, have in recent years increasingly asserted their interest in the right to keep and bear arms.⁴ Many different types of organizations, some more problematic than others, that may want to possess weapons or direct their use are formed as corporations. These include private security corporations, private detention facilities, armored car companies, as well as associations and organizations like the Guardian Angels, some chapters of the Black Panther Party, the parent organization of the Minutemen (a border patrol group), and

¹ See generally Robert E. Wagner, Corporate Criminal Prosecutions and the Exclusionary Rule, 68 Fla. L. Rev. 1119 (2016) [hereinafter Wagner, Corporate Criminal Prosecutions] (proposing that courts should adopt a default rule that all reliable evidence should be admitted against corporate defendants regardless of its provenance); Robert E. Wagner, Miranda, Inc.: Corporations and the Right to Remain Silent, 11 Va. L. & Bus. Rev. 499 (2017) (discussing why corporations do not have the right to remain silent and whether it should remain true); Robert E. Wagner, Cruel and Unusual Corporate Punishment, 44 J. Corp. L. 559 (2019) (advocating that laws and institutions must go hand in hand with the progress of the human mind to become more developed and enlightened); Robert E. Wagner, Corporate Criminal Prosecutions and Double Jeopardy, 16 Berkeley Bus. L.J. 205 (2019) (arguing that corporations should not obtain the Double Jeopardy Clause protection).
certain chapters of the Ku Klux Klan. In addition, some school districts also want to arm their teachers. However, it has not been judicially established whether groups of people, local governments, schools, or corporations, have the right to own and use firearms; and, if so, what limitations on these groups would be constitutionally permissible.

One reason to allow corporations to have Second Amendment rights is that it would increase their ability to ban guns on their property and in their businesses, thereby protecting their employees and customers. Courts have recently been asked to reject businesses’ claims of Second Amendment violations under the rationale that corporations are not “people” or “individuals” and hence are not entitled to Second Amendment protection. However, some courts that have addressed this issue refused to extend the right and stated that “people” in the Second Amendment means the same thing as it does throughout the Bill of Rights. Nevertheless, other judges have said that “organizational plaintiffs ‘do not have the necessary standing to demonstrate their irreparable harm’ because ‘Heller and McDonald addressed an individual’s right to possess a firearm’ but ‘did not address an organization’s right.’” In that case, the City of Chicago emphasized that the Second Amendment protects an individual right, not an organizational one, and this point led the court to conclude that “the organizations do not have the necessary standing to demonstrate their irreparable harm.” Many of these discussions highlight the problem with using any version of “personhood theory” as opposed to “purpose” theory in deciding to what rights a corporation is entitled. After the Supreme Court expanded corporations’ First Amendment rights, as well as the

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6 Fagundes & Miller, supra note 4, at 679.
7 *Id.* at 731–33.
9 *Id.* at 761 (citation omitted).
10 Ezell v. City of Chicago, 651 F.3d 684, 693 (7th Cir. 2011).
11 *Id.* at 696.
12 See Fagundes & Miller, supra note 4, at 701–07.
scope of Second Amendment rights for individuals, the question now arises whether the next step will be to enlarge corporations’ Second Amendment rights, and how the choice of theoretical lens could be outcome determinative.\textsuperscript{13}

Part I begins with a discussion of the history of the treatment of corporations in the law as well as an analysis of the corporate personhood theory and the purpose theory, which the current Supreme Court has applied with greater frequency. Part II offers a history of the Second Amendment. Part III analyzes the established purpose of the Second Amendment and how that purpose legitimizes the application of the Second Amendment to corporations. Some of these discussions highlight the flawed approach that the Court adopted in \textit{Bruen}, which a number of scholars have argued was an extreme move. This Part also points out how the \textit{Bruen} decision suffers from flawed factual and legal analysis. For example, the Supreme Court repeatedly states that judges do not have the expertise to make cost-benefit judgments when it comes to firearms\textsuperscript{14} and that judges should not be empowered to make these decisions,\textsuperscript{15} while the Court, at the same time, eliminates all evaluation from legislators and assumes significant power for the six Justices in the majority.\textsuperscript{16} While the reasoning of the \textit{Bruen} decision may be flawed, there is little doubt that the decision’s reasoning and rationale, and a more thoughtful and balanced approach to the Second Amendment in years to come, point to the conclusion here, that corporations should be able to exercise the right to bear arms.

I. CORPORATE HISTORY AND CONSTITUTIONAL STANDING

As the Supreme Court said over one hundred years ago, “[c]orporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.”\textsuperscript{17} Basically, corporations exist because there are some ventures that require the combined efforts and

\textsuperscript{13} Miller, \textit{Guns, Inc.}, supra note 5, at 902.
\textsuperscript{14} N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2130 (2022).
\textsuperscript{15} \textit{Id.} at 2131.
\textsuperscript{16} \textit{Id.} at 2153.
\textsuperscript{17} Hale v. Henkel, 201 U.S. 43, 76 (1906).
engagement of several distinct individuals to achieve an intended business outcome.18

However, there is a lot of controversy surrounding what constitutional rights corporations should have.19 This is fueled in part by the different variations of corporations and their relatively new existence as legally cognizable business organizations.20 The word “corporations,” unlike “nations,” “states,” “people,” and “citizens,” is not in the Constitution.21 Scholars have been trying to define and conceptualize corporations for hundreds of years.22 Originally, corporations evolved from European joint stock companies created for a limited period of time, with a specific purpose, and chartered by the monarch.23 There is little to no evidence the founders thought that the Constitution should protect corporations.24

It is understandable that the Constitution would be silent about corporations because during the Eighteenth Century, there were fewer than 400 corporations in existence.25 Not only were corporations not even named in the U.S. Constitution,26 but also only four states mentioned corporations in their original state constitutions (Connecticut, Pennsylvania, Massachusetts, and Vermont).27 “The Constitution’s drafting history indicates that the

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19 See Fagundes & Miller, supra note 4, at 702.
20 See id. at 689–90.
21 Miller, Guns, Inc., supra note 5, at 909.
24 Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights 3 (2018) [hereinafter Winkler, We the Corporations].
business corporation as it exists today was not within the imagination of the Framers,” just like modern firearms’ capabilities were far beyond what the Framers could have envisioned.28 “Corporate Second Amendment rights therefore challenge the Court’s current preference for originalist methodologies”29 for interpreting questions of constitutional rights.

Even if not referenced in the Constitution, corporations do have a long history in the United States, some of which involved firearms. Prior to the formation of the country, corporations chartered to settle early colonies were given the authority to employ arms for their defense and safety.30 Private corporations like the Pinkerton National Defense Agency have historically provided protective and investigative services and maintained large private arsenals.31 History, however, can be an uncertain guide for analyzing corporate law or gun regulation because its application and interpretation may come down to a Supreme Court justice’s subjective choice of historical evidence or narrative.32 For both corporations and firearms, there are limits when one tries to analogize contemporary laws and regulations to those from over one hundred years ago.33 In Bruen, the Supreme Court, emphasizing the supremacy of historical analysis in this context, acknowledged the difficulty of using history when dealing with “unprecedented societal concerns or dramatic technological changes.”34

Along with their relatively new appearance and dramatic transformations over the decades, the vast degree of variation between corporations also raises challenges for applying certain laws and granting particular rights to them. Corporations are endlessly diverse, ranging from Coca-Cola and the New York Times to a small family company and a modest church.35 Some

28 Miller, Guns, Inc., supra note 5, at 951.
29 Id.
30 Id. at 934.
31 Id. at 935.
33 Kachalsky v. County of Westchester, 701 F.3d 81, 91 (2d Cir. 2012).
34 N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2132 (2022).
35 Elizabeth Pollman, A Corporate Right to Privacy, 99 MINN. L. REV. 27, 63 (2014) [hereinafter Pollman, Corporate Right to Privacy].
corporations are privately held by a close-knit group of stakeholders, while others are publicly held with large numbers of shareholders, separate executive management, and a distinct board of directors.  

A few corporations have accrued and exercised power equal to, or surpassing, the coercive power of the state. But the vast majority of corporations are much smaller. In fact, the Supreme Court has pointed out that most corporations are small: of the three “million businesses that belong to the U.S. Chamber of Commerce,” more than ninety-five percent “have fewer than 100 employees,” and of all federally taxed corporations, more than seventy-five percent have less than one million dollars in receipts reported per year.

The purposes of corporations also vary greatly: GE, Ford, Facebook, the Guardian Angels, at least one chapter of the Black Panthers, and some Ku Klux Klan chapters are all organized as corporations, but for very different purposes. The Supreme Court has discussed the difficulty of categorizing corporations because they range from large public companies to small closely held firms, from media companies to retailers, and they exist for an even larger range of purposes.

Notwithstanding their variety, corporations have been viewed as a very serious threat to the survival of America by some of the country’s greatest leaders, like Abraham Lincoln and Theodore Roosevelt. Thomas Jefferson feared that corporations “would subvert the Republic.” This fear partially explains why


37 Miller, *Guns, Inc.*, supra note 5, at 891.

38 Garrett, *supra* note 36, at 105.


40 Miller, *Guns, Inc.*, supra note 5, at 906.


42 See Garrett, *supra* note 36, at 98–99 (discussing *Citizens United*).

43 Miller, *Guns, Inc.*, supra note 5, at 950 (citing Timothy K. Kuhner, *The Separation of Business and State*, 95 CAL. L. REV. 2353, 2366–67 (2007) (discussing a fear that these three presidents had about the ability of well-financed corporations to influence and corrupt the government)).

44 *Citizens United*, 558 U.S. at 427 (Stevens, J., concurring in part and dissenting in part).
historically, when compared with individuals, American corporations (and English ones) have had limited constitutional protections.\textsuperscript{45} It may also help to explain why juries are more likely to find corporations guilty than they are to find individuals guilty.\textsuperscript{46} However, it is possible that this fear is misplaced or at least excessive given the social benefits which corporations are capable of delivering to the public.

The first Thanksgiving was a corporate initiative.\textsuperscript{47} But more importantly, corporations are often the most effective defenders of constitutional rights, if for no other reason than unlike many would-be constitutional litigants, corporations have the money and ability to fight.\textsuperscript{48} Corporations were behind most early decisions that helped establish equal protection and other due process guarantees under the Fourteenth Amendment.\textsuperscript{49} The National Association for the Advancement of Colored People (NAACP), a nonprofit membership corporation, was essential in establishing a corporation’s right to freedom of association.\textsuperscript{50} The freedom of the press, one of the hallmarks of American law, owes many of its earliest and most important legal wins to corporations.\textsuperscript{51}

Nonetheless, in the text of the Constitution, there is no explanation of whether its provisions apply to corporations.\textsuperscript{52} Yet, courts have established that corporations are legal persons, with rights and cognizable characteristics making them more and more legally indistinguishable from humans.\textsuperscript{53} Today, corporations are treated in many ways as though they are natural people.\textsuperscript{54} For example, corporations can own property, participate in legally binding contracts, be sued in court and in turn sue others, and be prosecuted and held responsible for criminal

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\textsuperscript{45} Okla. Press Publ’g Co. v. Walling, 327 U.S. 186, 204–05 (1946).

\textsuperscript{46} See Henry W. Edgerton, Corporate Criminal Responsibility, 36 YALE L.J. 827, 834 (1927).

\textsuperscript{47} WINKLER, WE THE CORPORATIONS, supra note 24, at 17.

\textsuperscript{48} Id. at 73.

\textsuperscript{49} Id. at xxiv.

\textsuperscript{50} Id. at 259.

\textsuperscript{51} Id. at 255.

\textsuperscript{52} Pollman, Corporate Right to Privacy, supra note 35, at 44–45.

\textsuperscript{53} Andrew E. Taslitz, Reciprocity and the Criminal Responsibility of Corporations, 41 STETSON L. REV. 73, 73 (2011).

\textsuperscript{54} See id. at 74.
In addition, business entities have long held numerous constitutional rights, including those under the First, Fourth, Fifth, Sixth, and Seventh Amendments, and they have benefited from the Contracts Clause, Due Process Clause, and Equal Protection Clause of the Fourteenth Amendment. But this list of rights and benefits held by corporations has not yet included those that natural persons hold under the Second Amendment.

Some people find the idea of granting corporations any constitutional protections troubling; obviously, the Supreme Court has disagreed, though these rights have not been awarded consistently, and the doctrinal basis upon which they have been granted or denied has also varied. The Supreme Court’s treatment of corporations and its view of what a corporation is has periodically changed over the past two hundred years, affecting the Court’s rulings on constitutional questions. The Court, at times grants rights to corporations as legal persons, and then at other times follows Justice Stevens’s perspective that the Founding Fathers had no problem distinguishing a human being from a corporation.
Corporations have been granted many, but not all, constitutional rights for disjointed, incoherent, and inconsistent reasons. For over two hundred years, the Court has failed to establish a test or standard approach for its corporate rights rulings. Simply saying that a corporation is not a natural person and therefore not entitled to protection under the Bill of Rights is insufficient. Arguably, the current Court’s corporate jurisprudence lacks any consistent conception of what a corporation is, nor does it state a consistent mechanism to decide which rights extend to corporations and which do not. Scholars, on the other hand, have developed complex theories to establish which rights a corporation should have. The contemporary Supreme Court’s treatment of corporations seems to rely on multiple theories of the corporation. One result of its multiple theories is the fact that the Court has never settled upon exactly what a corporation is for constitutional purposes and has never had a consistent test for determining if a particular constitutional right applies to a corporation. Rather than establishing one consistent helpful theory, courts and scholars have used varying theories of corporate personhood to attempt to resolve arguments about what rights a corporation should have.

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62 Miller, Guns, Inc., supra note 5, at 910–12.
63 Pollman, Corporate Right to Privacy, supra note 35, at 50.
64 Citizens United, 558 U.S. at 343.
65 Marcantel, United Framework, supra note 59, at 169.
67 Marcantel, United Framework, supra note 59, at 116.
68 Peter J. Henning, The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions, 63 TENN. L. REV. 793, 807 (1996) (citing for comparison First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (“We need not survey the outer boundaries of the [First] Amendment’s protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment.”), with id. at 823–24 (Rehnquist, J., dissenting) (“Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, our inquiry must seek to determine which constitutional protections are ‘incidental to its very existence.’”) (quoting Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819))).
In recent years and decades, many scholars and jurists have proposed numerous reasons that a corporation should not be granted rights under the Constitution. For example, Justice Alito reasoned that in a corporation, “[a]n established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.” In an earlier decision, Justice White stated fears of further empowering corporations with additional rights in his dissent in *First National Bank of Boston v. Bellotti*:

Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.

In a decision from the Court of Appeals for the Seventh Circuit, Judge Easterbrook suggested that corporations have neither fundamental rights nor liberty interests. Justice John Marshall described a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . .” Furthermore, Justice Stevens stated that “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires . . . . [T]heir ‘personhood’ often serves as a useful legal fiction. But they are not

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71 *Bellotti*, 435 U.S. at 809 (White, J., dissenting).
72 Nat’l Paint & Coatings Ass’n v. City of Chicago, 45 F.3d 1124, 1129 (7th Cir. 1995).
73 *Woodward*, 17 U.S. at 636.
themselves members of ‘We the People’ by whom and for whom our Constitution was established.”74 Legal scholars have frequently expressed concerns about the Supreme Court’s arbitrary, incoherent jurisprudence about the nature of corporations.75 “The decision in *Santa Clara County v. Southern Pacific Railroad Co.* showed another view, from an early Supreme Court, that a corporation has rights and duties conferred upon it stemming from the rights and duties of its human members.”76

Then, less than twenty-five years following *Santa Clara*, but still “over one hundred years ago, the Supreme Court established that there are distinctions between natural people and corporations, holding in *Hale v. Henkel* that the Fifth Amendment gives personal privileges to witnesses that corporations cannot invoke.”77 A number of justices have acknowledged that corporations do not always have to be treated the same way as natural persons.78 Justice Stevens, for example, sought to describe the plain differences between people and corporations, and concluded that the government therefore has to regulate them based on those distinctions.79 However, “[t]he Supreme Court has explicitly noted that the state cannot use the provision of special advantages given to corporations, such as perpetual life or limited liability, as a price for the forfeiture of constitutional rights.”80

The Court rejected in *Citizens United* the idea that natural personhood is a requirement for First Amendment protection.81 The Court said that at least when talking about political speech, there is no basis for “the Government [to] impose restrictions on

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76 Wagner, *Corporate Criminal Prosecutions, supra* note 1, at 1130 (citing *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886)).
77 *Id.* at 1152 (citing *Hale v. Henkel*, 201 U.S. 43, 70 (1906), overruled in part by *Murphy v. Waterfront Comm’n*, 378 U.S. 52 (1964)).
78 *Citizens United*, 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part).
79 See *id.* at 465–66 n.72, 466 (Stevens, J., concurring in part and dissenting in part) (citing *Trs. of Dartmouth Coll. v. Woodward*, 4 Wheat. 518, 636 (1819) (Marshall, C. J.).
81 *Citizens United*, 558 U.S. at 343.
certain disfavored speakers.’” Justice Stevens, apparently jokingly, suggested that after recognizing First Amendment rights in *Citizens United*, to be consistent, the Court would have to grant corporations all other constitutional rights. Several scholars have described “corporate personhood” as a doctrinal non-starter, while others have argued that all corporate personhood means is that a corporation receives certain constitutional protections, without clarifying what those rights are or offering a justification for giving them to corporations. Arguably, anthropomorphizing corporations resulted in novel impositions of criminal liability on them, which both prompted new constitutional questions about and secured additional rights for corporations. But, as far back as *New York Central Railroad Co. v. United States*, the Supreme Court has at times rejected the personification of corporations. Conversely, it has also been claimed that an evaluation of corporate personhood is required to determine how or if a corporation is entitled to constitutional rights. Other scholars have criticized personhood theories for simply laying a theoretical groundwork to argue in favor of whatever legal outcome is preferred. Complicating the analysis is the fact that questions about extending rights to corporations are asked both seriously and in jest, posing hypotheticals about

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82 Id. at 341.
83 Garrett, *supra* note 36, at 98 (citing *Citizens United*, 558 U.S. at 424 (Stevens, J., concurring in part and dissenting in part)).
85 WINKLER, *WE THE CORPORATIONS*, *supra* note 24, at 164.
86 212 U.S. 481, 494 (1909).
87 See id. (“[I]t is true that there are some crimes, which in their nature cannot be committed by corporations.”); Henning, *supra* note 68, at 797 (discussing several constitutional protections for criminal defendants and their applicability to corporations).
88 See Mayer, *supra* note 26, at 579.
the legal reasonability of corporate activities like obtaining marriage licenses,\textsuperscript{91} or running for positions in a legislature.\textsuperscript{92}

The Supreme Court sometimes uses history and purpose tests to analyze the scope of the right in question, and at other times focuses on the nature of the corporation through various lenses viewing it as a creature of the state, an aggregate of people, or a real entity in and of itself.\textsuperscript{93} Use of the person metaphor was historically common, but despite the amount of clamor over recent cases like \textit{Hobby Lobby} and \textit{Citizens United}, the Court has actually described corporations as people less frequently.\textsuperscript{94} Nonetheless, there was a perception of and popular backlash against \textit{Citizens United} as having established or furthered the concept of corporations as people to an unacceptable degree.\textsuperscript{95}

There has been a vast amount of scholarly discussion on this topic since \textit{Citizens United}.\textsuperscript{96} Many scholars, commentators, politicians, and even presidents have criticized \textit{Citizens United}.\textsuperscript{97} After the 2010 decision, some polls found that 80% of Americans opposed it,\textsuperscript{98} revealing both discontent and a perceived disconnect with extending constitutional protections to corporations, rights presumed to exclusively protect people.\textsuperscript{99} This disconnect led at least one pundit to call for a constitutional amendment clarifying that “corporations are not people.”\textsuperscript{100}

(explaining how sources like \textit{The Onion} published a satirical story on the Supreme Court’s decision in \textit{Citizens United}).

\textsuperscript{91} See Guisado, supra note 58, at 123–24.

\textsuperscript{92} Graczyk, supra note 90, at 88.

\textsuperscript{93} Pollman, \textit{Corporate Personhood}, supra note 89, at 1647.

\textsuperscript{94} Graczyk, supra note 90, at 98.

\textsuperscript{95} See \textit{Citizens United v. FEC}, 558 U.S. 310, 319 (2010); see \textit{e.g.}, Pollman, \textit{Corporate Personhood}, supra note 89, at 1664 (noting how public opinion polls found that 80% of Americans opposed the Court’s \textit{Citizens United} ruling).

\textsuperscript{96} Marcantel, \textit{Unified Framework}, supra note 59, at 127–28 (citing Henning, supra note 68, at 797 (“[T]he Court’s opinion in \textit{Citizens United} opened a groundswell of interest in the topic’’)).


\textsuperscript{98} Pollman, \textit{Corporate Personhood}, supra note 89, at 1664. See \textit{infra} notes 109–33 and accompanying text (illustrating how the staggeringly large percentage of Americans opposing the \textit{Citizens United} decision is evidence of the incorrect way the case was presented).

\textsuperscript{99} See Pollman, \textit{Corporate Personhood}, supra note 89, at 1629.

\textsuperscript{100} Robinson, supra note 97, at 607.
federal Constitution, proposed amendments to state constitutions have sought to clarify that corporations are not people in the eyes of the law.101 Originally, some state constitutions awarded specific rights to corporations, but those were different in kind than those given to individuals.102

At least one proposed constitutional amendment specifically required that “the U.S. Constitution protect[ ] only the rights of living human beings,”103 but even if it was ratified, it may not achieve the desired result since one could argue that Citizens United itself protects the free speech rights of living human beings, albeit via a corporation.104 For example, the Court:

[I]n Citizens United . . . did not discuss whether a corporation is a pure creature of state law, as Justice Sotomayor suggested; a ‘real entity’ that can exercise all or most of the legal rights of an individual person; or an aggregate entity that helps groups of people realize their interests.105

In fact, the Court never referenced corporate personhood and nothing in the decision turned on that position; the entire decision rests on the rights of individuals, not entities, like shareholders and those listening to the speech of corporations.106

Both the effect of personification and the sources of corporate constitutional rights have historically diverged from many people’s expectations. For example, Chief Justice Taney, the notorious author of the Dred Scott decision, was one of the most ardent advocates for limiting the rights of corporations,107 and the well-known liberal Warren court started the current era of

101 Petrin, supra note 22, at 18 (citing Susanna Kim Ripken, Corporate First Amendment Rights after Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations, 14 U. PA. J. BUS. L. 209 (2010)).
102 Marcantel, Real Constitutional Person, supra note 27, at 241.
103 Pollman, Corporate Personhood, supra note 89, at 1664 (citation omitted).
104 Id. (“[T]he irony is that the notion of the corporate person was embraced to protect the rights of living human beings—to protect the property of individuals regardless of whether it is held in the corporate form.”).
105 Garrett, supra note 36, at 98–99 (generally examining the application of several constitutional rights to corporations).
106 WINKLER, WE THE CORPORATIONS, supra note 24, at 364.
107 Id. at xix.
extending rights to corporate entities. Justice Sotomayor has asked whether it was a mistake to give human characteristics to a creature of state law. However, surprisingly, corporate personhood can serve to limit the rights given to a corporation. For example, in the first case in which a corporation was explicitly denied extension of a constitutional right, Bank of Augusta v. Earle, the limitation was based on the court’s reasoned acceptance of corporate personhood. In other decisions the Court has granted corporations various constitutional rights with very little discussion.

Often when the Court extends a right to a corporation, it claims to do so in the interests of protecting the rights of the human beings within and supporting the corporation. The more reliable approach is to focus on the purpose of the right rather than on the relationship between the corporation, its constituent individuals, and the state to predict whether the Court will grant a certain constitutional right to corporations. As numerous judges and scholars have observed, there is a modern trend in certain justices’ opinions to zero in on the right in question rather than the entity.

However, Professor Darryl Miller claims that “the Court has no systematic jurisprudence for corporate constitutional rights because it has no systematic jurisprudence for corporate personhood.” He asserts that focusing on the purpose and not the corporate form was a dodge that simply “assumes the equivalence of the corporate person and the natural person.” Other scholars have found that focusing on the nature of corporate personhood can cause “unnecessary complications and flawed

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108 Id. at xx.
109 Miller, Guns, Inc., supra note 5, at 897.
110 See generally WINKLER, WE THE CORPORATIONS, supra note 24.
111 38 U.S. 519 (1839); WINKLER, WE THE CORPORATIONS, supra note 24, at 102.
112 Marcantel, United Framework, supra note 59, at 120.
114 Garrett, supra note 36, at 108 (examining the general analysis for applying several different constitutional rights to corporations).
116 Id. at 914.
117 Id. at 943.
outcomes.” In a different context, Justice Kavanaugh pointed out the overarching interpretive problem of defining a corporate person (as well as appropriate gun regulation) when he said that “it is difficult therefore to apply an overarching interpretive approach to questions of constitutional law that are necessarily guided by decades of precedent interpreting different provisions of the Constitution under different methodologies.”

Additionally, given the multitude of types of corporations with widely varied purposes, some rights may be more appropriately granted to particular corporations. Scholars have suggested that whether or not someone or something is a constitutional person can depend on the right at issue, so a corporate entity could be considered a person in the context of one right and not a person in another. Even natural human beings are in certain instances deemed not a “person” for some constitutional rights. Regardless of how one thinks of a corporation, recognizing “personhood” is, at most, only a part of answering the question of which rights a corporation can exercise and how.

“One could imagine that each right might apply in different ways to individuals and organizations, or apply to only some types of organizations. Instead, the Court keeps constant the substantive content of rights when litigated by organizations.” Ultimately, the Court prioritizes constitutional theory and legal analysis, as opposed to factual questions of organizational diversity and character.

Professor Miller has used organization theory to examine the corporate form and, specifically, how it impacts a corporation’s right to bear arms after Citizens United and McDonald. This Article argues, however, that this is the wrong way to approach questions of corporate constitutional rights. Rather than looking at the organization’s corporate form, one should both

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118 Petrin, supra note 22, at 3.
120 Pollman, Corporate Right to Privacy, supra note 35, at 32.
121 Robinson, supra note 97, at 654–55.
122 Id. at 635.
123 Id. at 607.
124 Garrett, supra note 36, at 100.
125 Miller, Guns, Inc., supra note 5, at 954–55.
examine the right and the purpose behind it to ask if granting the specific right to a corporation furthers its goal. As argued in previous works and as other scholars have stated in a slightly different articulation, “the Court should consider the purpose of the constitutional right at issue, and whether it would promote the objectives of that right to provide it to the corporation—and thereby to the people underlying the corporation.”126

Scholars in a number of other legal contexts have endorsed this approach to various degrees. For example, in the privacy arena, scholars have suggested that courts should ask, “which kind of privacy is involved . . . ?” “[W]hat is the role of the organizational person in advancing the claim?” And “whose interests are at stake, and are those interests weighty enough to mandate protection through the recognition of a right?”127 Endorsing similar reasoning, one scholar proposed using the right’s purpose as a way to determine “constitutional personhood.”128 Additionally, some scholars have endorsed a broader purpose analysis focused on the idea that what really should be asked is whether granting constitutional protections in any instance would further the purpose that the Constitution is trying to fulfill.129 The Court has at times embraced the analytical focus on purpose endorsed here.130 For example, in Bellotti, the Court pointed out that the purpose of the First Amendment was to protect the inherent value of speech and its ability to inform the public, and also ruled that this ability was not dependent on the nature of the protected speaker.131 In Citizens United, Justice Scalia stated, “The [First] Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals . . . .”132 His analysis focuses and relies on the purpose of the First Amendment, intentionally ignoring the form

126 Pollman, Corporate Personhood, supra note 89, at 1631.
127 Orts & Sepinwall, supra note 84, at 2283–84.
128 Robinson, supra note 97, at 661.
129 Pollman, Corporate Right to Privacy, supra note 35, at 54.
131 Bellotti, 435 U.S. at 776–77.
132 Citizens United, 558 U.S. at 392–93 (Scalia, J., concurring).
of an actor exercising the right or the manner in which the purpose is being accomplished.

However, some scholars have argued that the purpose framework cannot be applied effectively.\textsuperscript{133} They cite as an example that the purpose of the Fourteenth Amendment was to “secure civil rights for African Americans” but corporations have nonetheless argued that purpose analysis justifies applying the Fourteenth Amendment to secure rights for corporations.\textsuperscript{134} As previously mentioned, corporations, like the NAACP, have in fact advanced the rights of a number of different groups and communities, demonstrating how there is not necessarily a disconnect between a corporation furthering the purpose of an amendment simply because the corporation was not the original envisioned recipient of the right.\textsuperscript{135} Given the inherent problems with personhood analysis and the fact that the Court has dramatically backed away from its use, purpose analysis is a more useful tool to establish the applicability of an amendment to corporations.

A more troubling problem with the purpose method of determining corporate rights is the fact that the purpose of the constitutional right in question itself may be subject to multiple interpretations.\textsuperscript{136} The decision in \textit{District of Columbia v. Heller} revolutionized the Supreme Court’s construction of the Second Amendment and announced its understanding of the purpose of the right to bear arms, but without as much clarity as may have been desired.\textsuperscript{137} In \textit{Bruen}, the Court reemphasized the centrality of self-defense to the Second Amendment right,\textsuperscript{138} though, again, without fully providing clear bounds for acceptable gun regulations.\textsuperscript{139} In the end, purpose analysis may be the best interpretive tool at courts’ disposal, despite its imperfections. The next Part analyzes what is the actual purpose of the Second Amendment and whether awarding gun rights to corporations fulfills that purpose.

\textsuperscript{133} Marcantel, \textit{United Framework}, supra note 59, at 132.
\textsuperscript{134} Id. at 131–32.
\textsuperscript{135} WINKLER, \textit{WE THE CORPORATIONS}, supra note 24, at xxiv; see supra notes 47–51 and accompanying text.
\textsuperscript{136} See Pollman, \textit{Corporate Personhood}, supra note 89, at 1672.
\textsuperscript{139} See id. at 2133, 2135, n.9.
II. THE SECOND AMENDMENT’S MUDDLED PAST

Laws regulating firearms predate the Constitution. The American Revolutionary War was arguably ignited by a governmental attempt to seize firearms. This may have contributed to the adoption of the Second Amendment, 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.” Keeping a gun means having it in one’s constructive possession (for example, in the house), and bearing a gun means carrying it on one’s person. One significant, early point of contention was whether the Second Amendment’s reference to a “militia” limited it to a group right or whether it was an individual right. Consequently, there is an enormous amount of literature on the Second Amendment, often focused on whether there is an individual right to gun ownership unrelated to any possible “militia” connection. For the vast majority of U.S. history, the controlling theory was that it was a group right as opposed to an individual right; in fact, former Chief Justice of the Supreme Court Warren Burger thought that the individual rights argument for the Second Amendment was so flawed that it amounted to “fraud.”

Ultimately, the Heller decision settled the debate about whether there is an individual right to keep and bear arms.

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140 Kachalsky v. County of Westchester, 701 F.3d 81, 84 (2d Cir. 2012).
141 Adam Winkler, Gun Fight: The Battle Over The Right to Bear Arms in America 104–05 (2011) [hereinafter Winkler, Gun Fight].
142 U.S. Const. amend. II.
143 Joseph Blocher, The Right Not to Keep or Bear Arms, 64 Stan L. Rev. 1, 2 (2012) (citation omitted) [hereinafter Blocher, The Right].
144 See Darrell A.H. Miller, Institutions and the Second Amendment, 66 Duke L. J. 69, 75–76 (2016) [hereinafter Miller, Institutions] (discussing United States v. Miller’s application of longstanding state law that relied on a militia focused interpretation of the Second Amendment).
145 Joseph Blocher, Categoricalism and Balancing in First and Second Amendment Analysis, 84 N.Y.U. L. Rev. 375, 399–400 (2009) [hereinafter Blocher, Categoricalism and Balancing].
146 Miller, Institutions, supra note 144, at 75–76.
There can, however, be group or collective rights in addition to individual ones. Professor Akhil Amar has claimed that the use of “people” as opposed to “persons” in the Constitution refers to collectives. In other contexts, scholars have pointed out that the Second Amendment has a key collective angle that serves the promotion of safety. “[A] lone gunman is far less able to defend himself than is an armed gang.” This framing supports the claim that groups, such as militias, towns, and corporations, may be included within the ambit of the amendment. Since the Heller decision, much of the debate has shifted from questioning the individual nature of the right to investigating its scope. Most recently in Bruen, the Supreme Court explicitly held that “the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.” However, the Court specifically refrained from commenting on the full extent of the right’s scope outside of that context.

There is a significant and fundamental divergence of opinion about the scope of the individual’s Second Amendment right. Most Americans think individuals should have the right to possess guns, but there are many disagreements about what that entails. The rate of gun possession seems to be growing at a staggering pace. Just over ten years ago, there were over 280 million guns in the United States—almost one for every American. Six years later, in 2017, there were approximately 393.3 million guns or 1.2 guns for every person. The United States


148 See N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2122 (2022); Miller, Guns, Inc., supra note 5, at 933 (citation omitted).

149 Miller, Guns, Inc., supra note 5, at 933 (citation omitted).

150 Fagundes & Miller, supra note 4, at 677, 681.

151 Id. at 719 (quoting Miller, Guns Inc., supra note 5, at 938–39).

152 Id. at 719–20.

153 See Blocher, Categoricalism and Balancing, supra note 145, at 377–78.


155 Id. at 2157 (Alito, J., concurring).

156 See Young v. Hawaii, 992 F.3d 765, 807–08 (9th Cir. 2021).

157 Miller, Home-Bound Second Amendment, supra note 147, at 1355.

158 Winkler, Gun Fight, supra note 141, at 10.

159 Bruen, 142 S. Ct. at 2164.
“has one of the highest murder rates and more guns per capita
than any western industrialized nation.”160 In fact, the United
States has more than double the number of guns per capita com-
pared to the next most highly armed country, Yemen.161 In an
attempt to deal with the amount of gun violence in the United
States, lawmakers have passed many regulations, and such laws
are not automatically unconstitutional.162

Frustratingly, empirical data about guns and their effects
and impact on public safety is notoriously contested.163 This lack
of definition and clarity in available data made it politically in-
feasible for the United States to consider completely eliminating
gun rights, even before Heller.164 As one scholar succinctly put
it, “guns are here to stay.”165 American guns are just “too com-
mon for a British-style gun ban to be feasible.”166 Others have
argued that if all guns were banned in the United States, the
black market expansion would be so massive that it would cause
more harm than good.167 There is, however, significant room for
regulation without resorting to outright bans.

Courts have acknowledged different potential solutions to
gun violence, ranging from promoting more private gun owner-
ship to deter criminals, to removing and restricting guns in cir-
culation to reduce the amount of criminal gun ownership.168 Courts
have pointed out that in dealing with appropriate firearms regu-
lation, legislatures are “far better equipped than the judiciary to
make sensitive public policy judgments (within constitutional lim-
its) concerning the dangers of carrying firearms and the manner
to combat [them].”169 The dissenting Justices in Bruen agreed

160 WINKLER, GUN FIGHT, supra note 141, at 77.
161 Bruen, 142 S. Ct. at 2164.
163 Blocher, The Right, supra note 143, at 3.
164 Adam Winkler, Scrutinizing the Second Amendment, 105 MICH. L. REV. 683, 733 (2007) [hereinafter Winkler, Scrutinizing the Second Amendment].
165 WINKLER, GUN FIGHT, supra note 141, at 10.
166 Id. at 19–20.
167 Id. at 20–21.
169 Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012) (ci-
tation omitted) (internal quotations omitted).
that given the complexity of the question, legislators, rather than
the Court, should address the proper way to solve the problem.170

Economists, historians, and politicians have long debated
policies affecting gun rights; their fights, at times, have reached
acrimonious levels and crossed personal boundaries.171 There
are also extremists on both sides of the gun debate.172 “[G]un nuts”
and “gun grabbers” alike can display and promote problematic
reasoning.173 Scholars have suggested that radical pro-gun lob-
byists, such as those who even resist machine gun limitations,
make passing effective gun safety laws very difficult.174 These same
scholars have also pointed out that supposed “gun grabbers” will
support any gun control measure even if there is no indication
the regulation will reduce violence at all.175 Both the pre- Heller
D.C. handgun ban and the federal assault rifle ban were described
by critics as triumphs of symbolism over substance.176 In discuss-
ing recently enacted legislation imposing a new gun prohibition,
even a supporter of the law admitted: “What we are doing today
will not take one gun out of the hands of one criminal.”177

Some early laws, such as the National Firearms Act, had
fingerprint requirements with which legislatures knew crimi-
nals would not comply, but that would allow the criminals to be
put in prison for years just for noncompliance.178 On the other
side, even though nearly everyone has acknowledged the impos-
sibility of eliminating guns in the United States, at least one
commentator has stated that “the ‘real purpose’ of licensing is to
collect data to enable [the] government to confiscate all the
guns.”179 Advocates advancing arguments and concerns about a
total confiscation of civilians’ guns have successfully defeated

170 See N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2167–68
(2022) (Breyer, J., dissenting).
171 See Miller, Institutions, supra note 144, at 70–71.
172 See Winkler, Gun Fight, supra note 141, at 8–11.
173 See id. at 33.
174 See id. at 9.
175 See id. at 9–10.
176 See id. at 39.
177 Id. at 18.
178 See id. at 203.
179 See Winkler, Scrutinizing the Second Amendment, supra note 164, at
733; Winkler, Gun Fight, supra note 141, at 230.
numerous federal registration initiatives.\textsuperscript{180} Instances of gun violence can often influence the ability of legislatures to pass gun control laws,\textsuperscript{181} and recently there has been, on average, at least one mass shooting every single day.\textsuperscript{182} Despite this trend, there is still no potential for completely eliminating individuals’ access and rights to firearms.

One concern raised about gun regulations is that criminals are likely to ignore them, and therefore, mainly law-abiding individuals will be impacted.\textsuperscript{183} The argument follows that firearm policies should avoid “arming the bad man and disarming the good one to the injury of the community.”\textsuperscript{184} In \textit{McDonald v. City of Chicago}, the Supreme Court, for the first time, incorporated the Second Amendment onto the states, applying it to state gun restrictions via the Fourteenth Amendment and thereby broadening an individual’s right to possess a firearm.\textsuperscript{185} However, even the dissenting justices who did not think the Second and Fourteenth Amendments required recognizing and securing an individual’s right to bear arms, suggested that a problem with some regulations is that they “simply take guns from those who use them for lawful purposes without affecting their possession by criminals.”\textsuperscript{186} This idea is reflected in Louis L’Amour’s famous quip: “There’s a saying that when guns are outlawed, only the outlaws will have guns.”\textsuperscript{187} Many gun owners support what most people would agree are reasonable regulations, such as background checks and gun-free zones.\textsuperscript{188} We have systems in place for dealers to run background checks on purchasers that take less than a minute\textsuperscript{189} and various registration requirements have been in effect for over a century.\textsuperscript{190}

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\textsuperscript{180} \textit{Winkler, Gun Fight, supra} note 141, at 252.
\textsuperscript{181} \textit{Id.} at 251.
\textsuperscript{182} \textit{N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2163 (2022)} (Breyer, J., dissenting).
\textsuperscript{183} \textit{See Miller, Institutions, supra} note 144, at 84.
\textsuperscript{184} \textit{Winkler, Gun Fight, supra} note 141, at 211.
\textsuperscript{185} \textit{McDonald v. City of Chicago, 561 U.S. 742, 791 (2010)}.
\textsuperscript{186} \textit{Id.} at 923.
\textsuperscript{187} \textit{Louis L’Amour, Galloway 42} (1977).
\textsuperscript{188} \textit{Winkler, Gun Fight, supra} note 141, at 88.
\textsuperscript{189} \textit{Id.} at 71.
\textsuperscript{190} \textit{Justice v. Town of Cicero, 827 F. Supp. 2d 835, 844 (N.D. Ill. 2011)}.
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Other gun laws are not restrictive in nature and some legislatures have considered laws that would make it more difficult for a private party to limit guns on their own property. Even simple registration is forbidden by some state laws. Several states have also passed laws that expressly limit a company’s ability to prohibit guns on its property. As already stated, one reason to allow corporations to have Second Amendment rights is that it would increase their ability to ban guns on their property and in their business, thereby possibly protecting their employees and customers.

Connected to the question of scope is the question of purpose: why do we have the Second Amendment? There are several possible goals for the Second Amendment, including autonomy, personal safety, and prevention of tyranny. Given the kinds of weaponry needed in modern times to oppose a tyrannical government, this argument likely has limited practical effect in legal discourses about gun rights. Yet, some people view guns as not only a way to protect themselves, but also as a way of forcing attention and possibly action in a political context.

States have also influenced the understanding of the purpose of the Second Amendment. Whereas most state constitutions lack any reference to the rights of corporations, the vast majority of states explicitly include the right to bear arms in their constitutions. Only a few states have no gun rights provisions at all in their respective constitutions, and of those state constitutions containing the right, some specifically point out that

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191 See Blocher, The Right, supra note 143, at 5.
193 Blocher, The Right, supra note 143, at 41.
194 Id. at 42; see supra note 7 and accompanying text.
196 See Miller, Home-Bound Second Amendment, supra note 147, at 1293–94.
199 Volokh, supra note 192, at 192.
defending property is one of the purposes of the right. The Supreme Court has recently reinforced its interpretation that self-defense is the core purpose of the Second Amendment.

Notwithstanding this clearly established right, courts have pointed out the danger of guns held in the wrong hands and often refer to the recent history of mass shootings. The dissent in *Bruen* pointed out that in 2020, over 45,000 Americans were killed by guns and that gun violence is now the leading cause of death for children. However, the Court’s majority did not readily acknowledge the death toll attributable to guns and in fact refers to handgun violence as an “alleged” societal problem. What is hard to view as anything but willful ignorance on the part of the Court’s majority makes it easier for the justices to support significant limitations on gun regulation. This level of vehemence against firearms control laws on the part of the Supreme Court is fairly recent.

In contrast, going back to the era of noted jurist William Blackstone, the right was recognized as non-absolute and stayed that way for a long time. As courts and scholars have pointed out, without reasonable regulation, the right to bear arms would “encourage anarchy, not liberty.” Philosophers have maintained that it is impossible to have an unregulated right to bear arms. Some anti-gun advocates have described the possibility of guns having a use for lawful self-defense as a “platitude.” However, especially for people who do not believe they can rely on the police, it is possible that having a gun is their only means of protection. Furthermore, anti-gun attitudes in some quarters have not deterred gun ownership across the broader public.

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200 *Id.* at 198–99.
203 *Bruen*, 142 S. Ct. at 2163 (Breyer, J., dissenting).
204 *Id.* at 2131.
206 *Young* v. Hawaii, 992 F.3d 765, 793 (9th Cir. 2021).
207 Cornell & DeDino, *supra* note 198, at 517.
208 *See* id. at 504.
210 WINKLER, GUN FIGHT, *supra* note 141, at 106.
211 *See* Fisher et al., *supra* note 197.
More people are buying guns than ever before. Historically, when a Democrat is elected President, gun sales go up, reportedly due to the fear of tighter restrictions. In addition, gun sales also dramatically increase in times of general uncertainty and insecurity.

Firearm regulations have fluctuated throughout history, with differing degrees of appropriate restriction and reasonable relaxation. American legal history reveals there have always been various types of weapons regulations. From before the American Revolution and continuing after the adoption of the Second Amendment, there have been gun regulations dealing with everything from what kinds of guns were permitted to how those guns had to be stored. “In the Revolutionary Era, gun laws were strict.” There were many gun regulations when the Second Amendment was adopted, and most of them were enacted at the state level. The federal government did not get involved in regulating guns until the 1930s. This was possibly because the need to regulate at the federal level changed—for example, all the way up to the Civil War, firearms only accounted for a very small percentage of homicides—and also potentially because the states themselves imposed a lot of regulations. Historically, there were laws both requiring and prohibiting the carrying of firearms publicly. Many states actually required men to carry arms at church. Looking back at both the Founding Era and the early republic, there is vast evidence for extensive regulation relating to keeping and carrying guns.

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212 See id.
213 See id.
214 See id.
215 See Kachalsky v. Cnty of Westchester, 701 F.3d 81, 91 (2d Cir. 2012).
216 Ruben, supra note 209, at 90.
217 Cornell & DeDino, supra note 198, at 516.
218 WINKLER, GUN FIGHT, supra note 141, at 113.
219 Id. at 502–03.
220 WINKLER, GUN FIGHT, supra note 141, at 64.
221 Cornell & DeDino, supra note 198, at 500.
222 See id. at 502–03.
223 Young v. Hawaii, 992 F.3d 765, 795 (9th Cir. 2021).
224 Id.
225 See Cornell & DeDino, supra note 198, at 505.
Founding Era laws required individuals to keep track of who had guns and to perform particular activities with those guns.\textsuperscript{226} Those laws could compel people to have guns and ammunition as well as to allow the government to use individuals’ guns without any obligation to reimburse or compensate them.\textsuperscript{227} Laws at the founding forced all men between sixteen and fifty to have an effective gun.\textsuperscript{228} These so-called militia laws required the government to keep track of gun ownership.\textsuperscript{229} “The founders understood that gun rights had to be balanced with public safety needs.”\textsuperscript{230} This regulatory tension explains apparent contradictions between different locales, like how early Bostonians’ banned essentially all loaded weapons from any building in the city,\textsuperscript{231} while the early Connecticut government forced people to take guns to church and other public meetings.\textsuperscript{232} Early practice in some states involved officials conducting door-to-door inspections and inquiries about gun ownership.\textsuperscript{233} As one can see, the historic laws dealing with firearms were extremely varied and were applied in seemingly haphazard and confusing ways.\textsuperscript{234} Unfortunately, gun laws share this feature with the laws that have historically been applied to corporations in the constitutional context.\textsuperscript{235} Utilizing purpose analysis helps clarify some of the confusion, but still requires careful consideration, application and interpretation of the purpose of the right granted under the constitutional amendment in the first place.

III. PURPOSE OF THE SECOND AMENDMENT

\textit{Heller} ranks up there with some of the most important Supreme Court decisions in recent history.\textsuperscript{236} Lower courts have

\begin{itemize}
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id. at 496.
\item \textsuperscript{228} Id. at 509.
\item \textsuperscript{229} Winkler, Scrutinizing the Second Amendment, supra note 164, at 709.
\item \textsuperscript{230} WINKLER, GUN FIGHT, supra note 141, at 114.
\item \textsuperscript{231} Id. at 117.
\item \textsuperscript{232} See id. at 115.
\item \textsuperscript{233} Id. at 113.
\item \textsuperscript{234} Id. at 115, 117.
\item \textsuperscript{235} See Pollman, Corporate Personhood, supra note 89, at 1647.
\item \textsuperscript{236} See Wilkinson, supra note 32, at 254.
\end{itemize}
issued over a thousand Second Amendment opinions since *Heller*.\textsuperscript{237} Given this significant number, clarity in Second Amendment analysis is essential.\textsuperscript{238} Nonetheless, Judge Wilkinson of the Fourth Circuit has described *Heller* as a majority of the Supreme Court reading “an ambiguous constitutional provision as creating a substantive right that the Court has never acknowledged in the more than two hundred years since the amendment’s enactment.”\textsuperscript{239} He describes this process of lawmaking as taking the gun question out of the political arena and putting it in the judicial one, a development similar to the Court’s approach to abortion law in *Roe v. Wade*.\textsuperscript{240} When the Court exercises its judgment in a way that simply appears to reflect the majority’s political viewpoint, the public “lose[s] faith in the idea that justice is blind.”\textsuperscript{241} Critics have asserted that the court’s originalist approach that draws on historical analysis maybe controversial because, “[h]istory may be schematic or fragmentary. In such a case, the most appropriate historical analogue simply appears to be the one that can garner five votes on the Supreme Court.”\textsuperscript{242}

However, given the amount of evidence presented on both sides in *Heller*, it is hard to say that one side clearly had the better argument.\textsuperscript{243} The Court has said that “[e]xpansive language in the Constitution must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design.”\textsuperscript{244} In line with that, the Court used historical and purpose-driven foundations to establish what the Second Amendment

\begin{itemize}
  \item \textsuperscript{238} Miller, *Home-Bound Second Amendment*, supra note 147, at 1316.
  \item \textsuperscript{239} Wilkinson, *supra* note 32, at 265.
  \item \textsuperscript{240} 410 U.S. 113 (1973); see Wilkinson, *supra* note 32, at 265.
  \item \textsuperscript{241} Wilkinson, *supra* note 32, at 267.
  \item \textsuperscript{243} Wilkinson, *supra* note 32, at 271.
  \item \textsuperscript{244} Roper v. Simmons, 543 U.S. 551, 560 (2005).
\end{itemize}
does and does not protect.245 The Court said: “Self-defense is a basic right, recognized by many legal systems from ancient times to the present day.”246 It added that “the right secured in 1689 as a result of the Stuarts’ abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.”247 Put most simply, self-defense is the central component and primary purpose of the right itself.248

Both the Heller Court and lower courts have repeated that the core protection granted through the Second Amendment is a right tied to defending the “hearth and home.”249 The Supreme Court referred to self-defense over eighty-three times in Heller and another eighty-three times in McDonald.250 Under Bruen, the Court expanded the explicit protections of the Second Amendment, making it clear that not only was the protection of hearth and home a core value, but self-protection even outside the home was also at the core of the rights the Second Amendment protects.251 Under Heller, keeping an arm is simply having a weapon, but bearing an arm means carrying a lawful weapon for the purpose of a confrontation involving defending one’s person or house.252 Even before the Bruen decision made it clear that the protection extended beyond the home, in some early laws, a person was granted the right to stand their ground in their place of business just like in their home.253 The Court has described an “individual right to possess and carry weapons in case of confrontation”254 and that this “right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities

245 Id. at 560–61 (citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).
246 McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).
248 Id. at 628.
250 Ruben, supra note 209, at 64.
252 Miller, Guns, Inc., supra note 5, at 899 (citing Heller, 554 U.S. 570, 585, 628).
253 See id. at 934.
254 Heller, 554 U.S. at 592.
Clause.”255 Given this focus on the protection of both “hearth and home,” as well as outside the home and possibly in their place of business, the potential use of this right by a corporation is apparent.

However, the fact that “Heller held that the Amendment’s central component is the right to possess firearms for protection”256 is not as simple as it may sound.257 The Second Amendment’s core value could be reframed as “safety” as opposed to simply self-defense.258 The concept of self-defense in Heller and Bruen is broader than traditional self-defense, as evidenced by the fact that, unlike traditional self-defense, the right to keep and carry guns can be exercised even when there is no imminent personal threat.259 Self-defense covers individuals, but it also covers groups or states or even nations.260 The Second Amendment right has been phrased a few different ways, but all of them boil down to the idea that its “central component is the right to possess firearms for protection.”261

This protection purpose, at first blush, sounds like a personal right that may be inappropriate for corporations. However, multiple scholars have pointed out that simply because a right, like that to protection may be personal, “does not mean it is purely personal.”262 Corporations are often limited in what rights they are given by reference to the idea that they are not entitled to protections that are “purely personal guarantees.”263 A “purely personal guarantee” can be defined as a right associated with personal liberty and bodily autonomy.264 But scholars have pointed out that there are good reasons to say that the right to bear arms is not “purely personal,” and that corporations have an arguable

256 Ezell v. City of Chicago, 651 F.3d 684, 699 (7th Cir. 2011) (citing Heller, 554 U.S. at 592–95).
257 Fagundes & Miller, supra note 4, at 682.
258 See id.
259 Blocher, The Right, supra note 143, at 16.
260 See Fagundes & Miller, supra note 4, at 714 (citing U.N. Charter art. 5).
262 See Fagundes & Miller, supra note 4, at 711 (citation omitted).
263 See Pollman, Corporate Right to Privacy, supra note 35, at 39.
264 WINKLER, WE THE CORPORATIONS, supra note 24, at 186.
claim to keeping and bearing arms.\textsuperscript{265} The protection afforded by the right to bear arms is not necessarily connected to personal liberty or bodily autonomy.\textsuperscript{266} Given this protection or self-defense purpose, it is entirely in accordance with the Second Amendment’s purpose to recognize the utility of granting this right to corporations.

It is not hard to see that corporations, like natural people, have a need to defend themselves.\textsuperscript{267} The idea of a corporation “bearing” arms, as opposed to keeping them, has been described as puzzling.\textsuperscript{268} That said, bearing a gun without arms or hands is the same as speaking without a mouth, and a corporation has that right. A corporate right to guns would not be a shareholder’s right to a gun, but rather, it would apply to uses determined by the board of directors or officers and directed to guard the interests of the corporation. (A corporate right to bear arms could be viewed similarly to a corporate right to speech, in that not everyone in the corporation that says something is exercising the corporations’ right to free speech, but rather the right is exercised when the corporation as an entity says something. In the arms context, the corporation (via its officers) could decide who is entitled to use the arms and for what purpose, much like they decide what is said for the corporation.) Those interests could be the protection of personnel or property, use in sport (possibly to hunt—e.g., a corporate farm needing to shoot predator animals), and potentially lawful use of force in a private prison or contracted police force. In addition, corporate arms may be safer than armed individuals; for example, in the huge private security industry, corporations could impose many more drug screening and background checks than would be imposed on an individual buying a gun.\textsuperscript{269}

The dissent in \textit{Heller} claimed that the purpose of the Second Amendment was connected with the militia, stating: “When each word in the text is given full effect, the Amendment is most

\begin{footnotesize}
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\item See Fagundes & Miller, \textit{supra} note 4, at 709.
\item See id. at 708–11.
\item Miller, \textit{Guns, Inc.}, \textit{supra} note 5, at 890.
\item Miller, \textit{Guns, Inc.}, \textit{supra} note 5, at 905–06.
\end{enumerate}
\end{footnotesize}
naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia."\textsuperscript{270} If so, corporations having and exercising the right would be hard to understand. However, this argument for the moment has lost at the Supreme Court. Unless the Court’s jurisprudence evolves, whether corporations definitively get these rights will follow the approach in \textit{Heller} and “depends on the nature, history and purpose of the particular constitutional provision.”\textsuperscript{271} And as the Court stated, “the need for defense of self, family, and property is most acute\textsuperscript{272} in the home”, but still constitutionally protected out in public.\textsuperscript{273}

Even if protection of self or family is questionably applied to a corporation, protection of property is not; when one considers the value of some corporate property, there is clearly a large need to protect that property.\textsuperscript{274} In addition to physical property, intellectual property and relatedly privacy also need to be protected.\textsuperscript{275} The Court has stated that a corporation “plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe.”\textsuperscript{276} Businesses need to be able to control access to their information and affairs to avoid harmful impairments.\textsuperscript{277} Information is central to the life of a corporation, and scholars and judges have acknowledged that while the property of a corporation may in reality be the property of the shareholders and those associated with the corporation, the same cannot be said for interests and rights to life and liberty.\textsuperscript{278} Like speech, the value of the life, liberty, or even simply the control of information for a corporation may be intangible or unquantifiable, but the Court of Appeals for the Seventh Circuit has held that “[t]he Second Amendment protects similarly

\textsuperscript{271} Fagundes & Miller, \textit{supra} note 4, at 708 (citation omitted).
\textsuperscript{273} N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2121 (2022).
\textsuperscript{274} \textit{See} Henning, \textit{supra} note 68, at 820; Pollman, \textit{Corporate Personhood}, \textit{supra} note 89, at 1671.
\textsuperscript{275} Graczyk, \textit{supra} note 90, at 101.
\textsuperscript{277} Pollman, \textit{Corporate Right to Privacy}, \textit{supra} note 35, at 30.
\textsuperscript{278} \textit{Id.} at 47.
intangible and unquantifiable interests. *Heller* held that the Amendment’s central component is the right to possess firearms for protection.” 279 Corporations also need this protection.

Further evidence of the applicability of the Second Amendment to corporations is the multiple times that the First Amendment has been applied to corporations, most notably in *Citizens United*. This is also illustrated in the degree to which “Justice Scalia borrowed liberally from First Amendment doctrine in *Heller* to support the personal and pre-constitutional nature of the Second Amendment and to urge a categorical approach to its limitations.” 280 The Supreme Court strengthened this connection between the First and Second Amendments in *Bruen*. 281

In addition to corporations, other groups of people, like local governments and municipal corporations, in recent years have increasingly asserted their interest in the right to keep and bear arms. 282 Therefore, the protective purpose of the Second Amendment fits well with the granting of the right to corporations, as does the history of the Second Amendment application to corporations. However, applying the right to corporations does not answer what types of limits are appropriate for the right generally.

The protective purpose of the Second Amendment supports the recognition of the right for corporations. However, the protective purpose of the right should also be used to mitigate the harms possible through general gun possession for both corporations and individuals. By analyzing the Supreme Court rulings and subsequent lower court decisions dealing with the proper application of the Second Amendment, it becomes clear that possession of firearms is not without limitations and appropriate regulations. The challenge is determining what regulations can increase the safety of gun possession for both corporations and individuals without limiting the constitutionally guaranteed right. These questions dealing with the possible use of the self-defense purpose of the Second Amendment to establish laws making gun possession safer need to be addressed in future scholarship.


CONCLUSION

The question of what, if any, rights a corporation should possess has been debated for well over a century. One way this question has been approached is through use of the personhood theory of the corporation. This theory of the corporation has led to much confusion and derision by commentators over the last few decades. As a result, the use of the personhood theory has appropriately decreased in recent years, replaced with the use of purpose analysis.

Leveraging purpose analysis can be particularly helpful in determining what constitutional rights should be afforded to corporations, including whether they should have the right to bear arms under the Second Amendment. The purpose of the Second Amendment is self-defense or protection. A corporation is equally in need of defense and can exercise this right potentially more safely and more effectively than individuals. Therefore, corporations should be granted the right to bear arms.