William & Mary Bill of Rights Journal

Volume *31 (2022-2023)*
Issue 2 *The Problem of Mass Incarceration: Diagnosis and Reform*

Article 10

12-2022

The Collective Right Endures: Pre-Heller Precedent and Our Understanding of the Modern Second Amendment

William Reach

THE COLLECTIVE RIGHT ENDURES: PRE-*HELLER* PRECEDENT AND OUR UNDERSTANDING OF THE MODERN SECOND AMENDMENT

William Reach*

INTRODUCTION

The Second Amendment is one of the rare pieces of constitutional law on which every American seems to hold an opinion. Step into any church, town hall, or mall in this country and ask a few citizens for their opinion on the right, and you will likely hear a diversity of viewpoints on what it means and how it impacts everyday people in a range of ways. Conversations over gun violence, deterring tyranny, school shootings, self-defense, and many more practical and theoretical considerations punctuate discourse on how the Second Amendment could or should impact American society.

Prior to 2008, legal scholars who examined the Second Amendment fell roughly into two camps: those who believed "the right of the people to . . . bear arms"[1] only covered state militias, and those who believed it extended to individual citizens.[2] Both groups of academics viewed the Constitution through the lenses of guiding precedent and historical context to develop their understanding of the right's strength and reach. Like an episode of HGTV's hit show *Love it or List It*, where dueling hosts must persuade homeowners to either stick with their remodeled home or move to a new one,[3] some scholars argued that federal interpretation of the right to bear arms deserved an "individual rights" overhaul,[4] while others questioned whether the Republic had outgrown a tired and obsolete "collective right" that granted states the power to fund militias.[5] And like any good TV show, the Supreme Court's dramatic finale in *District*

---

* My time in the United States Army (stateside and overseas) inspired this Note. I would especially like to thank the men and women with whom I served for their service, friendship, and bravery.

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

[2] *Compare* ANDREW CARLSON, THE ANTIQUATED RIGHT: AN ARGUMENT FOR THE REPEAL OF THE SECOND AMENDMENT 3 (David A. Schultz ed., 2002) ("The Second Amendment . . . no longer makes the statement it once did, for times have changed . . . ."), *with* CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND THE JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 5 (1994) ("What was the intent of the Second Amendment? [T]he assumption that individual ownership of arms was a fundamental right of freemen.").

[3] *Love It or List It* (HGTV television broadcast 2008–present).

[4] *See, e.g.*, Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY BILL RTS. J. 1737, 1737, 1764–65 (1995).

[5] *See, e.g.*, H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 428 (2000).

of Columbia v. Heller picked a clear winner for the American public.[6] Writing for the majority, Justice Antonin Scalia observed that although "[t]he two sides in this case ha[d] set out very different interpretations of the Amendment,"[7] the Court conclusively established that the "Second Amendment conferred an individual right to keep and bear arms."[8]

After *Heller*, discussion of the collective right to bear arms largely receded from public discussion and most litigation surrounding the Second Amendment shifted to define the outer edges of the individual right.[9] But the pre-*Heller* showdown between these competing viewpoints did not fully encompass or address the nuances of federal precedent. Although the credits may have rolled on the collective versus individual right discussion in the public forum, it left much undiscussed in defining the scope of the Second Amendment.

This Note argues that the dichotomous split in opinion over the Second Amendment pre-*Heller* led both camps of scholars to overlook particularly important aspects of the collective right that survived *Heller* in federal precedent through two cases: *Presser v. People of the State of Illinois* and *United States v. Miller*.[10] Because *Presser* and *Miller* are binding precedent, their holdings still offer insight into our modern understanding of the Second Amendment. Taken together, *Presser* and *Miller* clearly and expressly limit the federal government's ability to regulate firearms when state governments can show a reasonable relationship for militia purposes. These cases essentially give individuals and states a justification to challenge federal assault weapons bans and other regulations, so long as the parties can present a reasonable relationship to a militia function. They also suggest limitations on the reach and extent of the modern individual right by reinforcing traditional areas of state firearm regulation. Although *Presser* and *Miller* do not sit neatly within the bounds of the pre-*Heller* arguments, these cases represent surviving aspects of the collective right framework that have relevant, modern, and practical uses in shaping our use of the Second Amendment.

I. PRE-*HELLER* BATTLE LINES

A. The Individual Right to Bear Arms

The first modern proponents of the view that the Second Amendment protected an individual right to bear arms emerged in academia in the 1980s.[11] This group

---

[6] 554 U.S. 570 (2008).

[7] *Id.* at 577.

[8] *Id.* at 595.

[9] *See, e.g.*, Miller v. Bonta, 542 F. Supp. 3d 1009, 1014, 1068–69 (S.D. Cal. 2021) (finding that a statewide ban on assault weapons unconstitutionally violated individual right); United States v. Marzzarella, 614 F.3d 85, 87 (3d Cir. 2010) (holding that conviction for possession of a handgun without a serial number was constitutional).

[10] Presser v. Illinois, 116 U.S. 252 (1886); United States v. Miller, 307 U.S. 174 (1939).

[11] *See generally* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS xiv (2019).

identified itself as a counter-movement to a perceived shift in legal interpretation that began in the mid-1960s in which "polite society" sought to minimize the historic bounds of the right.[12] Proponents of the new theory drew upon a great quantity of historical documents to support arguments for an individual rights view of the Second Amendment. Most supporting material for this interpretation came from three sources: historical English law, the contemporary opinions of the Founding Fathers, and state constitutions.[13]

For individual rights proponents, historical support within English history and jurisprudence for the individual right extends as far back as the reign of King Alfred in the eighth century.[14] The first definite codification of the right came in 1181, when King Henry II published the Assize of Arms, which required free men to purchase and maintain weapons for periods of military service.[15] During this time, bearing arms was a requirement for subjects of feudal lords in medieval England.[16] Likewise, the Statute of Winchester in 1285 required every Englishman to obtain and keep arms as a deterrent against banditry.[17] Later militia statutes continued to codify and modernize versions of these requirements throughout the 1500s.[18] When King Henry VII first sought to prohibit the shooting of crossbows in 1503, he did so in order to encourage Englishmen to train and use longbows.[19] The crossbow prohibition was followed a decade later in 1512 by modifications to the Statute of Winchester, requiring all adult males below the age of sixty to possess and train with bow and arrows.[20] Individual rights supporters point to these ancient laws as the basis of the historical right in English society that favored individual ownership and use of arms.[21]

Political instability in England in the mid-seventeenth century led to greater political, religious, and class conflict between commoners and the King in English society.[22] From 1662 through the mid-1680s, King Charles II and King James II sought to restrict and ultimately ban firearms ownership among English commoners, necessarily depriving the lower and middle classes of political power with which to resist monarchical rule.[23] But the Glorious Revolution of 1688 saw the abdication of King James II and bound the new co-regents, William and Mary, to the English

---

[12] *Id.* at xiiv–xiv.

[13] *Id.* at xiv.

[14] STEPHEN HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 36 (2013).

[15] DAVID T. HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 13–14 (1986).

[16] *Id.*

[17] *Id.* at 14–15.

[18] *See, e.g.*, *id.* at 16–17, 19.

[19] *Id.* at 16–17.

[20] *Id.* at 17.

[21] *See* HALBROOK, *supra* note 14, at 35–38.

[22] *See id.* at 35, 42–43.

[23] *See id.* at 42–43 ("[T]he act was also aimed at the aspiring bourgeoisie, the burghers and professionals who supported progressive republicanism and opposed feudal domination.").

Bill of Rights.[24] The new English Bill of Rights expressly granted Protestant Christians the right to carry arms for the purpose of defense.[25] To scholars who hold the view that the Second Amendment enumerates an individual right to bear arms, English history preceding the Revolutionary War is essential to understanding the overall context of the Founders' decisions in crafting the Bill of Rights.[26]

Another evidentiary pillar that supports the interpretation of the Second Amendment as an individual right is the existence of contemporary legislation and debate within American society around the time that the Founders drafted the Constitution. Individual right proponents looked to transcripts and historical discussions surrounding the drafting of state constitutions, many of which predated the federal constitution by ten years or more.[27] These sources provide a wealth of period commentary, a sizeable amount of which discusses militia provisions in the context of an individual right to carry arms.[28] For example, while drafting the Virginia Constitution in 1776 (following the colonies' declaration of independence), Thomas Jefferson wrote in brackets on one of his drafts that "[n]o freedman shall be debarred the use of arms [within his own lands or tenements]."[29] This quote implies that Jefferson likely considered the right a fundamental part of Virginians' individual liberty. Likewise, the Pennsylvania State Constitution, ratified in 1790, specifically enumerated an individual right to bear arms.[30] And the first Massachusetts Constitution—which was drafted by John Adams in 1780 and served as a model for the U.S. Constitution—included a section that asserted "[t]he people have a right to keep and bear arms for the common defence."[31] Individual rights proponents broadly pointed to these examples as emblematic of the Founders' common sentiments during the drafting of the Constitution.[32] The sentiment of many of these ancillary documents supports the view that at least some within the Founding generation assumed the right to keep and bear arms was an individual right. If the generally understood meaning and purpose of Second Amendment–like provisions were commonplace at the time, then these sources provide justification for the *Heller* interpretation of the Second Amendment.

Other pieces of the historical and legislative record also suggest that Americans have long understood the Second Amendment to include the right to possess and use

---

[24] *Id.* at 43.

[25] *Id.* at 43–45.

[26] *See* CRAMER, *supra* note 2, at 27–28 ("The American Revolution is a child of the Enlightenment . . . if we wish to understand the well-educated men of the American Revolution, we need an understanding of Enlightenment ideas."); *see also* HALBROOK, *supra* note 11, at 12–13.

[27] *See* HALBROOK, *supra* note 14, at 68.

[28] CRAMER, *supra* note 2, at 32–39.

[29] HALBROOK, *supra* note 11, at 131.

[30] PA. CONST. OF 1790 art. IX, § 21 ("That the right of the citizens to bear arms, in defence of themselves and the State, shall not be questioned.").

[31] HALBROOK, *supra* note 11, at 157 (quoting the Massachusetts Declaration of Rights, Art. XVII (1780)).

[32] *Id.* at 68–157.

firearms. Of the thirty-seven states that contain constitutional provisions dealing with the right to bear arms, fifteen states expressly enumerate an individual right to bear arms to varying degrees.[33] These provisions were not necessarily added during the era of the Founding generation, and some were enacted or reaffirmed relatively recently.[34] For example, the 1820 version of the Maine Constitution stated that "[e]very citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned."[35] The language of this text suggests that the ratifiers of the Maine Constitution considered the right to keep and bear arms both individually and collectively necessary. In 1987, during the pre-*Heller* debate about the Second Amendment's meaning, the Maine General Assembly clarified the language of the right, removing mention of the common defense: "Every citizen has a right to keep and bear arms and this right shall never be questioned."[36] This change emphasized the individual aspect of the right over the "common defence."[37] Maine's constitutional language provides snapshots of the individual right's intellectual lineage from the state's post-revolutionary history up through the modern *Heller* era. Likewise, the ratification and amendment of state constitutions at different points throughout American history suggest that many Americans have consistently considered the right to bear arms a fundamental right.

The final and most important pieces of evidence for an individual right to bear arms comes from discussions of the right itself during the drafting and ratification of the U.S. Constitution and the Bill of Rights. Theodore Sedgewick, proponent of the individual right and Federalist representative, opined during the ratification of the U.S. Constitution that the American people could never be oppressed by a tyrannical government since its liberty-loving population was individually armed.[38] Sedgewick's commentary shows that at least some Founders saw the right as a fundamental liberty. Of equal value to the Drafters' notes are the commentaries of the Founders' contemporaries, whose analysis of the Constitution often went beyond the political machinations of the ratification process. Luminaries like Justice Saint George Tucker (a renowned College of William and Mary professor and federal judge) created early works illuminating the nature of the nation's founding documents.[39] In 1803, Justice Tucker edited a version of William Blackstone's *Commentaries* and included his own legal analysis of the American system within it.[40] On the topic of the

---

[33] WARREN FREEDMAN, THE PRIVILEGE TO KEEP AND BEAR ARMS 28–29 (1989).

[34] *State Constitutional Right to Bear Arms*, PROCON ENCYCLOPEDIA BRITANNICA (May 18, 2015), https://gun-control.procon.org/state-constitutional-right-to-bear-arms-2/ [https://perma.cc/8TK2-ZU8H] (last visited Dec. 8, 2022).

[35] ME. CONST. OF 1819 art. 1, § 16 (amended 1987).

[36] 1987 Me. Laws 999–1000.

[37] *Id.*

[38] HALBROOK, *supra* note 11, at 266 ("[H]ow could a standing army 'subdue a nation of freemen, who know how to prize liberty; and who have arms in their hands?'").

[39] *Id.* at 310–11.

[40] *Id.* at 311.

Second Amendment, Justice Tucker noted that, unlike the English Bill or Rights, the American right to bear arms bore no qualifications or constraints.[41] Justice Tucker wrote, "[t]he right of the people to keep and bear arms shall not be infringed . . . and this without any qualification as to their condition or degree, as is the case in the British government . . . ."[42] Justice Joseph Story, a scholar and former Supreme Court Justice, wrote in 1834: "[t]he militia is the natural defense of a free country . . . since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable to people to resist and triumph over them."[43] Justice Story's commentary describes the American people as individual agents opposing tyranny rather than relying on state or civic institutions. Individual rights theorists in the pre-*Heller* era of discussion pointed to such authorities as evidence that the Founders' generation incorporated the implied individual right into the Second Amendment during its drafting.[44]

In total, proponents of the individual right to bear arms amassed a considerable body of evidence supporting their view that at least some of the Founders' intended the Second Amendment to safeguard the common person's ability to bear and carry arms. Supporters of the individual right pointed to state constitutions, English history, and commentary from the Founding generations to support the view that the Second Amendment protected an individual right to bear arms enshrined in the plain meaning of its time, but "unilluminated"[45] in federal case law until the *Heller* decision.[46]

B. The Collective Right to Bear Arms

Like individual rights scholars, academics who embraced the collective rights view of the Second Amendment felt that the traditional interpretation of the text was under threat of radical revisionism.[47] Contemporaries of the movement in the 1980s placed the blame at the feet of individual rights activists on the political right and organizations like the National Rifle Association.[48] Proponents of the collective right to bear arms drew support for their arguments against an individual right from many of the same sources as individual rights advocates, such as historical sources and commentary surrounding the ratification of state constitutions and the Bill of Rights.[49] But these academics also pointed to modern gun violence statistics as well as local, state, and federal legislation and case law that demonstrated at least some

---

[41] *Id.* at 311.

[42] *Id.*

[43] Joseph Story, *Commentaries on the Constitution 3: §§ 1890–91*, *in* 5 THE FOUNDERS' CONSTITUTION 214 (Philip B. Kurland & Ralph Lerner eds., 1987).

[44] *See, e.g.*, HALBROOK, *supra* note 11, at 309–20.

[45] District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

[46] HARDY, *supra* note 15, at 13–14, 71–77; *see also* HALBROOK, *supra* note 11, at xiv.

[47] *See* FREEDMAN, *supra* note 33, at 1.

[48] *Id.* at 68.

[49] *Id.* at 68–70.

regulation of firearms.[50] The cumulative effect of this scholarship made the compelling argument that the Second Amendment was essentially a dead right and had no use in a modern society.

Collective rights scholars began their study of the Second Amendment with many of the same sources as individual rights scholars: English and American history. To these academics, the Founding generation conceptualized a virtuous citizen militia as a republican alternative to monarchical despotism.[51] Citizen militias consisted of organized and drilled representatives of the state called forth in its defense rather than "random individuals" or "government employees."[52] In the collective rights paradigm, the right to bear arms was given to an organized body of citizens rather than universally bestowed upon each person. For example, the Virginia Declaration of Rights held that "a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state."[53] This language emphasizes the organized nature of militia service through training and selectivity, which cements the state's role in its leadership.[54]

The Founders also were aware of the distinction between illegitimate rebellion and legitimate revolution.[55] To this end, Founders like James Madison advocated federal control over the militia: "[without] power to suppress insurrections, our liberties might be destroyed by domestic faction."[56] Madison's words suggest a focus on the power of the militia itself to resist domestic insurrection, which an individual right to bear arms would likely empower. Additionally, of the thirty-seven states that constitutionally possessed analogs to the Second Amendment, twenty-two of those states had provisions that either clearly embraced a collective rights view of the Second Amendment or alternatively did not expressly grant an individual right.[57] These sources suggest that at least some of the Founders, and some of the states, were leery of granting a universal right to bear arms.

Another major component of collective rights scholarship focused on legislation and numerous lower court decisions that enforced a militia-centric rather than individual-centric view of the right.[58] For example, in 1905, the Kansas Supreme Court held in *Salina v. Blaksley* that the Kansas Bill of Rights referred only to the

---

[50] *Infra* note 68.

[51] DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC 27–29 (2003).

[52] *Id.* at 48.

[53] *Id.* (quoting 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 239 (1971)).

[54] *Cf. id.* at 52, 67.

[55] *Id.* at 57.

[56] *Id.* at 43.

[57] FREEDMAN, *supra* note 33, at 28–31.

[58] *Id.* at 22 ("'A well-regulated militia' clearly negates any individual right to keep and bear arms.").

people as a collective body, and not as individuals.[59] Since Kansas ratified its constitution in 1859, the holding in *Salina* occurred in a relatively contemporary environment to the ratification of the state constitution.[60] Cases similar to *Salina v. Blaksley* show state interpretations that trended towards firearms rights tied to militia activity. Advocates of the collective rights position pointed to federal cases such as *United States v. Cruickshank*, *Presser v. Illinois*, *Miller v. Texas*, and *United States v. Miller*.[61] Since the body of these cases dignified some forms of federal regulation or conformed in some degree to the view that the Second Amendment only protects states against federal overreach, collective rights scholars argued that they supported their limited Second Amendment view.[62] These cases helped establish the argument that courts in the past had, to some degree, dignified limited forms of firearm regulation.

Early gun control laws that were passed around the time that the Constitution was ratified also point to the Founder's intent to create a collective right since such laws would show at the very least a somewhat willful ignorance of an abrogated Second Amendment. After the American Revolution, some of the former colonies, like Pennsylvania and Massachusetts, passed acts to confiscate the arms of individuals who refused to swear allegiance to their state government.[63] The presence of these laws, initiated in the intervening years before the Constitution was ratified, suggest that not all colonies or states felt that the right to bear arms was universal, especially to those whose loyalty was in doubt. In the early nineteenth century, several states took steps to regulate or prohibit the concealment of weapons, including pistols.[64] Some states and municipalities made it a crime to discharge firearms within towns or within proximity of a road or highway.[65] Collective rights proponents pointed to such legislation as evidence of state regulation of firearms, and argued that these early statutes demonstrate in part that the Second Amendment did not grant citizens an absolute or fundamental right to bear arms after the Founding.[66]

Crime statistics and mortality rates form the final aspect of the argument in favor of a collective interpretation of the Second Amendment. About 30,000 people are fatally shot each year in the United States, and another 70,000 are injured due to firearm discharges.[67] In 2011, there were over 467,300 victims of non-fatal firearm crimes

---

[59] FREEDMAN, *supra* note 33, at 22.

[60] *See Kansas Constitution*, BALLOTPEDIA, https://ballotpedia.org/Kansas_Constitution [https://perma.cc/6S9H-YGVW] (last visited Dec. 8, 2022).

[61] *See* FREEDMAN, *supra* note 33, at 20, 33, 55–56.

[62] *See, e.g.*, *id.* at 55.

[63] Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506–07 (2004).

[64] *Id.* at 513.

[65] *Id.* at 515–16.

[66] *See, e.g.*, *Gun Law History in the United States and Second Amendment Rights*, ROCKEFELLER INST. OF GOV'T, https://rockinst.org/issue-area/gun-law-history-united-states-second-amendment-rights/ [https://perma.cc/KM7C-YKXL] (last visited Dec. 8, 2022).

[67] Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J. L. & PUB. POL'Y 187, 193 (2016).

in the United States.[68] And in the mid-1990s, guns in the home were twenty-two times more likely to be used in a domestic homicide, suicide, or accidental shooting than in self-defense.[69] Firearms' role in crime, suicide, and accidental injury has caused commentators to question whether a "right to live" in the Constitution supersedes aspects of the individual rights view of the Second Amendment.[70] These individuals argued that states possess a valid public policy interest in the safety and well-being of their citizens. If the Second Amendment is open to interpretation, then collective rights scholars believe that policy rationales and public safety statistics add weight to the view that firearms are safer in the hands of an organized militia than individual citizens.

C. Two Incompatible Views of the Second Amendment?

The Second Amendment is clearly a piece of law on which reasonable minds can examine evidence and disagree. Both sides of the pre-*Heller* Second Amendment debate presented authentic and convincing evidence for their respective interpretations of the right. Like the historical conflict between Anti-Federalists and Federalists over the role of militias in securing the country's future, so too do modern scholars debate over the efficacy of the right in the lives of ordinary Americans. One commentator described the issue as a metaphorical "fault line in the bedrock of the Constitution" that displays the Founders' competing visions of the country's government.[71] The Second Amendment is such a contentious issue today in part because our Constitution itself contains compromises between differing ideologies and the Founders' lacked consensus on the best way to govern the country.[72] These fault lines still echo through time and history to shape our present-day conversations about the Second Amendment.

II. THE COLLECTIVE RIGHT SURVIVES *HELLER*

The polarizing debate over the right to bear arms came to a finale in *Heller* in 2008 and gave rise to our modern understanding of the Second Amendment.[73] Both the majority and each dissent summarized many of the arguments that collective and individual rights scholars had formulated over the preceding two decades.[74] The majority, which favored an individual rights interpretation, leaned heavily on English history and early commentary about the meaning of the Constitution outlined in the

---

[68] ANTHONY A. BRAGA & PHILIP J. COOK, *The Criminal Records of Gun Offenders,* 14 GEO. J. L. & PUB. POL'Y 1, 2 (2016).

[69] Lowy & Sampson, *supra* note 67, at 192.

[70] *Id.* at 194, 196.

[71] FREEDMAN, *supra* note 33, at 44.

[72] *Id.*

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

[74] *Id.* at 580, 584–87, 591, 596–97, 599, 625; *id.* at 644, 646, 649–59 (Stevens, J., dissenting).

sections above.[75] Likewise, the dissents explored related case law and the Founders' opinions on the role of the militia in early American society.[76] Each participant in the *Heller* opinion reflects, to no insignificant degree, the academic discussion over the role of the Second Amendment that had preceded the holding and dissents in academia.

Presser and *Miller* both feature prominently in the majority opinion,[77] and in Justice Stevens's dissent.[78] *Miller* also features prominently in Justice Breyer's dissent.[79] Unsurprisingly, each viewpoint interprets the holdings of the cases in very different ways.[80] But each interpretation of *Presser* and *Miller* also ignores key aspects of the cases that do not fit neatly within the individual or collective rights framework.

A. The Presser *Case*

In 1879, a man named Herman Presser organized a "military company" of about four hundred members that trained and drilled in Chicago.[81] The state of Illinois subsequently indicted him for violating Illinois military code and drilling without a license.[82] Presser's indictment came during a period of great unrest in the United States.[83] Early workers' rights and labor movements were flexing their muscles at this time and fear of communist agitators in factories and among the working class shaded the nature of Presser's challenge.[84] In his defense, Presser raised two arguments.[85] First, he claimed that the statute under which he was convicted was unconstitutional because it violated his individual Second Amendment right.[86] Second, Presser claimed that the Illinois law conflicted with Congress's constitutional power to raise and support armies.[87] In response to Presser's Second Amendment claims, the Court reaffirmed that the Second Amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the States," which precluded Presser's claim of unconstitutionality.[88] The Court found that "[t]his is one of the amendments that has no other effect than to restrict the powers of the

---

[75] *Id.* at 592–95.
[76] *Id.* at 653–61.
[77] *Id.* at 595, 620–25, 627, 637.
[78] *Id.* at 577, 637–38, 640, 661–62, 667, 673–75, 677–78 (Stevens, J., dissenting).
[79] *Id.* at 715–16 (Breyer, J., dissenting).
[80] *Id.* at 620–22; *id.* at 637, 673–75 (Stevens, J., dissenting).
[81] Presser v. Illinois, 116 U.S. 252, 254–55 (1886).
[82] *Id.* at 253–54.
[83] Stephen P. Halbrook, *The Right of Workers to Assemble and to Bear Arms:* Presser v. Illinois*, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943, 945–46 (1999).
[84] *Id.*
[85] *Presser*, 116 U.S. at 260–61.
[86] *Id.*
[87] *Id.* at 260.
[88] *Id.* at 265–66.

National government . . . ."[89] The *Presser* Court's conclusion is important for several reasons. First, the Court specifically and intentionally addressed the issue of Presser's Second Amendment Rights. Second, the Court did so in manner that did not address the context of individual rights, but as a protection against federal overreach.

The dark side of *Presser* and other cases of its time is that they stem from the repressive constitutional era where judges sought to minimize the power of the Bill of Rights and the Fourteenth Amendment. In 1833, the Supreme Court held that the Bill of Rights applied only to the federal government, not to the states.[90] After the American Civil War and subsequent passage of the Fourteenth Amendment, Congress "intended to redesign American federalism" and protect the rights of former slaves in the post–Civil War South.[91] The Supreme Court impeded this change by reaffirming the doctrine that limited the Bill of Rights applications to individual citizens.[92] *Presser* played its own role in this history, initially preventing the enumeration of an individual right to bear arms.[93] Another part of *Presser*'s legacy was that nearly all gun control measures were passed at the state level.[94] Despite *Presser*'s inauspicious history, American courts cited its holding throughout the pre-*Heller* era.[95]

Both the majority and dissent in *Heller* framed *Presser*'s holdings as favorable to their own arguments in the context of individual and collective rights.[96] Justice Scalia, writing for the majority, did not find *Presser* dispositive to the individual right to bear arms.[97] The Court concluded that "*Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations."[98] Such an interpretation of *Presser* contradicts the Court's prima facie reading of the case, which reiterated and affirmed an earlier holding.[99]

---

[89] *Id.* at 265.

[90] Michael J. Habib, Note, *The Future of Gun Control Laws Post*-McDonald *and* Heller *and the Death of One-Gun-Per-Month Legislation*, 44 CONN. L. REV. 1339, 1343–44 (2012).

[91] Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J.L. & PUB. POL'Y 17, 25 (2016).

[92] *Id.* at 25–26.

[93] *See* FREEDMAN, *supra* note 33, at 33.

[94] Cottrol & Mocsary, *supra* note 91, at 26.

[95] *List of 236 Citing References for Presser v. People of State of Ill.*, WESTLAW, https://1.next.westlaw.com/RelatedInformation/Icdfb6db89cb911d993e6d35cc61aab4a/kcCitingReferences.html?docSource=ebb4de19aea849d291ac26d3979e2ee5&rank=1&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&ppcid=bd3b10139c024426b7048a82c284e3b6&originationContext=citingreferences&transitionType=CitingReferences&contextData=%28sc.Search%29 [https://perma.cc/28AK-XLCN] (last visited Dec. 8, 2022).

[96] *See* District of Columbia v. Heller, 554 U.S. 570, 621 (2008); *Heller*, 554 U.S. at 674–75 (Stevens, J., dissenting).

[97] *Id.* at 621.

[98] *Id.*

[99] Presser v. Illinois, 116 U.S. 252, 269 (1886).

Conversely, Justice Stevens, in his dissent, reached the opposite conclusion: *Presser* "affirmed . . . that the Second Amendment posed no obstacle to regulation by the state governments."[100] Such an interpretation aligns well with the plain meaning of the *Presser* holding.[101] Elaborating further, Justice Stevens argued *Presser* implied that "nothing in the Constitution protected the use of arms outside the context of a militia 'authorized by law' and organized by the State or Federal Government."[102] Justice Stevens's dissent suggested that the Second Amendment did not authorize the use of arms outside of a state militia. But no such suggestion exists in the original text of the case.[103] The *Presser* Court treated the Second Amendment claim as a discrete issue by addressing it separately from Herman Presser's militia argument.[104] Furthermore, the *Presser* Court concluded exactly the opposite of what Justice Stevens suggested: that the government lacked authority to prohibit private gun ownership.[105]

The Court's holding in *Presser* posed challenges to both the individual and collective right proponents' arguments sketched out within the *Heller* decision. Both the majority opinion and Justice Stevens's dissent sidestepped the plain meaning and historical context of the *Presser* holding in favor of advancing their own favored collective or individual right interpretations of the Second Amendment. Critically, neither the majority nor the dissent identified the case's holding as unsound; instead, both sides incorporated it into their arguments about what the modern Second Amendment right should be.[106] But *Presser* discussed the Second Amendment solely within its own limited context: whether Herman Presser's actions were protected under the Court's contemporary understanding of the Second Amendment.[107]

As controlling precedent and valid law, *Presser's* holding has important ramifications for the modern Second Amendment: it protects states against federal regulation of firearms.[108] *Presser* articulated the Second Amendment as a protection against federal overreach and gave states the right to manage firearms regulation within their respective sovereignties. In this manner, the Second Amendment functions today as a federalist mechanism to guard against national interference with state regulations of the militia.

---

[100] *Heller*, 554 U.S. at 674.

[101] *See Presser*, 116 U.S. at 265.

[102] *Heller*, 554 U.S. at 674–75 (Stevens, J., dissenting).

[103] *See Presser*, 116 U.S. 252.

[104] *Id.* at 265–66 (stating that "this amendment prohibits the legislation in question [and the answer] lies in the fact that the amendment is a limitation only upon the power of Congress and the National government." After fully addressing this question, the Court moved on to discreetly address Fourteenth Amendment issues that the plaintiff raised.).

[105] *Id.* at 265 (stating "[t]he states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security . . . .").

[106] *Heller*, 554 U.S. at 621, 674–75.

[107] *Presser*, 116 U.S. at 264–65.

[108] *Id.* at 264–65.

B. Miller *and the Collective Right*

One of the most consequential discussions within the context of the individual right and collective right debate is found in *United States v. Miller*.[109] In *Miller*, two men violated federal law by transporting a short-barrel shotgun over state lines.[110] The defendants in the case argued that the federal law usurped the national "police power reserved to the States" and violated the Second Amendment.[111] In response, the *Miller* Court concluded that the federal government was well within its rights to regulate such a weapon.[112] The Court stated: "In the absence of any evidence tending to show that possession or use of [the weapon] at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."[113] In doing so, the *Miller* Court took two important steps. First, the Court recognized the stated principle in *Presser*: that the Second Amendment specifically protected the state's right to regulate firearms.[114] Second, the Court established the outer bounds of the Amendment's protection: a state's Second Amendment right only extended to weapons that were reasonably related to militia functions.[115] The Court observed that short-barreled shotguns were not "any part of the ordinary military equipment or that its use could contribute to the common defense."[116] Therefore, regulation of such a weapon fell outside the state's Second Amendment protections and under the purview of the federal government.[117] The *Miller* Court also defined the term militia broadly, essentially including all persons of military age who could fight in defense of the state.[118]

A few lines later in the opinion, the Court made a critical observation. It noted that many states had "adopted provisions touching the right to keep and bear arms" and that "[d]ifferences in the language employed . . . led to somewhat variant conclusions concerning the scope of the right guaranteed."[119] This piece of dictum explains both the rationale of the *Miller* Court and the implications of its holdings on the Second Amendment's state protections. It suggests that the protection of the Second Amendment expands and contracts in relation to individual state provisions that

---

[109] *See generally* United States v. Miller, 307 U.S. 174, 178 (1939).

[110] *Id.* at 175. According to the Court, the federal law which the plaintiffs violated was the National Firearms Act which passed in 1934, and which regulated barrel length.

[111] *Id.* at 176.

[112] *Id.* at 178.

[113] *Id.* at 178.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 179.

[119] *Id.* at 182.

touch on the right to bear arms within their respective states.[120] This dictum, if applied today, would mean that state protection against federal regulation under the Second Amendment correlates to state action establishing what weapons bear reasonable relation to militia functions.

The *Miller* decision makes the most sense when viewed specifically in the context of *Presser*. If one assumes the view of the Court in *Presser*—that the Second Amendment protects state regulation of the militia against federal imposition—then the Court's reasoning in *Miller* becomes more clear. Short-barreled shotguns were not "any part of the ordinary military equipment," and did not "[have] some reasonable relationship to the preservation or efficiency of a well regulated militia."[121] Therefore, the federal government was free to pass laws restricting their trafficking, because these laws did not conflict with the Second Amendment's protection of states ownership of militia responsibilities.[122] However, if the federal regulation touched upon a weapon that did have some reasonable relationship to the preservation of the militia, as explained by state statute or militia operations, then the Second Amendment would protect those weapons against federal regulation.[123] The Court alludes to this right's fluctuation by noting that state "provisions touching the right to keep and bear arms" expanded or contracted the degree to which the federal government could regulate firearms, leading to "variant conclusions concerning the scope of the right guaranteed."[124]

Once again, *Heller*'s majority and minority opinions dueled over the implications of the *Miller* ruling. Justice Scalia, writing for the majority, relied on *Miller* for the majority's definition of militia,[125] and gave it similar treatment to *Presser* by arguing that the Court's findings had no real relation to the regulation of the individual right.[126] Justice Stevens, in dissent, drew a much narrower view of *Miller*'s conclusion, stating that the Second Amendment "protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons."[127] In framing *Miller*'s conclusion in such a manner, Justice Stevens's dissent slightly distorted the plain meaning of *Miller*'s holding. The operative language in *Miller* liberally describes the Second Amendment, since a "reasonable relationship" is jurisprudentially a relatively easy threshold to meet.[128] This language is weaker than the "nonmilitary"

---

[120] *Id.*

[121] *Id.* at 178.

[122] *Id.*

[123] *Id.* at 182.

[124] *Id.*

[125] *Heller*, 554 U.S. at 595 (2008) ("[W]e explained that 'the Militia comprised all males physically capable of acting in concert for the common defense.' That definition comports with founding-era sources." (quoting United States v. Miller, 307 U.S. 174, 179 (1939))).

[126] *Id.* at 622.

[127] *Id.* at 637.

[128] *Miller*, 307 U.S. at 178 (1939).

criteria on which Justice Stevens relies.[129] Furthermore, *Miller* did not suggest any restrictions on the "ownership" of weapons in the way Justice Stevens suggested.[130] The expansive language Stevens used in his dissent goes beyond the holding of *Miller*, and suggests conclusions unsupported by the text of the opinion.

Both individual and collective rights advocates within the *Heller* Court each struggled to fit *Miller* within the paradigm of their respective arguments. And, like *Presser*, neither the majority nor the dissents in *Heller* treated *Miller* as unsound law.[131] As guiding precedent, *Miller* gives states a powerful protection against federal encroachment of the states' ability to regulate firearms, so long as those firearms bear a reasonable relationship to militia activity.[132] This deference towards state regulation of firearms has implications towards federal regulation today.

C. Presser *and* Miller *Meet the Incorporation Doctrine*

Both *Presser* and *Miller* approached the Second Amendment from a federalist perspective rather than through the individual right to bear arms. This structure distinguishes it significantly from *Heller*, where the plaintiff argued that his individual Second Amendment right to use a firearm was inappropriately violated.[133] The structure of the Second Amendment, as described in *Presser* and *Miller*, gives states protection to regulate firearms in ways that reasonably relates to militia operation.[134] And since the Court defines the term "militia" as broadly applicable to the general population, *Presser* and *Miller* give the states broad purview to craft the firearm policies each state finds necessary.

Critically, the post-*Heller* Court did not repudiate the *Presser* and *Miller* holdings in later decisions. Had the *Heller* majority treated both cases as bad precedent and discarded the holdings entirely, Justice Scalia and the majority might have weakened *Heller* itself and made it more vulnerable to being overturned by collective rights-minded justices. For example, the late Justice Ruth Bader Ginsburg publicly announced her belief that the *Heller* decision ought to be overturned.[135] The end result in *Heller* is a case that establishes the individual right to bear arms without sweeping away the Court's earlier holdings in *Presser* and *Miller*.[136] The *Heller* decision did not replace the collective right with the individual right to bear arms. Rather, the

---

[129] *Heller*, 554 U.S. at 677.

[130] *Miller*, 307 U.S. at 174–82.

[131] *Heller*, 554 U.S. at 625; *id.* at 638 (Stevens, J., dissenting).

[132] *Miller*, 307 U.S. at 178.

[133] *Heller*, 554 U.S. at 575–76.

[134] *Presser*, 116 U.S. at 265; *Miller*, 307 U.S. at 182.

[135] Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html?smid=url-share [https://perma.cc/235J-822Q].

[136] *Heller*, 554 U.S. at 570–71.

Heller Court enumerated an individual right that functions independently alongside the holdings of *Presser* and *Miller*.[137]

The Second Amendment, viewed in this way, applies in different degrees of force depending on whether it is protecting a state or an individual. According to *Heller*, Americans possess the individual right to bear arms for protection, subject to several traditional caveats.[138] Likewise, *Presser* and *Miller* collectively enumerate state protection from the federal government, allowing them to pass firearms rules permitting or restricting the use of firearms so long as they reasonably relate to militia service.[139] This structure also explains how the Second Amendment allowed states to regulate firearms within localities and cities while the individual right went unenumerated.[140]

Beginning in the early twentieth century, the Supreme Court underwent a cultural shift on the bench. The Court began to rule that rights established in the Bill of Rights could apply to individual citizens incorporated through the Fourteenth Amendment.[141] Prior to *Heller*, there was no need to incorporate the Second Amendment to the public since the individual right was not yet fully recognized by the Court. It remained at least partially unincorporated along with the Third, Fifth, Sixth, and Seventh Amendments.[142] Since federal decisions had only extended the Second Amendment's protections to state governments, there was no need to incorporate it until after the Court's *Heller* decision. In 2010, the Court heard *McDonald v. City of Chicago* and found that the Second Amendment's individual right to bear arms warranted incorporation to the states under the Fourteenth Amendment.[143] In the wake of the *Heller* decision, plaintiffs sued a municipal government in Chicago on the grounds that its restrictions on firearms effectively violated their individual rights.[144] The Court agreed, holding that the Second Amendment was fully incorporated against the states under the Fourteenth Amendment.[145] The Court also took time to affirm its original conclusions in *Heller*, once again echoing its individual rights conceptualization of the law.[146]

---

[137] Liptak, *supra* note 135.

[138] *See Heller*, 554 U.S. at 570–71 (*Heller* broadly addresses themes of self-protection, defense of the home, possibly the right to publicly bear arms, prevention of the mentally ill, felons, or others from possessing weapons; no military-esque weapons allowed under the individual right).

[139] *See Presser*, 116 U.S. at 252; *Miller*, 307 U.S. at 178.

[140] Michael Waldman, *How the NRA Rewrote the Second Amendment*, BRENNAN CTR. FOR JUST. (May 20, 2014), https://www.brennancenter.org/our-work/research-reports/how-nra-rewrote-second-amendment [https://perma.cc/9R8J-XSXA] ("[F]or two centuries we had guns (plenty!) and we had gun laws in towns and states, governing everything from where gunpowder could be stored to who could carry a weapon . . . .").

[141] *Incorporation Doctrine*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine [https://perma.cc/SC9R-HELT] (last visited Dec. 8, 2022).

[142] *Id.*

[143] 561 U.S. 742, 750 (2010).

[144] *Id.* at 749–50.

[145] *Id.* at 750.

[146] *Id.* at 775–78.

The *McDonald* Court noted that *Presser* and *Miller* were products of an era when the Court had not yet recognized the incorporation doctrine; therefore, these cases holdings bore no influence on the Court's analysis.[147] The Court's treatment of *Presser* and *Miller* is, again, particularly striking. The main thrust of the argument in *McDonald* was that the Second Amendment was undeveloped at the time.[148] This is significant given the Court's ability to overturn either case as unsound law. The majority's decision not to repudiate *Presser's* and *Miller's* holdings suggests that the incorporation of the Second Amendment applies so far as the "individual right" to bear arms is concerned. Since neither *Heller* nor *McDonald* overturn *Miller* or *Presser* as precedent, the federalist remnants of the collective right probably endure in conjunction with the individual right. Accordingly, states retain the prerogative to regulate firearms while the Second Amendment acts as a shield against "the power of Congress of the national government"[149] so long as those regulations bear a reasonable relationship to militia purposes.[150] This collective right exists in conjunction with individual right enumerated in *Heller*. The federal government must give states wide deference to regulate firearms "reasonably related" to militia purposes.[151] Where the federal government passes firearms legislation that infringes upon the states' constitutional right to manage firearms policy for its militia, states could hypothetically sue the federal government for violating its Second Amendment right against national interference. Conversely, the existence of the collective right suggests that courts ought to respect the historical deference that the federal government has shown states when crafting firearms policy and suggests potential curtailment on the growth of the individual right where it might conflict with traditional areas of state regulation. Outside of the *Heller*-established individual right, the nation's courts are still refining the outermost limits and bounds of the decision. Allowing the states to function as laboratories of democracy, as they have historically done with respect to firearms regulation, gives states the tools to balance public interest outside the limits of the individual right.

D. Militia Preemption and the Second Amendment

Prior to the *Heller* decision in 2008, the legal community generally accepted the holdings of *Presser* and *Miller*. For example, the Seventh Circuit upheld *Miller* in 1983, directly quoting the case's holding and noting that "the Court held that the right to keep and bear arms extends only to those arms which are necessary to maintain a

---

[147] *Id.* at 758–59 ("*Cruikshank*, *Presser*, and *Miller* all preceded the era in which the Court began the process of 'selective incorporation' under the Due Process Clause, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.").

[148] *Id.* at 759.

[149] *Presser*, 116 U.S. at 253.

[150] *Miller*, 307 U.S. at 178.

[151] *Id.*

well-regulated militia."[152] Likewise, the American Bar Association (ABA) recognized on its website that the "Supreme Court and lower federal courts have consistently interpreted this Amendment only as a prohibition against Federal interference with State militia" but did not include an individual right to bear arms.[153]

Not all commentators in the legal community shared this view. At least one journal author strenuously disagreed with the ABA's stance at the time, citing it as evidence that "jurists have deluded themselves and the legal community into accepting the convoluted proposition that plenary power to organize and arm the militia was both delegated to Congress (through the Militia Clauses) and reserved to the states (under the Second Amendment)."[154] Instead, the author pointed to the militia preemption clause of the Constitution, which establishes that the federal government has regulatory primacy over aspects of organized and unorganized militia governance.[155] The constitutional authority for militia preemption stems from Article I, Section 8 of the U.S. Constitution.[156] This clause grants the federal government the ability to take command of militia forces during a time of national crisis and incorporate them into the national defense force[157] and is well established in federal case law.[158] In his conclusion, the author argued that the militia preemption doctrine ultimately governs any militia-related collective right contained within the Second Amendment.[159]

The outlier theory that Article I, Section 8 of the Constitution and the militia preemption doctrine take precedence over Second Amendment collective right case law fundamentally misinterprets *Presser and Miller*. Both cases specifically establish or reiterate specific interpretations of the Second Amendment, which must be treated as a subsequent change to the Constitution.[160] *Presser* specifically asserts that the Second Amendment "is a limitation only upon the power of Congress and the national government, and not upon that of the States."[161] Because the Second Amendment modifies the Constitution itself, its interpretation in case law must to be treated precedentially over the militia preemption doctrine.[162]

---

[152] Quilici v. Vill. of Morton Grove, 695 F.2d 261, 268–70 (7th Cir. 1982).

[153] J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39, FN 111 (2001).

[154] *Id.* at 71–72.

[155] *Id.* at 50.

[156] U.S. CONST. art. I, § 8 ("To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]").

[157] *See id.*

[158] Houston v. Moore, 18 U.S. 1, 24 (1820).

[159] Heath, *supra* note 153, at 72 ("If such a phenomenon exists in the U.S. Constitution it is remarkable that the Supreme Court has never cited the Second Amendment as an example of 'dual sovereignty[.]'").

[160] *See* Presser v. Illinois, 116 U.S. 252, 254–61 (1886).

[161] *Id.*

[162] U.S. CONST. art. V.

III. THE COLLECTIVE RIGHT'S MODERN UTILITY

Each state's ability to set its own permissive firearms laws is an underused but important aspect of the Second Amendment. States still shoulder an important burden by contributing manpower to the nation's overall defense and to their own militia forces. However, some states place much greater emphasis on militias than others. For these states, internal policy considerations may drive the need for more permissive firearm rights than a federal law would allow. Not all states have the same policy considerations; some states have greater need for permissive firearm regulations than others, while some have a greater need for more restrictive policies. And loose firearms regulations of the militia, in some instances, has had an indirect impact on the United States' ability to win wars.

A. A Modern Need for a Militia

Today, modern law codifies the meaning of the term militia and breaks it down into two distinct groups: the organized and unorganized militia.[163] The statutory definition of the unorganized militia corresponds roughly to the Court's definition in *Miller* and *Heller* and encompasses practically all of-age Americans.[164] The unorganized militia is separate and distinct from the organized militia, which is composed of the National Guard and formal state militias.[165] The organized militia has a complicated relationship with the federal government and, since 1990, organized militia members surrendered their state militia status upon activation for active-duty tours.[166] The modern force structure of the Army shows why state permissiveness in militia readiness bears directly on the force readiness of the military. Although military personnel numbers fluctuate considerably, a 2010 study of Department of Defense force structure found that national guardsmen and military reservists of all categories accounted for approximately one-half of total military personnel.[167] National Guardsmen, who fall under command of their respective Governors unless drafted into federal service, alone accounted for over 470,000 service members.[168]

---

[163] *See* Armed Forces, 10 U.S.C. § 246 (1953) ("The militia of the United States consists of . . . (1) the organized militia, which consists of the National Guard and the Naval Militia; and (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.").

[164] *See* CRAMER, *supra* note 2, at 32–33.

[165] *See* 10 U.S.C. § 246 (1953).

[166] Perpich v. Dep't of Def., 496 U.S. 334, 335 (1990) ("The unchallenged validity of the dual enlistment system means that Guard members lose their state status when called to active federal duty, and, if that duty is a training mission, the training is performed by the Army. During such periods, the second Militia Clause is no longer applicable.").

[167] MILITARY LEADERSHIP DIVERSITY COMMISSION, ISSUE PAPER NO. 53: NATIONAL GUARD AND RESERVE MANPOWER 1 (2010).

[168] *Id.*

Furthermore, each state maintains its National Guard and state militias of variable strength that are not directly correlative to its population.[169] For example, Minnesota, which maintains the eighth most Army and Air National Guardsmen in the country, ranks only twenty-second in the country for total population.[170] Notably, Texas maintains its own Texas State Guard, a state-licensed militia that operates independently of the National Guard apparatus.[171] Unless called upon for active duty service, the Texas State Guard performs in-state missions under the authority the Governor of Texas.[172] States that enlist and commission citizens into the National Guard and Reserve also enlist and commission military personnel into active duty at different proportions.[173] Alaska, which ranks forty-eighth in terms of total population, is sixteenth in the number of state citizens serving on active duty, with over 20,800 personnel in uniform in the active-duty Armed Forces.[174]

States that maintain National Guards, internal state militias, and contribute citizens directly from the unorganized militia to the military at disproportionate rates relative to the size of their populations have good reason to regulate and craft policies that best reflect the needs of their own population. Establishing a firearms culture within the state contributes to the readiness and ability of unorganized militia members to serve in the Armed Forces and National Guard. For example, a state like Texas, which contributes a significant number of its citizens to the Armed Forces and its own National Guard and state defense force, has a greater incentive to permit its unorganized militia to own and train with military-like weapons. If the state extended a permissive regulatory scheme, such as allowing citizens to possess rifles with militia training value, like the AR-15, to increase the readiness of its unorganized militia, then *Miller* and *Presser* hypothetically protect the state's right to do so. Significantly, *Miller* and *Presser* would also protect a state like Texas from federal legislation that interfered with the state's regulatory scheme, so long as that legislation bore reasonable relation to the state's militia function.

Another reason that a state may choose to have a restrictive or permissive firearms policy relates directly to the geography and population density of the state. The New York legislature may have a more pressing need to restrict gun type/use outside of the individual right in its densely packed population centers than a high military-donor state like Alaska, where citizens will have greater means and need

---

[169] *DoD Personnel, Workforce Reports & Publications: Military and Civilian Personnel by Service/Agency by State/Country (Updated Quarterly)*, DMDC, https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports [https://perma.cc/TB6K-5LK3] (last visited Dec. 8, 2022).

[170] *Id.*

[171] *About TXSG: Texas State Guard*, TEX. MIL. DEP'T, https://tmd.texas.gov/state-guard [https://perma.cc/R33S-43WH] (last visited Dec. 8, 2022).

[172] *Id.*

[173] *DoD Personnel, Workforce Reports & Publications: Military and Civilian Personnel by Service/Agency by State/Country (Updated Quarterly)*, *supra* note 169.

[174] *Id.*

to build firearms proficiency. In Alaska, where low population density, severe inclement weather, and seasonal conditions like winter darkness[175] hinder the National Guard's ability to effectively conduct training, a state-endorsed permissive view of firearms ownership allows individual members of the militia to train outside of formally scheduled events.

Another important consideration are the cost considerations of effective military training. In the Army Reserves and National Guard, firearms proficiency is so important that enlistees must demonstrate firearms proficiency to advance in rank and retain an appropriate skill level to remain combat-ready.[176] However, fiscal concerns remain a prevalent issue for many modern National Guard and Reserve units.[177] Funding constraints remain a perpetual issue within the organized militia, limiting training and forcing units to scale back on planned exercises.[178] Lack of ammunition or available funding has, at times, gotten so troublesome that military regulations allow for suspension of soldier training in the face of fiscal austerity measures.[179] Each state has a vested interest in the preparedness of its citizens and their ability to contribute to the collective defense in times of state or national crisis. Private ownership and use of firearms outsources funding for the organized and unorganized militia onto those individuals most likely to be summoned to service in the event of a national crisis. Recognizing the constitutional authority of states' primacy over firearms regulations allows states to tailor policies that provide the greatest benefit return. It also meets the Founders' general intent that the militia augment the active-duty military in the event of a national crisis or conflict.[180]

Permissive use of firearms for future conflicts training likely influences the talents and skills of those soldiers later drafted in the active-duty military or enlisted into the National Guard. One prominent historical example of this phenomenon is Alvin C. York, a World War I veteran of repute who famously developed sharpshooting skills related to his upbringing in rural Tennessee.[181] York credited his

---

[175] *See Alaska Weather & Climate*, ALASKA.ORG, https://www.alaska.org/expert-advice/weather-climate [https://perma.cc/WK9X-X6S3] (last visited Dec. 8, 2022).

[176] *See generally* HEADQUARTERS DEPARTMENT OF THE ARMY, ARMY REGULATION 600-8-19: ENLISTED PROMOTIONS AND REDUCTIONS (2019).

[177] *See, e.g.*, Steve Beynon, *Cashed-Strapped National Guard Warns It Will Be Forced to Cancel Training, Ground Aircraft*, MILITARY.COM, https://www.military.com/daily-news/2021/06/22/cash-strapped-national-guard-warns-it-will-be-forced-cancel-training-ground-aircraft.html [https://perma.cc/UQP8-BU72] (last visited Dec. 8, 2022).

[178] *Id.*

[179] HEADQUARTERS DEPARTMENT OF THE ARMY, *supra* note 176, at 124 ("During times of ammunition shortages due to deployments, the AG and DARNG may suspend all promotion points for that fiscal year for their entire force. Use a minimum score of Marksman for all re-fires.").

[180] 10 U.S.C. § 246 (1953).

[181] *Alvin York—Hero of the Argonne*, DEP'T OF VETERANS AFFS. (Jan. 25, 2019), https://blogs.va.gov/VAntage/55912/alvin-york-hero-argonne/ [https://perma.cc/XZS3-WV9S].

marksmanship skills to his backwoods upbringing, and he used his firearm skills with great success during the battle of the Argonne Woods.[182] For soldiers like York, exposure to firearms training can make them more proficient during periods of military service.[183] *Presser* and *Miller* afford states the flexibility to foster this level of skill independent of federal legislation that may not fully contemplate the state's need for a particular firearms regulatory regime.

B. Modern Warfare

As weaponry continues to advance in sophistication, commentators periodically declare that modern war's complexity renders the Second Amendment obsolete. In 1940, one *Harvard Law Review* author commented on the relevance of the Second Amendment, stating "[w]e may note the tremendous waste in blood and treasure as a result of reliance upon raw recruits and green generals in the past—a tragic fallacy which today has its counterpart in the view that squirrel hunters are adequate to repel tanks and dive bombers."[184] This view has been echoed particularly by scholars who believe the Second Amendment has outlived its usefulness.[185] But modern history and conflicts have thoroughly challenged the veracity of this assertion. First, recent conflicts have demonstrated that armed populations have been largely successful in fending off larger powers in prolonged conflicts.

Among the notable twentieth and twenty-first century conflicts, three stand above the rest in illustrating this principle: the Vietnam War, the Afghan War, and the Russia-Ukraine conflict. In both Vietnam and Afghanistan, the professionally trained and equipped United States military suffered defeat at the hands of citizen-militia organizations. The Vietnam War brought about great advances in warfare and technology, including the development of combined air support, whereby soldiers would communicate with air units for indirect fire, and the use of new air cavalry for rapid insertions and evacuations.[186] The core element of U.S. military tactics in Vietnam was the foot patrol, whose mission was to locate Viet Cong forces in a given region, and call for support-by-fire from nearby fire bases.[187] This strategy resulted in high numbers of Viet Cong casualties, but led U.S. infantry patrols and National Guard units into close-contact fighting against the Viet Cong, where weapons proficiency impacted the survivability of the American soldier.[188] In the aftermath of

---

[182] *Id.*

[183] *See id.*

[184] Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 182 (1940).

[185] CARLSON, *supra* note 2, at 99–100.

[186] Jeffrey L. Chatman et al., *Running Head: Combined Arms Operations, Ready and Relevant*, 6 (2007), https://apps.dtic.mil/sti/pdfs/AD1132209.pdf [https://perma.cc/3GGT-2ZC6].

[187] *Vietnam Fire Support Base*, ARMY WAR COLL., https://ahec.armywarcollege.edu/trail/Vietnam/index.cfm [https://perma.cc/T85F-6GYV] (last visited Dec. 8, 2022).

[188] *Id.*

Vietnam, military scholars revisited the utility of such tactics, and some argued for greater focus on close-quarters combat with the enemy.[189] Likewise, the modern lesson of Afghanistan can teach us about the efficacy of determined regional militias and loosely organized cells in defeating a superior military force.[190] The rapid rout of the Afghan government's forces in the face of a much smaller and decentralized armed population validates the utility of militia forces in regional conflict.

A final example of the Second Amendment's modern utility is the Ukraine-Russia conflict. Russia's military was widely regarded as one of the most powerful militaries in the world, but Ukraine, a smaller and weaker neighbor, was able to significantly slow the speed of Russia's invasion during the first two weeks of the war.[191] Despite invading Ukraine with approximately 150,000 troops, the Russian military's progress was slow due to several factors, including low morale, poor logistics, and communications problems.[192] Another contributing factor was the mobilization of citizen-defense militias and public support for the Ukrainian Army. The Ukrainian President called the conflict a "People's War,"[193] and in the early days of the conflict, provincial governments mobilized civilian volunteers into reserve brigades and distributed arms to any willing recipient.[194] Over 80,000 Ukrainian civilians returned after Russia invaded the country, most of whom ostensibly returned to serve in the military.[195] National unity and patriotism has led to an influx of citizens joining

---

[189] *See, e.g.*, Gregory M. Heritage, *Tactical Methods for Combatting Insurgencies: Are U.S. Army Light Infantry Battalions Prepared?*, 23 (1993), https://apps.dtic.mil/sti/pdfs/ADA262607.pdf [https://perma.cc/N8HS-Y58D] ("Although firepower provided significant advantages to American forces, there are limitations to the effectiveness of firepower. American tactical units allowed firepower to substitute for maneuver. American forces surrendered maneuver to the enemy by avoiding closing with and destroying the enemy units. Instead, American units often backed away from enemy forces and called for fire support assets.").

[190] *See generally* Julia Hollingsworth, *Who Are the Taliban and How Did They Take Control of Afghanistan So Swiftly?*, CNN (Aug. 24, 2021), https://www.cnn.com/2021/08/16/middleeast/taliban-control-afghanistan-explained-intl-hnk/index.html [https://perma.cc/ENH5-MZXL].

[191] Robert Burns & Lolita C. Baldor, *Ukraine War at 2-Week Mark: Russians Slowed but Not Stopped*, ASSOCIATED PRESS (Mar. 9, 2022), https://apnews.com/article/russia-ukraine-kyiv-europe-moscow-world-war-ii-81b2f12c177810ee8fef7c4ce832fd6f [https://perma.cc/52JS-999C].

[192] *Id.*

[193] Dipaneeta Das, *'The Enemy Will Have No Chance in People's War': Zelensky Calls Ukrainians to Fight Russia*, REPUBLICWORLD.COM, https://www.republicworld.com/world-news/russia-ukraine-crisis/the-enemy-will-have-no-chance-in-peoples-war-zelensky-calls-ukrainians-to-fight-russia-articleshow.html [https://perma.cc/2XWD-HGAL] (last updated Feb. 27, 2022).

[194] Isabelle Khurshudyan et al., *'Weapons to Anyone': Across Ukraine, Militias Form as Russian Forces Near*, STARS & STRIPES (Feb. 26, 2022), https://www.stripes.com/theaters/europe/2022-02-26/weapons-anyone-across-ukraine-militias-form-russian-forces-near-5158268.html [https://perma.cc/LEF3-MD87].

[195] Roman Olearchyk et al., *Zelensky's Call for Volunteers to Defend Ukraine Heeded by*

provisional militias or the armed forces in both organized and unorganized defense of Ukraine.[196] The war in Ukraine illustrates the modern utility of the individual and collective right to bear arms in helping the unorganized militia and organized militias prepare for war. For regular citizens of Ukraine who are called to duty during a national crisis in defense of their homeland, possession of militia-related weapons knowledge and training likely increased their effectiveness and survivability on the battlefield. The Ukrainian-Russian struggle illustrates the importance played by members of the unorganized militia in national defense in a manner comparable to the intention of the Founders.

Our recent military history demonstrates the effectiveness of armed populations at using access to firearms and training against more powerful nations with great effect. In short, it is still reasonable for state legislatures to introduce gun regulation that permits members of the unorganized militia the ability to own and use firearms in a manner that best comports with the state legislature's views on militia preparedness. *Presser* and *Miller*, in protecting the will of these legislatures, reserves power to the states to best represent the needs of their citizens and to prepare them for mobilization events. This precedential remnant allows states to regulate firearms in a manner that best suits their individual needs.

CONCLUSION

The heated nature of the debate over gun rights among the American public might lead an observer to believe that the individual right described in *Heller* definitively swallowed the collective "militia right." But elements of the collective right live on in *Presser* and *Miller*, with profound and relevant influence on modern gun regulation and the readiness of the modern militia member and soldier. As a protection of state sovereignty, states may constitutionally challenge federal laws that impinge upon their ability to reasonably regulate firearms. Of course, states must still respect the Second Amendment right to bear arms granted to individuals, enumerated under *Heller*, and incorporated through *McDonald*. Moreover, the existence of state spheres of regulatory influence suggests limits on the outer bounds of the individual right. The best way to analyze the Second Amendment is not to choose between the collective right or the individual right, but to recognize that the individual right and the collective right coexist peacefully within their separate spheres of interest.

The *Heller* majority argued that the prefatory clause "a well-regulated militia" described the ultimate purpose for which the right existed.[197] Under this interpretation, the Founders likely enacted the Second Amendment to ensure the security of

---

Thousands from Abroad, FIN. TIMES (Feb. 26, 2022), https://www.ft.com/content/2a877400-50df-4878-8815-605405e92c68 [https://perma.cc/U74J-CS35].

[196] *Id.*

[197] District of Columbia v. Heller, 554 U.S. 570, 598 (2008).

the states and the republic at large.[198] Although lost in the largely partisan shuffle over a collective versus individual right, *Presser* and *Miller*'s precedential rulings on the Second Amendment gives states the latitude to adjust militia regulation beyond the individual rights enumerated in *Heller*. Doing so affords the states flexibility to adjust firearms regulations according to the individual needs of the state, and to balance the benefits and harms of firearms policy with the needs of its own militia. This protection, which shields states from federal overreach, affords future soldiers and members of the unorganized militia the ability to train in accordance with the state's needs.

[198] *Id.* at 577.