TYRANNY PREVENTION: A "CORE" PURPOSE OF THE SECOND AMENDMENT

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ABSTRACT

This Note argues that "tyranny prevention" is a core purpose of the Second Amendment which therefore necessitates protection for some quantum of military-style weaponry. It does so by examining the Second Amendment through the lens of the most commonly accepted modes of constitutional interpretation. This analysis is especially relevant today as courts struggle to decide what kinds of weapons are protected by the Second Amendment—and why. Although courts are understandably reluctant to engage with the topic of tyranny prevention and military weaponry, courts will not be able to properly define the scope of the right without engaging in a serious examination of the right's core purposes. This Note seeks to do just that.

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I. INTRODUCTION

"Hell yes, we're coming for your AR-15, your AK-47!"
Former Democratic Presidential Candidate Beto O'Rourke[1]

The Second Amendment protects "the right of the people to keep and bear arms," but the meaning and scope of this right is hotly debated today. One of the most contentious issues is whether the Second Amendment protects so-called "assault weapons," including some rifles, shotguns, and other military-style weaponry such as the infamous AR-15. Before courts are able to resolve this question, a thorough examination of the Amendment's purposes is warranted in order to ensure that the outcome is consistent with constitutional design.

This Note argues that "tyranny prevention" is a "core purpose" of the Second Amendment. To support this argument, this Note examines the tyranny-prevention purpose through the lens of the most commonly accepted methods of constitutional interpretation: textualism, historical, precedential, structural, pragmatic, national identity, and moral. Under any method of interpretation, tyranny prevention emerges as a core purpose of the Amendment which in turn necessitates the protection of some quantum of military-style weaponry.

Part II lays the groundwork by offering background information on the current state of the Supreme Court's Second Amendment jurisprudence, the lower-court framework that has emerged from it, and an explanation of terms. For those who are more familiar with Second Amendment jurisprudence, Sections D and E—in which I define how I will use key terms throughout, as well as how I have broken down my understanding of the modes of constitutional interpretation—will be most useful.

Part III includes an analysis under each method of constitutional interpretation. Each section is presented (and intended) to stand on its own. Those more familiar with Second Amendment jurisprudence may find the Structural, Pragmatic, and National Identity sections most useful, as they put forth more novel arguments that have not been treated as extensively in other works.

Part IV concludes that some quantum of military weaponry is protected by the Second Amendment and then invites more discussion on the topic. As this question affects every American regardless of which "side" one comes out on, it is vitally important that this question is treated more extensively than is possible in a single student work.

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[1] Kate Sullivan and Eric Bradner, *Beto O'Rourke: 'Hell, yes, we're going to take your AR-15, your AK-47,'* CNN (Sept. 13, 2019, 12:35 PM ET), https://www.cnn.com/2019/09/12/politics/beto-orourke-hell-yes-take-ar-15-ak-47/index.html.

II. BACKGROUND, PRESENT QUESTION, AND DEFINITIONS

A. The State of Second Amendment Jurisprudence

Perhaps the most striking feature of Second Amendment jurisprudence is how new it is. The United States Supreme Court did not seriously examine the right to keep and bear arms until *District of Columbia v. Heller* in 2008, over 200 years after the founding.[2] As the Court explained, for most of our history the question just simply did not present itself.[3]

In *Heller*, the District of Columbia had practically banned all handguns from the city.[4] By the time the issue reached the Supreme Court, the primary question was whether the right to keep and bear arms was individual or collective in nature.[5] In a 5-4 decision, the Court determined (among other things) that the right was individual in nature and that the city could *not* ban individuals from owning handguns.[6] This pivotal case is the one around which all Second Amendment jurisprudence currently revolves.

Although there were cases prior to *Heller* that mentioned the Second Amendment,[7] only a few of them were considered by the Court to have actually touched upon the substantive right: *United States v. Cruikshank* in 1875, *Presser v. Illinois* in 1886, and *United States v. Miller* in 1939.[8] After *Heller*, there have been only two Second Amendment cases heard by the Supreme Court: *McDonald v. City of Chicago* in 2010, which incorporated the Second Amendment against the States,[9] and *Caetano v. Massachusetts* in 2016, which was a very brief *per curiam* opinion striking down a Massachusetts law banning stun guns.[10]

This lack of consideration is astounding, given how often other enumerated rights have been examined by the Court. Justice Thomas, among other Justices, has called on the Court to take more Second Amendment cases, pointing out that from 2010 to 2017, the Court heard roughly thirty-five cases on the First Amendment and twenty-five cases on the Fourth Amendment while only hearing two cases on the Second Amendment.[11] Despite this disparity, the Court did not take up another Second Amendment

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2 *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

3 *Id.* at 626 ("It is demonstrably not true that, as Justice STEVENS claims, 'for most of our history, the invalidity of Second–Amendment–based objections to firearms regulations has been well settled and uncontroversial.' For most of our history the question did not present itself.") (citation omitted).

4 *Id.* at 573.

5 *Id.*

6 *Id.* at 635.

7 S*ee* David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999).

8 District of Columbia v. Heller, 554 U.S. 570, 619-22 (2008).

9 McDonald v. City of Chicago, 561 U.S. 742 (2010).

10 Caetano v. Massachusetts, 136 S. Ct. 1027 (2016).

11 Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting).

case until January of 2019 when it granted certiorari to *New York State Rifle and Pistol Association, Inc. v. City of New York*, a case challenging a New York City carry law.[12] As there are so few words from the Supreme Court on the substance of the Second Amendment, this case is likely to have a meaningful impact on Second Amendment jurisprudence.

This scarcity of substantive Supreme Court jurisprudence on the Second Amendment highlights the incredible position in which legal scholars find themselves: nearly the entire field of Second Amendment jurisprudence is ripe for meaningful research and debate.

B. Lower Court Confusion on the "Core" Purpose

Since 2008, lower courts have struggled to apply the principles of *Heller* to Second Amendment challenges. Although the Court explicitly rejected rational basis and interest-balancing review,[13] it did not prescribe a specific level of scrutiny test—or any test at all—for analyzing Second Amendment challenges.[14] Consequently, the circuit courts have had to "clarify the field" themselves.

Today, almost every circuit court has adopted a two-part test for Second Amendment challenges.[15] Step One asks whether the conduct at issue is

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12 N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (U.S. Jan. 22, 2019) (No. 18-280); *see infra* Part III.C.7.

13 District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

14 *Id.* at 634-35 ("Justice BREYER moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions . . . [and] for leaving so many applications of the right to keep and bear arms in doubt . . . . But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.").

15 David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 212 (2017). There is a notable dissent to the two-step framework: Justice Kavanaugh. In *Heller II*, Washington D.C. upheld a near-total ban on so-called "assault weapons" using the two-step approach in which they applied a form of intermediate scrutiny. Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011). Then-Judge Kavanaugh, in a lengthy dissent, argued against the two-step framework: "In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Id.* at 1271. He explained: "For example, the Court has not typically invoked strict or intermediate scrutiny to analyze the Jury Trial Clause, the Establishment Clause, the Self-Incrimination Clause, the Confrontation Clause, the Cruel and Unusual Punishments Clause, or the Habeas Corpus Clause, to name a few." *Id.* at 1283. Under this approach, he concluded that the D.C. ban on so-called "assault weapons" was unconstitutional because the semi-automatic rifles at issue were "in common use," have historically been available for purchase to citizens, and were constitutionally distinct from fully automatic rifles. *Id.*

protected by the Second Amendment.[16] If it is, then Step Two is to apply some form of means-end scrutiny as determined by the court.[17]

Under this approach, the "core purpose" (sometimes referred to as the "core right" and often as simply "the core") of the Second Amendment is a critical reference point in both steps. In Step One, the core purpose of the Amendment informs whether the conduct in question is protected; the closer to the core purpose the conduct comes, the more likely it is protected.[18] In Step Two, the level of scrutiny applied by the court often depends on how close the law comes to the core; the closer the law comes to the core, the higher the scrutiny.[19] Furthermore, in Step Two, the court weighs the law's burdens against the core of the Amendment; the more the law burdens the core, the less likely it is to be constitutional.[20]

The problem is that the circuits disagree on what the "core purpose" is exactly. The Supreme Court explicitly stated in *Heller* that: "[A total handgun ban] makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional."[21] The Court echoed this in *McDonald*: "Thus, we concluded, citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'"[22] Although these pronouncements do not indicate that there is a location component to the core purpose of self-defense (nor that this is the *only* core lawful purpose), the Court repeatedly stressed the importance of the home in its *Heller* analysis, culminating in the pronouncement that: "[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[23]

And here, the circuits split. Many circuits, seizing on the "hearth and home" language, have determined that the core of the Second Amendment

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16 Kopel & Greenlee, *supra* note 15.

17 *Id.* Although the circuits are in almost complete consensus on the use of a two-part test, this does not mean that there is any kind of uniformity in the application of this test. Courts strongly disagree on nearly every aspect of the test, such as what threshold questions apply, whether certain conduct is protected in Step One, whether Step Two should treat core rights differently from other rights, whether the core right is limited to self-defense in the home, and what level of scrutiny to apply in Step Two. *See* David T. Hardy, *Standards of Review, the Second Amendment, and Doctrinal Chaos*, 43 S. ILL. U. L.J. 91, 105 (2018).

18 Kopel & Greenlee, *supra* note 15, at 229. Because the Supreme Court has not given much guidance on what conduct triggers Second Amendment protections, many courts struggle to answer this question and simply assume that the challenged conduct burdens the core of the right and skip to Step Two, largely in order to avoid this highly significant constitutional question.

19 *Id.* at 276.

20 *Id.*

21 District of Columbia v. Heller, 554 U.S. 570, 630 (2008).

22 McDonald v. City of Chicago, 561 U.S. 742, 767-68 (2010).

23 District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

includes *only* self-defense *in the home*.[24] Others, including the D.C. Court of Appeals, have held that the core is simply self-defense, which necessarily entails self-defense outside of the home.[25] Although these two readings focus on the location component of the core purpose, the two readings also disagree on something more fundamental: whether the core purpose of the amendment has been completely defined, or if the core has yet to be fully fleshed out.

How the core is defined matters. Under one interpretation, you do not have the right to carry a handgun for self-defense outside of the home; under the other interpretation, you do. How the core is defined matters to the present question as well: if the core is limited to "self-defense in the home," then it may be reasonable to conclude that military weapons of all kinds are excluded from protection. If the core purpose is merely "self-defense," then it may be reasonable to conclude that something more than a handgun is protected. And if the core includes "tyranny prevention" (whether because "self-defense" includes "self-defense from tyranny" or because the core is later defined by the Supreme Court to include it), then some quantum of military weaponry must be protected.

Thus, the present question of this Note: is "tyranny prevention" part of the "core purpose" of the Second Amendment?

C. Defining "Tyranny" and "Tyranny Prevention"

Perhaps the most relevant definition of the word "tyranny" for the purposes of constitutional analysis is the well-known definition from the Federalist Papers: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny."[26]

Note that this definition does not necessarily imply a positive or normative judgment. James Madison used it to describe a very specific set of conditions of governance. When spoken of in a legal and political context, tyranny is not (necessarily) a dramatic pronouncement of abuse of power—it is the word used by our foremost political scientists for the exercise of all powers by one body, which in their experience usually tended toward the detriment of the governed and was a condition to be avoided. That is how this Note uses the word "tyranny."

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[24] *E.g.*, Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 193 (5th Cir. 2012); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); Worman v. Healey, 922 F.3d 26, 36 (1st Cir. 2019).

[25] Wrenn v. District of Columbia, 864 F.3d 650, 657 (D.C. Cir. 2017). Some courts have also concluded that the "core" right only includes "law abiding citizens," further illustrating that the "core" of the right has yet to be fully defined. *E.g.*, Worman v. Healey, 922 F.3d 26, 36 (1st Cir. 2019).

[26] THE FEDERALIST NO. 47 (James Madison).

Likewise, "tyranny prevention" is not used in this Note to refer exclusively or necessarily to armed resistance against an abusive government—it also entails the *prevention* of the accumulation of all powers into one body. Thus, the present question of whether the Second Amendment codifies a principle of tyranny prevention may be fairly reworded to whether the Second Amendment codifies a method of preventing, either before or after the fact, the accumulation of all powers into one body which experience has shown tends towards the detriment of the governed.

D. Modes of Constitutional Interpretation

Although there is no official categorization of the modes of constitutional interpretation, six general approaches or "modalities" have been recognized and are taught in law schools across the country.[27] These modalities are textual, historical, structural, precedential (or doctrinal), prudential (or pragmatic), and ethical.[28] Similarly, the Congressional Research Service, colloquially known as "Congress' Think Tank," published a report for Congress in early 2018 which listed eight methods or "modes" of constitutional interpretation: textualism, original meaning, precedent, pragmatism, moral reasoning, national identity (or ethos), structure, and historical practices. [29]

These methods of interpretation are fluid in their definitions, subdivisions, and applications and have developed over time.[30] This Note will proceed using the following framework:

Textual analysis focuses on the text itself and attempts to derive a legal conclusion consistent with the meaning of that text. This Note subdivides textualism into two categories: original meaning and original intent. Broadly speaking, original meaning seeks to uncover the meaning of the words as understood by the general population at the time the law was passed, and original intent seeks to uncover the meaning of the words as the legislators understood it when the law was passed.

Historical analysis uses history to inform interpretation. This Note subdivides historical analysis into two categories: historical evidence and

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27 *See* PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

28 *See id.*

29 CONGRESSIONAL RESEARCH SERVICE, MODES OF CONSTITUTIONAL INTERPRETATION, 3 (Mar. 15, 2018), https://fas.org/sgp/crs/misc/R45129.pdf.

30 Indeed, Bobbitt himself hoped to persuade his readers that the modes he put forth were not the only ones. BOBBITT, *supra* note 27, at 7. He maintained: "My typology of constitutional arguments is not a complete list, nor a list of wholly discrete items, nor the only plausible division of constitutional arguments. The various arguments illustrated often work in combination. Some examples fit under one heading as well as another . . . . A different typology might surely be devised through some sort of recombination of these basic approaches, and there can be no ultimate list because new approaches will be developed through time." *Id.* at 8.

historical practice. Historical evidence uses history *prior* to the enactment of legislation as proof of the original meaning or intent; historical practice instead uses the traditions and practices that developed *after* the legislation's enactment as proof of how subsequent generations understood the words of the law.

Precedential (or doctrinal) interpretation seeks to reach a legal conclusion that is consistent with the Court's prior rulings.

Structural analysis "draws inferences from the design of the Constitution: the relationships among the three branches of the federal government (commonly called separation of powers); the relationship between the federal and state governments (known as federalism); and the relationship between the government and the people."[31]

Prudential (or pragmatic) interpretation seeks the legal interpretation that has the most desirable practical consequences.

National Identity (or "Ethos") "relies on the concept of a 'national ethos,' which draws upon the distinct character and values of the American national identity and the nation's institutions in order to elaborate on the Constitution's meaning."[32]

Moral interpretation is grounded in moral concepts such as "equal protection" or "due process of law" which often limit government authority over the individual (i.e., individual rights).[33] Although often dismissed, this kind of reasoning is prevalent in modern equal protection and due process cases.[34]

With this framework in mind, this Note will now turn to the question at hand: is "tyranny prevention" a "core" purpose of the Second Amendment?

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31 CONGRESSIONAL RESEARCH SERVICE, MODES OF CONSTITUTIONAL INTERPRETATION 3 (Mar. 15, 2018), https://fas.org/sgp/crs/misc/R45129.pdf.

32 *Id.* at 17. Bobbitt called this mode "Ethical," recognizing at once "the difficulties created by my choice of this particular name. As I shall use the term, ethical arguments are not moral arguments." He explained: "By ethical argument I mean constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people. It is the character, or ethos, of the American polity that is advanced in ethical argument as the source from which particular decisions derive." BOBBITT, *supra* note 27, at 94. I have coined this mode "National Identity/Ethos" precisely to avoid this confusion.

33 CONGRESSIONAL RESEARCH SERVICE, MODES OF CONSTITUTIONAL INTERPRETATION 15 (Mar. 15, 2018), https://fas.org/sgp/crs/misc/R45129.pdf. Here, I use the term "ethical" in line with a more common understanding of the moral undertones associated with the word, although as explained above, *supra* note 32, this is not the same way that Bobbitt used the word.

34 *Id.*

III. CONSTITUTIONAL INTERPRETATION

This Part is not intended to be an exhaustive review of each method's relation to the present question; certainly, an entire work could be devoted to each method. Instead, this Part is intended to highlight how much evidence there is that "tyranny prevention" was an intended "core purpose" of the Second Amendment, and that this purpose was deliberately and purposefully intended to extend constitutional protection to some quantum of military weaponry.

A. Textualism

Textualism focuses on the text itself and attempts to derive a legal conclusion consistent with the meaning of that text.[35] Although this may sound straightforward, textualism itself may be subdivided between original meaning and original intent.[36]

Original meaning is generally meant to suggest that the words of the Constitution should be interpreted to mean what the voters of the founding generation who ratified it thought they meant. This contrasts with "original intent," which interprets the meaning of the words as the legislators themselves believed them to mean.

Because so much has already been written on this particular aspect of Second Amendment interpretation, this Note will focus on *Heller's* use of textualism, which provides a thorough analysis of both original meaning (in the majority) and original intent (in the dissent). Although this might seem more "Precedential" than "Textualist," Justices Scalia and Stevens expend an incredible amount of effort in determining the meaning of the Amendment's text, and independently reproducing their analysis (which has been done many times before) would be redundant. Instead, this Note will apply their conclusions (and some brief observations) to the question at hand.

Regardless of whether original meaning or original intent is used, however, the ultimate conclusion is the same: the text of the Second Amendment codifies the principle of tyranny prevention and necessarily protects military-style weaponry to that end.

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35 For a thoroughly detailed accounting of textualist principles, cannons, and interpretative rules, see ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

36 For a brief overview of the history and evolution of originalism, see Emily C. Cumberland, *Originalism, in A Nutshell*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 52 (2010). Although textualism and originalism are technically distinct interpretative methods, this Note treats originalism as a branch of textualism.

1. Textualism: Original Meaning

The majority opinion of *Heller*, which is widely regarded as a model of original meaning interpretation, provides the following rules for interpreting the words of the Second Amendment:

> In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[37]

The Court in *Heller* then applies that principle to the text. The Second Amendment reads: "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."[38] Before defining each word and phrase, the Court notes that the Second Amendment is unique in its structure as it is divided into a prefatory and operative clause.[39] The prefatory clause does not limit the operative clause grammatically, but rather announces a purpose.[40] Apart from this clarifying function, the prefatory clause does not limit or expand the scope of the operative clause.[41]

Using these rules, the Court makes the following conclusions regarding the original meaning of the following words:

"Well-Regulated" implies "nothing more than the imposition of proper discipline and training."[42]

The "militia" comprises "all males physically capable of acting in concert for the common defense."[43] Under this interpretation, the "unorganized militia" includes every able-bodied male in the country, regardless of their affiliation with any official organization, and the "organized militia" includes the official state and federal militias.[44] Under the Court's reading, the Second Amendment refers to the unorganized militia. The Court rejected the narrower interpretation of "militia" which included only the "state- and congressionally-regulated military forces described in the Militia Clauses."[45]

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37 District of Columbia v. Heller, 554 U.S. 570, 576-77 (2008) (citations omitted).
38 U.S. CONST. amend. II.
39 *Heller*, 554 U.S. at 577.
40 *Id.*
41 *Id.*
42 *Id.* at 597.
43 *Id.* at 595 (quoting United States v Miller, 307 U.S. 174, 179 (1939)).
44 *Id.* at 595-96.
45 *Id.* at 595-96.

"Security of a free State" meant "security of a free polity," not the security of each of the several States.[46] It would be synonymous with "security of a free country."[47]

"The Right of the People" refers to the *individual* right of all Americans to keep and bear arms, regardless of their affiliation with any organized or state-sponsored militia, as opposed to a *collective* right of the people to keep and bear arms when part of some state-sponsored militia.[48]

To "keep" arms is to "have weapons."[49]

To "bear" arms refers to "carrying for a particular purpose—confrontation."[50] It does not connote participation in structured military organization, nor confrontation in an exclusively militaristic setting.[51] The Court stressed that the phrase is neutral in terms of what kind of confrontation is at issue. The confrontation could be public or private in nature.[52] For example, one could "bear arms in defense of themselves and the state."[53]

"Arms" refers, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.[54] *Heller* also suggests that the original meaning of "arms" encompassed defensive armor.[55] It also quoted a 1794 thesaurus as stating that all firearms constituted "arms."[56]

"Infringed" was not explicitly defined, nor was there any discussion on its particular meaning, if any.

With the words of the Amendment defined in detail, there are some conclusions that may be made in reference to the present question of whether the Second Amendment encompasses a tyranny-prevention purpose.

First, the Court did not engage with the word "security" as extensively as it did with "free State." The Court spent one small paragraph describing three of the "many reasons" why an armed, unorganized militia (aka, an armed population) was thought to be necessary to the security of a free country: "First, of course, it is useful in repelling invasions and suppressing

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46 *Id.* at 597.

47 *Id.*

48 *Id.* at 581.

49 *Id.* at 582.

50 *Id.* at 584.

51 *Id.* at 581-92.

52 *Id.* at 594.

53 *Id.* at 584-85.

54 *Id.* at 582; *see also* Caetano v. Massachusetts, 136 S. Ct. 1027, 1027 (2016) (per curiam) (in which the Court curtly invalidated a Massachusetts law prohibiting the possession of stun guns. There, the state court banned stun guns because they were "dangerous per se at common law and unusual," and because stun guns were not "the type of weapon contemplated by Congress in 1789 as being protected.").

55 District of Columbia v. Heller, 554 U.S. 570, 581 ("The 1773 edition of Samuel Johnson's dictionary defined 'arms' as '[w]eapons of offence, or armour of defence.'").

56 *Id.* (quoting 1 J. TRUSLER, THE DISTINCTION BETWEEN WORDS ESTEEMED SYNONYMOUS IN THE ENGLISH LANGUAGE 37 (3d ed. 1794)).

insurrections. Second, it renders large standing armies unnecessary . . . . Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."[57] This suggests that the types of weapons protected by the Second Amendment include those necessary to repelling invasions, suppressing insurrections, and defending against governmental tyranny.

Second, the Court concluded that the purpose announced by the prefatory clause is to prevent elimination of the militia,[58] which it said comprised "all males physically capable acting in concert for the common defense."[59] In other words, the purpose announced by the prefatory clause is to prevent the people from being disarmed so that they may be called upon to serve in concert for the common defense. Again, this suggests a degree of weaponry that would be useful, or even necessary, for common defense.

Third, since to "bear" arms means carrying for the purposes of confrontation, the question necessarily arises as to which confrontations the Second Amendment is envisioned to protect. As stated above, the types of confrontations may be private or public in nature and may be small or large scale. The confrontations envisioned by the text of the Second Amendment include confrontations that would necessitate the need for a militia. Militias are necessary in military confrontations. A fair understanding of the text, then, suggests that the Second Amendment protects the bearing of arms for military confrontations including, but not limited to, invasions, insurrections, and governmental tyranny.

Fourth, the word "infringed" is not given any textual treatment. The closest it comes to defining "infringed" is quoting an 1846 Georgia Supreme Court case which remarked that the Second Amendment right "shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State."[60] Although it does not go into the same kind of textual analysis with the word "infringed" as it does with every other word in the Amendment, the Court did allocate an entire section on the limitations of the Second Amendment,[61] which will be discussed in the precedential section of this Note. Perhaps "infringed" has no special meaning, and the only pertinent definition of infringed is whatever limitations the Court places on the right. If taken on its face, however, the phrase "shall not be infringed" would suggest that military-style weapons are protected since the right is, using Georgia's definition, not to be curtailed in the smallest degree.

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57 *Id.* 597-98.

58 *Id.* at 599.

59 *Id.* at 595 (quoting United States v Miller, 307 U.S. 174, 179 (1939)).

60 *Id.* at 612-13.

61 *Id.* at 626-29.

Finally, utilizing all of the explicit definitions from *Heller*, the text of the Second Amendment could fairly be re-written to say: Because a well-trained, armed population is necessary for the internal and external security of a free country, the pre-existing, individual right of the people to have and carry weapons in the event of confrontation, shall not be infringed.[62]

Taking the Court's original meaning interpretation at face value, it is clear that a central purpose of the Second Amendment included arming the population for the internal and external security of the nation. The founding generation understood that the Second Amendment was designed, in part, to preserve the people's ability to resist invasion, insurrection, and governmental tyranny. Under this method of interpretation, Second Amendment protection must therefore extend to at least some weaponry that is useful in military service.

2. Textualism: Original Intent

Original intent interpretation attempts to give the text the meaning that the legislature intended when passing the law. Justice Steven's dissent in *Heller* is an example of this interpretation. Although his dissent concluded that the right protected by the Second Amendment is collective in nature, it nevertheless leads to the same conclusion in regard to the question at issue: the purpose of the Second Amendment is to provide for a method of resisting and preventing governmental tyranny and therefore necessarily extends to weapons useful in military service.

Justice Stevens begins with the prefatory clause, concluding that it makes three important points: "It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be 'well regulated.'"[63] Here, however, "State" is interpreted to mean one of the several States of the Union and "well regulated" is suggested to imply thorough regulation over and regarding all aspects of the militia, including the arms that were to be provided or required.[64]

"The right of the people" under his view "do[es] not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia."[65]

"To keep and bear arms" describes a single right that is "both a duty and a right to have arms available and ready for military service, and to use

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62 *Cf. id.* at 577 ("The Amendment could be rephrased, 'Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.'").

63 *Id.* at 640 (Stevens, J., dissenting).

64 *Id.* at 646 (Stevens, J., dissenting).

65 *Id.* at 646 (Stevens, J., dissenting).

them for military purposes when necessary."[66] Furthermore, Justice Stevens concludes that "the Framers' single-minded focus in crafting the constitutional guarantee to keep and bear Arms was on *military uses* of firearms, which they viewed in the context of service in state militias."[67] Thus, "arms" under this interpretive measure are those used for military purposes. This suggests two things: 1) the Amendment protects weapons used for military purposes, and 2) that at least one of the kinds of "confrontation" for which the Amendment was written is a confrontation with military connotation.

Finally, as with the majority opinion of *Heller*, the phrase "shall not be infringed" is not engaged in a meaningful way, as far as textualism is concerned.

From an original intent analysis, the same conclusion can be drawn in relation to the present question: the Second Amendment was intended by the original legislators to protect military weapons in some way. Justice Stevens' argument centers on the proposition that the Framer's "ultimate purpose [in adding the] Amendment was to protect the States' share of the divided sovereignty created by the Constitution."[68] If the federal government chose to send its armed forces to impose its will on the States, the States would be able to defend themselves thanks to the protections of the Second Amendment. They would only be able to do that, however, if they were equipped with military-style weapons which the federal government would be prevented from prohibiting.

Under either of the opinions discussed above, the answer to the present question is the same. Under original meaning or original intent, regardless of whether the Second Amendment protects an individual or collective right to keep and bear arms, one of the fundamental purposes of the Second Amendment is to provide a measure of tyranny control and prevention which necessitates protection of some level of military weaponry. Under the individual rights interpretation, the purpose of the Amendment is to ensure that the population is individually armed so that they may rise up in defense of their lives and liberties against a multitude of threats—including governmental tyranny. Under the collective rights interpretation, the purpose of the Amendment is to provide a mechanism for the States to ensure itself an armed defense of its people and liberties from threats including a tyrannical federal government. Additionally, under the collective view especially, the Second Amendment was written with military weapons and military uses expressly in mind. If the purpose of the Amendment included an aspect of tyranny prevention, then it must necessarily protect some

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66 *Id*. at 651 (Stevens, J., dissenting).

67 *Id*. at 643 (Stevens, J., dissenting) (emphasis added and quotations omitted).

68 *Id*. at 645 (Stevens, J., dissenting).

measure of military-grade weaponry, or else the purpose of the Amendment could easily be frustrated by legislation.[69]

B. Historical

Historical interpretation uses historical analysis to come to a legal conclusion. This Note explores two subdivisions of historical interpretation. The first, which I refer to as "historical evidence," uses historical evidence *preceding* the adoption of the text to show what the Framers/founding generation understood the words to mean. The second, which I refer to as "historical practice," uses historical evidence *after* adoption of the text to show what subsequent generations understood the text to mean. In either case, the pre- and post-ratification history of the Second Amendment clearly demonstrates that the Second Amendment protects some measure of military-style weaponry for the prevention of tyranny.

1. Historical Evidence

In 1215 King John of England signed Magna Carta in order to retain his throne.[70] Magna Carta was essentially an agreement between the king and the barons that the king would recognize certain rights retained by the nobles in exchange for the barons' submission to his rule. Although the charter is significant for a great number of reasons, the 61st article is of particular relevance to the present question. This article was an enforcement mechanism which provided that in the event of a breach of these rights by the monarch, the barons

> together with the community of the whole land shall distrain and distress [the monarchs] in every way they can, namely, by seizing castles, lands, possessions, and in such other ways as they can, saving our person and the persons of our queen and our children, until, in their opinion, amends have been made; and when amends have been made, they shall obey us as they did before."[71]

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69 The majority determines that guaranteeing the existence of the militia is only possible by guaranteeing an individual right to own firearms; the dissent does not really examine how a collective view ensures the existence of the militia. Furthermore, the collective view paradoxically argues that the Amendment protects the right to military-style weapons (at least in a collective context) while allowing the banning of handguns wholesale, since they presumably have no value in the militia.

70 RALPH V. TURNER, MAGNA CARTA THROUGH THE AGES 52 (2003).

71 *Id.* at 234-35. Magna Carta of 1215 was not subdivided into articles, but rather read as one continuous text.

Although this specific clause was repudiated by subsequent monarchs, the ideas of inviolable rights, government as contract, and of a right to resist tyranny upon a breach of that contract would find their way into the Declaration of Independence and early American governance centuries later.

The 1689 English Bill of Rights included a provision that has long been understood to be the predecessor to the Second Amendment.[72] In the decades leading up to the English Bill of Rights, the Stuart Kings had selectively disarmed portions of the Protestant population (under the pretext of hunting laws) because of their religion (and thus, their political persuasion) in an effort to establish a monopoly of force.[73] Upon their overthrow, the new monarchs were coronated on the condition that they accept a Declaration of Rights, which they did, and which was subsequently enacted by Parliament as the Bill of Rights.[74] The relevant provision read: "That the subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[75] Later, James Madison's notes to his speech introducing the American Bill of Rights revealed what he considered to be deficiencies in the English Bill of Rights, among them being that it protected only Protestant's (as opposed to other religious groups') right to arms,[76] suggesting that the right should have a far broader application.

Although the guarantee of arms in the English Bill of Rights was limited by both economic status and religious affiliation, by the time of the founding this right was understood to be fundamental for English subjects.[77] William Blackstone, the "preeminent authority on English law for the founding generation,"[78] wrote as much, saying that it "is indeed a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[79] Blackstone pointed out the Stuart King's attempt to disarm the bulk of the people by way of hunting laws,[80] warning that, "Nothing then . . . ought to be more guarded against in a free state, than

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72 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441; *see* E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 51 (1957); W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 122 (1825).

73 *See* J. MALCOLM, TO KEEP AND BEAR ARMS 31–53 (1994); L. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, p. 76 (1981); NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 125-33 (2d ed. 2018).

74 The Avalon Project, *English Bill of Rights 1689*, YALE LAW SCHOOL LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/17th_century/england.asp (last visited Jan. 19, 2020).

75 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441.

76 James Madison, *Notes for Speech in Congress Supporting Amendments, June 8, 1789*, THE ORIGIN OF THE SECOND AMENDMENT 645 (David E. Young ed., 1991).

77 MALCOLM, *supra* note 73, at 31-53.

78 District of Columbia v. Heller, 554 U.S. 570, 593-94 (2008) (citing Alden v. Maine, 527 U.S. 706, 715 (1999)).

79 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1769).

80 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 412 (1769).

making the military power . . . a body too distinct from the people."[81] Finally, Blackstone noted that "[I]n cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people."[82]

Relatedly, in his summary of the common law of lethal force against violent criminals, he summarized a principle that would carry over to the American Revolution: "the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting."[83] Although more applicable to discussions of self-defense, this principle applies if certain abuses of a tyrannical government may be said to be "capital crimes."

John Locke, whom Thomas Jefferson described as one of the four major sources of the American consensus on rights and liberty,[84] wrote that even under government, "Men can never be secure from Tyranny, if there be no means to escape it, till they are perfectly under it: And therefore it is, that they have not only a Right to get out of it, but to prevent it."[85]

And then, of course, there was the American Revolution. In the years leading up to the Revolution, King George III attempted to disarm the colonies. In 1774, the King and his ministers blocked importation of arms and ammunition to America,[86] but it was too late. Realizing that Great Britain lacked sufficient troops to impose its will on the rebellious colonies, Lord Barrington, head of the War Office, wrote to Lord Dartmouth, head of the Colonial Office, advising retreat in light of the fact that Massachusetts, full of armed farmers, would be nearly impossible to conquer.[87] The Duke of Manchester, a member of Parliament, "cautioned the House to proceed with deliberation, as America had now three millions of people, and most of them were trained to arms, and he was certain they could produce a stronger army than Great-Britain."[88] It is clear that by this time, with many of them armed, the Colonists viewed it their right as Englishmen to keep arms on par with the British military.[89]

Nevertheless, England persisted. Intending to seize American arms at Lexington and Concord, the British left Boston on April 18, 1775. The war

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81 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 401 (1769).

82 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 82 (1769).

83 *Id*. at 179-82.

84 Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 117-19 (Andrew A. Lipscomb ed., 1903).

85 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 220 (1690).

86 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES, VOL. 5, A.D. 1766-1783 401 (Burlington, Canada: TannerRitchie Pub., 2000) (James Munro & Almeric W. Fitzroy eds., 1912).

87 NICK BUNKER, AN EMPIRE ON EDGE: HOW BRITAIN CAME TO FIGHT AMERICA 348-65 (2015).

88 JOHNSON ET AL., *supra* note 73, at 256.

89 District of Columbia v. Heller, 554 U.S. 570, 594 (2008).

began the next day. It seems perfectly fair to say that the American Revolution began when the Redcoats attempted to deprive the Colonists of their military-style arms. As if to accentuate for the Colonists (and for future Americans) how easily abused the right to keep arms is, General Gage made a deal with Bostonians on the day of Lexington and Concord: surrender your arms and you may leave the city peacefully.[90] City leaders elected to accept the offer, and a number of residents surrendered their arms.[91] Gage refused to allow the Bostonians to leave.[92]

A year later, the Continental Congress unanimously adopted the Declaration of Independence. This document succinctly points out a number of relevant principles:

The opening phrase, "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another,"[93] implies that there *are* times when it becomes necessary for a people to declare political independence. The Founders accepted this proposition and therefore intended that the population be properly armed for just such a lawful revolution.

The document continues:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[94]

Although not codified in the Constitution or the Bill of Rights, the Declaration nevertheless serves as evidence of the nation's guiding principles at the time of the founding. The ultimate legal remedy for tyrannical government is revolution. The Second Amendment is an outgrowth of that principle. Thus, "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."[95]

While the right to keep and bear arms for personal self-defense in the home is unquestionably within the "core" of the Second Amendment right,

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90 JOHNSON ET AL., *supra* note 73, at 264.

91 *Id.*

92 *Id.*

93 DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

94 DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

95 District of Columbia v. Heller, 554 U.S. 570, 594 (2008).

historical evidence refutes the idea that the perimeter of the core is established at that point. The Framers and the founding generation understood the Second Amendment to be a check on the repeated abuses of past tyrannical governments. The Founders identified a legal right, whether implicit in natural law or as part of the contract of government, to revolution. In order to ensure that this remedy and right was available when needed, the Second Amendment was codified. Whether the mechanism be by the great body of an armed American citizenry or well-regulated state militias, the purpose of the Second Amendment was to provide a check to the ancient and constant abuses of tyranny.

2. Historical Practice

The previous section looked to pre-enactment history to determine what the Framers/founding generation believed the words to mean. This section looks to post-enactment history to see how the founding and subsequent generations understood and applied the words. The relevant question here is whether the founding and subsequent generations understood the Second Amendment's purpose as a check on tyranny necessitating protection of military arms.

The Court in both *Heller* and *McDonald* provided a number of examples of historical sources shedding light on the subsequent understanding of the Second Amendment in the form of post-ratification commentaries from influential founding-era scholars, pre-Civil War case law, post-Civil War legislation, and post-Civil War Commentators. Their works were cited in the context of the individual versus collective right of the Second Amendment, but they also inform the discussion on the Amendment's purpose for preventing tyranny. A few are presented below.

a. Post-Ratification

George Tucker, in his commentaries on Blackstone and the U.S. Constitution, elaborated on the Second Amendment:

> This may be considered as the true palladium of liberty. . . . The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.[96]

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[96] ST. GEORGE TUCKER, 2 BLACKSTONE'S COMMENTARIES 143, Note D (ellipsis in original).

First, Tucker very closely aligned self-defense with tyranny prevention; for him, the line between the two—if there was one—was exceptionally thin. Second, Tucker recognized that disarming the population, under one pretext or another, leaves the population vulnerable to oppressive government. Finally, Tucker makes these points specifically under the heading of the "Second Amendment," indicating his understanding of the Amendment's intimate relationship with repelling the standing army of tyrannical government.

William Rawle's treatise contained a similar condemnation of widespread disarmament as a tool of tyranny which the Second Amendment was designed to prevent. "In the [Second Amendment], it is declared, that a well regulated militia is necessary to the security of a free state; a proposition from which few will dissent."[97] Rawle explained why a militia was necessary to the security of a free state: "They are ready to repel invasion, to suppress insurrection, and preserve the good order and peace of government."[98] Under Rawle's understanding, military weapons must be protected by the Second Amendment, since such weapons would be necessary to carrying out these enumerated functions.

Rawle continued:

> The corollary, from the first position is, that the right of the people to keep and bear arms shall not be infringed.
>
> The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.[99]

Rawle understood that neither Congress nor the state legislatures had any power to disarm the people. Furthermore, if either party attempted disarmament, the Second Amendment could be "appealed to as a restraint on both." Regardless of whether he meant a theoretical restraint (i.e., providing legal arguments against disarmament) or a practical restraint (i.e., an armed population could prevent disarmament by force), or both, it is clear that Rawle viewed the Second Amendment as a check on tyrannical government and protected some level of arms capable of carrying out that check.

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97 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125 (1825).

98 *Id.* at 125-26.

99 *Id.*

Justice Story's commentaries agree:

> The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; 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 the people to resist and triumph over them.[100]

He went on in *Familiar Exposition of the Constitution of the United States* to say: "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia."[101] Truly, as he commented there, "the importance of this article will scarcely be doubted by any persons who have duly reflected upon the subject."[102]

These post-ratification commentaries help to illustrate that the Second Amendment was understood by the founding generation to codify a principle of tyranny prevention. All of these commentators understood that arming the militia with military weaponry of some kind was a core purpose of the Second Amendment.

b. Civil War Era

In its section on pre-Civil War case law, the *Heller* Court cited to *Nunn v. State*, the Georgia Supreme Court case cited above,[103] which the Court said "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right,"

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to

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100 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746-47 (1833).

101 JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 450 (1840).

102 *Id*. § 451. It should be noted that Justice Story went on to lament the growing indifference of the American people towards any system of militia discipline even his day. "How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our National Bill of Rights" *Id*. Regardless, this does not change the underlying premise that the Second Amendment was intended to serve a tyranny-prevention function.

103 *See supra* Part III.A.1, examining the cited portion for its contribution to textual analysis of the word "infringed."

> be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta*![104]

This understanding continued after the Civil War. Pomeroy's post-Civil War commentary was cited by the Court for its description of the Second Amendment's purpose in preserving the efficacy of the militia with "warlike weapons."

> [The purpose of the Second Amendment is] to secure a well-armed militia . . . . But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against the usurpations of government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms . . . . The clause is analogous to the one securing the freedom of speech and of the press. Freedom, not license, is secured; the fair use, not the libellous abuse, is protected.[105]

The Court in *McDonald* also treated this time period in its analysis of whether the Second Amendment right is fundamental to our ordered scheme of liberty:

> By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.[106]

The Court was not suggesting that the *purpose* of protecting against an oppressive national government was no longer valid or necessary—only that it had faded from concern. Nor did it make the right any less fundamental. It cited an 1868 speech in Congress expounding on the Fourteenth Amendment's application of the fundamental right to arms: "Disarm a community and you rob them of the means of defending life. Take away their

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104 District of Columbia v. Heller, 554 U.S. 570, 613 (2008) (quoting Nunn v. State, 1 Ga. 243, 251 (1846)).

105 *Id.* at 618 (quoting JOHN POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 239, 152-53 (1868)).

106 McDonald v. City of Chicago, 561 U.S. 742, 770 (2010).

weapons of defense and you take away the inalienable right of defending liberty."[107]

Furthermore, by the Civil War's end, twenty-two of the thirty-seven States recognized a right to keep and bear arms in one way or another.[108] Many recognized this right for the "common defense" or for the defense of "the State."[109] Such a right appears to implicitly recognize a purpose of tyranny prevention and necessitate the protection of military-style weaponry in some form or another.

c. Modern

With this understanding firmly in place, the issue of the Second Amendment rarely, if ever, was raised at the national level. As the Court said in *Heller*, the issue just didn't present itself for much of our history.[110] That is, until the Federal Assault Weapons Ban (FAWB) of 1994. This 10-year ban on "assault weapons" passed in 1994 by a 52-48 vote and expired in 2004 in accordance with its sunset provision after it failed to be reenacted.[111] Although the lower courts dismissed challenges to the FAWB on the grounds that it 1) constituted a bill of attainder, 2) was unconstitutionally vague, 3) was incompatible with the Ninth Amendment, 4) violated the Commerce Clause, and 5) violated Equal Protection, the FAWB was never directly challenged under the Second Amendment.[112]

The fact that this law passed would seem to indicate a change in both the population and legislature's understanding of the Second Amendment's tyranny-prevention purpose. However, it can just as easily be argued that the FAWB's expiration, which barely passed through Congress in the first place and which could not garner enough support to be reenacted, is strong evidence that the political will summoned to pass the bill initially was an anomaly.

This scant recitation of history is no substitute for a thorough historical review of the present question; nevertheless, it illustrates the seriousness of the inquiry. Whether we as a country have viewed the Second Amendment

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107 *Id*. at 776 (citing Cong. Globe, 40th Cong., 2d Sess., 1967).

108 *Id*. at 777.

109 Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 210 (2006).

110 District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("It is demonstrably not true that, as Justice STEVENS claims, 'for most of our history, the invalidity of Second–Amendment–based objections to firearms regulations has been well settled and uncontroversial.' For most of our history the question did not present itself.").

111 VIVIAN S. CHU, CONGRESSIONAL RESEARCH SERVICE, FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES 3 (Feb. 14, 2013), https://fas.org/sgp/crs/misc/R42957.pdf.

112 *Id*. at 7-11.

as involving a tyranny-prevention purpose is a question that deserves serious treatment and recognition.

Regardless, whether opinions and understanding of the Second Amendment's tyranny-prevention purpose is changing today does not change the fact of 200 years of understanding the Amendment to include such a protection. Perhaps the law *should be* different; as of right now, however, the evidence seems to clearly indicate that the Second Amendment has been largely understood since the founding to include a protection against tyranny.

C. Precedential (or Doctrinal)

Precedential interpretation seeks to resolve a constitutional question by squaring it with prior precedent. The principle of stare decisis, or "let the decision stand," is often implicitly, if not explicitly, informing this type of analysis. Besides increasing the legitimacy of the Court by ensuring that its pronouncements are consistent and that they logically build on one another, stare decisis also serves to protect those who have relied on the current legal scheme and who would be injured by a sudden shift in the legal landscape. It is further used as evidence of "what the law is" by showing how the Court has understood the legal principle at issue over time.

Precedential interpretation is highly relevant in Second Amendment analysis for two reasons. First, Second Amendment jurisprudence is relatively scant, so every word spoken on the matter is highly relevant. Only three Supreme Court cases seem to carry any weight with the Court itself and the legal community.[113] And second, in the wake of *Heller*, all courts must bend their decisions to conform with its precepts.

This section will analyze whether the Second Amendment's core lawful purpose of tyranny prevention, necessitating protection of some military-style weaponry, is consistent with prior precedent. First, this section will examine the precedents that have been highlighted by the Court since *Heller* as especially relevant to Second Amendment analysis. Specifically, this section will examine *Cruikshank*, *Presser*, and *Miller*, in relation to *Heller*, *McDonald*, and *Caetano*. A short word on *New York State Rifle*, which as of publication of this Note has been argued but not decided, will follow.

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[113] *But see*, Kopel, *supra* note 7, at 118 (reviewing 35 cases which quote, cite, or discuss the Second Amendment in the context of the individual/collective debate prior to *Heller*. These cases do not lend much in the way of precedential analysis on the present question of the Second Amendment's relationship to tyranny prevention, but largely focus on discussions of the individual or collective nature of the Amendment in relation to other Constitutional provisions and in unrelated contexts.).

1. United States v. Cruikshank

In *Cruikshank*, the Court vacated the convictions of white mob members charged with conspiring to deprive others of their Constitutional rights including the rights to freely assemble and keep and bear arms.[114] The Supreme Court explained that neither right was "granted by the Constitution [or] in any manner dependent upon that instrument for its existence," reaffirming the notion that the Bill of Rights does not confer rights but merely adds an additional layer of protection to pre-existing rights.[115] The Court continued: "The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government[.]"[116] The Court in *Cruikshank* thus held that although the Second Amendment protects a pre-existing right to keep and bear arms, its protections can only be enforced against the federal government and not private citizens.

In *Heller*, the Court commented that in *Cruikshank*, "We described the right protected by the Second Amendment as 'bearing arms for a lawful purpose.'"[117] This raises the question of whether "tyranny prevention" is a "lawful purpose" and thus whether the Second Amendment protects bearing arms for the lawful purpose of tyranny prevention. Based on Part III.B's historical analysis, above, it seems clear that such a purpose is lawful.

2. Presser v. Illinois

In *Presser*, a man named Herman Presser was convicted for violating an Illinois law which made it unlawful for:

> [A]ny body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this state, without the license of the governor thereof[.][118]

Presser, without the Governor's permission, led a military parade through the streets of Chicago, riding on horseback and in command of a private company of 400 men belonging to an organization created ostensibly for the purpose of "improving the mental and bodily condition of its members

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114 United States v. Cruikshank, 92 U.S. 542, 552 (1875).
115 *Id.* at 553.
116 *Id.*
117 District of Columbia v. Heller, 554 U.S. 570, 620 (2008).
118 Presser v. Illinois, 116 U.S. 252, 253-54 (1886).

so as to qualify them for the duties of citizens of a republic."[119] Presser brought a number of Constitutional challenges, including the challenge that the law violated the Second Amendment.[120] On this challenge, the Court specifically ruled that "the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms."[121] It then quoted *Cruikshanks'* holding that the Second Amendment only restricts the power of the national government, and not state governments, and then concluded its analysis of the Second Amendment challenge with this paragraph:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the 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, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect.[122]

To the Court in *Presser*, it is obvious that military weapons are protected; the only question was whether private paramilitary organizations could muster, parade, and drill with those weapons. The Court in *Heller* summarized *Presser* by stating: "*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."[123]

3. United States v. Miller

In *Miller*, the Court upheld a federal indictment against Jack Miller for transporting an unregistered short barreled shotgun in interstate commerce, in violation of the National Firearms Act.[124] Miller argued that this law violated the Second Amendment. The Court disagreed:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this

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119 *Id.* at 254.
120 *Id.*
121 *Id.* at 264–65.
122 *Id.* at 265–66.
123 District of Columbia v. Heller, 554 U.S. 570, 621 (2008).
124 United States v. Miller, 307 U.S. 174, 178 (1939).

> 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. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[125]
>
> The Constitution as originally adopted granted to the Congress power- "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; 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." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.[126]

A brief review of historical sources led the Court to conclude that,

> [T]he Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.[127]

The Court in *Miller* clearly articulated the Amendment's "obvious purpose" to ensure the existence and effectiveness of the militia, which in their words equates to a population armed with military-style weaponry.

4. District of Columbia v. Heller

Then came the seminal case *District of Columbia v. Heller* in 2008. Washington D.C. passed a law that effectively banned all handguns, and a number of petitioners challenged the law as violating the Second Amendment. The central issue in that case was whether the Second Amendment protected an individual right to keep and bear arms, or whether the right protected was collective in nature and dependent upon one's connection to the militia. In a 5-4 ruling, the Court held that the right protected was individualistic in nature and that the total ban on handguns violated the Second Amendment under any level of scrutiny. In part II, subsection E of the opinion, the Court conducted a precedential analysis to

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125 *Id*.

126 *Id.*

127 *Id*. at 179.

confirm that its ruling was consistent with prior precedent.[128] It only examined the previous three cases, *Cruikshank*, *Presser*, and *Miller*, discussed above, in the context of cases that substantially touch on the individual versus collective nature of the right.

Heller was the first in-depth analysis of the Second Amendment by the Supreme Court. Although other cases had touched upon the right briefly, *Heller* devoted over 60 pages to exploring the historical origins and application of the Second Amendment right. While specifically pointing out that the opinion was not meant to be an exhaustive analysis of the entire scope of the right, the Court made a number of important holdings: the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home (indeed, the Court referred to self-defense within the home as the "core lawful purpose" of the right[129]); the Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause; the "militia" comprised all males physically capable of acting in concert for the common defense; that there are a number of "presumptively lawful" regulations on firearms; and like most rights, the Second Amendment right is not unlimited—it is not a right to keep and carry any weapon in any manner whatsoever and for whatever purpose.[130]

The full influence and reach of the *Heller* opinion has yet to be realized; all sides of the gun control debate cite and interpret the opinion in ways to fit their side. Decisions and opinions of lower court must be squared in some way with the opinion. Indeed, this entire work is, in a way, an effort to square the present question with the guidelines set forth within.

5. McDonald v. City of Chicago

Since *Heller*, there have been two Supreme Court cases concerning the Second Amendment right. The first was *McDonald v. the City of Chicago*. There, Chicago passed an ordinance "effectively banning handgun possession by almost all private citizens who reside in the City."[131] Petitioners filed suit challenging the ordinance as a violation of the Second Amendment and argued that the Second Amendment applied to the States either by virtue of selective incorporation or by overturning the *Slaughterhouse Cases* and applying the Amendment via the Privileges and Immunities Clause of the Fourteenth Amendment.[132] Choosing not to

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128 District of Columbia v. Heller, 554 U.S. 570, 619 (2008).
129 *Id.* at 630.
130 *Id.* at 626.
131 McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).
132 *Id.* at 753.

overturn *Slaughterhouse*, the Supreme Court examined whether the Second Amendment protection is fundamental to our Nation's particular scheme of ordered liberty and system of justice.[133] The Court ultimately held that it is and that the Second Amendment applies to the States by virtue of selective incorporation via the Fourteenth Amendment.[134]

6. Caetano v. Massachusetts

Incorporation of the Second Amendment led to the short and succinct *per curiam* holding of *Caetano v. Massachusetts* in 2016. There, the Supreme Judicial Court of Massachusetts upheld a Massachusetts law prohibiting the possession of stun guns after examining "whether a stun gun is the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment."[135] In five paragraphs, the Supreme Court overruled that decision and affirmed the prior holdings of *Heller* and *McDonald*: that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," and that this "Second Amendment right is fully applicable to the States."[136] The Court rebutted three points of the lower court's reasoning. First, the fact that stun guns were not common at the time of the founding was irrelevant to the analysis because of *Heller's* clear directive that the Second Amendment protects even those weapons that were not in existence at the time of the founding.[137] Second, in determining whether stun guns were "dangerous per se at common law and unusual," the Massachusetts court equated "unusual" with "in common use at the time of the time of the Second Amendment's enactment" and was likewise unsound.[138] Finally, the lower court found "nothing in the record to suggest that [stun guns] are readily adaptable to use in the military, but the Supreme Court rebutted by pointing out that *Heller* rejected the proposition "that only those weapons useful in warfare are protected."[139]

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133 *Id.* at 767-80.
134 *Id.* at 791.
135 Caetano v. Massachusetts, 136 S. Ct. 1027, 1027 (2016).
136 *Id.*
137 *Id.* at 1028.
138 *Id.*
139 *Id.*

7. New York State Rifle and Pistol Association v. City of New York

During the writing of this Note, in January of 2019, the Supreme Court granted certiorari to *New York State Rifle and Pistol Ass'n, Inc. v. City of New York*.[140] There, Petitioners allege that:

> New York City prohibits its residents from possessing a handgun without a license, and the only license the City makes available to most residents allows its holder to possess her handgun only in her home or en route to one of seven shooting ranges within the city. The City thus bans its residents from transporting a handgun to any place outside city limits—even if the handgun is unloaded and locked in a container separate from its ammunition, and even if the owner seeks to transport it only to a second home for the core constitutionally protected.[141]

As of publication of this Note, *New York State Rifle* has been argued although it has not yet been decided. The resolution of this case could have far-reaching effects in Second Amendment jurisprudence as only the fourth case on the topic in modern times. That is, if the case is not declared moot—while the case was in progress, New York changed its law removing this restriction and the Court has yet to determine whether this change in the law renders the case moot.[142]

Although Supreme Court case law regarding the Second Amendment is sparse, what precedent there is supports the argument that the Second Amendment was written with a tyranny-prevention purpose in mind. At the very least, nothing in the precedent forecloses this interpretation. On the contrary, protecting weapons most suited to the militia appears constantly throughout the cases cited above.

D. Structural

Structural interpretation draws inferences from the design of the Constitution to shed light on the issue at hand. It often focuses on three major structural features of our government: the separation of powers between the three branches of government; the separation of power between state and federal government; and the republican relationship between the government as a whole and the people. The Second Amendment touches on all three features; however, this work will focus on the last two.

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140 N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (U.S. Jan. 22, 2019) (No. 18-280).

141 *Id.*

142 Oral Argument at 2:11, N.Y. State Rifle & Pistol Ass'n v. City of New York, No. 18-280 (2d Cir. argued Dec. 02, 2019), https://www.oyez.org/cases/2019/18-280.

1. Federalism

There does not seem to be much disagreement that one of the central purposes of the Second Amendment was to provide for a state check on federal power. Both sides of the Court in *Heller* agreed that the Second Amendment was codified to ensure that the militia was armed so that it could resist an overreaching Federal government; the difference in opinion was on whether the individuals have the right to arms, or if the right ultimately rested with the state legislature. Justice Stevens' opinion is especially illustrative here of the structural role that the Second Amendment plays in preventing tyranny in American government and further suggests that the types of weaponry envisioned by the Amendment included some form of military weaponry.

Justice Stevens wrote that "the proper allocation of military power in the new Nation was an issue of central concern for the Framers. The compromises they ultimately reached . . . represent quintessential examples of the Framers' 'split[ting] the atom of sovereignty.'"[143] According to the collectivist view—as well as the individualist view—the Second Amendment was a compromise between "a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States," and the realistic recognition of "the dangers inherent in relying on inadequately trained militia members as the primary means of providing for the common defense."[144]

From historical sources and evidence, Justice Stevens concludes that:

> The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger. But state militias could not effectively check the prospect of a federal standing army so long as Congress retained the power to disarm them, and so a guarantee against such disarmament was needed.[145]

Thus, according to this opinion, the right to keep and bear arms was, presumably, contingent on membership in a state militia.

The majority of *Heller* essentially agreed with this proposition but rejected the idea that this was the *exclusive* purpose for the Amendment:

> It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent

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143 District of Columbia v. Heller, 554 U.S. 570, 652 (2008) (Stevens, J., dissenting).

144 *Id.* at 653 (2008) (Stevens, J., dissenting) (quotations omitted).

145 *Id.* at 616 (Stevens, J., dissenting).

> elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. Justice Breyer's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right's *codification;* it was the *central component* of the right itself.[146]

As to the Amendment's purpose and place in the structure of American government, it seems clear for the majority that it was codified to prevent the militia from being disarmed. In order to ensure that the militia could not be disarmed, the Second Amendment right must therefore be, by necessity, an *individual* right. Otherwise, disarmament of the militia—by either federal or the state legislatures—was still a very real possibility.

The point here is that regardless of whether the right is individual or collective in nature, the principle of tyranny prevention is central to both interpretations. And, under each view, in order to preserve the state and federal balance of power, the States must have access to a militia armed with weaponry suitable to resisting federal encroachment.

No discussion of the structure of the Constitution is complete without some discussion of the Federalist Papers. At the risk of repeating the above analysis, the following excerpts of the Federalist Papers are analyzed to make the point that the Second Amendment has a deeply embedded structural component relevant to the present question.

In No. 29, Hamilton engages in a discussion of the compromise that the Court considered in *Heller*.[147] To address the concerns of relying exclusively on standing armies or on state militias, Hamilton lays out the compromise, as he sees it, of the proposed Constitution.[148] He first argues that the training of all militiamen in the nation would be impossible, because expertise in military matters requires time and practice.[149] Taking away a great body of the men of the nation for regular training "would be a real grievance to the people, and a serious public inconvenience and loss."[150] It would hurt the economy as well as civil government, since so many people would be training.[151] Therefore, he says:

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146 *Id.* at 599.

147 THE FEDERALIST NO. 29 (Alexander Hamilton).

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

> Little more can reasonably be aimed at, with respect to the people at large, *than to have them properly armed and equipped*; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.
>
> . . .This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a *large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens*. This appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.[152]

A few points bear mentioning here. First, Hamilton seems to have understood the Constitution's structure to involve an armed citizenry. Since he envisioned the people being called up once or twice a year, and yet remain little, if at all, inferior to the standing army, this suggests that he understood the Constitution to secure arms to the people themselves so that they could maintain some level of proficiency with such weaponry. Second, Hamilton understood the Constitution to include a provision for resisting tyranny in the form of an armed population coalescing into a militia which would repel such tyranny. Finally, Hamilton envisioned a population armed with the appropriate weaponry to repel a standing army.

In No. 46, Madison argued that the state militias would be able to repel a national government with a number of points. The first point deals with raw numbers:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best

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152 *Id.*

> acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it.[153]

Madison's computations are surprisingly accurate, even by today's standards. The Department of Defense puts the total active duty Armed Services number as of December 2018 at roughly 1.3 million, and at 2.66 million including the National Guard and civilian support staff.[154] The U.S. Census' total population estimates for 2017 is roughly 325 million (for a soldier to population ratio of .008%), and roughly 253 million who are 18 and older (for a soldier to "arms bearing age" ratio of .01%).[155] Instead of the 30,000 strong Army versus the 500,000 strong citizenry of the founding era, today it would be more like 3 million soldiers versus 100 million or more armed citizens.

These numbers are rough estimates, not intended to be conclusive or dispositive, presented to show the massive disparity between the number of soldiers and the total population at large. Madison sees the underlying structure of the American government to include the calculation that the citizenry is armed and capable of defending itself. Indeed, he references the Revolution, where the greatest military at the time was defeated, in part, by the facts of raw numbers in support of the proposition.

Furthermore, he points out that it isn't just numbers, but men "fighting for their common liberties, and united and conducted by governments [presumably state and local governments] possessing their affections and confidence" which would propel the citizenry to victory over a standing army.[156] Again, these calculations seem a part of Madison's understanding of the underlying structure of the Constitution. He continues:

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local

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153 THE FEDERALIST NO. 46 (James Madison).

154 DEFENSE MANPOWER DATA CENTER, MILITARY AND CIVILIAN PERSONNEL BY SERVICE/AGENCY BY STATE/COUNTRY (UPDATED QUARTERLY) (Dec. 2018), https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp.

155 U.S. CENSUS, POPULATION BY AGE AND SEX (2017), https://www.census.gov/quickfacts/fact/table/US/PST045218.

156 THE FEDERALIST NO. 46 (James Madison).

> governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.
>
> Let us not insult the free and gallant citizens of America with the suspicion, that they would be less able to defend the rights of which they would be in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors. [157]

On top of being armed, Madison says, having local governments aligned with the interests of the people, directing and supporting the militia, forms a powerful counter to federal encroachment. The governments of Europe, he points out, "are afraid to trust the people with arms," which factored alone might not be able to liberate them from tyranny; but add in local government, chosen and effectuated by them, however, and "the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it."[158]

This discussion begs the question of whether these points are relevant in the 21st Century. Warfare is different today than it was in 1776; the federal government has nuclear weapons. Surely the idea that a militia—or in other words, an armed population—could defeat the U.S. Armed Forces in a war is absurd? To that there are a few immediate responses which deserve more treatment in future works.

First, a collection of states, with their National Guards, armed population, and disposable resources, may very well be able to counter the federal standing army; legal commentators with zero military experience or education should not be so quick to dismiss this possibility without any serious empirical or military analysis. Military science is a discipline as deep as any other, and those lacking such expertise should seriously consider pronouncements such as then-Defense Secretary Mattis' in the 2018 National Defense Strategy Summary: "America's military has no preordained right to victory on the battlefield."[159] Calculations concerning population disparities, geographical advantages, international support, and available military weaponry and experience of the two sides of an American Civil War are warranted before legal scholars make casual proclamations predicting the outcome of war.

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157 *Id.*

158 *Id.*

159 DEP'T OF DEFENSE, SUMMARY OF THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1, https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf.

Second, the wars in Vietnam and Afghanistan have shown the incredibly small amount of military sophistication necessary to bog down the U.S. Armed Forces in a protracted struggle. Although federal U.S. forces dominate conventional warfare, insurgencies have proved a problem time and time again. The Afghan Insurgency has lasted for almost twenty years. An American Insurgency would be a terrifying scenario for conventional forces to confront.

Third, nuclear weapons do not, in and of themselves, determine the issue of whether states and their citizenry can resist federal forces. No nuclear weapons have been used since World War II and then only against a foreign power. They were not used in Korea, Vietnam, Desert Storm, the Iraq War, or the War in Afghanistan. The likelihood of their use on American soil, even in a civil war, is not an obvious outcome where the legitimacy of the federal government in the eyes of both its citizens and the international community are at stake. In fact, the ramifications of the U.S. government using nuclear weapons on its own people would be world-altering. Using nuclear weapons on *its own population* would create more insurgents; it would seriously test the faith and loyalty of those on "the government" side; it would destroy the very population and infrastructure over which "the government" is fighting to govern; it would create international chaos as other countries sought to analyze, interpret, and react to a world power using nuclear weapons to *subdue its own people*. In addition to the ramifications of actually using nuclear weapons in an American Civil War, the physical locations of nuclear weapons are within the various states themselves, leading to the possibility of some states or segment of the population gaining control of a nuclear weapon and assuring mutual destruction. In short, it is not an "obvious" outcome that the federal government would actually nuke its own people in a civil war.

Finally, whether this point is relevant in the 21st Century because our culture and government have somehow "evolved" past the possibility of tyrannical government (an exceptionally dubious—if not absurd—proposition) is irrelevant to the Second Amendment analysis; the question is whether the Second Amendment *actually* codifies a principle of tyranny prevention necessitating the protection of military arms, not whether it *should*. In other words, the fundamental question at issue is what the purpose of the Second Amendment *is*, not what it *should be*. Materials like the ones discussed above clearly indicate that Second Amendment did in fact codify these principles under the framework of federalism; whether they are relevant to the 21st Century and should be amended is an entirely separate question.[160]

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[160] For more on these arguments, *see infra* Part III.E.2.

2. Republican Relationship

This discussion about federalism is important, but insufficient. Although federalism concerns the separation of power between federal and state government, it ignores the place of the people in the structure of a republican government. In a "government of the people, by the people, for the people,"[161] the people reign as the ultimate sovereign. It was the people, not the States, that ratified the Constitution, and it is from that body that the document derives its authority.[162] As the Supreme Court explained as far back as 1816 in *Martin v. Hunter's Lessee*, the government of the United States:

> can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. . . . The people [of the United States] had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either.[163]

The people of the United States did not delegate responsibility for their personal safety to any government in the Constitution. Therefore, the people retain that responsibility. Nor did the people delegate the power or responsibility of protecting the citizenry from an oppressive government, *to* any government. Therefore, the people retain that power and responsibility. Furthermore, nowhere did the Constitution affirmatively grant the government of the United States the power to disarm its citizenry. One would have to find implied authority for such a prospect and somehow harmonize that implicit grant with the explicit protection of the Second Amendment.

If one accepts both that the government of the United States is of, by, and for the people, as well as the commonly-accepted Weberian definition of the state as the repository of a monopoly of the legitimate means of violence,[164] then it seems that the people would be the repository of a monopoly of the legitimate means of violence.

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161 Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).
162 Martin v. Hunter's Lessee, 14 U.S. 304, 324-25 (1816).
163 *Id.* at 325.
164 Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 650 (1989).

All law is ultimately enforced at gunpoint.[165] If "we the people" are the source of the law, then we are the ones ultimately wielding "the gun." Although the Executive is charged with the duty to enforce the law, even that branch is not the final authority (as evidenced by, among other things, the concept of a citizen's arrest). In a government of the people, the buck stops with us.

Under a structural interpretation of the Second Amendment, it is clear that the purpose of the Amendment was to preserve a critical feature of the Constitutional structure: an armed population. The prevention of governmental tyranny was achieved by securing an armed population, the continuation of state militias, and the withholding of disarmament powers from the federal government. Whether from a separation of powers, federalism, or the republican nature of American government standpoint, an armed population features prominently as a protection against tyranny.

E. Pragmatic (or Prudential)

Pragmatic interpretation focuses on the practical consequences of the legal decision. The pragmatic approach often involves weighing the practical consequences of competing interpretations and selecting the most favorable given the circumstances. A court using this method might focus on the best outcome for society, the outcome which the court feels most closely aligns with legislative intent, or perhaps on what the practical effect might be on the structure and decision-making processes of government.[166] This method of interpretation is fairly characterized as policy-driven since a court must ultimately make a value judgement about different outcomes.[167]

Pragmatic interpretation bears special mention in this Note because of its prevalent use in Second Amendment argumentation despite the fact that the Court has expressly rejected determining the scope of the Second Amendment right by judicial interest balancing.[168] After a more thorough review of pragmatic methodology, this section focuses on the pragmatic arguments for and against reading a tyranny-prevention principle into the

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165 Even a crime punishable by fine is enforced at gunpoint. You either pay the fine, or law enforcement shows up at your doorstep to force you to pay on threat of arrest. If you still refuse to pay, law enforcement will arrest you. If you resist arrest, law enforcement will take you by force, at gunpoint if necessary. If you respond in kind, you will be shot. All law is ultimately enforced at gunpoint under a (legitimate) threat of abduction and imprisonment.

166 BOBBITT, *supra* note 27, at 7. ("Prudential argument is self-conscious to the reviewing institution and need not treat the merits of the particular controversy (which itself may or may not be constitutional), instead advancing particular doctrines according to the practical wisdom of using the courts in a particular way.").

167 Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1670 (1990).

168 McDonald v. City of Chicago, 561 U.S. 742, 785 (2010) ("In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing . . . .").

core right of the Second Amendment, and therefore, the pragmatic arguments for and against allowing citizens to own military-style weapons of some kind.

1. Methodology of Pragmatic Interpretation

Pragmatic interpretation seems to be the predominant approach among those seeking to limit or absolve individual Second Amendment protections. These arguments are (perhaps) not legal in nature (other than that they assert legal authority to regulate), but practical, asking what the law *should be*, as opposed to what the law *is*. These arguments often rely on the "facts on the ground" to come to their conclusion, rather than static legal principles:

> Pragmatism remains a powerful antidote to formalism, which is enjoying a resurgence in the Supreme Court. Legal formalism is the idea that legal questions can be answered by inquiry into the relation between concepts and hence without need for more than a superficial examination of their relation to the world of fact. It is, therefore, anti-pragmatic as well as anti-empirical. It asks not, What works?, but instead, What rules and outcomes have a proper pedigree in the form of a chain of logical links to an indisputably authoritative source of law, such as the text of the United States Constitution? Those rules and outcomes are correct and the rest incorrect. Formalism is the domain of the logician, the casuist, the Thomist, the Talmudist.[169]

As Judge Posner puts it, the question for pragmatic interpretation is: "What works?" Under this view, the law is to be used as an instrument for social ends.[170] This necessarily requires the court to rank social ends in line with some value system before selecting the "best" one. The question at hand, then, is whether interpreting the Second Amendment to include tyranny prevention as a core purpose (thereby extending its protection to some quantum of military-style weaponry) "works"—that is, leads to desirable social ends.

To answer this question, pragmatic interpretation will essentially seek to balance the costs and benefits of this interpretation before coming to a conclusion. Indeed, it is perhaps fair to say that balancing tests are the mainstay of pragmatic interpretation. Judge Breyer's dissent in *Heller* is an illustrative example:

> This historical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry. That the

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169 Posner, *supra* note 67, at 1663.

170 *Id.* at 1670 ("All that a pragmatic jurisprudence really connotes . . . is a rejection of a concept of law as grounded in permanent principles and realized in logical manipulations of those principles, and a determination to use law as an instrument for social ends.").

> District law impacts self-defense merely raises *questions* about the law's constitutionality. But to answer the questions that are raised (that is, to see whether the statute is unconstitutional) requires us to focus on practicalities, the statute's rationale, the problems that called it into being, its relation to those objectives—in a word, the details. There are no purely logical or conceptual answers to such questions. All of which to say that to raise a self-defense question is not to answer it.[171]

This is important to identify immediately: the purpose of the Amendment (here, self-defense) served as the *starting* point, but not the *end*, for the balancing test to follow. The details, which Justice Breyer defines as the "practicalities, the statute's rationale, the problems that called it into being, its relation to those objectives," are weighed in relation to the purpose. This is why properly identifying the purpose of the Amendment is so critical: if the starting point is off-balance to begin with, all of the subsequently balanced factors will be improperly weighted.

For Justice Breyer, the question in *Heller* was one of balancing the individual's interest with that of the government's. On the government interest side of the scale, he goes to great length, in great detail, to outline the facts and figures presented in the case.[172] Ultimately, he deferred to the legislature's findings that handguns were closely linked to violent crime "because legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact."[173] For him, the Court's "'sole obligation' in reviewing a legislature's 'predictive judgments' is 'to assure that, in formulating its judgments,' the legislature 'has drawn reasonable inferences based on substantial evidence.'"[174]

On the individual's side of the equation, he assesses "the extent to which the District's law burdens the interests that the Second Amendment seeks to protect."[175] Instead of affirmatively stating what he believes those interests (or purposes) are exactly, he explains that "Respondent and his *amici,* as well as the majority, suggest that those interests include: (1) the preservation of a 'well regulated Militia'; (2) safeguarding the use of firearms for sporting purposes, *e.g.*, hunting and marksmanship; and (3) assuring the use of firearms for self-defense."[176]

Again, it must be stressed how intimately involved the purposes of the Amendment are in a balancing test. Any time pragmatic interpretation is employed in a Second Amendment context, the court must specifically

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171 District of Columbia v. Heller, 554 U.S. 570, 687 (2008) (Breyer, J., dissenting) (emphasis original).

172 *Id.* at 699-705 (Breyer, J., dissenting).

173 *Id.* at 704 (Breyer, J., dissenting).

174 *Id.* (Breyer, J., dissenting) (quoting Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 195 (1997)).

175 *Id.* at 706 (Breyer, J., dissenting).

176 *Id.* (Breyer, J., dissenting).

recognize the purpose of the Amendment, lest the balancing test improperly weigh the factors involved. Here, Justice Breyer *assumes* certain purposes; the fact that he does not expressly and affirmatively articulate what he believes the purposes to be further indicates that the purpose of the Second Amendment has yet to be fully defined.

In any event, Justice Breyer concludes that the D.C. law banning handguns did not disproportionately burden those assumed purposes. Relevant to the present question, Justice Breyer quickly determined that the handgun ban burdened the Amendment's "first and primary objective hardly at all."[177] He continued:

> As previously noted, there is general agreement among the Members of the Court that the principal (if not the only) purpose of the Second Amendment is found in the Amendment's text: the preservation of a "well regulated Militia." What scant Court precedent there is on the Second Amendment teaches that the Amendment was adopted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces" and "must be interpreted and applied with that end in view."[178]

This interpretation (that the principal, if not the only, purpose of the Second Amendment was to preserve the militia) solidly supports the protection of military weapons in one way or another. This might explain why Justice Breyer "assumed" this purpose, rather than conclusively and definitively asserting this purpose. To recognize the "core purpose" assumed by Justice Breyer here is to essentially admit that the Amendment was concerned with some quantum of military weaponry.

This review of pragmatic interpretation yields two guiding principles for the analysis to follow. First, the "core purpose" of the Second Amendment must be properly defined at the outset; for if the purpose of the Amendment is misstated, or artificially restricted, the balancing will be fundamentally flawed. Second, while the practical realities of gun violence, tyranny, and tyranny prevention may be irrelevant to a legal analysis under more formalist theories, pragmatic interpretation is intimately involved with the "details." Therefore, the details relating to these topics bear exploration in the following sections.

2. Balancing Tyranny Prevention and Gun Violence

The pragmatic arguments *against* interpreting the Second Amendment to include a principle of tyranny prevention largely center around (1) the

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177 *Id.* (Breyer, J., dissenting).

178 *Id.* (Breyer, J., dissenting) (citation omitted).

harm caused by so-called "assault weapons"; (2) the improbability of the United States ever becoming tyrannical; and (3) the impossibility of repelling the United States' full federal might, including its host of tanks, missiles, and nuclear weapons. The next sections will address each of these in turn.

a. Tyranny Does More Harm than "Assault Weapons"

i. Harm Caused by Tyranny

Strikingly, perhaps the most pragmatic argument *in favor* of the tyranny-prevention purpose is collective, rather than individual: tyranny prevention should not be excised from the Second Amendment because tyrannical government is likely the single greatest murderer of mankind in history. Tyranny—whether by the majority, minority, or government itself—is arguably the ultimate evil to be prevented when designing a system of government. And if absolute power corrupts absolutely,[179] then it is only a matter of time before a government with power abuses that power. The 20th Century provides ample examples of this, showing the reach of tyrannical government and its incredible potential for wholesale slaughter of populations.

Perhaps the most well-known example of a 20th Century tyrannical government is Nazi Germany. Prior to the Nazi takeover of Germany, the Weimar Republic adopted a number of gun control laws, culminating in the required registration of all firearms and allowing confiscation of arms at the discretion of authorities.[180] After Adolf Hitler seized power and transformed the government into a tyrannical dictatorship, he used those laws to forcefully and brutally disarm "enemies of the state," as defined by him and the Nazi Party.[181] He then began to exterminate these now-disarmed enemies. By the end of his dictatorship, Hitler had systematically killed an estimated 6 million Jews, 1.8 million Polish civilians, 312,000 Serb civilians, 250,000 people with disabilities living in institutions, roughly around 200,000 Romas (Gypsies), around 1,900 Jehovah's Witnesses, at least 70,000 "repeat criminal offenders and so-called asocials," and an undetermined amount of German political opponents, as well as "hundreds, possibly thousands" of homosexuals.[182] These staggering numbers include only those that could be

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179 Letter from John Emerich Edward Dalberg, Lord Acton to Archbishop Creighton (Apr. 5, 1887), *in* ACTON-CREIGHTON CORRESPONDENCE 5, 9.

180 STEPHEN P. HALBROOK, GUN CONTROL IN THE THIRD REICH: DISARMING THE JEWS AND "ENEMIES OF THE STATE" 44 (2013); David Kopel, *Lethal Laws*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 355, 359-64 (1995) (reviewing the book LETHAL LAWS and surveying gun control laws of nations which perpetuated genocide in the 20th Century).

181 HALBROOK, *supra* note 180, at 49.

182 *Holocaust Encyclopedia, Documenting Numbers of Victims of the Holocaust and Nazi Persecution*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM (Feb. 4, 2019), https://encyclopedia.

considered Germany's *own people* at the time of their extermination; the total number of deaths caused by the tyranny of Nazi Germany increases when combined with the roughly 7 million Soviet civilians and 3 million Soviet prisoners of war under the regime's direct control, or with the roughly 70 million total attributed to World War II itself.[183]

But there is real debate as to whether Joseph Stalin or Adolf Hitler holds the title for most murders. After coming to power in the communist Soviet Union, Stalin forcefully collectivized the land-working peasants, using previously established firearm registrations to disarm them in the process.[184] As the head of a previously tyrannized system, Stalin was free to imprison millions in political prisons, collectively called the Gulag, where an uncountable number of souls were starved, executed, or literally worked to death.[185] During the Great Terror, also called the Great Purge, Stalin executed at least 750,000 people thought to be dissenting members of his party (and anyone else considered a threat).[186] While "revolutionizing" the economic system of the Soviet Union, Stalin initiated a deliberate killing policy related to nationality, wherein certain nationalities were deemed undesirable and shipped to the Ukraine in forced labor camps; somewhere between 1.5 to 3.3 million were deliberately starved to death in this way.[187] The total number of deaths under Stalin's tyranny are nearly impossible to pin down exactly and estimates vary greatly, from around 6 million to well into the tens of millions.[188] This account is an extremely basic summary and is still difficult to comprehend.

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ushmm.org/content/en/article/documenting-numbers-of-victims-of-the-holocaust-and-nazi-persecution (last accessed Mar. 7, 2019).

183 *Id.*; *see also*, Neil Halloran, *The Fallen of World War II*, YOUTUBE (Oct. 26, 2016), https://www.youtube.com/watch?v=DwKPFT-RioU (a graphical representation of all deaths attributable to World War II).

184 *See* ROBERT CONQUEST, THE HARVEST OF SORROW: SOVIET *Collectivization and the Terror-Famine* (1987).

185 *See* Anne Applebaum, *Gulag: Understanding the Magnitude of What Happened*, THE HERITAGE FOUNDATION (Oct. 16, 2003), https://www.heritage.org/europe/report/gulag-understanding-the-magnitude-what-happened.

186 STEPHEN KOTKIN, STALIN: WAITING FOR HITLER, 1929-1941, at 306-7 (2017); *Great Purge*, THE HISTORY CHANNEL (Aug. 21, 2018), https://www.history.com/topics/russia/great-purge.

187 ANNE APPLEBAUM, RED FAMINE: STALIN'S WAR ON UKRAINE 282 (2018).

188 *Cf.* STEVEN ROSEFIELDE, RED HOLOCAUST 17 (2010) ("We now know as well beyond a reasonable doubt that there were more than 13 million Red Holocaust victims 1929–53, and this figure could rise above 20 million."), *with* JONATHAN BRENT, INSIDE THE STALIN ARCHIVES: DISCOVERING THE NEW RUSSIA 3 (2008) ("Estimations on the number of Stalin's victims over his twenty-five-year reign, from 1928 to 1953, vary widely, but 20 million is now considered the minimum."), *and* Timothy Snyder, *Hitler vs. Stalin: Who Was Worse?*, NEW YORK REVIEW OF BOOKS (Jan. 27, 2011), https://www.nybooks.com/daily/2011/01/27/hitler-vs-stalin-who-was-worse/ ("The total number of noncombatants killed by the Germans—about 11 million—is roughly what we had thought. The total number of civilians killed by the Soviets, however, is considerably less than we had believed . . . . For the Soviets during the Stalin period, the analogous figures are approximately six million and nine million. These figures are of course subject to revision, but it is very unlikely that the

Unfortunately, there is more. One of Stalin's admirers, Chairman Mao Zedong, would not be outdone. He appears to hold the title for "greatest mass murderer," and like both Hitler and Stalin, Mao inherited his gun control regime which he expanded to outlaw the purchase or possession of any firearm or ammunition "in contravention of safety provisions."[189] Once in control, Chairman Mao killed millions in the first decade of the "People's" Republic of China,[190] upwards of 45 million during the Great Leap Forward,[191] and up to 1.5 million during the Cultural Revolution in which Mao purged the country of dissidents.[192] The numbers are staggering, and the abuses are largely beyond comprehension.

Tyranny on this scale is not a relic of the past century. The realities of life in North Korea, which may fairly be described as a country-sized Gulag, are so abysmal as to lead the United Nations to declare: "The gravity, scale and nature of these [human rights] violations reveal a state that does not have any parallel in the contemporary world."[193]

North Korea is a well-known example of modern tyranny, but it should not be considered an anomaly. Tyranny is alive and well in the world today. Another egregious modern tyranny is China, a one-party, communist state whose President, Xi Jinping, is now president for life.[194] The nine-member Politburo Standing Committee ultimately controls all aspects of governance.[195]

China's abuses are well documented: somewhere between 1-3 million Muslims are kept in concentration camps where they are "re-educated" into healthy citizens.[196] The Chinese government is forcefully harvesting organs

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consensus will change again as radically as it has since the opening of Eastern European archives in the 1990s.").

189 David Kopel, *Lethal Laws*, 15 N.Y. L. SCH. OF INT'L & COMP. L. 355, 365-66 (1995).

190 *See* FRANK DIKÖTTER, THE TRAGEDY OF LIBERATION: A HISTORY OF THE CHINESE REVOLUTION, 1945-1957 (2010).

191 *See* FRANK DIKÖTTER, MAO'S GREAT FAMINE: THE HISTORY OF CHAIN'S MOST DEVASTING CATASTROPHE, 1958-62 (2013).

192 *See* FRANK DIKÖTTER, THE CULTURAL REVOLUTION: A PEOPLE'S HISTORY, 1962-1976 (2016).

193 UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, REPORT OF THE DETAILED FINDINGS OF THE COMMISSION OF INQUIRY ON HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 365 (Feb. 17, 2014), https://www.ohchr.org/en/hrbodies/hrc/coidprk/pages/reportofthecommissionofinquirydprk.aspx.

194 *China's Xi Allowed to Remain "President for Life" as Term Limits Removed*, BBC NEWS (Mar. 11, 2018), https://www.bbc.com/news/world-asia-china-43361276.

195 The details of Chinese governance are difficult to discern precisely due to the level of secrecy surrounding the Communist Party's operations. Some details are known, however. *See, e.g.*, Lauren Mack, *An Overview of the Chinese Communist Party*, THOUGHT CO., https://www.thoughtco.com/chinese-communist-party-688171 (last updated July 3, 2019); Eleanor Albert & Beina Xu, *The Chinese Communist Party*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/backgrounder/chinese-communist-party (last updated Sept. 27, 2019).

196 *Cf.* Phil Stewart, *China Putting Minority Muslims in 'Concentration Camps,' U.S. Says*, REUTERS (May 3, 2019), https://www.reuters.com/article/us-usa-china-concentrationcamps/china-putting-minority-muslims-in-concentration-camps-us-says-idUSKCN1S925K (citing Randall Schriver,

from both living and deceased inmates from practitioners of Falun Gong, a spiritual discipline banned in China, for sale on the open market.[197] Under the Communist Party's regime, you can schedule a heart transplant weeks and months in advance—no need to worry, a heart will be ready for you one way or another.[198] The Communist Party of China is an equal-opportunity tyrant: Christians are also routinely routed, detained, and driven underground.[199] The list of abuses goes on and extends beyond religious persecution, but the point is made: tyranny is not a relic of the past.

ii. Harm Caused by "Assault Weapons"

With an overview of the harms caused by government-scale tyranny, we now turn to the harms caused by military-style weapons. The harms examined below include mass shootings and rifle-related homicide. The purpose of this analysis to compare the harms caused by tyranny with the harms caused by gun violence (particularly military-style weapons) in America and then ask an uncomfortable question: Which is more harmful, tyranny or gun violence? Using a pragmatic interpretation, this sort of weighing takes center stage. It is an awful calculus, but one necessary to confront.

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who leads Asia policy at the US Defense Department, as saying that the Chinese Communist Party has closer to 3 million Muslims in concentration camps), *with* Stephanie Nebehay, *U.N. Says it has Credible Reports That China Holds Million Uighurs in Secret Camps*, REUTERS (Aug. 10, 2018), https://www.reuters.com/article/us-china-rights-un/u-n-says-it-has-credible-reports-that-china-holds-million-uighurs-in-secret-camps-idUSKBN1KV1SU (citing a UN human rights panel which said it had "received many credible reports that 1 million ethnic Uighurs in China are held in what resembles a 'massive internment camp that is shrouded in secrecy.'"). For a look inside some of these "re-education camps," *see* BBC News, *Inside China's 'Thought Transformation' Camps*, YOUTUBE (June 18, 2019), https://www.youtube.com/watch?v=WmId2ZP3h0c&t=212s.

197 Saphora Smith, *China Forcefully Harvests Organs From Detainees, Tribunal Concludes*, NBC NEWS (June 18, 2019), https://www.nbcnews.com/news/world/china-forcefully-harvests-organs-detainees-tribunal-concludes-n1018646 (citing the final judgement and report of the China Tribunal's findings found at https://chinatribunal.com/final-judgement-report/).

198 NTD Television, *Israeli Prof. Fights China Organ Harvesting*, YNET NEWS (Mar. 16, 2013), https://www.ynetnews.com/articles/0,7340,L-4354684,00.html (in which Professor Lavee, a heart transplant surgeon in Israel, explains how he came to learn of the organ harvesting in China: "The way I got involved in the issue of forced organ harvesting in China was when a patient of mine told me in 2005 he was tired of waiting for a heart in Israel, and was told by his insurance company to go to China in three weeks time to get a heart transplant. The patient actually went to China and got his heart on day he was promised he would receive it. So this set me researching, and I found out the whole gruesome story about the use of forced organ harvesting, and later on the fact that most of the organs in China are retrieved from Falun Gong practitioners, based on the research by Kilgour and Matas.").

199 Nina Shea & Bob Fu, *Inside China's War on Christians*, WALL STREET JOURNAL (May 30, 2019), https://www.wsj.com/articles/inside-chinas-war-on-christians-11559256446; *China City Offers Cash for Information in Religion Crackdown*, APNEWS (Mar. 29, 2019), https://www.apnews.com/ccf276a62fa4410f8fe8fe5be4a7fe15.

Pinning down the number of mass shooting deaths is a complicated task because of reporting and recording issues across multiple organizations that are tracking the data.[200] Nevertheless, we have some data to pull from, and even the most liberal estimates reveal a surprisingly low body count (especially in relation to tyranny-related deaths). For instance, the Washington Post reports of a *running total* of 1211 persons killed in 168 mass shootings since 1966.[201]

That number is shockingly low when compared to the millions of deaths attributable to tyrannical government in the same time frame. Let's widen the scope by looking at *all* rifle-related deaths. The FBI reports 1437 homicides by rifle from 2014-2018, for a yearly average of 288 (rounding up).[202] Even if we multiplied that number by 100 in order to simulate how many deaths have occurred by rifle over the past 100 years (just for the sake of argument), we would be looking at 28,800 deaths in 100 years—a paltry amount compared to the 6 million Jews slaughtered by the tyranny of Nazi Germany in less than a tenth of the time.

The numbers start to appear absurdly low when compared with other types of homicides. The FBI reports 297 deaths by rifles in 2018—which, to be fair, could be underreported given that it characterizes 900 incidents as "other weapons or weapons not stated."[203] Even still, in the same year the FBI reports 672 homicides *by hands, fists, and feet*; 443 by blunt objects such as clubs and hammers; and 1515 by knives or cutting instruments.[204] Even if

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200 Nick Wing, *Nobody Knows Exactly How Many People Are Getting Killed with Assault-Style Rifles*, HUFFPOST (Mar. 2, 2018), https://www.huffingtonpost.com/entry/assault-rifle-deaths-ar-15_us_5a96de5ae4b0e6a52304248a.

201 Bonnie Berkowitz, Denise Lu, & Chris Alcantara, *The Terrible Numbers that Grow with Each Mass Shooting*, WASHINGTON POST (Originally written Oct. 1, 2017, updated Oct. 6, 2019), https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/ (last accessed Oct. 25, 2019) (defining a mass shooting this way: "There is no universally accepted definition of a public mass shooting, and this piece defines it narrowly. It looks at the 162 shootings in which four or more people were killed by a lone shooter (two shooters in a few cases). It does not include shootings tied to gang disputes or robberies that went awry, and it does not include domestic shootings that took place exclusively in private homes. A broader definition would yield much higher numbers."). In schools, where much of the attention on mass shooting is focused, there have been 16 "multiple victim shootings," defined as incidents involving 4 or more victims and at least 2 deaths by firearms, excluding the assailant, since 1996. While there are roughly 20 to 30 mass murders (with or without a firearm) per year, only one mass murder, on average, occurs in schools each year. Allie Nicodemo & Lia Petronio, *Schools Are Safer than They Were in the 90s, and School Shootings Are Not More Common than They Used to Be, Researchers Say*, NEWS@NORTHEASTERN (Feb. 26, 2018), https://news.northeastern.edu/2018/02/26/schools-are-still-one-of-the-safest-places-for-children-researcher-says/.

202 FEDERAL BUREAU OF INVESTIGATION, EXPANDED HOMICIDE DATA TABLE 9: MURDER VICTIMS BY WEAPON, 2014-2018, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/expanded-homicide-data-table-8.xls (last accessed Oct. 25, 2019).

203 *Id.*

204 *Id.*

all 900 "other weapons or weapons not stated" incidents were attributed to rifles, there would be 1197 deaths by rifles and 1515 by knives.

This analysis is not intended to minimize the horrific loss of life suffered in mass shootings and firearm homicides—every life lost in violence is a tragedy, especially when it could have been avoided. However, a truly pragmatic approach to the present question must consider the bigger picture and coldly evaluate the numbers. The question is: which is worse for society, tyranny or military weapon-related gun violence?

iii. Balancing Tyranny and Rifle-Related Gun Violence

The numbers are hard to refute. Even the low estimates of tyranny-related deaths dwarf the deaths caused by "assault weapon" violence. There simply is no comparison, in the grand scheme of history, between these two evils.

Not only is tyranny destructive (to put it mildly), it is axiomatic that disarming the population is a preferred method of accumulating all powers into the hands of a single body. As Justice Story put it: "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia."[205] The Second Amendment, as he saw it, was a "powerful check upon the designs of ambitious men."[206] As has already been quoted here, he considered the right to keep and bear arms the palladium—as in, the protection—of the liberties of a republic "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 the people to resist and triumph over them."[207] This resistance to tyranny was precisely "the protection intended by this clause of our national bill of rights."[208]

Justice Story was right then, and he is right today. His assessment—that one of the ordinary (but not exclusive or even necessary) modes of imposing tyranny is to disarm the people, thereby accumulating a monopoly of force—has been repeated throughout modern history. This, of course, happened in Nazi Germany, Soviet Russia, and Maoist China.[209] For the Second Amendment to remain the ultimate protection of our republic's liberties, then, it must necessarily protect military-style weaponry of some sort in order to effectively prevent or repel tyranny.

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205 JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1842).

206 *Id.*

207 *Id* at 265.

208 *Id.*

209 *Supra* Part III.E.2.a.i.

The fact, scope, and destruction of tyranny must be balanced as part of the pragmatic equation. On the one hand we have the harm caused by tyranny; on the other, we have the harm caused by "assault weapons."[210] A cursory review of history and of gun violence statistics is sufficient to conclude that the harm caused by tyranny is by far the greater evil. Avoiding this evil must feature prominently in any balancing conducted on the right to keep and bear military-style arms.

b. The Probability that the United States Federal Government Will Become Tyrannical

But, some naively say, the United States could never become tyrannical. This is a patently absurd claim that nevertheless requires a brief rebuttable.

First, although the social, political, and economic nature of American governance is unique in world history, the *people* are not fundamentally different from any other people in history. Americans are just as human as anyone else. Have we as a people somehow evolved beyond the human frailties of envy, greed, and hate? When did we make this transition? At what point in our history did this transfiguration take place? Perhaps we became a nation of angels when we enslaved millions of people based on their skin color.[211] Maybe we transformed into benevolent democrats when we interned 120,000 Japanese Americans on account of their ethnicity and our fear,[212] or when we destroyed people's lives on the barest whiff of communist sympathies.[213] Or perhaps our enlightened nature is evidenced by our esteemed political leaders, an incredible body of saints whose natures have been elevated beyond the common deplorables of *other* countries.

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210 This section has focused on "deaths" as the primary harm of both tyranny and "assault weapons," but there are other costs worth exploring, such as social, economic, and moral costs.

211 UNITED STATES CENSUS BUREAU, 1860 CENSUS: POPULATION OF THE UNITED STATES. By the time of the Civil War, there were roughly four million slaves in bondage; this figure does not account for all those who had been enslaved prior.

212 WAR RELOCATION AUTHORITY, UNITED STATES DEPARTMENT OF THE INTERIOR, THE EVACUATED PEOPLE A QUANTITATIVE DESCRIPTION 2 (1946) ("Some 120,313 persons of Japanese descent came under the custody of the War Relocation Authority between May 8, 1942 (the date Colorado River Relocation Center opened) and March 20, 1946 (the date Tule Lake closed). For purposes of simplification and clarity of terminology in this report, these persons shall be referred to as 'evacuees.' With few exceptions the group was composed of persons of Japanese descent who were evacuated from, or who were involved in, the Army evacuation of the West Coast in 1942.").

213 *McCarthyism*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/McCarthyism (last visited Mar. 11, 2020) ("McCarthyism, name given to the period of time in American history that saw U.S. Sen. Joseph McCarthy of Wisconsin produce a series of investigations and hearings during the 1950s in an effort to expose supposed communist infiltration of various areas of the U.S. government. The term has since become a byname for defamation of character or reputation by means of widely publicized indiscriminate allegations, especially on the basis of unsubstantiated charges.).

Second, democracy is just as capable of atrocity as any other form of government. Athens, the birthplace of democracy, routinely voted for the wholesale massacre of friends and enemies alike.[214] This beacon of democracy held a mock trial and democratically voted to execute one of its most favored sons, Socrates, in an event "usually recalled as one of the worst moments in the history of Athenian democracy."[215]

Likewise, republics are not somehow immune to tyranny. It only takes a cursory review of Roman history to see how the government routinely vacillated between democracy, republicanism, and tyranny. Nevermind that the Roman Republic was as brutal a government as has ever existed, by any standard. Slavery, forced gladiatorial executions, huge income inequality, tyranny on a grand scale—the blueprint for the American Experiment was not a perfect system. Why would we think our system immune from tyranny?

Then, of course, there was the insidious practice of American slavery which pervaded our society for centuries. This tyranny was perpetrated by the majority against a minority, and is evidence of the fallibility of the United States government and her people, consistent with all people from all countries in all of history. Pile on the abuses of Jim Crow and the monumental efforts required by the Civil Rights movement to counter our history, it is evident that our people, and our democratic-republican form of government, are just as prone to prejudice, bias, mistake, and evil as any other.

Third, there is no guarantee that the American government will continue indefinitely. In fact, *no* government has endured forever. The Founders knew this, and they recognized that the American Experiment could fail. The Federalist Papers went to great lengths to convince the people that the Constitution was setting up a government with the best man-made bulwarks against tyranny ever devised. As already discussed in the Structural section

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214 VICTOR DAVIS HANSON, A WAR LIKE NO OTHER (2005). Hanson's account of the Peloponnesian War is replete with democratically-sanctioned genocide, ethnic cleansing, and revenge slaughter. For a few typical examples, see *id*. at 101 ("In the new Athenian world there was nothing intrinsically at odds with citizens watching a play of Euripides' one day and voting to kill the adult male citizens of [some city state] the next."); *id*. at 102 ("Meanwhile, once these Athenians got into their collective minds to kill, kill they did, whether the citizenry of Melos or old Socrates, with impunity . . . . Athens' conduct during and right after the [Peloponnesian] War—whether killing Mytileneans, Melians, or Socrates—was all done according to majority vote, besmirching the reputation of democracy itself for centuries to come. Almost every savage measure taken by generals in the field was either preapproved by the sovereign Athenian assembly or understood by fearful commanders to be in line with the harsh dictates of an unforgiving voting citizenry back home."); and *id*. at 106 ("The furious Athenians took some 1,000 ringleaders captive. They even rounded up a number of the poorer who for a time had joined the wealthy to contravene the Athenian blockade. In the end, after raucous debate at Athens—the Athenian popular leader Cleon had wished to slaughter thousands on the grounds of collective guilt—about 1,000 were executed. Much of the island was ethnically cleansed and redistributed to Athenian settlers . . . . The usually cool Thucydides called the action of his countrymen "savage" (*ômon*).").

215 *Id*. at 247.

of the paper, debate about the right to keep and bear arms, as well as the proper roles of the militia and the standing army, were directly related to the fear of the American government becoming tyrannical.[216]

Fourth, anyone familiar with the criminal justice system will immediately see the constant need for vigilance in protecting our freedoms from tyranny. Many of the criminal justice reforms that we take for granted today are recent developments and are constantly being challenged by over-reaching governmental authority.

Fifth, for those who see the United States' military campaigns as a problem, there is more evidence of tyrannical possibilities. The United States has been engaged in war for large portion of its history. Anyone younger than sixteen has lived their entire life with the U.S. at war.[217] Today the United States has troops all around the world.[218]

Finally, news outlets and pundits accuse President Trump of tyranny. CNN published an opinion piece entitled "Trump is taking US down the Path to Tyranny."[219] Time Magazine ran a piece, "Donald Trump and the New Dawn of Tyranny" by a Yale University history professor.[220] If one actually

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216 One anecdote serves to illustrate how fragile the government was at the time of the founding. Before the American Revolution had even officially ended (though it had been practically over for the past two years since Yorktown), the Newburgh Conspiracy threatened to destroy the country in a military coup. A group of Army officers, frustrated with Congress' failure to make good on its promises of payment, circulated an anonymous letter condemning Congress and threatened to either disband the army, leaving the country unprotected while still at war, or else to refuse to disband after peace was made official. George Washington confronted the conspirators at an unsanctioned meeting of the military officers and managed to talk the officers down. After denouncing the anonymous letter and imploring the men to stay true to their country, he proceeded to read them a supportive letter from a member of Congress. After stumbling through the first paragraph due to his extremely poor eyesight, he remarked, "Gentleman, you must pardon me, for I have not only grown gray but almost blind in service to my country." The disarming hint of vulnerability from their otherwise stoic leader so deeply affected the officers that some wept openly. The officers voted and resolved to remain true to their country and to Congress. THE GEORGE WASHINGTON DIGITAL ENCYCLOPEDIA, NEWBURGH CONSPIRACY, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/newburgh-conspiracy/ (last accessed Mar. 7, 2019).

217 *The History of the Afghanistan War*, BBC (Mar. 07, 2012), https://www.bbc.co.uk/newsround/15214375 (putting the start of the war in September 2001).

218 Daniel Brown & Skye Gould, *The US Has 1.3 Million Troops Stationed Around the World—Here Are the Major Hotspots*, BUSINESS INSIDER (Aug. 31, 2017), https://www.businessinsider.com/us-military-deployments-may-2017-5#the-navys-6th-fleet-is-stationed-around-the-strait-of-gibraltar-the-5th-is-by-saudi-arabia-and-the-7th-is-near-japan-and-the-pacific-ocean-4.

219 Jeffrey Sachs, *Trump is Taking US Down the Path to Tyranny*, CNN (July 24, 2018), https://www.cnn.com/2018/07/23/opinions/trump-is-taking-us-down-the-path-to-tyranny-sachs/index.html.

220 Timothy Snyder, *Donald Trump and the New Dawn of Tyranny*, TIME (Mar. 3, 2017), http://time.com/4690676/donald-trump-tyranny/. Other cultural outlets repeat this claim as well. Andrew Sullivan, *America Takes the Next Step Toward Tyranny*, INTELLIGENCER (Mar. 23, 2018), http://nymag.com/intelligencer/2018/03/america-takes-the-next-step-toward-tyranny.html. The point here is that if one truly believes the danger posed by Tyrant Trump, then the Second Amendment has never been more important.

believes the President of the United States to be presently engaged in a program of tyranny, then that person should welcome the protections afforded by the Second Amendment to prevent its fulfilment or else put it back in check.

The point is that the United States—while unique in its culture, governance, and history—is not immune from the pressures of human nature and tyranny. The notion that *any* government is immune from turning tyrannical is simply naïve.

c. Defeating a Tyrannical United States Federal Government

There is a real, pragmatic argument promulgated that the armed citizenry of the United States could not stand up to the federal government in an armed conflict and that the tyranny-prevention purpose of the Second Amendment is moot. Our elected officials seem to think this way. Consider this Twitter exchange between a citizen (Joe Biggs @Rambobiggs) and Representative Eric Swalwell (D-CA). Representative Swalwell wrote an opinion column in which he called for banning "military-style semi-automatic assault weapons" as well as criminally prosecuting those who did not turn in those types of weapons.[221] In the Twitter exchange surrounding that piece, a man named Joe Biggs tweeted,

> So basically @RepSwalwell wants a war. Because that's what you would get. You're outta your fucking mind if you think I'll give up my rights and give the gov all the power."[222]

Rep. Swalwell replied:

> "And it would be a short war my friend. The government has nukes. Too many of them. But they're legit. I'm sure if we talked we could find common ground to protect our families and communities."[223]

Of course, Rep. Swalwell clarified that he had been joking:

> Read the thread. That guy said he was going to go to war with America if someone banned assault weapons. I joked that he may not win that war. A

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221 Eric Swalwell, *Flashback: Ban Assault Weapons, Buy Them Back, Go After Resisters: Eric Swalwell*, USA TODAY (May 3, 2018), https://www.usatoday.com/story/opinion/2018/05/03/ban-assault-weapons-buy-them-back-prosecute-offenders-column/570590002/.

222 Ryan Saavedra, *Democrat Calls for Gun Confiscation, Suggests Nuking Americans Who Fight Back*, THE DAILY WIRE, https://www.dailywire.com/news/38451/democrat-calls-gun-confiscation-suggests-nuking-ryan-saavedra (last accessed Mar. 07, 2019).

223 *Id.*

> joke 😕 Tom, can we not use sarcasm anymore? ***i don't think the guy was joking about going to war, tho.

Rep. Swalwell also explained:

> Don't be so dramatic. No one is nuking anyone or threatening that. I'm telling you this is not the 18th Century. The argument that you would go to war with your government if an assault weapons ban was in place is ludicrous and inflames the gun debate. Which is what you want.[224]

This is not to suggest that an elected Congressman was threatening a citizen with nuclear force; the point is in the argumentation. Rep. Swalwell appears to believe that there is simply no chance of an armed population defeating the U.S. government, "because nukes." This point has been briefly discussed above,[225] but it is worth repeating that it is not obvious in any way that nukes would be used in such a conflict when they have not been used in any conflict since World War II.

It isn't just juvenile Twitter exchanges involving our elected officials which suggest the futility of resisting a tyrannical U.S. government. Scholars,[226] commentators,[227] judges,[228] and even and Supreme Court Justices[229] have express doubt that an armed population could resist a 21st Century federal government. The *Heller* court itself said, "Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks."[230]

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224 Dan MacGuill, *Did Democrat Rep. Eric Swalwell 'Suggest Nuking' Gun Owners Who Resist Confiscation?* SNOPES.COM (Nov. 19, 2018), https://www.snopes.com/fact-check/eric-swalwell-gun-owners-nukes/.

225 *See supra* Part III.D.

226 Carl T. Bogus, *Heller and Insurrectionism*, 59 SYRACUSE L. REV. 253 (2008) ("[T]he idea that the Founders gave us a right to keep and bear arms as an ultimate check against governmental tyranny . . . is an insurrectionist theory because it legitimizes a right of the people to be armed, potentially to go to war against their own government. The Court, however, so far, has embraced this idea tentatively and perhaps not irrevocably. This essay is a plea that it reconsider its endorsement of insurrectionism.").

227 Mark Nuckols, *Why the 'Citizen Militia' Theory Is the Worst Pro-Gun Argument Ever*, ATLANTIC (Jan. 31, 2013) (arguing, among other things, that the idea that an armed population could defeat the government in armed conflict is "wildly speculative—and downright implausible.").

228 Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC (Aug. 26, 2008) ("There are few more antiquated constitutional provisions than the Second Amendment . . . . There is no greater urgency about allowing people to possess guns for self-defense or defense of property today than there was thirty years ago, when the prevalence of violent crime was greater, or for that matter one hundred years ago.").

229 District of Columbia v. Heller, 554 U.S. 570, 627 (2008) ("It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks.").

230 *Id.*

The ACLU's official position prior to *Heller* parroted this view:

> If indeed the Second Amendment provides an absolute, constitutional protection for the right to bear arms in order to preserve the power of the people to resist government tyranny, then it must allow individuals to possess bazookas, torpedoes, SCUD missiles, and even nuclear warheads, for they, like handguns, rifles and M-16s, are arms. Moreover, it is hard to imagine any serious resistance to the military without such arms.[231]

The New York Times published an Opinion piece in the same vein:

> Gun-rights advocates also make the grandiose claim that gun ownership is a deterrent against tyrannical governments. Indeed, the wording of the Second Amendment makes this point explicitly: "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." That may have made sense in the 1770s, when breech-loading flintlock muskets were the primary weapons tyrants used to conquer other peoples and subdue their own citizens who could, in turn, equalize the power equation by arming themselves with equivalent firepower. But that is no longer true.
>
> If you think stock piling firearms from the local Guns and Guitars store, where the Las Vegas shooter purchased some of his many weapons, and dressing up in camouflage and body armor is going to protect you from an American military capable of delivering tanks and armored vehicles full of Navy SEALs to your door, you're delusional.[232]

Of course, if this is true, then we are already at the mercy of our government and cannot hope to resist it should the President actually turn tyrant.

Thankfully, this defeatist view of the current state of the power balance between the people and the government is wrong, based on ignorance of military principle and history. It is far from certain that an armed population would never be able to resist a tyrannical U.S. government.[233] Proving this

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231 *Gun Control*, ACLU ARCHIVE, http://web.archive.org/web/20020924205016/http://www.aclu.org/library/aaguns.html (Web Archive page of ACLU's web page, stating its position as of Sept. 24, 2002.).

232 Michael Shermer, *Guns Aren't a Bulwark Against Tyranny. The Rule of Law Is*, THE NEW YORK TIMES (Oct. 05, 2017), https://www.nytimes.com/2017/10/05/opinion/gun-rights-vegas-massacre.html?mtrref=t.co&assetType=opinion.

233 *See generally*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 656-57 (1989) ("Indeed, only in recent months have we seen the brutal suppression of the Chinese student demonstrations in Tianamen Square. It should not surprise us that some N.R.A. sympathizers have presented that situation as an object lesson to those who unthinkingly support the prohibition of private gun ownership. '[I]f all Chinese citizens kept arms, their rulers would hardly have dared to massacre the demonstrators . . . . The private keeping of hand-held personal firearms is within the constitutional design for a counter to government run amok . . . . As the Tianamen Square tragedy showed so graphically, AK-47s fall into that category of weapons, and

argument wrong is beyond the scope of this Note, but it certainly bears some exploration here.

First, an armed conflict between the people of the United States and its government is more accurately described as a civil war or a rebellion. The question is better framed, therefore, as whether an armed population could defeat the federal government in a civil war or armed rebellion. This completely changes the way the question is analyzed and requires much more analysis than the casual declaration that "Whoever has the biggest guns, wins the war."

Second, the armed population would not have to *win* the armed conflict, merely outlast the tyrannical aspect of the federal government. Again, this changes the analysis to whether an armed population could sufficiently resist or outlast a tyrannical government.

Third, there are numerous contemporary and historical examples of lesser-armed forces, such as insurgencies, defeating a superior-armed force (such as Afghanistan and Vietnam); as well as armed populations defeating their more well-armed governments (such as Timor-Leste in 2002, Angola in 1975, and Israel in 1948, among others). More comparison and analysis between these insurgencies with an armed American population is warranted before making any proclamation about the futility of armed resistance.

Fourth, on the note of insurgencies, Afghanistan itself serves as an ongoing reminder of the ability of an insurgency to resist and outlast a superior military power. The United States invaded Afghanistan in 2001; two presidents and almost twenty years later, the situation is described as a "slowly deteriorating stalemate."[234] Today, the Taliban control more territory

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that is why they are protected by the Second Amendment.' It is simply silly to respond that small arms are irrelevant against nuclear-armed states: Witness contemporary Northern Ireland and the territories occupied by Israel, where the sophisticated weaponry of Great Britain and Israel have proved almost totally beside the point. The fact that these may not be pleasant examples does not affect the principal point, that a state facing a totally disarmed population is in a far better position, for good or for ill, to suppress popular demonstrations and uprisings than one that must calculate the possibilities of its soldiers and officials being injured or killed."); Michael Brendan Dougherty, *Yes, the Bubbas Can Beat Uncle Sam*, NATIONAL REVIEW (Oct. 07, 2017), https://www.nationalreview.com/2017/10/second-amendment-armed-citizenry-vs-government-force-history/ ("The British Empire controlled one quarter of the world's territory and ruled one quarter of the earth's population in 1922. In that very year, they were forced to make an effective exit from the main part of their oldest colony, Ireland. Why? Because a determined group of Irish men with guns made the country ungovernable. The British technically could have deployed their entire navy, blockading the restive island, and starving any rebellion into submission. But they were unwilling to pay the moral price, or the price in blood. It was precisely this foreseeable event that had caused the British to ban Irish Catholics from possessing firearms hundreds of years earlier."); David Kopel, *Why the Anti-Tyranny Case for the 2nd Amendment Shouldn't Be Dismissed So Quickly*, VOX (Aug. 22, 2016), https://www.vox.com/2016/8/22/12559364/second-amendment-tyranny-militia-constitution-founders.

234 Richard N. Haass, *Agonizing Over Afghanistan*, COUNCIL ON FOREIGN RELATIONS (Jan. 14, 2019), https://www.cfr.org/article/agonizing-over-afghanistan.

than they have at any point since 2001.[235] Even a casual comparison of the Afghan insurgency, including all of the foreign interference encountered by the United States, would highlight the absurdity of casually dismissing an American Insurgency's chances of resistance.

These observations deserve more treatment, especially if legal scholars continue to outright dismiss the notion of effective armed resistance. Serious questions about which side the military, national guards, and police forces of the nation would join with, along with a comparison of the advantages and disadvantages that the American people have with other insurgencies, have yet to be considered seriously by the legal community debating the Second Amendment. Until then, the tyranny-prevention purpose of the Second Amendment stands unrebutted by this argument.

d. The Practical Realities of Confiscation

Truly asking "what works?" would require looking at the practical realities of removing military-style weaponry from the American population, whether "voluntarily" or forcefully, especially given the sheer number of military-style weaponry throughout the country. It is estimated that the U.S. civilian gun inventory is at least 360 million, more than one gun per person in America.[236] These guns seem concentrated in somewhere between a third and a half of the population.[237] Specifically speaking about AR-style weaponry, a Fourth Circuit dissent recently gave these numbers:

> Between 1990 and 2012, more than 8 million AR- and AK- platform semiautomatic rifles alone were manufactured in or imported into the United States. In 2012, semiautomatic sporting rifles accounted for twenty percent of all retail firearms sales. In fact, in 2012, the number of AR- and AK- style weapons manufactured and imported into the United States was "more than double the number of the most commonly sold vehicle in the U.S., the Ford F-150." J.A. 1878. In terms of absolute numbers, these statistics lead to the unavoidable conclusion that popular semiautomatic rifles such as the AR-15 are commonly possessed by American citizens for lawful purposes within the meaning of *Heller*.[238]

The dissent says that "[m]illions of Americans keep semiautomatic rifles and use them for lawful, non-criminal activities, including as a means

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235 PBS NewsHour, *In Afghanistan, Fighting the Taliban Increasingly Involves Covert Operations* (Nov. 14, 2019), https://www.youtube.com/watch?v=fuC6fIun5iQ, at 1:20.

236 JOHNSON ET AL., *supra* note 73, at 12.

237 *Id.*

238 Kolbe v. Hogan, 849 F.3d 114, 153 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017) (Traxler, J., dissenting).

to defend their homes."[239] How are these weapons to be removed from the country? Much like "sanctuary cities," which refuse to enforce federal immigration law, some cities and counties have become Second Amendment sanctuaries, refusing to enforce any kind of federal gun confiscation scheme.[240] More importantly than law enforcement, would Americans comply with disarmament?[241] What if not?

Pragmatic interpretation asks what the law *should be.* Although arguably not legal in nature, these arguments nevertheless require rebuttal in courts where balancing occurs. In such balancing, then, pragmatic concerns such as the actual harm of tyranny and the sheer volume of military-style weaponry in the population simply cannot be ignored or discounted in the face of Second Amendment discussions. To do so is to ignore human history and is disingenuous in the extreme. Nor should referencing the governmental butchering of its citizens be considered an appeal to emotion any more than referencing the slaughter of children at school by a lone gunman—for preventing the abuses of tyranny is a central question to designing and interpreting the nation's Constitutional structure.

F. National Identity (or Ethos)

National Identity (or "Ethos") "relies on the concept of a 'national ethos,' which draws upon the distinct character and values of the American national identity and the nation's institutions in order to elaborate on the Constitution's meaning."[242] Examples of this kind of interpretation include cases involving incorporation of the Bill of Rights and center on how deeply rooted a particular protection is in the ordered scheme of liberty found in American governance.[243] Under this method, the question becomes whether

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239 *Id*. at 154.

240 For an introductory list of sanctuaries with sources, see *Second Amendment Sanctuary*, WIKIPEDIA https://en.wikipedia.org/wiki/Second_Amendment_sanctuary (last accessed Oct. 27, 2019).

241 I would not.

242 CONGRESSIONAL RESEARCH SERVICE, MODES OF CONSTITUTIONAL INTERPRETATION, 17 (Mar. 15, 2018), https://fas.org/sgp/crs/misc/R45129.pdf. As previously mentioned, *supra* note 32, Bobbitt referred to this mode as ethical, "because of its etymological basis. Our word 'ethical' comes from the Greek *ethikos*, which meant "expressive of character" when used by the tragedians. It derives from the term *ethos* which once meant the *habits* and character of the individual, and is suggestive of the constitutional derivation of ethical arguments." BOBBITT, *supra* note 27, at 95.

243 Bobbitt references Moore v. City of E. Cleveland, Ohio, 431 U.S. 494 (1977) as an example. BOBBITT, *supra* note 27, at 96. In *Moore*, the Court struck down a statute that limited occupancy of a dwelling unit to members of a single family. That statute had led to the conviction of a grandmother for the crime of living with her son and two grandsons because this arrangement not fit the legal definition of "single family." Writing for the plurality, Justice Powell said: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition . . . . Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with

tyranny prevention, as a core purpose of the Second Amendment necessitating protection of military-style weaponry, is part of the American Ethos. I think few would argue the negative.

The sheer number of guns owned by Americans lends credence to the image of a "gun-nut" culture embracing the notion of tyranny prevention. In addition to the numbers previously offered above, it appears that although Americans make up just 5% of the world's population, we account for something in the range of 35-50% of the world's firearms.[244] Even the international community recognizes the unique gun-culture of America. This staggeringly high rate of gun ownership suggests that some part of the American national identity is tied up in firearms—and both historical and contemporary views suggest that tyranny prevention plays a central role in this identity.

This Note has already surveyed the historical views of tyranny prevention in America.[245] Besides the historical influences on the American Revolution, commentators since the time of the founding have repeated the refrain that the people are the ultimate repository of sovereignty and remain the ultimate check on tyranny.[246] The people felt this way, as well. The "Minutemen," civilian colonists who independently organized during the Revolutionary War "at a minute's notice," have been a symbol of American independence since the founding.[247]

This view of the American citizen persists today. For instance, 65% of Americans see gun rights as protection against tyranny.[248] Those same polls show that 74% of Americans believe that individuals have a Constitutional right to own a gun, and that 66% believe that the federal government has too much power.[249] Today, a majority in the United States now *oppose* banning

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parent s and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history , that supports a larger conception of the family." Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 503-05 (1977).

244 GRADUATE INST. OF INT'L STUDIES, SMALL ARMS SURVEY 46 (2007) ("With less than 5 per cent of the world's population, the United States is home to roughly 35–50 per cent of the world's civilian-owned guns, heavily skewing the global geography of firearms and any relative comparison. Therefore, any discussion of civilian gun ownership must devote disproportionate attention to the United States, if only because of the scale of its gun culture.").

245 *See supra* Part III.B.

246 *See supra* Part III.B.

247 *Minuteman*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/minuteman.

248 *65% See Gun Rights as Protection Against Tyranny*, RASMUSSEN REPORTS (Jan. 18, 2013), http://www.rasmussenreports.com/public_content/politics/current_events/gun_control/65_see_gun_rights_as_protection_against_tyranny.

249 *Id.*

assault rifles.[250] According to Gallup, 57% oppose banning assault rifles, and 40% favor a ban; furthermore, the number of those opposing an assault rifle ban has increased over the past ten years.[251]

Another example of this ethos comes in the form of Second Amendment sanctuaries cropping up all over the nation. These sanctuary city, towns, and counties have passed ordinances or resolutions which declare that the county will not enforce certain state and federal gun restrictions—similar to how sanctuary cities for undocumented immigrants refused to enforce federal immigration laws.[252] Hundreds of counties, towns, and cities have passed similar ordinances.[253] In December of 2019, nearly 100 cities and counties in Virginia alone passed some kind of resolution opposing impending gun-control legislation.[254] Hundreds to thousands of people have shown up to these townhall meetings to support their passage, and it has even prompted one sheriff to deputize thousands of residents in order to avoid the restrictions.[255]

State constitutions also help define the national identity in terms of the citizen's right (and duty) to resist tyranny. Forty-four state constitutions have some provision protecting the right to bear arms.[256] Many guarantee the right "for their common defense."[257] Others guarantee it the right "to bear arms in defense of himself and the state."[258] North Dakota includes the inalienable right to defending life and liberty.[259] Of course, that leaves a number of states, perhaps most notably California and New York, with no express provision.[260] Those states which protect the right for the "common defense" and defense of "the State" clearly contemplate military weaponry in some form or another.

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250 Megan Brenan, *Snapshot: Majority in U.S. Now Oppose Ban on Assault Rifles*, GALLUP (Oct. 19, 2018), https://news.gallup.com/poll/243860/snapshot-majority-oppose-ban-assault-rifles.aspx.

251 *Id.*

252 Bryan Griffith & Jessica M. Vaughan, *Map: Sanctuary Cities, Counties, and States*, CENTER FOR IMMIGRATION STUDIES (Updated Feb. 5, 2020), https://cis.org/Map-Sanctuary-Cities-Counties-and-States.

253 *19 States Now Have Counties with Second Amendment Sanctuaries in Place*, AMMOLAND (Nov. 25, 2019), https://www.ammoland.com/2019/11/19-states-now-have-counties-with-second-amendment-sanctuaries-in-place/#axzz6ASn9YrH3. For a running list of Second Amendment sanctuaries, see *Second Amendment sanctuary*, WIKIPEDIA, https://en.wikipedia.org/wiki/Second_Amendment_sanctuary.

254 Peter Galuszka, *The Disturbing 'Second Amendment Sanctuary' Trend in Virginia*, WASHINGTON POST (Jan. 3, 2020), https://www.washingtonpost.com/opinions/local-opinions/the-disturbing-second-amendment-sanctuary-trend-in-virginia/2020/01/03/21a442b2-2c0f-11ea-bcb3-ac6482c4a92f_story.html.

255 *Id.*

256 Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192 (2006).

257 *Id.*

258 *Id.* at 193.

259 *Id.* at 201.

260 *Id.* at 194, 200.

The Supreme Court has also signaled the tyranny-prevention ethos of American government. In *McDonald v. City of Chicago, Ill.*, the Supreme Court incorporated the Second Amendment against the States via the Fourteenth Amendment and dwelt on this particular aspect of constitutional interpretation at length. There, the Court held that the right of self-defense was deeply rooted in American history and tradition.[261] If the Court found that one aspect of the Second Amendment right—unrelated to the central purpose of providing a check on federal power—is fundamental to the character of the nation, it stands to reason that the central purpose would also be found to be fundamental.

If the question is whether Americans see the responsibility to resist tyranny as part of their identity, the answer seems an easy yes.

G. Moral

Ethical or moral interpretation relies on underlying ideals or moral concepts.[262] Examples of this reasoning are found in substantive due process cases such as *Lawrence v. Texas*, in which the Court held that the concept of liberty "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[263]

It seems reasonable to conclude that the concept of liberty presumes an autonomy of self that also includes freedom to defend one's self, home, and family. Such autonomy would require the ability and means to do so. Indeed, John Adams—in agreement with Blackstone—considered self-defense the primary canon of the law of nature.[264] The United Nations, in the *Universal Declaration of Human Rights*, recognizes the right to "security of person."[265] Under this line of reasoning, it is seriously doubtful that a law which proscribed all self-defense would be legitimate.[266]

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261 McDonald v. City of Chicago, 561 U.S. 742, 768 (2010).

262 CONGRESSIONAL RESEARCH SERVICE, MODES OF CONSTITUTIONAL INTERPRETATION, 3 (Mar. 15, 2018), https://fas.org/sgp/crs/misc/R45129.pdf.

263 Lawrence v. Texas, 539 U.S. 558, 562 (2003).

264 LEGAL PAPERS OF JOHN ADAMS, VOLUME 3 (L. Kinvin Wroth & Hiller B. Zobel, eds., 1965) (a digital reprint provided by the Massachusetts Historical Society is available at http://www.masshist.org/publications/adams-papers/index.php/view/ADMS-05-03-02-0001-0003-0007).

265 UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS, https://www.un.org/en /universal-declaration-human-rights/index.html (last accessed Oct. 27, 2019); UNITED NATIONS, GENERAL ASSEMBLY RESOLUTION 217A, https://www.un.org/en/ ga/search/view_doc.asp?symbol =A/RES/217(III) (last accessed Oct. 27, 2019). Although the right to life and security are expressly guaranteed by the United Nations, there is no express right to self-defense.

266 *See generally* David B. Kopel, Paul Gallant, and Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43 (2007) (exploring the concept of self-defense as a human right and the United Nation's position on this issue).

The *Universal Declaration of Human Rights* also touches briefly on the relationship between human rights, tyranny, and rebellion by the people. The third preamble states: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"[267] While not expressly enumerating a "right to rebellion," this declaration asserts that if human rights are not protected by rule of law, but rather repressed by tyranny, the people will inevitably be compelled to rebel. Indeed, the moral justification of rebelling against Nazi Germany or Stalin's Soviet Russia does not seem to be a morally controversial proposition. The Second Amendment's tyranny-prevention purpose is designed to facilitate such an endeavor.

Furthermore, although self-defense is a human right, but it is not limited to "defense of self" as the Supreme Court has made clear. In *Heller*, the Court repeatedly used the term self-defense interchangeably with "lawful defense of self, family, and property,"[268] "the defense of himself and family and his homestead,"[269] "the home, where the need for defense of self, family, and property is most acute,"[270] "for protection of one's home and family,"[271] and "using a gun to protect himself or his family from violence."[272] Extrapolating this principle, there are moral grounds for reasoning that "self-defense" includes defense of others similarly situated to you from true threats and oppression.

Even if self-defense were limited to "defense of self," this idea could very well include defense against *all* kinds of threats, whether self-defense against animals, criminal activity, or governmental tyranny. A Jew, shooting and killing a Gestapo officer who was attempting to ship her to Auschwitz is still "self-defense," even though the aggression was coming from a governmental actor.

The purpose of this section is not to argue that moral reasoning should take a more prominent role in judge's decision-making, but rather to briefly highlight the need for the consideration of the morality of owning military-style arms. Defense of self, family, home, human rights, and the oppressed are moral goods. Such defense is only possible with the appropriate means, and this is precisely why tyranny prevention was written into the Bill of Rights.

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267 UNITED NATIONS, *supra* note 265.

268 District of Columbia v. Heller, 554 U.S. 570, 571 (2008).

269 *Id.* at 616.

270 *Id.* at 628.

271 *Id.* at 628-29.

272 *Id.* at 634; David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 212 (2017).

IV. CONCLUSION

No matter what method of interpretation is used, tyranny prevention is a core purpose of the Second Amendment, and this purpose necessitates the protection of military weaponry to that end. The text, as understood by both its authors and the people who ratified it, highlights this purpose by pointing out the necessity of an armed population to the security of a free nation. Pre- and post-ratification history supports the public's understanding that the Amendment afforded them a protection against overreaching government. Precedent does not foreclose this natural reading. Furthermore, the Amendment serves a fundamental structural role in our federalist, republican system: allocating power to the people themselves by ensuring their ability to enforce their will. Even pragmatic arguments favor a tyranny prevention interpretation, as the harms from tyrannical government greatly exceed the harm caused by mass shootings and gun violence. Finally, this interpretation is embedded in the American identity and is morally sound.

This project comes to a close with the following Ninth Circuit dissent, which ably captures the spirit and tenor of the arguments presented:

> The majority falls prey to the delusion—popular in some circles—that ordinary people are too careless and stupid to own guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll. But the simple truth—born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process. In the North, by contrast, blacks exercised their right to bear arms to defend against racial mob violence. As Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to resist. A revolt by Nat Turner and a few dozen other armed blacks could be put down without much difficulty; one by four million armed blacks would have meant big trouble.
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> All too many of the other great tragedies of history—Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few—were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the Militia Act required here. If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.
>
> My excellent colleagues have forgotten these bitter lessons of history. The prospect of tyranny may not grab the headlines the way vivid stories of

> gun crime routinely do. But few saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.
>
> Fortunately, the Framers were wise enough to entrench the right of the people to keep and bear arms within our constitutional structure. The purpose and importance of that right was still fresh in their minds, and they spelled it out clearly so it would not be forgotten. Despite the panel's mighty struggle to erase these words, they remain, and the people themselves can read what they say plainly enough: "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.*"[273]

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[273] Silveira v. Lockyer, 328 F.3d 567, 568-70 (9th Cir. 2003) (Kozinski, J., dissenting) (emphasis original, citations omitted).