SHOCKING THE SECOND AMENDMENT: INVALIDATING STATES' PROHIBITIONS ON TASER WITH THE *DISTRICT OF COLUMBIA V. HELLER*

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I. INTRODUCTION

On June 26, 2008 the United States Supreme Court announced its first substantive ruling on the Second Amendment to the United States Constitution and the right-to-bear arms in *District of Columbia v. Heller*.[1] Respondent Dick Heller, legally permitted to carry a handgun for his job as a private security guard, was denied a registration certificate to keep the gun in his home under the District of Columbia's handgun bans.[2] The District had prohibited the registration of handguns and the carrying of unregistered handguns, amounting to an almost complete ban;[3] it also required residents to keep registered long-guns "unloaded and dissembled or bound by a trigger lock or similar device" unless it was being used at a business or for recreation.[4] Holding the District's bans unconstitutional, the Supreme Court held the Second Amendment protects an individual's right to keep and bear arms unconditioned upon militia service.[5]

While *Heller* provides an answer to several constitutional questions, it has left in its wake a proverbial pin-the-tail-on-the-donkey in placing non-lethal weapons, such as Tasers,[6] on the Second Amendment's concentric dartboard of protection. Advocates for legalizing Tasers are not hesitating to strike while the iron is hot—and for good reason. The Supreme Court has

[1] I'd like to thank Albany Law School Professor Timothy D. Lytton, Albert and Angela Farone Distinguished Professor of Law, for all of his assistance in helping me write this Note. I also thank University of Pennsylvania Law Professor Paul H. Robinson, Colin S. Diver Professor of Law, for contributing his Second Amendment expertise in creating this Note's thesis. And lastly, I'd like to thank Kayla E. Corbett and Turk E. Wright for their editorial oversight as well as Robert A. Wright, U.B., for his inspirational contribution as American patriot and Second Amendment aficionado.

[2] Emma Schwartz, *A Key Case on Gun Control*, U.S. NEWS & WORLD REP., Mar. 6, 2008, *available at* http://www.usnews.com/articles/news/national/2008/03/06/a-key-case-on-gun-control.html.

[3] District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008) (citing D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001)).

[4] *Id*. (quoting D.C. CODE § 7-2507.02 (2001) (invalidated by District of Columbia v. Heller, 128 S. Ct. 2783 (2008)).

[5] *Id.* at 2821–22.

[6] The use of the word "Taser" in this Note is used as a noun and refers to an electronic shocking device, but not exclusively TASER® devices manufactured by TASER® International. The use of the word "Taser" should not be confused with the trademarked name "TASER®," which the company expressly states must be set off in all capital letters. Taser.com, Trademark Use, http://www.taser.com/legal/pages/trademarks.aspx (last visited Sept. 20, 2009).

adjudicated a Second Amendment issue, on average, *once* every forty-three years.[7] But despite this limited quantity of Second Amendment precedent *Heller* has conceivably laid the deductive framework to eliminate state and federal prohibitions that ban the possession and use of Tasers by civilians.

This Note will explore and provide an answer to precisely that proposition: does the logic of *District of Columbia v. Heller*, when applied to state prohibitions on Tasers, necessarily require their invalidation? Part I of this Note will serve as a three-part primer to the Second Amendment as interpreted under *Heller*: the prefatory clause, the operative clause, and the use of public meaning originalism in the constitutional interpretation and construction of those meanings. Part II examines the technological and historical origins of Tasers and where and for what reasons they're prohibited. Part III will prove that Tasers fall within the requirements established by *Heller* for a given weapon to be protected under the Second Amendment, as well as additional factors to be taken into consideration. Lastly, Part IV examines the individual states' right-to-bear arms provisions where Tasers are currently prohibited and, while seeking to maintain congruency with *Heller's* originalist methodology, demonstrates these prohibitions as necessarily invalid.

II. TASER TECHNOLOGY IN THE 21ST CENTURY

What we know of today as the Taser first began in 1969 when NASA researcher Jack Cover envisioned the practical utility of a "high-voltage, low-ampere electric shock [device that] would disorient [a criminal] long enough for police" to take action without causing either party permanent harm.[8] Cover labeled his shocking device with the acronym "T.A.S.E.R.," or "Thomas A. Swift's Electric Rifle," in tribute to his beloved childhood comic-book hero.[9] By 1974, Cover had unveiled his first model, the TF-76, which propelled two darts fifteen feet using a gunpowder-

[7] *See, e.g.*, Lewis v. United States, 445 U.S. 55 (1980); United States v. Miller, 307 U.S. 174 (1939); Miller v. Texas, 153 U.S. 535 (1894); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1875); Clark Neily, *Respondent's Amici*, DCGunCase.com, Feb. 12, 2008, http://www.dcguncase.com/blog/2008/02/12/respondents-amici/.

[8] Jerry Langton, *The Dark Lure of "Pain Compliance,"* THE STAR, Dec. 1, 2007, *available at* http://www.thestar.com/News/article/281499 (noting Cover envisioned the practicality of using a Taser to subdue unruly criminals following several successful test-runs on large pigs).

[9] *Id.*

based propellant system.[10] Cover's use of gunpowder would later prove fatal for the TF-76, resulting in a Title-2 firearm classification by the United States Bureau of Alcohol, Tobacco and Firearms ("A.T.F.").[11] The classification precipitated the eventual collapse of Cover's company by preventing civilians who lacked special firearms qualifications from being able to purchase his T.A.S.E.R. device.[12] Twenty-years would pass before the Taser would reappear on the non-lethal weapons market.

In 1993, brothers Rick and Tom Smith, current CEO and Chairman of the Board of TASER® International, respectively, purchased Cover's device and set to work on revamping its design.[13] The brothers' work was chiefly motivated by the loss of Rick's high school friend who had been murdered in a "traffic altercation."[14] The biggest alteration ultimately made to Cover's Taser design was coincidentally the very change that saved it from almost certain demise: they switched to a compressed gas-based propellant which allowed the Taser to be reclassified by the A.T.F. as a "non-firearm," no longer requiring special firearms qualifications.[15] Since the reclassification the Smith's have developed four distinct generations of Taser devices while being the only company currently manufacturing Tasers in the United States.[16] TASER® International has continued to innovate its Taser design to produce the ultimate self-defense weapon.

A. How Do Tasers Work?

Tasers shoot two small, needle-like tethered probes 135–160 feet-per-second into the skin or clothing of a target using compressed nitrogen.[17] The probes instantly emit a pulsating,

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[10] Rick Smith, *History of TASER Devices*, TASER.COM, Mar. 12, 2007, http://www.taser.com/research/science/pages/HistoryofTASERDevices.aspx; *see also History of Taser*, SOUTH FLORIDA SUN-SENTINEL, June 19, 2005, *available at* http://www.sun-sentinel.com/news/local/broward/sfl-taserhistjun19,0,3658981.story.

[11] Smith, *supra* note 10.

[12] *Id.*

[13] Langton, *supra* note 8; Taser.com, Executive Team, http://www.taser.com/company/Pages/executives.aspx (last visited Feb. 20, 2009).

[14] Smith, *supra* note 10.

[15] Langton, *supra* note 8; Smith, *supra* note 10.

[16] First Timer's Guide to Stun Gun & TASER Devices, http://www.beststungun.com/taser_analysis.html (last visited Feb. 20, 2010); Smith, *supra* note 10.

[17] R. Kayne, *What is Taser?,* WISEGEEK, http://www.wisegeek.com/what-is-a-taser.htm (last visited Feb. 20, 2010); Taser.com, General FAQ's, http://www.

electrical charge on contact that lasts an uninterrupted five to seven seconds.[18] Tasers are distinct from many non-lethal weapons by the wide-range of environments they're capable of operating in.[19] They're able to be used at any altitude, "in weather ranging from -20 to 160 degrees Fahrenheit," and even submerged in water without causing electrocution.[20] Unlike other non-lethal weapons, Tasers are not limited to only those situations where the intended target is at arm's length.[21] While the optimum distance for their use is in the seven- to ten-foot range, Tasers are effective up to distances of fifteen feet.[22]

The optimum range for a Taser is this seven- to ten-foot range because of the spacing that results between the two probes when they make contact with the target.[23] This distance allows the probes to travel at a trajectory so as to make contact with the target approximately sixteen inches apart from each other—a spacing that delivers the most powerful electrical stimulation.[24]

taser.com/RESEARCH/Pages/FAQGeneral.aspx (last visited Feb. 20, 2010) [hereinafter *General FAQ's*].

[18] Brodie Abbot, *Be Prepared–The Pros & Cons of Using Non-Lethal Self-Defense Weapons*, 2007, http://www.talewins.com/protectyourself/stunguns.htm; Kayne, *supra* note 17; Mark W. Kroll, *TASER® Electronic Control Devices: Review of Safety Literature*, Taser.com, Aug. 25, 2008, *available at* www.taser.com/SiteCollectionDocuments/Appendix%2025%20Aug%202008.pdf. Additional electrical stimulation can be administered by simply repressing the Taser's trigger. First Timer's Guide to Stun Gun & TASER Devices, How to Choose a TASER Device, http://www.beststungun.com/how_to_choose_a_taser.html (last visited Feb. 20, 2010).

[19] *See, e.g.*, Abbot, *supra* note 18 (noting pepper spray is often ineffective in windy conditions because the spray can actually blow back into the *victim's* face even when aimed at an attacker).

[20] Kayne, *supra* note 17.

[21] *See* Abbot, *supra* note 18 (noting Tasers are effective up to fifteen-feet, whereas stun guns require the user be "be close enough to your attacker to touch him," and pepper sprays as having a range of just six to eight feet and may either blow back in the user's face or be easily avoided by the attacker); Larry Zolna, *Pepper Spray - Some Basic Facts*, EZINEARTICLES.COM, http://ezinearticles.com/?Pepper-Spray---Some-Basic-Facts&id=643710 (last visited Feb. 20, 2010) ("Stream-type Pepper Spray . . . usually travels over 6 feet or more.").

[22] Kayne, *supra* note 17; *see also* Abbot, *supra* note 18 ("With a taser, you can disable an attacker from up to 15 feet away."). Tasers designed for law enforcement use are capable of using special cartridges enabling them to be effective at greater distances than civilian models. *See* Taser.com, Taser Cartridge Technology, Mar. 12, 2007, http://www.taser.com/research/technology/Pages/Cartridge.aspx; *see also* Taser.com, TaserX26, http://www2.taser.com/products/law/Pages/TASERX26.aspx (last visited Feb. 20, 2010).

[23] Kayne, *supra* note 17.

[24] *Id*. The area between where the two probes make contact is where the actual electrical stimulation is delivered to the target. *Id*.

The Taser's superb efficacy at this close-quarter "striking distance" makes it an attractive personal protection weapon since "[m]ost [physical] confrontations occur within [a] ten-foot" radius.[25] Tasers have become especially reliable since the advent of "Electro-Muscular Disruption" technology ("EMD") and its ability to cause "uncontrollable contraction[s] of the muscle tissue . . . [that] physically debilitat[es] a target regardless of pain tolerance or mental focus."[26]

Much confusion still exists over the type of "shock" that Tasers deliver to their targets. While Tasers are capable of administering a 50,000-volt spark through nearly two-inches of clothing, only 400-volts are actually delivered into a person's body.[27] However, it is the amount of amperes that are delivered that determines, if any, the amount of bodily harm.[28] Today's Tasers deliver an electrical charge of around 2.1 *milli*amps.[29] As an idea of how little amperage that is, consider that a bulb from a string of Christmas tree lights emits around 1 ampere, and that the average 110-volt household socket delivers around 16 amperes.[30]

B. Proscribing Tasers

Tasers are currently prohibited from civilian possession and use in seven states.[31] While they are not 100% injury-free

[25] Paul H. Robinson, *A Right to Bear Firearms but Not to Use Them? Defensive Force Rules and the Increasing Effectiveness of Non-lethal Weapons*, 89 B.U. L. REV. 251, 257 (2009).

[26] WorthProtectionSecurity, Taser M-18, http://www.worthprotectionsecurity.com/TASER_M18.htm (last visited Feb. 20, 2010). Tasers can be subdivided into two categories of "energy weapons" based on the type of electrical stimulation they deliver. *Id*. The first category are "stun weapons," which emit "a 7–14 Watt range [of stimulation that] interfere[s] with the communication signals within the nervous system of the target." *Id.* The second and most recently developed is the category of "Electro-Muscular Disruption" (EMD) weapons, which emit an "18 to 26 Watt electrical signal [that] completely override[s] the central nervous system and directly control[s] the skeletal muscles." *Id.* EMD-based Taser devices notably outperform stun-energy Tasers and as a result are the bulk of those manufactured and purchased today. Smith, *supra* note 10.

[27] Peter Allen, *Facts on Tasers,* THE POST-STANDARD, Mar. 9, 2008, *available at* http://blog.syracuse.com/graphics_impact/2008/03/0309_taser_facts.pdf (explaining a person can shuffle their feet on carpet and, while touching a doorknob, discharge nearly 20,000-volts of electricity).

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *See* HAW. REV. STAT. § 134-16(a) (2007) ("It shall be unlawful for any

(assuming *any* self-defense weapon could ever be) they have proven themselves to be "among the safer use-of-force alternatives to subdue violent individuals who could harm law enforcement officers, innocent citizens or themselves."[32] Unfortunately, Tasers are known better for their sometimes-negative results which are often publicized by critics seeking to eliminate the use of Tasers by civilians and law enforcement. Tasers are usually used in situations when the use of a firearm would be unwarranted and for this reason injuries and deaths that in these instances are met with public indignation because of the seemingly minor offense the Taser's use was predicated on.[33] Almost always overlooked is the fact that Tasers are time and again chosen in lieu of a firearm, and that without the option of a Taser deadly force would most certainly be the first and perhaps last choice made in subduing a criminal.[34]

person . . . to possess, offer for sale, hold for sale, sell, give, lend, or deliver any electric gun."); MASS. GEN. LAWS ch. 140 § 131J (LexisNexis 2008) ("No person shall possess a . . . weapon from which an electrical current . . . may be directed, which . . . is designed to incapacitate temporarily, injure or kill . . . ."); MICH. COMP. LAWS. SERV. § 750.224a(1) (LexisNexis Supp. 2009) ("[A] person shall not . . . possess . . . [a] weapon from which an electrical current, impulse, wave, or beam may be directed, which . . . is designed to incapacitate temporarily, injure, or kill."); N.J. STAT. ANN. § 2C:39-3(h) (West 2005) ("Any person who knowingly has in his possession any stun gun is guilty of a crime of the fourth degree."); N.Y. PENAL LAW § 265.01(1) (McKinney 2009) ("A person is guilty of criminal possession of a weapon in the fourth degree when . . . [h]e or she possesses any firearm, electronic dart gun, electronic stun gun . . . . "); R.I. GEN. LAWS § 11-47-42(a)(1) (LexisNexis 2002) ("No person shall carry or possess . . . [a] weapon . . . commonly known as a . . . stun-gun . . . . "); WIS. STAT. § 941.295(1) (Supp. 2008) ("Whoever . . . possesses . . . any electric weapon is guilty of a Class H felony."). Tasers are also restricted in the District of Columbia (but can be carried by civilians who obtain a valid firearms permit) as well as the following cities and counties, though not addressed in this Note: Annapolis, Baltimore, and Howard County, MD; Chicago, IL.; Lynn County, OH; New York City, N.Y.; and Philadelphia, PA. Memorandum of Law from Douglas E. Klint, Vice President & Gen.Counsel, to TASER Int'l Inc. (May 3, 2004), http://www.taser.com/SiteCollectionDocuments/Controlled Documents/Legal/memorandumoflaw.doc.; TASER International, State Statutes Regarding TASER® Electronic Control Devices, http://www.taser.com/SiteCollection Documents/Controlled%20Documents/Legal/7-2007%20State%20Statute%20 Summary.pdf (last visited Feb. 20, 2010).

[32] General FAQ's, *supra* note 17.

[33] *See, e.g., Tasers-Potentially Lethal and Easy to Abuse*, (Amnesty International), Dec. 16, 2008, http://www.amnesty.org/en/news-and-updates/report/tasers-potentially-lethal-and-easy-abuse-20081216 [hereinafter *Tasers Easy to Abuse*].

[34] *See, e.g.,* Ryan J. Stanton, *Nude Man Tasered Going to Bay City Church*, BAY CITY TIMES, Feb. 20, 2009, *available at* http://www.mlive.com/news/bay-city/index.ssf/2009/02/nude_man_tasered_going_to_bay.html (reporting how

Amnesty International is currently the leading proponent of discontinuing Taser use in the United States. Amnesty's chief objection is that the functional capability of the Taser renders it "inherently open to abuse" because it's "easy to carry and easy to use and can inflict severe pain at the push of a button, without leaving substantial marks."[35] In 2008, Amnesty released a report titled "USA: Less Than Lethal?" detailing its investigation of Taser use by law enforcement agencies throughout the United States between 2001 and 2008.[36] Amnesty reported that nearly 334 people had died after having been stunned with a Taser device.[37] Amnesty further reported that "90 per cent [*sic*] of those who died . . . were unarmed."[38] That said, the report also noted many of the victims had been "subjected to repeated or prolonged shocks—far more than the five-second 'standard' cycle—or by more than one officer at a time."[39] These additional variables (prolonged shocks and multiple Tasers being used) call into question whether Tasers, when used *properly*, are truly dangerous. Most reports like Amnesty's are based on Taser abuse rather than the distinct inquiry of whether or not they are dangerous in and of themselves.[40]

III. DISTRICT OF COLUMBIA V. HELLER AND THE SECOND AMENDMENT

The Second Amendment to the United States Constitution 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."[41] Its linguistic structure is divided into two near equally-worded segments known as the prefatory clause

officers had to Taser a naked man who, after arguing with his parents and showing up to a church naked, refused to cooperate and shouted obscene remarks).

[35] *Tasers Easy to Abuse*, *supra* note 33.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *Id*.

[40] Amnesty International USA, *Taser Abuse in the United States*, http://www.amnestyusa.org/us-human-rights/taser-abuse/page.do?id=1021202 (last visited Feb. 20, 2010) ("Amnesty International is concerned that Tasers are being used as tools of routine force -- rather than as an alternative to firearms.").

[41] U.S. CONST. amend. II; David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007, 1038 (1994) (quoting U.S. CONST. amend. II).

and the operative clause.[42] In *Heller*, the Court examined both clauses in isolation before synthesizing their extracted meanings into a coherent, articulable reading of the Second Amendment.[43] It first undertook a semantic interpretation of the operative clause and combined it with the historical origins of the Second Amendment. Second, the Court similarly analyzed the prefatory clause and the intrinsic purpose it announces. Third, it juxtaposed the meanings of the individual clauses to ensure they are compatible not only with each other but with the overall meaning of the Second Amendment itself.[44]

A. The Operative Clause

The operative clause of the Second Amendment proclaims that "the right of the people to keep and bear Arms, shall not be infringed."[45] There was a marked discordance between the Justices in *Heller* as to whether "the people" in the Second Amendment were people in an individual or collective-sense.[46] A further dispute arose over whether, given either finding, such a conclusion was congruent with the keeping and bearing of arms.[47] The Court ultimately held that the operative clause guaranteed an "individual right to possess and carry weapons in case of confrontation."[48]

To determine whether the Second Amendment protected an individual or collective right, the Court examined the Constitution and Bill of Rights as a sort of "rights-exemplar," looking at the differing treatments of the phrase "right of the people" found therein, the number of times those instances referred to constitutionally recognized "rights," and whether those rights were individual or collective in scope.[49] In doing so, the Court concluded the operative clause "unambiguously"

[42] District of Columbia v. Heller, 128 S. Ct. 2783, 2789 (2008).

[43] *Id*. at 2789–801.

[44] *Id*. at 2801.

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

[46] *Compare Heller*, 128 S. Ct. at 2790–91 (stating that a right attributed to "the people" refers only to an individual right), *with id*. at 2826–27 (Stevens, J., dissenting) (arguing that the right attributed to "the people" refers to the collective).

[47] *Compare id.* at 2795–96 (majority opinion) (noting that using either definition will establish the "right to bear arms" is not limited to military use), *with id*. at 2828–31 (Stevens, J., dissenting) (arguing that the "right to bear arms" is connected to state-organized militia).

[48] *Id*. at 2797 (majority opinion).

[49] *Id.* at 2790–91.

guaranteed an individual right for three reasons.[50] First, the phrase "the people" as it appears in the First and Fourth Amendments[51] and in similar language in the Ninth Amendment[52] all refer to individual, as opposed to collective, rights.[53] Second, though the Constitution refers to "the people" collectively on three other occasions,[54] the Court did not find such usage dispositive of an individual-right reading since they referred to the "exercise or reservation of powers, [and] not rights."[55] Lastly, in the six instances in which the phrase "the people" was used it "unambiguously refer[red] to all members of the political community, [and] not an unspecified subset" such as a militia or military group.[56] Thus, the operative clause's "people" refers to individuals and is applicable to the "national community."[57]

Examining the phrase "to keep and bear Arms," along with its individual right basis, the Court rejected the idiomatic approach advocated by the dissent,[58] choosing instead to dissect meaning word-by-word.[59] Justice Scalia placed significant emphasis on the fact that, historical evidences aside, the product of an

[50] *Id.* at 2790.

[51] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of *the people* peaceably to assemble . . . . ") (emphasis added); U.S. CONST. amend. IV ("The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . . ") (emphasis added).

[52] U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by *the people*.") (emphasis added).

[53] District of Columbia v. Heller, 128 S. Ct. 2783, 2790 (2008).

[54] U.S. CONST. pmbl. ("WE *THE PEOPLE* of the United States . . . . ") (emphasis added); U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by *the People* of the several States . . . . ") (emphasis added); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to *the people*.") (emphasis added).

[55] *Heller*, 128 S. Ct. at 2790.

[56] *Id*. at 2790–91.

[57] *Id.* at 2791 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

[58] The debate over using an idiomatic approach in the Second Amendment's interpretation essentially turned on whether meaning was to be derived from each word's individual definition (as the majority did) or whether meaning was incapable of being understood in such a way and could only be understood as a whole, figuratively (advocated by the dissent). *Compare Heller*, 128 S. Ct. at 2791–97, *with id*. at 2827–31 (Stevens, J., dissenting).

[59] *Id.* at 2791–94 (majority opinion).

idiomatic interpretation would be patently illogical. Parting ways with an idiomatic method of interpretation was critical for the majority's reasoning to remain coherent.

> If "bear arms" means, as we think, simply the carrying of arms, a modifier can limit the purpose of the carriage ("for the purpose of self-defense" or "to make war against the King"). But if "bear arms" means, as the petitioners and the dissent think, the carrying of arms only for military purposes, one simply cannot add "for the purpose of killing game." The right "to carry arms in the militia for the purpose of killing game" is worthy of the mad hatter.[60]

Using sources from the Colonial era and other conclusions from previously defined, similar words, the Court defined the word "Arms" as "anything that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another."[61] Adding the word "keep" altered the meaning of "Arms" to simply "hav[ing] weapons."[62] Adding the word "bear," defined as "to carry," further altered the meaning to "carrying [Arms] . . . for . . . confrontation."[63] In sum, to "keep and bear Arms" means simply to have and to carry a weapon for self-defense; the phrase does not necessarily speak exclusively to military purposes or to weapons specifically designed for or employed in military applications.[64]

B. The Prefatory Clause

The prefatory clause of the Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State."[65] The linguistic structure of the Second Amendment and contemporaneous state constitutional provisions demands that the prefatory clause serve strictly as clarification;[66] it does not restrict or expand the operative clause's command but instead

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[60] *Id*. at 2796.

[61] *Id*. at 2791 (quoting 1 T. CUNNINGHAM, ESQ., A NEW AND COMPLETE LAW DICTIONARY (Majesty's Law Printers 2d ed. 1771)).

[62] *Id.* at 2792.

[63] *Id*. at 2793 ("[W]ear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

[64] *Id*. at 2791–99.

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

[66] District of Columbia v. Heller, 128 S. Ct. 2783, 2789 (2008) (citing Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814–21 (1998)).

"announces [its] purpose."[67] Like its analysis of the operative clause, the Court divided the prefatory clause into smaller parts, looking first to the meaning of a "well regulated Militia" and secondly to the meaning of the phrase "security of a free state."[68]

The militia's "necessity" to a free state is subsumed within the definition of a militia itself. Referring to a militia as being "well regulated" means no more than a familiarity with the use of arms and does not necessarily imply membership in a disciplined, or the formally structured, standing army. If anything, it implies the type of continual use found in personal firearm ownership, distinct from the infrequent militia training and spontaneity with which a militia is called upon.[69] Many of the firearms used during the Revolutionary War, for example, were often supplied by the militia members themselves.[70]

> Instead, *Heller* reasons that a culture that protects gun ownership for personal purposes, such as self-defense and sporting use, will naturally tend to produce a population that is skilled and familiar with firearms, and in which personal gun ownership is widespread. These traits, in turn, enhance the ability of the people to function as a popular militia of the kind contemplated in the preface of the Second Amendment. *That* is the connection between the Second Amendment's preface and its operative clause, *Heller* concludes.[71]

In the years leading up to the Revolutionary War, the British were quick to recognize the Colonists' potential as an oppositional force. Massachusetts in 1767, for instance, had

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[67] *Id.*; *see also* Adam Freedman, Op-Ed., *Clause and Effect*, N.Y. TIMES, Dec. 16, 2007, *available at* http://www.nytimes.com/2007/12/16/opinion/16freedman.html ("According to the court, the second comma divides the amendment into two clauses: one 'prefatory' and the other 'operative.' On this reading, the bit about a well-regulated militia is just preliminary throat clearing; the framers don't really get down to business until they start talking about 'the right of the people . . . shall not be infringed.'").

[68] *Heller*, 128 S. Ct. at 2799–801.

[69] Demonstrations from the Scotch-Irish backwoodsmen of the Pennsylvania militia's rifled long-guns—able to "hit a mark seven inches in diameter at a distance of 250 yards, while the ordinary musket was accurate at only 100 yards or so"—exhibited deadly effects on British sentries and complemented the aura of the American frontier marksman and his familiarity with firearms. DAVID MCCULLOUGH, 1776, 38 (Simon & Schuster 2005).

[70] *See* RICHARD M. KETCHUM, SARATOGA, 148 (Henry Holt & Co. 1997) (stating that recruits brought in through the Committees of Safety "had to furnish their own 'good effective Fire-arm, with a Bayonet fixed thereto, a Cartouch Box, Knapsack and Blanket.'").

[71] Michael P. O'Shea, *The Right to Defensive Arms After* District of Columbia v. Heller, 111 W. VA. L. REV. (forthcoming Winter 2009) (manuscript at 364, *available at* http://ssrn.com/abstract=1287405).

nearly 200,000 men out of a population of one million that owned arms.[72] Rather than confront such a sizable and hostile force head-on in the event of a conflict, the British took preemptive measures by disarming the Colonists, seizing the arms they owned and restricting their access to any other arms and ammunition.[73] As *Heller* noted, history's tyrants had eliminated the possibility of subversive uprisings by disarming its citizens and instead arming its own government-loyal militia members.[74] Seeking to prevent future despots from ever successfully implementing such a scheme in the Colonies, the Founders included the prefatory clause in the Second Amendment in order to memorialize "the purpose for which the right [to-bear arms] was codified: to prevent elimination of the militia."[75]

The preservation of the militia is second in importance to exactly *which* militia the prefatory clause speaks. According to *Heller*, the citizens'-militia—formed from "[able-bodied] men . . . bearing arms supplied by themselves . . . of the kind in common use at the time"[76] collectively exercising their individual right-to-bear arms—is the gravamen to dispensing with the proposition that the Second Amendment's militia is indistinguishable from that which Congress is granted authority under Article I, § 8, cl. 15 of the United States Constitution.[77] If

[72] STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 11–12 (Ivan R. Dee 2008) ("There are, in the different provinces, about a million of people, which we may suppose at least 200,000 men able to bear arms; and not only able to bear arms, but having arms in their possession . . . . In the Massachusetts government particularly, there is an express law, by which every man is obliged to have a musket, a pound of powder, and a pound of bullets by him . . . . " (quoting FRANK ARTHUR MUMBY, GEORGE III AND THE AMERICAN REVOLUTION, 173 (Constable & Co., 1924))).

[73] District of Columbia v. Heller, 128 S. Ct. 2783, 2799 (2008); *see also id*. at 2798 (quoting 1 W. &M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689)).

[74] *Id.* at 2801. The Second Amendment is the American descendant of the English Bill of Rights (the codified progeny of the Declaration of Right). *Id.* at 2798. Under the despotic Catholic rule of the 17th-century Stuart Kings Charles and James II, insubordinate Protestant regions were controlled via combination of loyal militias "suppress[ing] political dissidents" and the disarming of specific, potentially subversive regions. *Id.* To pacify trepidations of a return to Stuart-style rule, William and Mary conferred express assurances to the Protestants in the Declaration of Right that they "would never be disarmed." *Id*. ("That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law." (quoting 1 W&M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689))).

[75] *Id*. at 2801.

[76] *Id.* at 2815 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)) (alteration in original).

[77] *Id.* at 2800–01; *see also* U.S. CONST. art. I, § 8, cl. 15–16 ("To provide for

the right-to-bear arms was predicated upon Article I, § 8 militia participation, the Second Amendment's guarantee is lost in contradiction and becomes merely a peppercorn: Congress can use the same powers to disarm members of the militia as it does to arm them.[78] And since militia participation would be the only means by which a person would be able to keep and bear a firearm it would be within Congress's province to disarm those citizens potentially disloyal to the government (non-militia members) while arming those it deemed were (militia members).

A guarantee to bear arms for self-defense makes little sense if it's preconditioned on the government's decision to let citizens keep and someday possibly bear arms against it. The Second Amendment's disconnect from unimpeded government intervention is intuitive if at the very least for this reason alone. That Congress is already constitutionally endowed with the power to raise a standing army in defense of the United States from foreign attack suggests the Second Amendment's "militia" is equivocal: it is an *actual* militia of individuals collectively exercising their natural right against an overreaching central government[79] and a *symbolic* militia of the individual citizen exercising his or her right to self-defense.[80] The preservation of the citizens'-militia is necessary to preserve both these freedoms and as such provides the underlying basis for the prefatory clause.[81]

C. Heller and Originalist Theory

Originalism is the theory of constitutional interpretation that "treats a constitution like a statute . . . giv[ing] it the meaning that its words were understood to bear at the time they were promulgated."[82] Within originalism itself lies a dichotomy

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.").

[78] *Heller*, 128 S. Ct. at 2802.

[79] David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235, 236–37 (2008).

[80] *Id*. at 237–38 ("*Heller*'s recognition of self-defense as a natural right was consistent with the same view in The Federalist, in most state constitutions, and in case law from before the Civil War to modern times.") (citations omitted).

[81] *Id.*; *see also* O'Shea, *supra* note 71, at 364.

[82] Antonin Scalia, U.S. Supreme Court Justice, A Theory of Constitution

turning on the authoritative sources used when extrapolating meaning from the constitutional provision in question: original *intent* originalism and original *public meaning* originalism.[83] Justice Scalia quickly revealed in the first few paragraphs of *Heller*'s majority opinion that the Court's reasoning would be guided by the latter.[84]

Public meaning originalism looks at "how the words . . . phrases, and structure [of a constitutional provision] . . . would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted."[85] The Court is able to distill "'semantic meaning'" from those words and phrases by looking at their "general pattern of usage at the time of [their framing and ratification],"[86] assuming the provision in question's semantic meaning "is fixed at the time [it] was framed and ratified."[87] Evidence of direct or indirect use of the particular language is culled to determine meaning. Any provincial meaning or intent attributed to the drafters' words is relevant only to the extent that a member of the general population at the

Interpretation, Remarks at The Catholic University of America (Oct. 18, 1996), http://web.archive.org/web/19980119172058/www.courttv.com/library/rights/scalia.html.

[83] Posting of Robert Justin Lipkin to Radio Juris, http://ratiojuris.blogspot.com/2006/12/does-originalism-refer-to-original.html (Dec. 6, 2006, 1:08PM EST) (quoting Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1277 (2002)) (noting the difference between original public meaning and original intent as "[t]he former seeks to understand the meaning of the Constitution by understanding the public meaning of the language used at the time of ratification. The latter looks to the framers intentions to either understand constitutional language entirely, or for Barnett 'to fill any gaps in the original public meaning at the time of enactment.'").

[84] District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008) ("In interpreting [the Second Amendment], 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.'" (quoting United States v. Sprague, 282 U.S. 716, 731 (1931))).

[85] O'Shea, *supra* note 71, at 370 (quoting Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1132 (2003)); *see also* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 15 (Univ. of Ill. Coll. of Law Ill. Pub. Law & Legal Theory Research Papers Series, No. 08-14, Draft, Feb. 9, 2009), *available at* http://papers.ssrn.com/abstract=1241655 ("[T]he meaning of a constitutional provision is a function of its original public meaning as determined by usage at the time the provision was framed and ratified.").

[86] Solum, *supra* note 85, at 20.

[87] *Id*. at 19.

time of the drafting would have similarly imputed that specific meaning and intent.[88] Justice Scalia, original public meaning's foremost judicial advocate, sans former Attorney General Ed Meese,[89] has stated that in order to give the United States Constitution "the meaning . . . it bore when it was adopted by the people"[90] the Court must examine its text and structure; the "contemporaneous understanding" of the particular issue as presented to the First Congress, Constitutional Convention, and English Constitution; as well as look to "various state constitutions in existence when the federal Constitution was adopted."[91]

Heller focused primarily on entries in Samuel Johnson's Dictionary—one of a select few ubiquitous, authoritative texts available during the Founding era—as its chief source to define the words of the Second Amendment.[92] From this starting point the Court verified the definitions it obtained with other prominent contemporary sources, such as Sir William Blackstone's magnum opus "*Commentaries*."[93] Though more detailed and elaborate treatment of the Second Amendment's controversial phrasing likely exists from that era, *i.e.*, phrases like "the people" or "keep and bear Arms", many of these additional sources (chiefly legislative materials) would exceed the tether of an original public meaning inquiry because they are unlikely to be synonymous with the meaning given by a reasonable and objective Colonist. Rather, they are definitions

[88] Randy E. Barnett, Book Review, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 239 (2004) ("What did [arms] mean in 1791? . . . . [B]ecause of the context of the Second Amendment, we can be quite sure that the term 'arms' refers to weapons, not the appendages to which our hands are attached.").

[89] Drew Zahn, *Ed Meese Hailed for Defending Freedom: Reagan Attorney General Rescued Constitution from Activist Judges*, WORLDNETDAILY, May 11, 2009, http://www.wnd.com/index.php?fa=PAGE.view&pageId=97830.

[90] Antonin Scalia, U.S. Supreme Court Justice, Constitutional Interpretation the Old Fashioned Way, Remarks at The Woodrow Wilson International Center for Scholars (Mar. 14, 2005), *available at* http://www.cfif.org/htdocs/freedom line/current/guest_commentary/scalia-constitutional-speech.htm.

[91] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

[92] District of Columbia v. Heller, 128 S. Ct. 2783, 2791–93 (2008); *see also* Solum, *supra* note 85, at 14, 16–17; Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 233–35 (1999) (noting Johnson's dictionary as one of the few available during that era).

[93] *Heller*, 128 S. Ct. at 2816; *see also* Solum, *supra* note 85, at 14 (noting the Court's approach in researching the definition of certain words).

likely to be given by those persons in political or legislative circles.[94] Dictionaries and treatises such as Blackstone's were often readily available during the Colonial era, even to those outside aristocratic circles, and for that reason are the mainstay of *Heller*'s historical inquiry into the Second Amendment's wording.[95]

IV. FINDING TASERS IN THE SECOND AMENDMENT

While *Heller* did not specifically delineate the weapons protected by the Second Amendment, it did conclude the guarantee is not unlimited. Justice Scalia noted, for example, that it did not protect "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[96] For a specific weapon to be protected under the Second Amendment it must meet *at least* three criteria.[97] First, the weapon in question must constitute an "arm" under Colonial dictates.[98] Second, it must be in use by law-abiding citizens for lawful purposes.[99] And third, it must be in "common use"[100] by the lawful citizenry such that it is not deemed "dangerous and unusual."[101] As shown below, Tasers are well within the purview of these criteria—in many respects more so than many of today's modern firearms.

Before delving into *Heller*'s requirements, an important aside must be made. *Heller* used an original public meaning interpretation in holding the Second Amendment protects an individual right-to-bear arms for self-defense. However, the Court's use of a specific method of constitutional interpretation when analyzing a given provision does not necessarily restrict

[94] *See Heller*, 128 S. Ct. at 2788.

[95] Solum, *supra* note 85, at 14–15; *see, e.g.*, Warren M. Billings, *Justices, Books, Laws, and Courts in Seventeenth-Century Virginia*, 85 LAW LIBR. J. 277, 287–88 (1993) (noting that treatises were accessible to anyone in the 1500s).

[96] *Heller*, 128 S. Ct. at 2816.

[97] I say *at least* because I conjecture the Court will eventually have to enumerate additional criteria to further distinguish between lawful and unlawful arms. The Court noted that the District of Columbia's handgun ban applied to an "entire class of 'arms'" (handguns)—even among handguns alone there will have to be some type of objectively distinguishable characteristic to discriminate between various models, *e.g.*, delineating between handguns based on attributes like fire-rate, caliber, etc. *Id*. at 2817.

[98] *Id.* at 2791–92, 2816.

[99] *Id.* at 2816–17.

[100] *Id*. at 2817 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

[101] *Id*. (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49).

the range of future acceptable methods in its constitutional construction; the Second Amendment's construction is not limited to only future analysis under color of original public meaning—nor, for that matter, is it limited to originalism at all. While this Note proceeds under *Heller*'s originalist methodology the comparison that follows is not strictly originalist in all elements. Notwithstanding the likelihood of the Court's departure from *Heller*'s strict originalist approach in the future,[102] doing so now inflicts minimal structural damage to this Note's argument. Non-originalist proponents "have in many cases looked at the underlying principles or internal structure of rights guaranteed by the Constitution and then applied them to situations that did not exist at the time of the founding."[103]

A. Tasers as "Arms"

To meet *Heller's* definition of an "Arm" a weapon must be one that is physically carried on one's person and used for self-defense.[104] Distinguishing between protected and unprotected weapons based on whether they are an arm certainly is not the most exacting requirement; rather, it appears to serve as the Court's reiteration of the Second Amendment's self-defense premises. That an "arm" must be a weapon "a man *wears* for his defence"[105] is redundant. A wearable weapon is the only weapon a person *could* use for self-defense—even the most ardent Colonist would've quickly realized a point of diminishing returns lugging around a Howitzer cannon for personal protection.[106]

While Tasers must be a wearable arm to be protected, they are not required to be the linear descendants of the colonial musket, actual nor by analogy. "[T]he Second Amendment extends, prima

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[102] District of Columbia v. Heller, 128 S. Ct. 2783, 2817 n.26 (2008).

[103] Email from Timothy D. Lytton, Albert and Angela Farone Distinguished Professor of Law, Albany Law School, to Ron F. Wright, J.D. Candidate, Albany Law School (Jul. 21, 2009, 10:15PM EST) (on file with author).

[104] *Heller*, 128 S. Ct. at 2791 (citing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) [hereinafter *Johnson's Dictionary*]; 1 T. CUNNINGHAM, ESQ., A NEW AND COMPLETE LAW -- DICTIONARY (Majesty's Law Printers 2d ed. 1771)); *see also supra*, Part II. A.

[105] *Heller*, 128 S. Ct. at 2791 (emphasis added) (quoting A NEW AND COMPLETE LAW–DICTIONARY, *supra* note 104).

[106] *See, e.g.,* John Mead Gould, *Artillery Pieces on Public Display in New England*, JOHN MEAD GOULD'S HOMEPAGE, http://www.geocities.com/~jmgould/neart.html (last visited Feb. 20, 2010) (estimating a British 6-pound Howitzer currently located in East Haven, Connecticut as weighing approximately 1,432-lbs).

facie, to all instruments that constitute *bearable* arms, even those that were not in existence at the time of the founding."[107] The significant number of improvements that have been made to the Taser's design within the few decades of its existence has allowed it to easily meet the requirement of being a wearable self-defense weapon similar to today's modern firearms. Tasers weigh no more than six ounces;[108] its lightweight and small size allows it to be easily carried in a person's hand, on a belt holster, or concealed carry like a handgun.[109] Compared to the common colonial flintlock musket and its average length of five feet and weight of around ten-pounds,[110] Tasers are far more "wearable" than any Colonists could have ever imagined. In fact, the dimensions and wear-ability of Tasers has advanced so much that they're now extremely popular among women seeking a personal self-defense weapon small enough to be carried in a purse or small handbag.[111]

B. Tasers Technology and the Law

A protected weapon must also be in use by law-abiding citizens for *lawful* purposes, such as self-defense.[112] Tasers are readily distinguishable from firearms in this respect in that they are specifically designed to serve non-lethal, self-defense purposes.[113] Although firearms are frequently used for many different purposes, like hunting or recreation, Tasers are essentially a "one-trick pony."[114] They are not necessarily incapable of being

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[107] *Heller*, 128 S. Ct. at 2791–92 (emphasis added).

[108] SelfDefenseGearCo.com, TASER® C2, http://www.selfdefensegearco.com/c2-taser.htm (last visited Feb. 20, 2010).

[109] *See id*.; PatentStorm, US Patent 6691906 – Taser Holster, http://www.patentstorm.us/patents/6691906/description.html (last visited Feb. 20, 2010). TASER® International released its most recent upgrade in 2003, the X26, which is 60% lighter and 60% smaller than its four year-old predecessor. Taser.com, History of Taser Devices, http://www.taser.com/research/Science/Pages/HistoryofTASERDevices.aspx (last visited Feb. 20, 2010).

[110] MCCULLOUGH, *supra* note 69, at 33.

[111] *See* Associated Press, *Forget Tupperware: Taser Parties Are the New Craze*, FOXNEWS.COM, Jan. 7, 2008, http://www.foxnews.com/story/0,2933,320385,00.html.

[112] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2818 (2008).

[113] *See* Taser.com, General FAQ's: Why Use a Taser Device?, http://taser.com/research/Pages/FAQGeneral.aspx (last visited Feb. 20, 2010).

[114] UsingEnglish.com, Idiom: *One-trick pony*, http://www.usingenglish.com/reference/idioms/one-trick+pony.html (last visited Feb. 20, 20010) (defining a "one-trick pony" as "someone who does one thing well, but has limited skills in other areas.").

put to other uses, but their effectiveness in temporarily immobilizing wild game and the recreational enjoyment from "stunning" clay pigeons is minimal. That Tasers are limited to a narrower stratum of use necessarily reduces the overall chances of being used for unlawful purposes compared to firearms.[115]

While a smaller range of uses doesn't render Tasers impervious to illicit use,[116] technological advancements have significantly reduced its frequency. TASER® International, for instance, has created the "Anti-Felon Identification" ("AFID") program that works by having its TASER® cartridges "disperse[] 20–30 serialized confetti [all over the ground] identify[ing] the owner of the TASER device" when it is discharged.[117] The serial numbers are synched with the background information of the person who purchased the TASER® cartridge prior to it being sold.[118] The individually-serialized confetti enables law enforcement officials to trace the owner of a discharged cartridge by contacting TASER® International with the serial number on any of the individual confetti to obtain the buyer's information.[119] The AFID program has been effectively deterring unlawful civilian use since its inception in 1994 and is currently being implemented in law enforcement circles to add an additional "layer of accountability."[120]

TASER® International has also developed a rechargeable

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115 A broader range of uses necessarily increases the potential for unlawful use. For example, while Tasers are not used for recreational purposes, firearms are, and carry with that additional use an increased possibility for unlawful activity even when they are in the hands of the most *lawful* citizens. *See, e.g.*, Jessica Peres, *Man Shot While Walking Near Police Shooting Range*, KFSN-FRESNO NEWS, Apr. 29, 2009, http://abclocal.go.com/kfsn/story?section=news/local&id=6785558 (discussing 68 year old man shot in the back walking near a police firing range after "officers were shooting at a target placed on an embankment wing–which is against the rules.").

116 *See, e.g.*, *Robber in W.V. Uses Taser to Stun a Clerk*, DESERET NEWS, Apr. 20, 2004, *available at* http://deseretnews.com/article/1,5143,595057454,00.html (discussing armed robbery in which convenience-store clerk was stunned with a Taser).

117 Taser.com, Taser Citizen Defense System Fact Sheet, http://www.taser.com/company/pressroom/Documents/Citizen%20Sales%20and%20TASER%20C2%20Info%2011%2008.pdf (last visited Feb. 20, 2010) ("The large number of AFIDs and their small size makes it impractical to clean up.").

118 Taser.com, General FAQ's: What about Accountability?, http://www.taser.com/research/Pages/FAQGeneral.aspx (last visited Feb. 20, 2010).

119 *Id*.

120 Taser.com, Anti-Felon Identification: A System to Deter Misuse Through Enhanced Accountability (2007), http://www.taser.com/research/technology/pages/AFID.aspx.

camera that can be equipped on its TASER® X26C model, the civilian version of its X26 model.[121] The camera is able to record audio and video, and is even capable of recording in zero-light settings.[122] The "TASER® cam" activates when the Taser's safety mechanism (used to prevent the Taser from accidentally firing) is switched off; in physical encounters involving Tasers or firearms, the expanse of time immediately after the safety is disengaged is the most critical when later recollecting the encounter.[123]

In contrast, much of the technology that has relegated Tasers to chiefly lawful use has been slow to catch on with firearms and largely ineffective. "Smart Gun" technology, which seeks to make handguns usable only to its owner, has fallen short of being implemented because of numerous design flaws that have emerged in its development. Smart Gun has ranged from having the gun's owner wear a "wristband[] . . . to transmit a radio signal . . . allow[ing] the gun to fire, . . . [to a] personalized identification code[] that the owner must enter before the gun will function."[124] In several highly publicized demonstrations in which "smart guns" were to be "sold" to the public they have failed miserably—many times locking-out the weapon's demonstrator from firing the gun—and subsequently crystallizing opposition against such technology.[125] Perhaps most damaging to the future of smart-gun technology is its inefficacy in combating the greatest constituency of gun-related homicides. "Suicide is still the leading cause of firearm death in the U.S., representing 55% of total 2005 gun deaths nationwide."[126] "Access to . . . firearms . . . increases the likelihood that someone

121 Taser.com, Taser Cam Overview, http://www.taser.com/Products/consumers/pages/Tasercam.aspx (last visited Feb. 20, 2010).

122 *Id*.

123 *See id*; *see, e.g*., Law Enforcement FAQ's, *Why is TASER International Developing Such a Complex Device?*, http://www.taser.com/research/pages/lawenforcementFAqs.aspx (last visited Feb. 20, 2010) (noting that recording the event has lead to police officers being exonerated from allegations or complaints of excessive force 96.2% of the time).

124 Jenny Murphy, *Is Mandatory Smart Gun Technology a Good Idea?*, SPEAKOUT, Apr. 5, 2000, http://speakout.com/activism/issue_briefs/1200b-1.html; Massad Ayoob, *State of the Smart Gun*, GUNS MAGAZINE (Feb. 2001), *available at* http://findarticles.com/p/articles/mi_m0BQY/is_2_47/ai_68704848/ (explaining the three main categories of smart gun technology are premised on "fingerprint recognition, electronic recognition and magnetic action.").

125 Ayoob, *supra* note 124.

126 Illinois Council Against Handgun Violence, *Statistics, Facts & Quotes*, http://www.ichv.org/suicideandguns.htm (last visited Feb. 20, 2010) (quoting CDC Nat'l Ctr, Health Stat., 56 NAT'L VITAL STAT. REP. 1, 10 (2008)).

will commit suicide. A gun in the home is 11 times more likely to be used to attempt or commit a suicide than to be used in self-defense."[127] The Taser's safeguards have fallen victim to none of these shortcomings (indeed, one could reasonably conclude that suicide with a Taser is an impossibility) but instead have continued to further isolate its use to lawful purposes.

C. In Common Use: Tasers on the Rise

Heller declared that a protected weapon must also be in "common use,"[128] which serves to reconcile early English prohibitions against "terrorizing people with dangerous or unusual weapons"[129] and permitting those weapons reasonably related to "the preservation or efficiency of a well regulated militia."[130] While this "common use" requirement employs ostensibly circular and possibly unworkable logic in future application,[131] it does synthesize these competing values into a somewhat workable directive.

A weapon is in "common use"[132] if it is neither "unusual"[133] nor "dangerous."[134] These prongs can be further reduced to simply whether or not the weapon is "unusual." Dangerousness as a "common use" consideration must be discarded as both unreliable and void lacking in any discernable analytical value. A weapon's propensity for "danger" aids only to objectively quantify variables that ultimately lead to, at best, arbitrary and subjective conclusions. By discarding the "dangerousness" prong it removes a considerable bulk of the *subjective* opposition that Tasers face and more rightfully places it on reliable *objective* indicia.[135]

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[127] *Id.* (quoting Arthur Kellerman et al., 45 J. TRAUMA 263–67 (August 1998)).

[128] District of Columbia v. Heller, 128 S. Ct. 2783, 2815 (2008) (citing United States v. Miller, 307 U.S. 174, 179 (1939)).

[129] *Id.*

[130] *Id.* at 2814 (quoting *Miller*, 307 U.S. at 178).

[131] *See, e.g., id.* at 2817. Suppose a new weapon is designed that emits a laser beam and is *absolutely* non-lethal. A legislature could immediately and completely ban the weapon before it reaches the masses and would theoretically be permissible to do so under *Heller*. While the firearms of *Heller* have been circulating in the public for centuries, our hypothetical laser weapon would never have a chance to become "common" enough to meet this third requirement; proof that a weapon isn't "unusual" is the only way to vindicate itself (it can't do so hypothetically or conjecturally), but the only way that can happen is if it *isn't* prohibited from the outset.

[132] *Id.*

[133] *Id.*

[134] *Id.* (quoting *Miller*, 307 U.S. at 179).

[135] The idea of Tasers "shocking" people into submission doesn't bode well

For example, danger can be measured in several different ways but none come close to being reliable in a general range of application. Take, for instance, measuring a given weapon's "end-result." In this respect, a six-inch dagger varies little in end-result than a .50-caliber rifle when their respective capabilities are fully employed: they both effectively decease a decedent. Such criterion allows very few weapons—even ones so drastically different as a dagger and a .50-caliber rifle—to be meaningfully distinguished. It would be nearly impossible to use such a measurement in the future to distinguish between weapons with less salient characteristics, such as two different handguns.

Measuring danger in terms of a weapon's lethality is further misleading and unreliable. That the Second Amendment is premised on self-defense principles implies the Founders had contemplated and at some point accepted the possibility that fatal consequences could arise from individuals exercising their right-to-bear arms. This isn't to say they wholeheartedly embraced this possibility.[136] Rather, they accepted it as an unavoidable and necessary corollary to the preservation of individual liberty. It would be a contradiction to conclude that a Taser, as a *non-lethal* weapon, is outside the scope of the Second Amendment because it is excessively lethal while maintaining that firearms, as *lethal* weapons, are. *Heller* seemed to impliedly recognize the shortcomings of using lethality as a measurement when it distinguished the handguns at issue with the sawed-off shotgun from *United States v. Miller* on the basis of "commonality" (essentially whether or not it was unusual) rather than its relative danger and lethality, *e.g.*, ballistic properties, weapon mobility, etcetera.[137]

Quantifying danger in terms of fire-rate is also an unreliable and ineffective variable for excluding Tasers from Second Amendment protection. A firearm's ability to fire a given number of rounds in an extremely short span of time, the total

with some because of the seemingly inhumane concept it employs: sending electricity through someone's body. *See, e.g.*, CBCNews.com, *In Depth: Tasers FAQ*, *available at* http://www.cbc.ca/canada/story/2009/03/18/f-taser-faq.html (last visited Dec. 20, 2009) (quoting The United Nations Office at Geneva, *The Committee Against Torture Concludes Thirty-Ninth Session*, (Nov. 23, 2007), *available at* http://www.unis.unvienna.org/unis/pressrels/2005/hr48 53.htm).

136 *Compare* U.S. CONST. amend. VIII.

137 *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2814 (2008); United States v. Miller, 307 U.S. 174, 178 (1939).

number of those rounds able to be fired before reloading, and whether its firing action is automatic or semi-automatic are all factors that significantly impact its legality.[138] The higher a gun's rate-of-fire the greater the likelihood that it will be viewed as dangerous and subjected to strict regulation.[139] The Founders were well aware of their firearm's capabilities for rate-of-fire and equally likely to have anticipated what the future could hold as technology advanced.

> [F]irearms technology has advanced since 1791—*but not as much as some would like to think.* Repeating, magazine-fed firearms date back to at least the 1600s; concealable "pepperbox" handguns capable of firing five to seven shots without reloading were in use by the end of the eighteenth century; and there are some indications that multibarrel handguns were in development as early as the seventeenth century. Several multibarrel repeating firearms survive from the late seventeenth century, and at least one six shot flint-lock pistol survives from the first half of the eighteenth century. Additionally, some British soldiers were issued magazine-fed repeating guns as early as 1658.[140]

In contrast, Tasers shoot only a *single* cartridge at a time and certainly can't be said to exceed firearms in danger measured by rate-of-fire; at the most Tasers break even with single-shot firearms. Measuring a weapon's danger—be it its end-result, lethality, or fire-rate—is a factor that must be wholly discarded from any post-*Heller* Second Amendment analysis.

Whether Tasers are "unusual"—whether they have permeated society similar to those arms protected during the Colonial era—is not controlled by militia-based considerations. Whether Tasers are suitable for today's military or state militia is irrelevant.[141] The schism between civilian and military arms, pedestrian to modern gun debates, was virtually nonexistent during colonial times. "[The] weapons used by militiamen and [the] weapons

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[138] *See, e.g.*, 18 U.S.C. § 921 (2006); *compare* HAW. REV. STAT. § 134-1 (2001), *and* MASS. GEN. LAWS ch. 140, § 121 (2004), *and* N.J. REV. STAT. § 2C:39-1 (2002), *and* N.Y. PENAL LAW § 265 (McKinney 2008).

[139] *See id.* A comparison need only be made between the legality of automatic firearms versus semi-automatic firearms.

[140] Clayton E. Cramer & Joseph Edward Olson, *Pistols, Crime and Public: Safety in Early America*, 44 WILLAMETTE L. REV. 699, 716 (2008) (citations omitted) (emphasis in original).

[141] *See Heller*, 128 S. Ct. at 2817 ("[T]he fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change . . . [the] interpretation of . . . [that] right.").

used in defense of person and home were one and the same."[142] The Second Amendment's militia was a byproduct of its citizenry; the musket resting atop the patriot's mantle used to shoot whitetail deer one day would be used to shoot British Redcoats the next. To count the use of Tasers by the citizens *and* military today would amount to double-counting, since *Heller's* concept of the citizens'-militia holds them to be one in the same. Alternatively, this does not exclude consideration of Taser use by law enforcement or private security officers since they continually use their firearms both in their official capacity while working and off-duty as citizens.[143]

1. Proportioned Availability as a Limitation

TASER® International is currently the only manufacturer of TASER® devices in the United States.[144] "The company will not ship its product outside the United States unless the person placing the order holds a valid import/export permit."[145] This single company is infinitesimal compared to the nearly 1,700 firearms manufacturers currently operating across the United States alone.[146] In addition to this manufacturing gap between Tasers and firearms, there is a correlating disparity in their respective distribution. In 2007, TASER® International reported it only had "approximately 2000 [authorized] dealers who . . . purchas[ed] and res[old] the TASER C2 to citizens in the United States."[147] TASER® devices are also distributed through the company's website, twenty commercial distributors, and three "sporting goods retail chains . . . in 118 of their sporting goods retail stores."[148] Though TASER® International appears to

[142] *Id.* at 2815 (quoting State v. Kessler, 614 P.2d 94, 98 (1980) (citing GEORGE C. NEUMANN, SWORDS AND BLADES OF THE AMERICAN REVOLUTION 6–15, 252–54 (1973))).

[143] Posting of Alan Gura to DCGunCase.com, http://dcguncase.com/blog/page/2/ (Feb. 4, 2008) (noting Dick Heller's employment as a private security guard at the inception of the *Heller* case).

[144] CBCNews.com, *In Depth Taser FAQ*, *available at* http://www.cbc.ca/canada/story/2009/03/18/f-taser-faq.html (last visited Dec. 20, 2009).

[145] *Id.*

[146] *See generally* TheGunGuy.com, *Firearms Manufacturers, Importers and Distributors*, http://130.94.182.159/page4.htm (last viewed Dec. 27, 2009) (stating there are more than 1,700 licensed U.S. firearms manufacturers).

[147] U.S. SEC, TASER INT'L SEC ANN. REP. 1, 7 (Dec. 31, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1069183/000095015308000423/p75050e10vk.htm#124.

[148] *Id.*

have a strong showing in the market of self-defense weapons those figures pale in comparison to the number of federally licensed gun dealers across the United States: as of 2005 there were more than 54,000,[149] reflecting a 78% *decrease* in the number of gun dealers from just a decade earlier.[150] These extremes in manufacturing and distribution between Tasers and firearms must be taken into account when determining if Tasers are as usual to such a degree as the Court in *Heller* mandated.

2. Quantifying "Unusual"

Quantifying "unusual" for Second Amendment purposes is a difficult task and certainly an issue the Court will need to clarify in the future. For purposes of this Note, I only intend to show that Tasers are in use in the United States in proportion to its firearm counterparts taking into account the handicaps they face. That *Heller* presents difficulties in future application[151] demands that subsequent Second Amendment inquiries of weapons *other* than firearms will have to be compared proportionately rather than absolute sums.[152] For that reason, the greater part of this comparison is proportionate.

In 2005, four out of every ten American homes contained a firearm, with "30% [of those living in the home stating] . . . they personally own[ed] a gun and 12% [stating] . . . another member of their household own[ed] it."[153] According to 2005 Census information, this means about 118.4 million homes contained at least one firearm with about 88.8 million individuals (approximately 30% of the population) declaring themselves as actual gun-owners.[154] In comparison, early probate records of the

[149] Jon S. Vernick et al., *Regulation of Firearm Dealers in the United States: An Analysis of State Law and Opportunities for Improvement*, 34 J.L. MED. & ETHICS 765, pt. 4, at 765 (2006) ("Persons in the business of selling firearms must obtain a federal firearm dealer's license.").

[150] *Id*.

[151] *See supra* note 131.

[152] It will be difficult to "credit" new weapon technology with a similar duration of time as firearms in the United States have enjoying developing and spreading throughout the public realm, *e.g.*, war, legislative obstacles, technological advancements).

[153] Joseph Carroll, *Gun Ownership and Use in America*, GALLUP, Nov. 22, 2005, http://www.gallup.com/poll/20098/gun-ownership-use-america.aspx [hereinafter *Gun Ownership*].

[154] *Whites to Become Minority in U.S. by 2050*, REUTERS, Feb. 12, 2008, http://www.reuters.com/article/domesticNews/idUSN1110177520080212 (noting U.S. 2005 population was 296 million); *see Gun Ownership*, *supra* note 153; *see*

Colonial era indicate that "50% of all wealthholders in the Thirteen Colonies . . . owned guns."[155] Assuming, *arguendo*, this 50% represented the *entire* population of the Thirteen Colonies (rather than the smaller wealth-holding populace) the required percentage of the population that must own a weapon for it to be deemed "usual" is between the 12% ownership held acceptable under *Heller* and the conjectural 50% ownership contemporaneous with the ratification-era of the Second Amendment.[156] While a strictly originalist construction would require a direct comparison between Taser ownership and colonial firearm ownership, a much clearer comparison is had by using *Heller's* mark, which has created a necessary-ownership continuum on which to compare various weapons. By looking at the handguns of today protected under *Heller*, a much clearer comparison can be made to better documented sources while sidestepping contemporary debates over colonial firearm ownership that have, in recent years, become quite unreliable.[157]

Since 1991, TASER® International has sold over 200,000 law enforcement Tasers and since 1994 about 120,000 civilian versions,[158] putting Tasers "in use" by about .001% of the

also LibraryIndex.com, *How Many Guns are There and Who Owns Them? Americans Who Own Guns*, http://www.libraryindex.com/pages/1727/How-Many-Guns-Are-There-Who-Owns-Them-AMERICANS-WHO-OWN-GUNS.html (last visited Feb. 20, 2010) (citing a similar 1994 study that found "only 25% of adults actually owned a gun, because a majority of gun owners possessed two or more guns . . . [and that h]andguns made up only 33% (sixty-five million) of the guns owned.").

155 James Lindgren & Justin Lee Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1800 (2002) (finding probate records as being one of the more prominent albeit incomplete methods of ascertaining personal property during the early colonial era).

156 Although my figures are crude in most respects, I have, I believe, erred *against* my position. My comparison is being made to all firearms, although *Heller* could be argued to apply only to handguns, which would be a much smaller number against which Tasers would have to contend. Schwartz, *supra* note 2.

157 *See, e.g.*, *Columbia Revokes Bancroft Prize for Arming America*, ACCURACY IN ACADEMIA, Jan. 2, 2003, http://www.academia.org/campus_reports/2003/january_2.html (reporting historian Michael Bellesiles was "stripped of the Bancroft Prize, the most prestigious award in the field of American history, by Columbia University . . . [for] 'violat[ing] acceptable norms of scholarly conduct'" after his claims of minimal gun ownership during colonial America were discovered to be largely undocumented and likely fabricated).

158 Robert Davis, *Taser Sells Small Version for Wider Use*, USA TODAY, Jan. 8, 2007, *available at* http://www.usatoday.com/news/nation/2007-01-08-little-taser_x.htm.

population as of 2007[159]—not very "usual" statistically speaking. But in *proportion* the possibility of Tasers achieving similar notoriety in society as firearms is not so elusive. In the third quarter of 2008, TASER® International "shipped 16,721 X26 units, 965 M26 units and 3,831 T2 [*sic*] units,"[160] which amounts to 86,068 Tasers shipped for the year (using 2008 Q3 figures as indicative of the fiscal year). Now, had Tasers been manufactured with the same output capacity that firearms have come to enjoy in their two-hundred-plus years of prominence in the United States—a 1700% increase compared to what Tasers boast now—their production would have exceeded the top six most-manufactured pistols and revolvers every year since 1998.[161] At such similar rates of manufacturing it would take Tasers roughly thirty years to achieve the same notoriety as *all* firearms currently have, assuming manufacturing output is an accurate proxy of measuring ownership of a given commodity.

In reality, the necessary minimum percentage of the population that an arm must be used by is much less than the 12% stated above. The Second Amendment does not protect all firearms, but it does protect handguns that are kept in the home to effect self-defense purposes, and at the very least .38-caliber pistols central to *Heller*.[162] Proportionalities aside, using the

159 Population Reference Bureau, 2007 WORLD POPULATION DATA SHEET (2007), *available at* http://www.prb.org/pdf07/07WPDS_Eng.pdf (estimating 2007 population of the United States at 302 million).

160 Transcript of Patrick Smith, CEO and Director, & Daniel Behrendt, CFO, TASER Int'l, Third Quarter 2008 Earnings Call Transcript (Oct. 28, 2008), *available at* http://seekingalpha.com/article/102495-taser-international-third-quarter-2008-earnings-call-transcript. The article states "T2" units, in mistaken reference to "C2," TASER International's popular civilian Taser. *See also* Taser.com, *TASER C2*, http://www.taser.com/products/consumers/Pages/C2.aspx (last visited Dec. 27, 2009).

161 *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ANN. FIREARMS MANUFACTURERS AND EXPORT REP. (1998-2006), *available at* http://www.atf.gov/firearms/stats/index.htm [hereinafter *BATFE Report*] (reporting manufacturing numbers: for the year 1998, 960,365 pistols and 324,390 revolvers; for the year 1999, 995,446 pistols and 335,784 revolvers; for the year 2000, 962,901 pistols and 318,960 revolvers; for the year 2001, 626,836 pistols and 320,143 revolvers; for the year 2002, 741,514 pistols and 347,070 revolvers; for the year 2003, 811,660 pistols and 309,364 revolvers; for the year 2004, 728,511 pistols and 294,099 revolvers; for the year 2005, 803,425 pistols and 274,205 revolvers; and for the year 2006 1,021,260 pistols and 382,069 revolvers).

162 Schwartz, *supra* note 2 (noting that at the end of Dick Heller's shift as a private security guard he had to store his .38-caliber pistol in a vault because he was unable to bring it home).

estimated 2008 data[163] more Tasers were manufactured per-year than .38-caliber pistols were in five of the past nine years.[164] Whether Tasers are compared to firearms with a common denominator relative to all firearms or juxtaposed in absolute sums they have clearly emerged as one of the most "usual" weapons in American hands today.

D. Self-Defense and a Lack of Lethality

The Second Amendment's right-to-bear arms guarantee does not memorialize a privilege to use an unlimited amount of lethal force. This truism, along with the rise of Tasers as an effective self-defense weapon, has led some scholars to opine *Heller's* decision has actually created an inverse effect for the Second Amendment's protection of firearms. University of Pennsylvania Law Professor Paul H. Robinson states, "[T]he greatest practical effect of the Supreme Court's interpretation of the Second Amendment in *Heller* may be its invalidation of statutes barring the possession of non-lethal weapons, which then ultimately undermines the right to use a firearm in defense."[165] Professor Robinson further noted that, "[g]iven the existing law, using a firearm in self-defense poses an obvious legal difficulty: if one can defend oneself as effectively with a non-lethal weapon, then the use of a lethal firearm is not 'necessary' and is therefore unjustified and unlawful."[166]

The Second Amendment and nearly all states' constitutional and statutory right-to-bear arms provisions are silent on the permissible level of lethality that can be inflicted when using the right to self-defense. Right-to-bear arms provisions serve only to memorialize the certain means individuals can use for their self-defense rather than the specific ends they are allowed to achieve.[167] For example, if during a robbery an assailant

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[163] *Supra* note 160.

[164] *See*, *e.g.*, BATFE Report, *supra* note 161.

[165] Robinson, *supra* note 25, at 253.

[166] *Id.* at 256.

[167] *Id*. at 252 (noting that "[i]t is the criminal law's defensive force rules in the fifty-two American jurisdictions, however, not the Second Amendment nor anything said in *Heller*, that govern the use of defensive force."); *see also* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV 103, 110 (2000)

> Guns were so difficult to fire in the eighteenth century that the very idea of being accidentally killed by one was itself hard to conceive. Indeed, anyone wanting either to murder his family or protect his home in the

attempted to use deadly force, the victim would normally be permitted to respond to that attempt with deadly force. But had the victim successfully responded with a non-lethal weapon instead, such as a Taser, he or she would no longer have the legal right to use what would previously have been permissible deadly force.[168] In short, the existence of a superior *non-lethal* weapon diminishes the legal necessity of a *lethal* weapon for self-defense purposes.[169] This ultimately questions the necessity of having to bear an actual firearm for self-defense rather than a suitable non-lethal equivalent.

Any reduction in the scope of protected weapons under the Second Amendment must necessarily come from anything in *excess* of its underlying self-defense premises.[170] By virtue of their inherent lethality, firearms will undoubtedly contain more of these unnecessary marginal excesses than Tasers possess when both are compared in their capacity as a self-defense weapon. If the Second Amendment is to be stripped of what it does not protect (lethality to the point of fatality beyond what is necessary for self-defense) while leaving intact what we know it does (the right to bear arms for self-defense), firearms must necessary fall from Second Amendment protection *before* Tasers. That Tasers haven't been vindicated in the light of *Heller's* holding reveals a deductive disconnect. This is just one of the several ancillary issues that *Heller* has presented which coincidentally exonerates Tasers from their current restrictions.

V. STATE STATUTES AND VINDICATING TASER PROHIBITIONS WITH *HELLER*

The underlying logic of the majority opinion in *District of Columbia v. Heller* can be used successfully to invalidate Taser

> eighteenth century would have been better advised (and much more likely) to grab an axe or knife than to load, prime, and discharge a firearm.

quoted in Richard A. Allen, *What Arms? A Texualist's View of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 191, 204 (2008).

168 Robinson, *supra* note 25, at 261 (noting several countries and states allow people to use the same amount of defensive force in proportion to the harm they're threatened with).

169 *Id.* at 257–58; *see also* Paul H. Robinson, Op-Ed., *Shoot to Stun*, N.Y. TIMES, Jul. 2, 2008, *available at* http://www.nytimes.com/2008/07/02/opinion/02robinson.html.

170 District of Columbia v. Heller, 128 S. Ct. 2783, 2817 (2008) ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

prohibitions in six of the seven states where they are banned, as well as the District of Columbia's prohibition.[171] Five of these states' constitutions expressly recognize a right-to-bear arms guarantee,[172] while New York recognizes a statutory right and New Jersey remains both constitutionally and statutorily silent. To apply *Heller*, the right-to-bear arms provisions of these respective states must similarly guarantee an individual right-to-bear arms, disconnected from militia participation, while at the same time allowing for reconciliation of any additional language that reasonably appears to diverge or conflict with that interpretation.

While this segment could be accelerated by simply "picking up" where many of these states' high-courts have left off (most have already adjudicated their respective provisions as protecting an individual right) it would cut corners and at the same time part with the greatest feature of *Heller*: its conclusion being predicated on original public meaning originalism.[173] Just as

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[171] *See supra* Part III.A–C.

[172] HAW. CONST. art. I. § 17 (1979), *reprinted in* CONSTITUTIONS OF THE UNITED STATES: NATIONAL AND STATE (Legislative Drafting Research Fund of Columbia Univ. ed., 1993); MASS. CONST. pt. I, art. XVII (1780), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 92, 95 (William F. Swindler ed., Oceana Publications, Inc. 1975); MICH. CONST. art. I, § 13 (1835), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 204, 205 (William F. Swindler ed., Oceana Publications, Inc. 1975); WIS. CONST. art. I, § 25 (1848), *reprinted in* West's Wisconsin Statutes Annotated (Thompson West, 2002); R.I. CONST. art. I, § 22 (1842), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 386, 388 (William F. Swindler ed., Oceana Publications, Inc. 1979).

[173] *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 205–07 (2006) (Michigan and Wisconsin's right-to-bear arms provisions have been read as expressly securing an individual right for self-defense); *id*. (Rhode Island's highest court has held its right-to-bear arms provision protects an individual right for, at the very least, self-defense) (citing Mosby v. Devine, 851 A.2d 1031, 1043 (R.I. 2004) ("[W]e also recognize an individual right flowing to the people to keep and bear arms.")); *id.* (Massachusetts' right-to-bear arms provision has not been "expressly characterized as individual and courts have not passed on the question.") (citing Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976)); David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 827, 834 n.46 (2002) (arguing Hawaii's high-court has acknowledged, in dicta, the legislative debates that took place during the ratification of its right-to-bear arms provision suggesting future recognition of an individual right) (citing State v. Mendoza, 920 P.2d 357, 362 (Haw. 1996) ("During the debates of the Committee of the Whole in 1950, a colloquy between the Chairman and delegates Phillips and Mizuha indicated their understanding that Section 15 provided an individual right to bear arms . . . .")); *see also* Amici Curiae Brief of District Attorneys in Support of Petitioners, District of Columbia v. Heller, 128

Heller defined the words of the Second Amendment using contemporaneous sources, similarly synchronous comparisons have been made here to define each state's respective right-to-bear arms provision.

A. Massachusetts

> *The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.*[174]

Of the states that prohibit Tasers, Massachusetts' right-to-bear arms provision appears on its face the furthest from protecting an individual right. Initially we note the words "keep," "bear," and "Arms" are all identical in meaning as when the Court defined them in *Heller*. Massachusetts' Constitution predates the Second Amendment by a little over a decade and, for that reason, the connection behind keeping and bearing of arms doesn't need to be expounded for a second time in this Note (it would be verbatim *Heller's* definition and analysis).[175]

We begin by comparing the number of times the phrase "the people" appears in Massachusetts' Constitution expressly referring to a "right" with the number of those appearances that recognize an individual right.[176] In the *Preamble* and *Part the First: A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts*, the phrase "the people" expressly appears on eleven occasions referring to a "right."[177] Seven of these instances refer to the "exercise or reservation of

S. Ct. 278 (D.C. Cir. 2008) (No. 07-290), 2008 WL 157190, *1, at *11 (noting that the New York Court of Appeals has yet to give a substantive ruling on whether its right-to-bear arms provision, as codified in its Civil Rights Law, is individual or collective, although some lower court case law has suggested it protects an individual right) (citing People v. Handsome, 18 Misc.3d 543, 846 N.Y.S.2d 852 (N.Y. Crim. Ct. Oct. 26, 2007)).

174 MASS. CONST. pt. I, art. XVII (1780), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 92, 95 (William F. Swindler ed., Oceana Publications, Inc. 1975).

175 *See supra* Part II.A.

176 *Id.*

177 MASS. CONST. *Preamble*, Pt. I, arts. III, IV, VII, VIII, XVII, XVIII, XIX, XXI, XXIX (1780), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 92, 93–96 (William F. Swindler ed., Oceana Publications, Inc. 1975).

powers, [and] not right[s],"[178] just as *Heller* carefully noted.[179] Of the three remaining appearances (discounting the right-to-bear arms provision), two do not enumerate any rights at all but only stress the importance of certain fundamentals necessary to free government.[180] The last instance is neither intuitively collective nor individual.[181] A semantic analysis of Massachusetts' right-to-bear arms provision leaves the inquiry, at best, inconclusive. Original public meaning mandates that when the public meaning "runs out[] application of the linguistic meaning of the constitutional case to a particular dispute must be guided by something other than original meaning."[182] We therefore turn to

[178] *Id*. at *Preamble* ("*[T]he people* have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.") (emphasis added); *id.* at pt. I, art. III.

> *[T]he people* of this commonwealth have a right to invest their legislature with power to authorize . . . religious societies to make suitable provision . . . for the institution of the public worship of God . . . . *[T]he people* of this commonwealth have also a right to . . . invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid . . . .

(emphasis added); *id.* at art. IV ("*[T]he people* of this commonwealth have the sole and exclusive right of governing themselves as free . . . and enjoy every power . . ., and right which is not . . . expressly delegated to the United States of America . . . .") (emphasis added); *id.* at art. VII ("*[T]he people* alone have an incontestable, unalienable, and indefeasible right to institute government . . ., and to reform [it] when their protection, safety, prosperity, and happiness require it.") (emphasis added); *id.* at art. VIII ("*[T]he people* have a right . . . to cause their public officers to return to private life . . . .") (emphasis added); *id.* at art. XVIII ("*The people* . . . have a right to require their lawgivers and magistrates an exact and constant observance of [the laws] . . . .") (emphasis added).

[179] District of Columbia v. Heller, 128 S. Ct. 2783, 2790 (2008).

[180] MASS. CONST., pt. I, art. XXI (1780), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 92, 95 (William F. Swindler ed., Oceana Publications, Inc. 1975) ("The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of *the people* . . . .") (emphasis added); *id.* at art. XXIX ("It is essential to the preservation of the rights of every individual . . . that there be an impartial interpretation of the laws . . . therefore . . . but for the security of the rights of *the people* . . . judges of the supreme judicial court should hold their offices as long as they behave themselves well . . . .") (emphasis added).

[181] *Id*. at art. XIX ("*The people* have a right . . . to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.") (emphasis added).

[182] Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 934 (2009).

additional provisions in Massachusetts' Constitution for enlightenment.

Although the additional uses of the phrase "the people" are not as salient as the Court noted in *Heller*, the intentional contrasts in wording at various points implies an individual right-to-bear arms distinct from militia participation. First, the word "militia" is used only once throughout the thirty separate Articles in the entire *Part the First*[183]—and it isn't in its right-to-bear arms provision (appearing only eleven Articles away).[184] Secondly, in *Chapter II* of *Part the Second* where the Executive's powers are enumerated it proclaims the governor is the commander-in-chief of the army, navy, *and* the militia.[185] It goes on to declare that the governor may serve his role as commander-in-chief for the "special" defense of the commonwealth,[186] in contrast to the "common" defense that its right-to-bear arms provision guarantees its citizens.[187] Colonial sources define "common" as "belonging equally to more than one,"[188] and "defence" as "guard; protection; fecurity [*sic*]."[189] The select use of language, such as denoting "specific" defense when delegating militia powers contrasted and using "common" defense elsewhere, is illuminating: when read in light of its right-to-bear arms the provision's reference to "a" right and not "the" right infers that the citizens of Massachusetts aren't limited to keeping and bearing arms for only a single purpose.

Furthermore, it states the governor is authorized to "to take and surprise . . . all and every such person or persons, with their ships, *arms*, ammunition, and other goods, as shall, in a hostile manner, . . . anno[y] this commonwealth."[190] This impliedly recognizes the governor's right to deprive his citizens of arms who aren't necessarily members of the army, navy or militia; it

183 MASS. CONST., pt. I, art. XXVIII (1780), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 92, 96 (William F. Swindler ed., Oceana Publications, Inc. 1975) (stating "no person can be subjected to martial law, except [those] in the militia in actual service, but by the authority of the legislature.").

184 *See id*. at art. XVII.

185 *Id*. at pt. 2, chap. 2, § I, art. VII.

186 *Id*.

187 *Id*. at pt. 1, art. XVII (emphasis added).

188 JOHNSON'S DICTIONARY, *supra* note 104, at COM (Times Books 1979).

189 *Id*. at DEF.

190 MASS. CONST. pt. 2, ch. II, § I, art. VII (1780), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, at 101 (William F. Swindler ed., Oceana Publications, Inc. 1975) (emphasis added).

presupposes a citizenry already keeping and bearing arms. These various observations strongly suggest Massachusetts' right-to-bear arms is an individual right that is distinct from army, navy, or militia membership.

B. Michigan

> *"Every person has a right to bear arms for the defence of himself and the State."*[191]

The right-to-bear arms provision of the twenty-sixth state to join the Union may differ from the Second Amendment textually but not in its guarantee.[192] The careful choice of language throughout Michigan's 1835 Constitution dispenses with having to conduct a "the people" vs. "individual-right" analysis. Rights, exercises, and/or reservations of power unequivocally state to whom they apply in its constitution: "No man or set of men,"[193] "Every person,"[194] "[E]very individual,"[195] "[T]he accused,"[196] or "No person."[197] In the three instances that Article I of its Constitution does use the phrase "the people," it does so to convey collective rights.[198] It's clear to a reasonable and objective reader of Michigan's 1835 Constitution that the "person" in its right-to-bear provision is undoubtedly individual.

Furthermore, Michigan's Constitution expressly states that its legislature is to "provide by law for organizing and disciplining the militia . . . not incompatible with the Constitution and laws of the United States"[199] all while remaining silent—expressly and

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191 MICH. CONST. art. I, § 13 (1835), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, at 205 (William F. Swindler ed., Oceana Publications, Inc. 1975).

192 *Compare id.* ("Every person has a right to bear arms for the defence of himself and the State."), *with* U.S. CONST. amend. II ("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.").

193 MICH. CONST. art. I, § 3 (1835), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, at 204 (William F. Swindler ed., Oceana Publications, Inc. 1975).

194 *Id.* at § 4.

195 *Id.* at § 8.

196 *Id.* at § 10.

197 *Id.* at § 11.

198 *Id.* at § 1 ("All political power is inherent in *the people*.") (emphasis added); *id.* at § 2 ("Government is instituted for the protection, security, and benefit of *the people* . . . .") (emphasis added); *id.* at § 20 ("*The people* shall have the right freely to assemble together . . . .") (emphasis added).

199 *Id*. at art. IX, § 1.

impliedly—of a militia in its right-to-bear arms provision. The contrasting language used to refer to individual or collective entities and the express references to the militia elsewhere is the same "unambiguous" evidence *Heller* found determinative and which indicates Michigan's right-to-bear arms provision announces a right distinct from militia participation.[200]

The definitions of the words "keep,"[201] "bear,"[202] and "Arms"[203] from 1835 are all duplicates of the definitions given in *Heller*.[204] The only segment of Michigan's right-to-bear arms provision that genuinely departs from the Second Amendment is its additional language of, "defense of himself and the state." The word "defense" at that time was defined as a means of repelling unlawful attacks.[205] And adding the word "state"[206] only confirms that the other half of the provision guarantees a right-to-bear arms for defending the state in addition to individual defense.

C. Rhode Island

> *"The right of the people to keep and bear arms shall not be infringed."*[207]

Rhode Island's first constitution was ratified in 1842 shortly after Michigan's. Its right-to-bear arms provision differs markedly from the Second Amendment in its lack of a prefatory clause. This omission not only reduces the number of possible interpretations antithetical to an individual right-reading, but almost entirely eliminates the possibility of basing the right-to-bear arms on militia participation. The phrase "the people"

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[200] *Id*. at art. I, § 13 (emphasis added).

[201] NOAH WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (1828), *available at* http://1828.mshaffer.com (defining "keep" as "To hold; to retain in one's power or possession; . . . [or t]o have in custody for security or preservation.") [hereinafter *WEBSTER'S DICTIONARY 1842*].

[202] *Id*. (defining "bear" as "To support; to sustain; as, to bear a weight or burden[; or] To carry.").

[203] *Id*. (defining "Arms" as "Weapons of offense, or armor for defense and protection of the body.").

[204] District of Columbia v. Heller, 128 S. Ct. 2783, 2791–93 (2008).

[205] WEBSTER'S DICTIONARY 1842*, supra* note 201 (defining "defense" as "[a]ny thing that opposes attack, violence, danger or injury; any thing that secures the person, the rights or the possessions of men.").

[206] *Id*. (defining "State" as "[a] political body, or body politic; the whole body of people united under one government, whatever may be the form of the government.").

[207] R.I. CONST. art. I, § 22 (1842), *reprinted in* 1 GEN. LAWS OF R.I. 253, 336 (Lexis 2004).

appears in Rhode Island's 1842 Constitution expressly referring to a "right" on four different occasions, discounting its right-to-bear arms provision.[208] Two of those instances refer to individual rights[209] while the remaining two refer to the reservation or exercise of powers and not rights in any shape or form.[210] Thus, in every instance "the people" expressly appears referring to a right in Rhode Island's Constitution it refers to an individual right. Under an original public meaning interpretation, Rhode Island's right-to-bear arms provision is unarguably an individual one.

Like the definitions in Massachusetts' constitution and the Second Amendment, the definitions of to "keep"[211] and "bear"[212] remain unchanged. At the time of the provision's ratification, however, the word arms was defined in an even more generalized sense as referring to weapons used for the defense of one's body while omitting the additional requirement that it also be *carried* on one's person.[213] In the light of *Heller*, Rhode Island's right-to-bear arms provision would decisively invalidate its own prohibition on Tasers.

D. New York

> *"A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed."*[214]

Ratified in 1909, New York's right-to-bear arms provision differs from the latter provisions in that it is a statutory rather

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[208] *Id.* at §§ 1, 6, 17, 24.

[209] *See id.* at § 6 ("The right of *the people* to be secure in their persons, papers, and possessions, against unreasonable searches and seizures . . . .") (emphasis added); *see also id.* at § 17 ("*The people* shall continue to enjoy and freely exercise all the rights . . . and the privileges of the shore . . . .") (emphasis added).

[210] *Id.* at § 1 ("[T]he basis of our political systems is the right of *the people* to make and alter their constitutions of government . . . .") (emphasis added); *see also id.* at § 24 ("The enumeration of the foregoing rights shall not be construed to impair or deny others retained by *the people*.") (emphasis added).

[211] *Webster's Dictionary 1842, supra* note 201 (defining "keep" as "To hold; to retain in one's power or possession; . . . [or t]o have in custody for security or preservation.").

[212] *Id.* (defining "bear" as "To support; to sustain; as, to bear a weight or burden[; or] To carry.").

[213] *Id.* (defining "Arms" as "[w]eapons of offense, or armor for defense and protection of the body.").

[214] N.Y. CIVIL RIGHTS LAW art. 2, § 4 (McKinney 2008).

than constitutional grant. While its language is similar to the Second Amendment, contemporaneous sources carry strong undertones of keeping and bearing arms for strictly militia purposes. Looking first to New York's treatment of the phrase "the people" in its Civil Rights Law, we note that other than its right-to-bear arms provision the phrase refers to a right only one other time: the individual right to be free from unreasonable search and seizures.[215] Furthermore, in the other appearances where the phrase "the people" appears not a single instance refers to an actual right, express or implied.[216]

"To bear"[217] and "to keep"[218] do not differ from the definitions provided in *Heller*. The *Second Edition of Black's Law Dictionary* gives the same definition of "Arms" as *Heller*, but additional language appears stating that when used in a "constitutional" sense arms refers to only those weapons used by militiamen or soldiers.[219] "The arms of the infantry soldier are . . . holster pistols, [and] . . . side arms."[220] Tasers certainly fall within this description, akin to pistols and other side arms as mentioned *supra*. Though the definition refers to militiamen it actually exclusive of no group of people since under the concept of a citizens'-militia the citizen and militiamen are one in the same. *Black's Law Dictionary* defines the word "militia" as a distinct body of soldiers used in emergencies-only and distinct from "regular troops or a standing army."[221] This is further evidence that these emergency-only soldiers are distinct from a standing army and instead the functional equivalent of the citizens'-militia. In sum, the seemingly conflicting definition given for the word "arms" actually bolsters *Heller's* logic.

E. Hawaii

"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

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[215] *Id.* art. 2, § 8; *compare* U.S. CONST. amend. IV, *with* District of Columbia v. Heller, 128 S. Ct. 2783, 2790 (2008).

[216] N.Y. CIVIL RIGHTS LAW art. 2, §§ 2, 3, 5 (2008).

[217] BLACK'S LAW DICTIONARY 124 (2d ed. 1910). *But see id.* (defining "Bear arms" as "[t]o carry arms as weapons and with reference to their military use, not to wear them about the person as part of the dress.").

[218] *Id.* at 685 ("To retain in one's power or possession . . . .").

[219] *Id.* at 87 ("Anything that a man wears for his defense, or takes in his hands, or uses in his anger, to cast at or strike at another.").

[220] *Id.*

[221] *Id.* at 778.

infringed."[222]

Hawaii's provision is textually verbatim the Second Amendment. Comparing the instances in which the phrase "the people" expressly appears in Hawaii's Constitution referring to a right to the number of those appearances recognizing an individual right is telling: in the three instances "the people" appears expressly referring to a right, again discounting its right-to-bear arms provision, they refer unequivocally to an individual right.[223]

The references in Hawaii's operative clause's to "keeping"[224] and "bearing"[225] "Arms"[226] are (as one would by now surmise) defined as the Court stated in *Heller*. Similarly, the term "militia"[227] is synonymous to the citizens' militia that comprises the core of the Second Amendments. Hawaii's Constitution directly refers to a "militia" in its Article I § 18 proscription on

[222] HAW. CONST. art. I, § 17 (1978). Hawaii's Constitution "went into effect on August 21, 1959, upon the issuance of a presidential proclamation admitting the state of Hawaii into the Union." Hawaii Legislative Reference Bureau, The Constitution of the State of Hawaii, http://hawaii.gov/lrb/con/ (last visited Feb. 9, 2010). In 1979, a legislative "technicality" was discovered, after which Hawaii mandated "the authority of Resolution No. 29 of the 1978 Constitutional Convention authorizing the revisor 'to effect such necessary rearrangement, renumbering and technical changes of the sections within the articles of the State Constitution . . . .'" *Id.* Current legislative references to Hawaii's right-to-bear arms indicate a 1978 amendment date (made retroactively in 1979) even though the provision's first appearance was in the 1959 constitution. *Id.* Though the 1978 "revised" constitution is used here, it is virtually identical to the 1959 draft except for numbering and order.

[223] HAW. CONST. art. I, § 4 (1978) ("No law shall be enacted . . . abridging . . . the right of the people peaceably to assemble and to petition the government for a redress of grievances."); *see id.* at § 6 ("[R]ight of the people to privacy . . . shall not be infringed . . ."); *see also id.* at § 7 ("[R]ight of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated.").

[224] BLACK'S LAW DICTIONARY 1006 (4th ed. 1951) (defining "keep" as "[t]o have or retain in one's power or possession . . . .").

[225] *Id.* at 194 (defining "to bear" as "[t]o support, sustain, or carry . . . ."). *But cf. id.* at 195 (defining "bear arms" as "[t]o carry arms as weapons and with reference to their military use, not to wear them about the person as part of the dress.").

[226] *Id.* at 138 (defining "armed" as "[f]urnished or equipped with weapons of offense or defense.").

[227] *Id.* at 1145 ("The body of citizens in a state, enrolled for discipline as a military force, but not engaged in actual service except in emergencies, as distinguished from regular troops or a standing army.").

quartering soldiers,[228] while its right-to-bear arms provision doesn't refer to a militia at all, express or implied. The presence of the term "State," according to sources contemporaneous with the provision's first appearance, does not limit the guarantee to only bearing arms for protection against the federal government.[229] When read with the reasoning of *Heller*, Hawaii's right-to-bear arms provision would invalidate its prohibition on Tasers.

F. Wisconsin

> *"The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."*[230]

Article I of Wisconsin's constitution grants its citizens a right-to-bear arms for several purposes: security, defense, hunting, recreation, and any other lawful purposes[231]. The treatment of the phrase "the people," in the Declaration of Rights portion of Wisconsin's Constitution (along with these other expressly stated purposes) is clear indication its right-to-bear arms provisions signals an individual right.[232] In only four instances does the phrase "the people" appear expressly referring to a right.[233] Discounting its right-to-bear arms provision, two instances expressly refer to individual rights,[234] while the last is arguably an individual right as well (it was disputed in *Heller* as to whether the right to assemble was wholly a collective right only).[235] This surely creates the inference that "the people" in the

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228 HAW. CONST. art. I, § 18 (1978).

229 BLACK'S LAW DICTIONARY 1578 (4th ed. 1951):

> A people permanently occupying a fixed territory bound together by common-law habits and custom into one body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations with other communities of the globe.

Id.

230 WIS. CONST. art. I, § 25 (1998).

231 *Id.*

232 *See infra* notes 226–28.

233 WIS. CONST. art. I, §§ 4, 11, 25, 26.

234 *Id.* at § 11 ("*The right of the people* to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . . .") (emphasis added); § 26 ("*The people have the right* to fish, hunt, trap, and take game subject only to reasonable restrictions . . . .") (emphasis added).

235 *Id.* at § 4 ("*The right of the people* peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall

right-to-bear arms provision are individuals and in no way close to the militia or a standing army.

The definitions of "keep"[236] and "bear"[237] arms at the time of the provision's ratification do not differ from the previous definitions that have been set forth thus for. The terms "security" [238] and "defense" [239] refer to being secure from attack and measures that a country—and equally as pertinent an *individual*—would take to effect security possible from attack. "Hunting" and "Recreation," while undefined in *Black's*, are self-serving in that they're both decidedly individual activities consistent with those other "lawful" [240] "purposes"[241] deemed permissible.

G. New Jersey

New Jersey does not have an express right-to-bear arms provision in either its constitution or state statutes. While this prevents us from applying the logic of *Heller* to invalidate its Taser prohibition the issue that has subsumed many post-*Heller* debates is still on the table: will the Second Amendment be incorporated against the states? In short, the Fourteenth Amendment to the United States Constitution has been judicially interpreted as making many of the Bill of Rights' provisions—once believed to apply only to the federal government—applicable to the states.[242] Should the Court eventually choose to follow the course taken with those Amendments that are now been incorporated, such as the First and Fourth Amendments, the Second Amendment would require states to recognize the right-to-bear arms as an individual right. Incorporation is hotly contested not only for whether it will happen at all but, if it does, will the Court choose to use an alternative avenue for incorporation like the Privileges and Immunities Clause of the

never be abridged.") (emphasis added).

[236] BLACK'S LAW DICTIONARY 868 (6th ed. 1990) ("To continue . . . To maintain, carry on, conduct, or manage . . . .;[or t]o maintain, to cause to continue without essential change of condition.").

[237] BLACK'S LAW DICTIONARY 147 (7th ed. 1999) ("To support or carry.").

[238] *Id.* at 1358 ("The state of being secure, esp. from danger or attack.").

[239] *Id.* at 431 ("Measures taken by a country or individual to protect against an attack.").

[240] *Id.* at 892 ("Not contrary to law; permitted by law.").

[241] *Id.* at 1250 ("An objective, goal, or end . . . .").

[242] *See* Debra Cassens Weiss, *Will Second Amendment Be Incorporated Through Citizenship Clause?*, ABA JOURNAL - LAW NEWS NOW (Jun. 17, 2009), http://www.abajournal.com/news/will_second_amendment_be_incorporated_through_citizenship_clause.

Fourteenth Amendment. Many have claimed that within *Heller's* Delphic language lies a preview of the Court's future direction.

> With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886) and *Miller v. Texas*, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.[243]

This brief passage in the majority opinion may contain a bit of foreshadowing for future incorporation. It indicates on its face that the Court's holding in *Cruikshank* was incorrect as evidenced by its later conclusions on the First Amendment as applying to the states.[244] But then in a 180-degree turn it lists the Supreme Court's holdings thereafter on the Second Amendment in which it continuously reaffirmed the invalidity of incorporation, antithetical to its affirmations in *Cruikshank*.[245] The questions persists: is *Heller* saying that the Court in *Cruikshank* was wrong about its statements regarding the incorporation of the Second Amendment and, just as the First Amendment was eventually incorporated, will the Second Amendment be as well? If it is, prohibitions on Tasers, especially in New Jersey, will inevitably be stricken as unconstitutional.

VI. CONCLUSION

This Note has shown that by analyzing each state's respective right-to-bear arms provision under *Heller* that those guarantees are both individual in scope and consistent with the keeping and bearing of arms for non-militia purposes. Since an analysis of these provisions produces the same conclusion that the Court came to in *Heller*, and Tasers meet the criteria set forth in that case, Taser prohibitions would ultimately be invalidated. Predicting whether or not Tasers will eventually be absolved from restriction in the future is contingent on how that same question is first answered with respect to firearms. Any

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[243] District Of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).

[244] Posting of Ben Winograd, SCOTUSblog, http://www.scotusblog.com/wp/heller-discussion-board-incorporation-and-the-need-for-further-litigation/ (Jun. 26, 2008, 2:24 pm).

[245] *Id.*

immunity for Tasers through the expansion of right-to-bear arms protection will obviously be predicated on how *Heller's* conclusion is developed in the near future—until then Tasers must wait idle for firearms to make sufficient legal headway for non-lethal weapons to be included.

Despite an existence of only a quarter-century, Tasers are so distinct from firearms in so many ways that they essentially present an issue of first impression for American jurisprudence. Tasers question many of the premises that underlie many central principles in our legal system that have existed since the Founding era—perhaps the most decisive being self-defense. As the Supreme Court and courts below begin to expound *Heller*, more substantive predictions can be made regarding Tasers without having to engage in the speculation that accompanies reading between the lines of *Heller's* decision. However, it is from this Note's unstated premise—that firearms will *never* be eliminated or relegated to military-use only—that I predict restrictions on Tasers will eventually be eliminated. Because of the firearm's eternal nature in the United States, and the Taser's evidenced success over firearms in nearly every single legitimate constitutional criteria they've been analyzed under, the constitutional protection will always contain within a the syllogism that exonerates Tasers.

At present, Tasers are limited to the scope of constitutional protection afforded to firearms, which unfortunately requires they compete for similar amounts of notoriety. Against such a well-entrenched staple of American culture like the modern firearm, this is a daunting prospect. That said, *Heller* may have given new life to the future of non-lethal weapons by leaving the proverbial door open for future Second Amendment inquiries to cast aside absolute sum comparisons and instead opt for relative comparisons like the one in this Note, all the while maintaining the originalist logic germane to *Heller's* interpretation. Just how far the Court is willing to part from its strict adherence to original public meaning, originalism will ultimately be the determinative factor.