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ARTICLE

SECOND AMENDMENT: RULED BY LAW OR BY JUDGES?

Herbert W. Titus, J.D.[†]

[T]here is no new thing under the sun. Is there any thing whereof it may be said, See this is new? It hath been already of old time, which was before us.

Ecclesiastes 1:9(b)–10.

I. INTRODUCTION

It is conventional wisdom in twenty-first-century America that ultimately law emanates from the bosoms of men and women on the bench. Law is, we are told, whatever the judges say it is. Or as Chief Justice Charles Evans Hughes is reported to have said: “We are under a Constitution, but the Constitution is what the judges say it is.”¹

It is also assumed that, because we separate church and state in America, the Bible has no place in a courtroom, much less a law school classroom. Nicholas Von Hoffman, a nationally-syndicated columnist, responded to the news in 1981 that the American Bar Association had accredited a Christian law school at Oral Roberts University by stating:

[I]n America we don't have Christian law, Jewish law, Moslem law. We only have law-law. Is a law school that winds its professional training inextricably in with religious doctrine even attempting to turn out attorneys ethically prepared to practice in a non-theocratic, secular court system?²

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1. Harry W. Jones, *Law and the Idea of Mankind*, 62 COLUM. L. REV. 753, 766 (1962) (“We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.”).

2. N. Von Hoffman, *For WASPs Only*, ADIRONDACK DAILY ENTERPRISE, August 26, 1981, at 4.

Both of these views—that judges make law and that American law is entirely secular—are of recent origin. Before the advent of the twentieth century, legal scholars agreed with Sir William Blackstone that judges, like Moses in Exodus 18:16, only “found” the law and “declared” it.³ The notion that judges are the sources of law was totally foreign to men like George Mason and James Madison and their fellow Virginians who subscribed their names to Section 16 of the 1776 Virginia Declaration of Rights, which defines “religion” as “the duty which we owe to our Creator, [enforceable] only by reason and conviction, not by force or violence.”⁴ They, like Blackstone before them, believed that all of law originated from God who had created the heavens and the earth.⁵ Indeed, it was upon this very foundation from the book of Genesis that Thomas Jefferson relied when he penned these words to the preamble to his 1786 statute establishing religious freedom in Virginia:

Well aware that . . . Almighty God hath created the mind free, and manifested his Supreme will that free it shall remain, by making it altogether unsusceptible of restraint: That all attempts to influence it by temporal punishments . . . are a departure from the plan of the holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone[.]⁶

The Founders understood that the first freedom of the First Amendment could not be rightly discovered and applied apart from the Bible teaching on the duties that are owed exclusively to the Creator, which alone are enforceable only by reason and conviction.⁷ Likewise, the Second

3. See Herbert W. Titus, *Moses, Blackstone and the Law of the Land*, 1 CHRISTIAN LEG. SOC'Y. Q. 5 (1980).

4. VIRGINIA DECLARATION OF RIGHTS § 16, available at www.archives.gov/exhibits/charters/Virginia_Declaration_of_Rights.html (last visited Jan. 1, 2014).

5. See 1 WILLIAM BLACKSTONE, COMMENTARIES *38–43.

6. THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (June 12, 1779), reprinted in 5 THE FOUNDERS' CONSTITUTION 77 (Philip B. Kurland & Ralph Lerner eds., 1987).

7. See Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT UNIV. L. REV. 7, 10–15, 52–56 (1995). See also Herbert W. Titus, *No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion*, 22 CUMB. L. REV. 505, 516–20 (1991–92); Herbert W. Titus, *Education, Caesar's or God's: A Constitutional Question of Jurisdiction*, J. OF CHRISTIAN JURISPRUDENCE 101, 153–61 (1982).

Amendment securing to the people the right to keep and bear arms can neither be rightly understood nor applied without understanding the Scriptural truth governing the duties owed by civil rulers to their constituents, and the rights of the people to hold those rulers accountable to the rule of law.

II. BIBLICAL ORIGINS

A. *The People's Limited Right to Change Their Civil Government*

The first book of Samuel, chapter eight, records the inspired prophet's account of the beginning of the Israeli constitutional monarchy. Israel's elders had come to the end of their patience with the system of government established when Moses led the nation out of Egypt. Gathered together, the elders submitted their complaint and their plea to Samuel: "Thy sons walk not in thy ways; now make us a king to judge us like all the nations."⁸

Displeased, Samuel prayed and the Lord answered, commanding Samuel to listen to the people, but to know this: "[T]hey have not rejected thee, but they have rejected me."⁹ Nevertheless, God told Samuel to "heed" the people's request but, before doing so, to warn them that the king they were seeking would be far worse than those about whom they were complaining.¹⁰ Unpersuaded, the elders persisted, imploring Samuel to give them a king.¹¹

God gave Israel a king, but not the totalitarian ruler that they had blindly sought. Rather, in fulfillment of a promise given to the people of Israel in the time of Moses, God gave them a covenant king—a constitutional monarchy. Note this remarkable prophecy given to Moses, as recorded in chapter 17 of the book of Deuteronomy, approximately 440 years before the Israeli elders submitted their complaint:

When thou art come unto the land which the LORD thy God giveth thee, and shalt possess it, and shalt dwell therein, and shalt say, I will set a king over me, like as all the nations that are about me; Thou shalt in any wise set him king over thee, whom the LORD thy God shall choose And it shall be, when he sitteth upon the throne of his kingdom, that he shall write him a copy of

8. 1 Samuel 8:5.

9. 1 Samuel 8:7.

10. 1 Samuel 8:9–18.

11. 1 Samuel 8:22.

this law in a book And it shall be with him, and he shall read therein . . . that he may learn to fear the LORD his God, to keep all the words of this law and these statutes, to do them . . . to the end that he may prolong his days in his kingdom¹²

And so, after God chose Saul to be king and after the people ratified that choice, declaring Saul as their king,¹³ the prophecy was fulfilled when “Samuel told the people the manner of the kingdom, and wrote it in a book.”¹⁴ This word—“manner”—is from the Hebrew word *mishpat*, which is variously translated as “judgment” or “ordinances,” and which denotes legal procedure, rights, and privileges.¹⁵ *Mishpat* thus included the laws governing the power of the kingship—or the rights and duties of the kingship. In modern terms, the document composed by Samuel would be called the written constitution of the realm.

B. *Civil Government: Ruled by Law, Not by Men*

Early in the reign of King Saul, both the king and the chief judge, Samuel, would be tested by God to see if the new government would be one of law or one of men. The story is recounted in I Samuel 13. King Saul assembled an army of 3,000, neither well-armed nor well-trained.¹⁶ Indeed, the people of Israel had been disarmed by their enemies, the Philistines having denied them access to “[black]smiths . . . [I]est the Hebrews make them swords or spears.”¹⁷ Thus, the Israelites resorted to their farm implements, each one sharpening his “[plow]share,” “coulter” (hoe), “axe” and “mattock” (pick) into a weapon.¹⁸ In contrast, the enemy Philistines, in assembled array against Israel, possessed 30,000 chariots, 6,000 horsemen, and people as numerous as sand on the seashore.¹⁹ So formidable were their foes that King Saul’s rag-tag band of ill-equipped Israelites went into hiding—in caves, in

12. *Deuteronomy* 17:14–15, 18–20.

13. *1 Samuel* 10:24

14. *1 Samuel* 10:25.

15. BROWN, DRIVER, BRIGGS AND GESENIUS, KJV OLD TESTAMENT HEBREW LEXICON, *Mishpat* (online version) available at <http://www.biblestudytools.com/lexicons/hebrew/kjv/mishpat.html>.

16. *1 Samuel* 13:2.

17. *1 Samuel* 13:19.

18. *1 Samuel* 13:20.

19. *1 Samuel* 13:5.

thickets, in rocks, in high places, and in pits.²⁰ Others hightailed it over the Jordan River, while those who remained “followed [Saul] trembling” in their boots.²¹

King Saul’s only hope was for God’s intervention, but according to the manner of the kingdom—under his limited powers as king—Saul was not authorized to offer sacrifices invoking God’s mercy on behalf of the nation. That task had been assigned to the priests—in this case to the priest/prophet Samuel. As restated later in II Chronicles 19:11, the constitution governing ancient Israel separated the jurisdictions of the church and the state.²² As recorded during the reign of the godly king Jehoshaphat, “Amariah the chief priest is over you in all matters of the LORD; and Zebediah the son of Ishmael, the ruler of the house of Judah, for all the king’s matters.”²³ And, even later, the separation of jurisdiction was applied to King Uzziah, who lost his kingship when he burned incense upon the altar, a duty reserved to the priests.²⁴ So it was that Uzziah lost his right to rule, his son Jotham reigning in his stead.²⁵

However, it all began with the first king, Saul, who wrongfully assumed the priest’s role to make the sacrificial offerings before going into battle against the enemy. In accordance with the written law of the kingdom, Saul had awaited Samuel’s set time of arrival.²⁶ But Samuel “came not” at the appointed time.²⁷ And things went from bad to worse. In addition to the troops in hiding, many more of King Saul’s troops scattered.²⁸ Pressed by an overwhelming enemy force and his own weakening army, the fearful king offered the sacrifice to God.²⁹ And “as soon as he had [finished],” who should show up, but Samuel.³⁰ And as King Saul went to meet and to greet him, Samuel demanded to know: “What hast thou done?”³¹ And Saul earnestly explained: “Because I saw that the people were scattered from me,

20. 1 *Samuel* 13:6.

21. 1 *Samuel* 13:7.

22. 2 *Chronicles* 19:11.

23. *Id.*

24. 2 *Chronicles* 26:16–21.

25. 2 *Chronicles* 26:21.

26. 1 *Samuel* 13:8.

27. *Id.*

28. *Id.*

29. 1 *Samuel* 13:9.

30. 1 *Samuel* 13:10.

31. 1 *Samuel* 13:10–11.

and that thou camest not within the days appointed, and that the Philistines [were] gathered [against them] . . . I forced myself therefore, and offered a burnt offering."³²

C. *No Exceptions: No Matter How Compelling*

Saul's argument that he was justified in doing what he was not authorized by the nation's constitution to do, should be familiar to any American law student who has taken a course in American constitutional law. Saul's plea was identical to those made by government lawyers today who persistently argue in American courts the doctrine of necessity—that the government has an important, indeed a compelling, interest that justifies its actions that would otherwise be contrary to the written law of the United States Constitution. After all, what could be more reasonable—indeed, what could be more compelling—than Saul's appeal to national security in wartime? And what better circumstances could there be to prove that Saul's choice was the "least restrictive alternative" taken only after Samuel did not show up in time?

As familiar as Saul's argument would be to today's lawyers and judges, Samuel's judicial response is almost totally foreign. Instead of asking whether to apply strict scrutiny to Saul's action, or the lesser standards of intermediate scrutiny or rational basis to determine how weighty the government interest must be—compelling if strict scrutiny applies, reasonable if intermediate scrutiny applies, or just plain old rationality—Judge Samuel simply ruled:

Thou hast done foolishly: thou hast not kept the commandment of the LORD thy God, which he commanded thee: for now would the LORD have established thy kingdom upon Israel for ever. But now thy kingdom shall not continue . . .³³

Saul chose not to obey God's limits upon his power as king, as written in the nation's covenant. But Samuel, as Moses had done before him, obeyed the limit placed upon his judicial power to *say what the law is*, not manipulating the law to affirm an act that appeared justified by the circumstances.

In so ruling, Judge Samuel was simply following the precedent established by Moses that prescribes the province and duty of the judiciary

32. 1 *Samuel* 13:11–12.

33. 1 *Samuel* 13:13–14.

to “make [] know[n] the statutes of God, and His laws.”³⁴ After all, it was not within the power of either Samuel, as judge, nor Saul as king, to change the paramount law of the kingdom, but only in the People who had ratified the written covenant when they accepted Saul as their king.³⁵ If there were to be a change of the law to accommodate the interests of national security, or some other compelling or important government interest, then the change had to come from a source other than the judiciary—the People.³⁶

D. *No Exceptions: No Matter How Popular*

Yet even the people could not just presumptuously change the covenant binding the king. King Saul would learn that lesson later, after his victory over the Amalekites.³⁷ Although required by God’s law of national judgment to kill all of the Amalakites and their livestock, King Saul spared the best of the sheep and the life of the Amalekite king.³⁸ “The people” rationalized the king and took some of the spoil for a sacrifice to God, only to be rebuffed by Samuel with the rebuke that “to obey is better than sacrifice.”³⁹ Even the people were bound by God’s law in the formation of their government, and could not change that form of government—except for good cause. And, thus, Samuel could not exercise judicial restraint without abusing his duty to say what the law is.

III. THE BIBLICAL PRINCIPLES

A. *The People: The Civil Sovereigns*

One might ask what this lesson of Saul, Samuel, and the people of Israel has to do with the American people, the Congress, and the Supreme Court Justices under the United States Constitution of 1787—the answer: plenty. According to a provocative new study by Harvard Professor Eric Nelson, I Samuel 8 and Deuteronomy 17 transformed European political thought.⁴⁰ Professor Nelson documents that Seventeenth-century Biblical theology marked the beginning point of the West’s commitment to the republican

34. *Exodus* 18:16.

35. See 1 *Samuel* 10:24–25.

36. *Accord Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

37. See 1 *Samuel* 15.

38. 1 *Samuel* 15:9.

39. 1 *Samuel* 15:15, 21–22.

40. See ERIC NELSON, *THE HEBREW REPUBLIC* 26–28 (2010).

form of government.⁴¹ In this book, Professor Nelson recounts that it was England's John Milton who led the way, establishing that:

God's remarks in Deuteronomy . . . were simply meant to underscore that

[T]he right of choosing, yea of changing their own Government is by the grant of God himself in the People. And therefore when they desir'd a King, though then under another form of government, and thir changing displeas'd him, yet he that was himself was their King, and rejected by them, would not be a hindrance to what they intended, furdur than by perswasion, but that they might doe therein as they saw good, 1Sam. 8 onely he reserv'd to himself the nomination of who should reigne over them.⁴²

From this premise of popular civil sovereignty in the nation of Israel, Milton inferred that "Israel is not a unique case," but served as a prototype for all nations, God having given "all peoples the right to choose their form of government."⁴³ But Milton pressed on, asking the question whether it was wrong for the people of Israel to have asked for a "king at all," in light of the failures of the Israeli monarchy and Christ's warning to his disciples that the kings of the gentiles exercise lordship over them.⁴⁴

B. *The People's Right to Use Force to Change Civil Government*

Although God relinquished his kingship of Israel voluntarily, and centuries later, King James II voluntarily abdicated the English throne to William and Mary, the 18th Century King George III was not so accommodating. Thus, the issue of whether the people could change their form of government by force of arms came to the foreground. One year before the Declaration of Independence, on July 6, 1775, the Congress of the United Colonies issued their Declaration of the Causes and Necessity of Taking up Arms, declaring that "[t]he legislature of Great-Britain . . . have at length . . . attempted to effect their cruel and impolitic purpose of enslaving these colonies by violence, and have thereby rendered it necessary

41. *Id.* at 23.

42. *Id.* at 37-38 (quoting HUGO GROTIUS, DE REPUBLICA EMENDANDA 101 (Aurthur Eyffinger ed., 1984)).

43. *Id.* at 38-39.

44. *Id.* at 39-45.

for us to close with their last appeal from reason to arms.”⁴⁵ In support of this claim, the representatives of the united colonies recounted the royal governor’s seizure of arms from the people of Boston “in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred.”⁴⁶ Pronouncing their resolve to fight for their freedoms they declared:

Our cause is just. Our union is perfect. Our internal resources are great We gratefully acknowledge, as signal instances of the Divine favour towards us, that his Providence would not permit us to be called into this severe controversy, until we were grown up to our present strength . . . possessed of the means of defending ourselves. With hearts fortified . . . we most solemnly, before God and the world, *declare*, that, exerting the utmost energy of those powers, which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverance, employ for the preservation of our liberties; being with one mind resolved to die freemen rather than to live slaves.⁴⁷

One year later, America’s founders took the next step, issuing the Declaration of Independence and declaring that according to “the Laws of Nature and of Nature’s God”:

[A]ll men are created equal, . . . [and] are endowed by their Creator with certain unalienable rights That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government [W]hen a long train of abuses and usurpations . . . evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government⁴⁸

45. DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775) *reprinted in* SOURCES OF OUR LIBERTIES 295 (Richard L. Perry & John C. Cooper eds., revised ed. 1978).

46. *Id.* at 298.

47. *Id.* at 299.

48. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

One hundred twenty-seven years before these words were penned in Philadelphia, the English people had used the force of arms to depose the tyrannical King Charles I, putting him to death for having breached his covenant to rule the people according to law. English barrister, Geoffrey Robertson—himself a leading human rights lawyer and a U.N. war crimes judge—has recounted Puritan John Cooke’s words in justification of this action, as they appear in the official annals of the English state trials:

When any man is entrusted with the sword for the protection and preservation of the people, if this man shall employ to their destruction that which was put into his hand for their safety, then by the law of that land he becomes an enemy to that people and deserves the most exemplary and severe punishment. This law—if the King become a tyrant he shall die for it—is the law of nature and the law of God written in the fleshly tablets of men’s hearts.⁴⁹

C. *The Second Amendment: A Revolutionary Birthright*

Well understood as the doctrine of the lower civil magistrate, the American colonial representatives of the people acted not only to throw off the tyrant, George III,⁵⁰ but to restore the rule of law by constituting new governments, beginning with the Virginia Declaration of Rights in 1776 and ending with the Constitution of New Hampshire of 1784. In six of the original States—Virginia, Pennsylvania, Delaware, Maryland, Massachusetts, and New Hampshire—the constitutions not only affirmed the people’s right to reform, alter, or abolish even these new governments should they fail to secure their lives, liberties, and properties, but also gave the people the means by which to do so.⁵¹ The 1776 Virginia charter led the way, declaring that “all

49. GEOFFREY ROBERTSON, *THE TYRANNICIDE BRIEF* 192 (2005) (quoting *STATE TRIALS* 1025).

50. See DOUGLAS F. KELLY, *THE EMERGENCE OF LIBERTY IN THE MODERN WORLD* 133 (1992).

51. See, VA. CONST., Bill of Rights § 3, 13 (1776) reprinted in *SOURCES OF OUR LIBERTIES*, supra note 45, at 311–12; PENN. CONST., Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania, art. V, XIII (1776) reprinted in *SOURCES OF OUR LIBERTIES*, supra note 45, at 329–30; Delaware Declaration of Rights §§ 5, 18 (1776) reprinted in *SOURCES OF OUR LIBERTIES*, supra note 45, at 338–39; MD. CONST., Declaration of Rights, art. IV (1776) reprinted in *SOURCES OF OUR LIBERTIES*, supra note 45, at 347; DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH OF MASSACHUSETTS, art. VII, XVII (1780) reprinted in *SOURCES OF OUR LIBERTIES*, supra note 45, at 375–76; CONSTITUTION OF

power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them,”⁵² and that “a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State.”⁵³ Four additional States—New York, New Jersey, Georgia and South Carolina—included that right in preambles patterned after the Declaration of Independence.⁵⁴ North Carolina’s Constitution was preceded by its own Mecklenburgh Declaration.⁵⁵ Only Connecticut and Rhode Island were silent, preferring governance under their colonial charters.

With such a constitutional legacy already in place, the preamble of the 1787 Constitution of the United States begins:

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.⁵⁶

And four years later, this new federal government would be capped by a Bill of Rights, the second article of which provides: “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.”⁵⁷

As Justice Antonin Scalia explained in *District of Columbia v. Heller*:

[O]nce one knows the history that the founding generation knew . . . [t]hat history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents.

NEW HAMPSHIRE, art. X, XXIV (1784) *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 45, at 383, 385.

52. CONSTITUTION OF VIRGINIA (1776) *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 45, at 311.

53. *Id.* at 312.

54. N.Y. CONST. pmb1 (1777); N.J. CONST. pmb1 (1776); GA. CONST. pmb1 (1777); S.C. CONST. pmb1 (1776).

55. The Mecklenburgh Resolutions (1775) *available at* http://avalon.law.yale.edu/18th_century/nc06.asp.

56. U.S. CONST. pmb1. (1787).

57. U.S. CONST. amend. II. (1791).

This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.⁵⁸

The *Heller* majority rejected the claim that the Second Amendment secured to the States, not to the People, the authority to form a militia, by securing to the People, not the States, the necessary means—the right to keep and bear arms. By conforming its opinion to the written text of the Second Amendment, the Court employed the venerable rule of construction that “[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.”⁵⁹

Thus, after quoting the entire text of the Amendment, Justice Scalia parsed first the words of the “operative clause,” beginning with the “right of the people” and ending with “to keep and bear arms,” before addressing the “prefatory clause,” beginning with the words “well-regulated militia” and ending with the “security of a free state.”⁶⁰ “[G]uided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases . . . used in their normal and ordinary . . . meaning,’⁶¹ Justice Scalia concluded that the ultimate purpose of the Second Amendment was to ensure a people “trained in arms [the] better able to resist tyranny.”⁶²

D. *The Second Amendment: Judicial Nullification*

The four dissenting justices read the Second Amendment text differently, claiming that it was designed to protect the individual right to keep and bear arms for State militia purposes, not for self-defense “detached from any militia-related objective.”⁶³ The dissenters also objected to the majority position that if a person was within the protected class of the “people” and if the firearm at issue was within the protected class of “arms,” then the right to keep and bear that arm was “absolute.”⁶⁴ Instead, as Justice Breyer painstakingly argued, the right to keep and bear arms would not be “infringed” by any law, unless it could be shown that the burden placed upon that right by a particular regulation was “unreasonable or

58. *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008).

59. *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570–71 (1840).

60. *Heller*, 554 U.S. at 577.

61. *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

62. *Id.* at 598.

63. *Id.* at 681 (Breyer, J., dissenting).

64. *Id.*

inappropriate.”⁶⁵ According to Justice Breyer and his dissenting colleagues, the D.C. “regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem”⁶⁶ because:

[A] legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted.⁶⁷

Remarkably, Justice Breyer’s reasoning resonates with that of King Saul standing before Judge Samuel.⁶⁸ After acknowledging that his “burnt offering” was forbidden by law, Saul made out a case that it was perfectly reasonable and appropriate for him to have substituted himself for Samuel. After all, his army was scattering and the Philistines were upon him, and Samuel was late. Surely Saul had not only good reason but, a compelling one, to invoke the power of God and ensure victory over the Philistines. Further, as Saul pled, it was out of necessity that he made the offering to the end that many lives would be saved, injuries prevented, and the very nation itself saved from annihilation.

IV. RULED BY LAW OR RULED BY MEN

A. *The Right of the People, Not the Discretion of Judges*

Unlike Justice Breyer’s response to the District of Columbia City Council, however, Judge Samuel refused even to entertain Saul’s claim that his response to Samuel’s late arrival was reasonable or appropriate.⁶⁹

65. *Id.*

66. *Id.* at 681–82 (Breyer, J., dissenting).

67. *Id.* at 682.

68. *See supra* Part II.C.

69. *See supra* Part II.C.

Instead, Judge Samuel pronounced judgment against the king for having acted “foolishly,” having broken the written commandment of God.⁷⁰ And, like Judge Samuel, Justice Scalia, for the *Heller* majority, refused to entertain the District of Columbia’s plea that it had good reason for its handgun ban:

After an exhaustive discussion of the arguments for and against gun control, Justice BREYER arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.⁷¹

In this telling rejection of the *Heller* dissenters’ “interest balancing” approach,” Justice Scalia asserted that:

The very enumeration of the right [to keep and bear arms] takes out of hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.⁷²

Indeed, such judicial reassessments are completely inconsistent with the Court’s own doctrine of judicial review as first articulated by Chief Justice John Marshall in *Marbury v. Madison*.⁷³

B. *The Role of Judges: Limited by Law*

In *Marbury*, Chief Justice Marshall reaffirmed the first principle upon which the nation was founded. Harkening back to the nation’s charter, the Declaration of Independence, and the Preamble to the United States Constitution, he wrote:

[T]he people have an original right to establish, for their future government, such principles as, in their opinion, shall most

70. 1 *Samuel* 13:13–14.

71. *Heller*, 554 U.S. at 634.

72. *Id.*

73. See generally, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

conduce to their own happiness, is the basis, on which the whole American fabric has been erected.⁷⁴

In *Heller*, Justice Scalia wrote:

Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad . . . [Thus,] [t]he *Second Amendment* . . . is the very *product* of an interest-balancing by the people[.]⁷⁵

In *Marbury*, Chief Justice Marshall declared that because “[t]he principles . . . so established, are deemed fundamental. . . [and] designed to be permanent,” they are put in writing so as they will “not be mistaken, or forgotten,” to the end that, as written, they “form[] the fundamental and paramount law of the nation.”⁷⁶ Thus, as written, the Constitution is “a rule for the government of *courts*, as well as of the legislature.”⁷⁷ In keeping with this principle, Justice Scalia embarked upon a lengthy discussion of the precise text of the Second Amendment to the end that the Court, in the exercise of its judicial power and duty might “say what the law is,”⁷⁸ that is, the law as stated in the text.⁷⁹ To be sure, Justice Scalia addressed other texts, and historic contexts, including prior Court precedents, but only as they appeared to reinforce the Court’s “adoption of the original understanding of the Second Amendment.”⁸⁰ And whatever limitations there may be on the scope of the protection afforded by the Amendment, Justice Scalia opined that they would be found within the text, not in any judicially-invented standard of review divorced from that text.⁸¹

C. *The Lawless Doctrine of Judicial Restraint*

In *Heller*, both Government merits briefs—one filed by the District of Columbia and the other by the United States—urged the Court to resolve the constitutionality of the D.C. handgun ban under one or another familiar

74. *Id.* at 176.

75. *Heller*, 554 U.S. at 634–35.

76. *Marbury*, 5 U.S. at 176–77.

77. *Id.* at 179–80.

78. *Id.* at 177.

79. *See Heller*, 554 U.S. at 576–600.

80. *Id.* at 625; *see id.* at 600–26.

81. *See id.* at 626–27.

standard of review—strict or intermediate scrutiny or rationality.⁸² Both briefs urged the Court to uphold the D.C. handgun ban on the ground that it was reasonably related to the government’s concern for community safety.⁸³ At oral argument, then Solicitor General, Paul Clement, explained that the Government’s brief suggests that “strict scrutiny” not be the standard of review because the right to keep and bear arms “always coexisted with reasonable regulations of firearms.”⁸⁴ Indeed, General Clement pointed out that if strict scrutiny were applied to the current federal firearms statutes, they could not be sustained as promoting a compelling government interest, but could be defended under the more relaxed intermediate scrutiny, because such laws would satisfy the test of reasonable relation to an important government interest.⁸⁵

Forthwith, Chief Justice John Roberts challenged the Solicitor General:

Well, these various phrases under the different standards that are proposed, “compelling interest,” “significant interest,” “narrowly tailored,” none of them appear in the Constitution⁸⁶

And, despite General Clement’s plea, none of these tests make an appearance in the *Heller* majority decision, but only in Justice Breyer’s dissent.

Five years later—in a petition for writ of certiorari before the Supreme Court to review a decision by the U.S. Court of Appeals for the Fifth Circuit that upheld the federal ban on the sale of a handgun by a federally-licensed firearms dealer to persons under the age of 21—former Solicitor General Clement, now counsel for the National Rifle Association (NRA) changed much of his tune. Although still wedded to some kind of balancing test, Mr. Clement charged:

It has been five years since this Court concluded . . . that the Second Amendment secures an individual right to keep and bear

82. Brief for Petitioner at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) 2008 WL 102223; Brief for the United States as Amicus Curiae at 8, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) 2008 WL 157201.

83. Brief for Petitioner, *supra* note 82, at 49; Brief for United States as Amicus Curiae, *supra* note 82, at 20–21 (arguing that “[g]iven the unquestionable threat to public safety that unrestricted private firearm possession would entail, various categories of firearm-related regulation are permitted by the Second Amendment”).

84. Transcript of Oral Argument at 39, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

85. *Id.* at 43–44.

86. *Id.* at 44.

arms Given the number of laws enacted by the federal government . . . in the years when a mistaken understanding of the Second Amendment held sway, one would have expected a major reconsideration of extant firearms laws to have occurred. It has not. Instead, jurisdictions have engaged in massive resistance . . . and the lower federal courts, long out of the habit of taking the Second Amendment seriously, have largely facilitated the resistance.⁸⁷

In a section of the petition entitled “This Court’s Intervention Is Needed To Stem The Tide Of Decisions Applying A Diluted Form Of Scrutiny To Artificially Cabin The Scope Of The Second Amendment,” the NRA chronicles not only the resistance of the courts below, but courts across-the-board, highlighting petitioner’s concern about the “tide of case law that strangles the Second Amendment right while purporting to apply a form of ‘heightened scrutiny’ to ‘protect’ it.”⁸⁸ The NRA then paraded before the Court the “watered-down form of ‘intermediate’ . . . scrutiny” afforded it by the courts below, forcefully asserting that:

[T]he prevailing methodology has led one commentator to observe that it is Justice Breyer’s dissent in *Heller*, not Justice Scalia’s majority’s opinion, that has become the touchstone of Second Amendment analysis. As the *Heller* majority correctly predicted, that ‘interest-balancing’ approach has proven so malleable as to provide ‘no constitutional guarantee at all.’⁸⁹

D. *Restoring the Rule of Law*

The issue is not whether the lower federal courts are applying a watered-down balancing test, as Mr. Clement now contends. Rather, it is whether the courts are abiding by the rule of law or displacing the law as revealed in the text with their own reasoning. In today’s world, the rule of law and the reasoning of judges are assumed to be the same thing. Indeed, Justice Marshall’s statement in *Marbury* that “[i]t is emphatically the province and duty of the judicial department to say what the law is” has been construed by the Supreme Court to conclude that whatever the Court says is law.⁹⁰

87. Petition for Writ of Certiorari at 1, *NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334 (5th Cir. 2013) (No. 13-137).

88. *Id.* at 26.

89. *Id.* at 27, 32.

90. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

According to this view, then, the Court's "interpretation" of the law as "enunciated" in its decisions is the "supreme law of the land."⁹¹ Indeed, according to this view of law, judicial reasoning is the law unless, and until, the justices change their minds. Under this regime of judicial supremacy, the only limit upon the exercise of judicial power is judicial self-restraint. The Constitution, as written, is not the objective standard by which a judicial opinion is to be measured. Rather, the Court's precedents are subject only to their own precedents, which, of course, may be overruled.

This modern view of judicial power is wholly inconsistent with the common understanding of judicial review at the time of the ratification of the Constitution. John Marshall, along with his other judicial colleagues in *Marbury* would have agreed with Sir William Blackstone who wrote in his *Commentaries on the Laws of England* that "*the law, and the opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law."⁹² Thus, according to Blackstone, a court opinion was not law, but only "evidence" of law.⁹³ Thus, he concluded, a court opinion, if contrary to law, was not "bad law;" rather, it was "not law" at all.⁹⁴

Consistent with this view, Chief Justice Marshall in *Marbury* justified the power of the court to rule that a Congressional statute conferring original jurisdiction upon the Supreme Court was unconstitutional because "the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature."⁹⁵ So the Chief Justice, like Judge Samuel before him,⁹⁶ did not review the legislative vesting of original jurisdiction in the Supreme Court for "reasonableness" or "appropriateness," but whether it was consistent with the written text. After all, the constitution in America, like the one in Israel, was "contemplate[d] . . . as forming the fundamental and paramount law of the nation."⁹⁷ Thus, Article VI of the Constitution states that "[t]his Constitution"—not this Constitution as interpreted by Congress, the President, or the Supreme Court—"shall be the supreme Law of the Land."⁹⁸ In like manner,

91. *Id.*

92. 1 WILLIAM BLACKSTONE, COMMENTARIES *71.

93. *Id.*

94. *Id.*

95. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179–80 (1803).

96. *See supra* Part II.C.

97. *See Marbury*, 5 U.S. at 177.

98. U.S. CONST. art. VI.

Deuteronomy 17:18–20 attests that the law of the kingdom established in the written document referred to in I Samuel 10:25 bound the king and all those under him as the law of the land.⁹⁹

Justice Breyer's dissenting opinion in *Heller* is to the contrary. According to Breyer's law, the Second Amendment does not constrain the courts or the legislatures from infringing upon the right of the people to keep and bear arms unless there is a showing "that the District's regulation is unreasonable or inappropriate in *Second Amendment* terms."¹⁰⁰ According to the words of the Second Amendment, the right is vested in the People of the United States—no exceptions. Yet, Justice Breyer's reasoning upholding the appropriateness of the handgun ban turned primarily upon his opinion that "[t]he law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban" and concerns only hand guns the "overwhelmingly favorite weapon of armed criminals."¹⁰¹

Suppose that Congress would impose a nationwide ban on handguns, what then? Would such a statute be unconstitutional as applied to American citizens living in rural Wyoming, but not as applied to citizens in Chicago? According to Justice Breyer, the answer appears to be in the affirmative, the Chicago law "fall[ing] within the zone that the *Second Amendment* leaves open to regulation by legislatures."¹⁰² Even then, the circumstances might change—even in Chicago. What then? According to Justice Breyer, "a court must consider [the facts] looking at the matter as of today."¹⁰³ While the studies, as reviewed by Justice Breyer, did not indicate that the danger of firearms in urban environments had changed since the District of Columbia had banned handguns, that is no guarantee for the future. Indeed, Justice Breyer acknowledged that a number of studies had been published since the District had installed its ban but was unpersuaded that the data had changed enough to persuade him that the empirical data concerning the competing interests of public safety and self-defense had changed sufficiently to justify intervention by the Court.¹⁰⁴

99. See *supra* Part II.A.

100. *District of Columbia v. Heller*, 554 U.S. 570, 681 (2008) (Breyer, J., dissenting) (emphasis added).

101. *Id.* at 682 (Breyer, J., dissenting).

102. *Id.* (emphasis added).

103. *Id.* at 696.

104. See *id.* at 701–03.

This is not Law. This is Sociology 101. A law to be law must be uniform as to person, universal as to place, and fixed as to time. As Blackstone so ably argued in his *Commentaries*, as the “law of nature . . . is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.”¹⁰⁵ An American citizen’s right to keep and bear arms does not turn on where he lives—Chicago or Cheyenne, or when he lives—in 1791 or 2013, but upon the such principles as are designed to be permanent as discovered in the Second Amendment as it is written.

V. THE LAW OF THE SECOND AMENDMENT

A. *The Right to Vote Is Not Preservative of All Other Rights*

Critics of the *Heller* and *McDonald* opinions belittle the stature of the Second Amendment as outdated and ineffectual.¹⁰⁶ Ridiculing the notion that the people’s right to keep and bear arms is any match for the military juggernaut of the United States of America, these critics argue that a semi-automatic rifle is no match against the nation’s arsenal of weapons.¹⁰⁷ Additionally, these critics claim that any right to keep and bear arms, independent from an official state militia, is wholly anathema to the American system providing for full participation in the election of her government officials and that this right to vote is sufficient to protect the people from tyranny.¹⁰⁸ These critics are seriously mistaken.

To be sure, in 1886, the United States Supreme Court pronounced that “the political franchise of voting . . . is regarded as a fundamental political

105. 1 WILLIAM BLACKSTONE, COMMENTARIES *41.

106. See, e.g., Edward Corcoran, *Forget the Second Amendment*, HUFFINGTON POST, Mar. 25, 2013, http://www.huffingtonpost.com/edward-corcoran/second-amendment_b_2950263.html (calling the Second Amendment “the single most outdated part of the entire Constitution”); Lee Gaillard, *Public Safety Trumps Outdated, Irrelevant Second Amendment*, SEATTLE TIMES, Jan. 3, 2008, http://seattletimes.com/html/opinion/2004104727_gaillard03.html (opining that the “irrelevant Second Amendment should be long gone, too”).

107. See, e.g., Adam Winkler, *Justice Scalia Goes Gun Crazy*, THE DAILY BEAST, Aug. 22, 2013, <http://www.thedailybeast.com/articles/2013/08/22/justice-scalia-goes-crazy.html>. On more than one occasion, God more than upset the imbalance of power between Israel and her enemies. See, e.g., *Judges* 7:1–25. And who would have bet on the early American minutemen against their adversary, Great Britain?

108. Robert J. Spitzer, *Gun Law, Policy, and Politics*, N.Y. ST. B.J., July/Aug. 2012, at 35, 40.

right, because [it is] preservative of all rights.”¹⁰⁹ Yet, as the Court has conceded, the right to vote is “not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions.”¹¹⁰ Indeed, in the United States Constitution of 1787, there is no provision guaranteeing to the people a right to vote either for members of Congress or for the President. With respect to the election of the President, Article II, Section 1 not only substituted specially designated electors for the people, but also provided for a system whereby those electors could be appointed “in such Manner as the Legislature [of each State] may direct,” and whereby a person could be elected to the presidency without any popular vote.¹¹¹ With respect to the election to the upper house of Congress, the members of the Senate were to be selected by the state legislators. Only the members of the House were to be chosen by the people of the several States, and, even then, the States were empowered to determine the qualifications to vote.

Not until the Fifteenth Amendment¹¹² was ratified in 1870 did the Constitution address the right to vote, but it secured that right only against laws that “denied or abridged [that right] on account of race, color, or previous condition of servitude.”¹¹³ The Fifteenth was followed by the Nineteenth,¹¹⁴ which secured the right to vote from being “denied or abridged . . . on account of sex.”¹¹⁵ The Nineteenth was followed by the Twenty-fourth¹¹⁶ protecting the right to vote from being denied “by reason of failure to pay any poll tax or other tax.”¹¹⁷ Finally, the Twenty-Sixth

109. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

110. *Id.*

111. U.S. CONST. art. II, § 1 (1787).

112. U.S. CONST. amend. XV, § 1 (1870) (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude[.]”).

113. *Id.*

114. U.S. CONST. amend. XIX, cl. 1 (1920) (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

115. *Id.*

116. U.S. CONST. amend. XXIV, § 1 (1964) (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.”).

117. *Id.*

Amendment¹¹⁸ was designed only to protect the right to vote “on account of age” of citizens who are eighteen years or older.¹¹⁹ In light of this history, the right to vote has never been constitutionally conferred upon the nation’s citizenry.

B. *The Right to Keep and Bear Arms Is Preservative of All Other Rights*

In contrast with the right to vote, the right to keep and bear arms appears not only in the 1791 Bill of Rights but is also a pre-existing right.¹²⁰ Thus, the Second Amendment states flat-out that “the right . . . shall not be infringed.”¹²¹ Furthermore, the Second Amendment appears on the heels of the First, which secures the pre-existing freedoms of religion, speech, press, assembly, and petition.¹²² Not only that, the Second Amendment is inextricably linked to the preservation of those freedoms, the people’s militia being declared “necessary to the security of a free State.”¹²³ According to *Webster’s* 1828 dictionary, “necessary” means “[t]hat [which] must be; . . . [i]ndispensable; requisite; essential; that cannot be otherwise without preventing the purpose intended.”¹²⁴ The Second Amendment right to keep and bear arms, then, is essential to the preservation of the freedoms of the people, such as those spelled out in the immediately preceding Amendment and those that follow, as well as any rights included in the body of the original Constitution.

Unlike the right to vote, which receives limited constitutional protection, the right to keep and bear arms receives plenary protection, because America’s founders knew from history and experience that an unarmed people would be defenseless against a tyrant who would deny them their basic freedoms.¹²⁵

118. U.S. CONST. amend. XXVI (1971) (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

119. *Id.*

120. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (“[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.”).

121. U.S. CONST. amend. II, cl. 2.

122. *See* U.S. CONST. amend. I.

123. *See* U.S. CONST. amend. II, cl. 1.

124. NOAH WEBSTER, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, Necessary* (1828 Online Ed.), available at <http://webstersdictionary1828.com/Home?word=Necessarian>.

125. *See Heller*, 554 U.S. at 597–98.

C. *The Law of the “People”*

1. All Members of the American Political Community

As Justice Scalia observed in *Heller*, “history showed that the way tyrants had eliminated the militia . . . was not by banning the militia but simply by taking away the people’s arms”¹²⁶ As Justice Scalia initially observed, “[t]he first salient feature of the operative clause [of the Second Amendment] is that it codifies a ‘right of the people,’” a right that belongs “to all members of the [American] political community.”¹²⁷ Unlike the 1689 English Bill of Rights, which limited the right to “have arms for their defense” to “protestants,”¹²⁸ the Second Amendment permits no exceptions. All American citizens who are numbered among those persons empowered to constitute and, if necessary, to reconstitute their civil government are endowed by the Creator with the unalienable right to keep and bear arms.

In direct contradiction of the nation’s commitment to the principle of equality, the D.C. Council in *Heller* limited the right to possess a handgun to three favored citizenship classes—D.C. residents who were in possession of a “validly registered” pistol prior to September 1976, organizations employing at least one commissioned special police officer, and retired metropolitan D.C. police officers.¹²⁹ Because the Second Amendment secures the right to keep and bear arms, including a handgun to all members of the D.C. political community, the D.C. handgun ban unconstitutionally infringed upon the right of the people.

2. Persons Who Are Not Members of the American Polity

Under current federal law there are nine categories of persons who are declared ineligible to possess a firearm, including a constitutionally protected handgun.¹³⁰ Only three of the categories are unquestionably constitutional—a person who is (i) a fugitive from justice; (ii) an alien; or (iii) “who, having been a citizen of the United States, has renounced his citizenship.”¹³¹ No alien, whether illegal, immigrant, or nonimmigrant, nor

126. *Id.* at 598.

127. *Id.* at 579–80.

128. ENGLISH BILL OF RIGHTS para. 25 (1689), available at http://avalon.law.yale.edu/17th_century/england.asp.

129. Brief for Gun Owners Foundation & Gun Owners of America, Inc. as Amici Curiae at 31, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 405567.

130. See 18 U.S.C. § 922(g).

131. See 18 U.S.C. § 922(g)(2), (5), (7).

anyone who has renounced his citizenship, is part of the American political community. A fugitive from justice—while he remains in flight—demonstrates his refusal to submit to the jurisdiction of a State or of the United States, and by his action has unilaterally declared himself an outlaw not subject to the jurisdiction of the current government. Unlike the citizen who renounces his citizenship, however, a fugitive has the power of to restore his citizenship by submitting himself to the proper civil authorities.

As is true of a fugitive from justice, persons incarcerated upon conviction of a crime do not enjoy full citizenship rights, having by their conduct put themselves into a position of servitude. Similarly, persons under a court order based upon a finding of a continuing credible threat of serious bodily harm to another person have, by their actions, forfeited their right to keep and bear arms because they have put themselves under the supervisory authority of the court. Persons, while duly committed to a mental institution, would likewise lose their Second Amendment rights while in the custody of the civil authorities.

3. Persons Who Are Members of the American Polity

While current federal law prohibits a person under the age of twenty-one from *acquiring* a firearm from a federally licensed firearms dealer, the law does not prohibit any child from *possessing* a firearm.¹³² The minor children (under eighteen years old) of American citizens not yet outside the authority of their parents or of the civil authorities legitimately exercising power of *parens patriae* are not full-fledged members of the polity, lacking the legal capacity to consent to be governed by the constituted civil authorities. Thus, such children are under the authority of their parents who have discretion to decide when and how their children possess and use firearms.

The National Rifle Association has challenged the constitutionality of this prohibition as applied to an American citizen who is eighteen years old on the ground that such children have reached the age of maturity and are, therefore, entitled to the same right of purchase as an adult.¹³³ The United States Court of Appeals for the Fifth Circuit has upheld the statute on public safety grounds.¹³⁴ Dissenting from the appellate court's denial of a motion for a rehearing *en banc*, Judge Edith Jones, after review of the "relevant historical materials," concluded that "they couldn't be clearer: the

132. See 18 U.S.C. § 922(b)(1).

133. *NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 188 (5th Cir. 2012) *cert. denied* 2014 WL 684055 (Feb. 24, 2014).

134. *Id.* at 203.

right to keep and bear arms belonged to citizens 18 to 20 years old at the crucial period of our nation's history."¹³⁵ Writ of certiorari in this case was recently denied by the United States Supreme Court.¹³⁶

More controversial are other categorical denials that have been in place in the near and distant past, such as felons, illegal drug users and addicts, those persons adjudicated as "mentally defective" or those who have been committed to a mental institution, persons who have been dishonorably discharged from the Armed Forces, and persons convicted of a misdemeanor of domestic violence. To date no court has ruled that such categorical denials are unconstitutional. Instead, as is discussed below, it is commonly assumed that none of these categorical exclusions would violate the Second Amendment. Upon closer look, it appears that this assumption is largely based upon the application of Justice Breyer's balancing approach under which each category could be justified as a measure designed to protect public safety and, therefore, a constitutionally reasonable regulation.¹³⁷ Properly analyzed, however, each of the five categories may very well be constitutionally illegitimate.

a. Felons

With respect to the ban on felon possession, Justice Scalia wrote in *Heller* that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."¹³⁸ At the same time, Justice Scalia stated that such a law was only one of several "presumptively lawful regulatory measures."¹³⁹ Unlike the fugitive from justice and the renounced citizen, a felon has not voluntarily severed his connection to the political community. True, while incarcerated a felon forfeits many of his constitutional rights to the overarching disciplinary needs of prison life, that is justified on the grounds that the Government, as proprietor, has authority to "control behavior on its property."¹⁴⁰

135. *NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 336–44 (5th Cir. 2013) (per curiam denying rehearing en banc) (Jones, J., dissenting).

136. *See* 2014 WL 684055 (Feb. 24, 2014).

137. *See, e.g., United States v. Skoien*, 614 F.3d 638, 643–44 (7th Cir. 2010) (denying the right to possess arms where recidivism rate and risk outweighed the right to possess firearms after convictions for misdemeanor domestic abuse).

138. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

139. *Id.* at 627 n.26.

140. *See, e.g., Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 U.C.L.A. L. REV. 1443, 1447 (2009).

Historically, it could be argued that felony firearms disqualification can be constitutionally justified by the English common law of “civil death,” under which a person who committed a felony lost “all civil rights,” including the right to own property or to engage in any other legal function because he was “regarded as dead by the law.”¹⁴¹ Even in England the doctrine of civil death was used sparingly, reserving it for a criminal who is “no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society.”¹⁴² Under this view, a citizen who is found guilty of a felony would no longer be counted as a member of the political community and, therefore, not part of the “people” of the United States.

But the felony disqualification in current federal law does not extend to citizens who have been convicted of certain business crimes.¹⁴³ Nor is the current felony disqualification limited to those citizens convicted of a crime of violence.¹⁴⁴ Furthermore, “[c]ivil death and the other incidents of attainder were never a part of the common law recognized in the United States, and in the absence of statute, courts have refused to recognize them as an incident of conviction.”¹⁴⁵

To be sure, felons have been disenfranchised in America, and, even though such disenfranchisement can be traced back to the English “tradition of civil death,” it appears to have a life of its own separate and apart.¹⁴⁶ While felons have been disenfranchised in America, they have not been deprived of any other rights, such as those under the First Amendment. And as noted above, access to the vote has never been considered an essential attribute to full participation in the political community, and, thus, cannot serve as a precedent for denial of the right to keep and bear arms.

If felons cannot be disqualified, then it would logically follow that neither can a citizen who has been dishonorably discharged from the armed forces. Such a discharge can be imposed only by general court martial and upon

141. See Harry David Saunders, *Civil Death - A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988, 988–89 (1970).

142. 4 WILLIAM BLACKSTONE, COMMENTARIES *380.

143. See 18 U.S.C. § 921(a)(20).

144. See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J. OF LAW & PUB. POL. 695, 699, 706–07 (2009) (noting that, prior to 1961, there was a federal ban on felony possession, but it was “limited to those convicted of a ‘crime of violence’”).

145. Volokh, *supra* note 140, at 990.

146. See Sarah C. Grady, Comment, *Civil Death is Different: An Examination of a Post-Graham Challenge to Felon Disenfranchisement under the Eighth Amendment*, 102 J. OF CRIM. L. & CRIMINOLOGY 441, 443–47 (2012).

conviction of a serious violation of the Uniform Code of Military tantamount to a felony. The only difference would be that the citizen committed the crime while serving in the American armed forces and that the penalty imposed reflects a decision that the actions of the service member were inimical to the reputation of the armed forces. One might argue that such action was not only a crime but also a betrayal of loyalty arising from the special disciplinary relationship between the citizen and the government.

b. Misdemeanants

Even if felons could be disqualified on the ground that they are “civilly dead,” there is absolutely no support for applying that ancient doctrine to misdemeanants. Nor is there any independent support for any disqualification from exercising the right to keep and bear arms on the ground that commission of misdemeanor, even one involving force, provides a sufficient basis for exclusion of the miscreant from the political community. Quite the contrary, as Blackstone documents in his *Commentaries*, while misdemeanors are synonymous with crimes, “in common usage, the word ‘crimes’ is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprized under the gentler name of ‘misdemeanors’ only.”¹⁴⁷

The Second Amendment properly applied, then, would be violated by a rule disqualifying citizens who have been convicted of a misdemeanor crime of domestic violence, as prescribed by 18 U.S.C. section 922(g)(9),¹⁴⁸ popularly known as the Lautenberg Amendment. However, eschewing *Heller’s* categorical test, the United States Court of Appeals for the Seventh Circuit *en banc* resorted to a modest interest balancing test¹⁴⁹ based on general social science studies of domestic violence to uphold the constitutionality of an absolute ban based upon a “belief . . . that people who have been convicted of violence once—toward a spouse, child, or domestic

147. 4 WILLIAM BLACKSTONE, COMMENTARIES *5.

148. 18 U.S.C. § 922(g)(9) (“It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

149. See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 745–46 (2012).

partner, no less—are likely to use violence again.”¹⁵⁰ As dissenting judge Sykes pointed out, the court did not even insist that the government make its case, but rather “supplied” the empirical studies and data—“an odd way to put the government to its burden of justifying a law that prohibits the exercise of a constitutional right.”¹⁵¹ *Skoien* is, thus, an example of rule by judges, *par excellence*, not worthy of an American court committed to the rule of law.

c. The mentally ill

An even greater threat posed to the rule of law is the popular assumption that it is constitutional to keep firearms out of the hands of the mentally ill, as many have inferred from Justice Scalia’s gratuitous statement in *Heller* that “nothing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by . . . the mentally ill.”¹⁵² In fact, the United States Court of Appeals for the First Circuit accurately observed, after *Heller*, that “section 922(g)(4) [of Title 18, United States Code,] does not bar firearms possession for those who are or were mentally ill and dangerous, but (pertinently) only for any person ‘who has been adjudicated as a mental defective’ or ‘has been committed to a mental institution.’”¹⁵³ Even before *Heller*, the United States Court of Appeals for the Eighth Circuit ruled in *United States v. Hansel*¹⁵⁴ that a State Board of Mental Health finding that a defendant was “mentally ill and in need of hospitalization” did not constitute an adjudication that the defendant was a “mental defective.”¹⁵⁵ After a careful review of the relevant medical and legal literature, the court acknowledged that there is “a distinction . . . between those persons who are mentally defective or deficient on the one hand, and those who are mentally diseased or ill on the other.”¹⁵⁶ A mental defective, the Court concluded, designates a person “of subnormal intelligence,” one who is “feebleminded,” and in “varying degrees of the descending scale of morosity, imbecility and idiocy.”¹⁵⁷ If a person fits this definition, then a person adjudicated as mental defective could perhaps be excluded from

150. *United States v. Skoien*, 614 F.3d 638, 642 (2010).

151. *Id.* at 646–47 (Sykes, J., dissenting).

152. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

153. *Rehlander v. United States*, 666 F.3d 45, 50 (1st Cir. 2012).

154. *United States v. Hansel*, 474 F.2d 1120 (8th Cir. 1973).

155. *Id.* at 1123.

156. *Id.* at 1124.

157. *Id.* (quoting *People v. Hoffmann*, 8 N.Y.S.2d 83, 85 (App. Div. 1938)).

the “people” on much the ground of a lack of capacity to consent, like a person under the age of eighteen, and not suited to serve in the people’s militia.

If, however, a “mental defective” is construed more broadly—to extend to a person who has been “adjudicated” mentally ill or committed to a mental institution, there is a strong argument that such persons cannot constitutionally be excluded from the “people,” in light of the well-documented twentieth century political abuse of psychiatry in the former Soviet Union and other communist countries.¹⁵⁸

While some would dismiss such concerns as farfetched, there are already such rumblings on the Internet. In a December 26, 2012 article in the Huffington Post, Mark Olmsted penned these words:

There is nothing about NRA-crazy we dare dismiss. It’s a deep crazy. It is the craziness of millions of gun-owners who have convinced themselves . . . that wielding an instrument of mayhem is spiritually elevated rather than spiritually bankrupt. It’s the craziness of confusing the Second Amendment with the Lord’s prayer. It’s the craziness which tells you the symptoms of your disease as your cure.¹⁵⁹

As famed psychiatrist, the late Thomas Szasz observed, the danger of an alliance between civil government and mental illness is similar to the danger of an alliance between civil government and religious faith: Both open the door to government tyranny in the form of a therapeutic state empowered to ensure right thinking.¹⁶⁰

d. Drug users

In a recent report by Mayors Against Illegal Guns, gun control advocates lamented the fact that the National Instant Criminal Background Check (NICS) has utterly failed to keep firearms out of the hands of the mentally

158. See Robert van Voren, *Political Abuse of Psychiatry — An Historical Overview*, SCHIZOPHRENIA BULLETIN, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2800147/>.

159. Mark Olmsted, *The Deep Crazy of the NRA*, HUFFINGTON POST, Dec. 26, 2012, http://www.huffingtonpost.com/mark-olmsted/the-deep-crazy-of-the-nra_b_2357428.html.

160. See CCHR Co-Founder D. Thomas Szasz Professor of Psychiatry Emeritus, CCHR International: The Mental Health Watchdog, <http://www.cchr.org/about-us/co-founder-dr-thomas-szasz/quotes.html> (last visited Jan. 4, 2014) (presenting Dr. Szasz’s thoughts on the dangers of government-psychiatry alliance).

ill and drug addicts.¹⁶¹ Why? Because there are no official government records kept on persons who are mentally ill or addicted to drugs. Indeed, the Mayors report found that “Forty-four states have submitted fewer than 10 records, and 33 of those haven’t turned in any.”¹⁶² Such erratic record keeping is strong testimony that Congress is not really serious about keeping firearms out of the hands of drug users.

Additionally, it appears that the drug use disqualification illegitimately discriminates in favor of citizens whose addiction is to FDA-approved pharmaceuticals and against those citizens whose addiction is to “controlled substances,” as defined by federal law. Yet the National Institute on Drug Abuse has reported recently that the misuse of pain relievers, tranquilizers, stimulants, and sedatives pose a serious problem among young adults.¹⁶³ Furthermore, with the changes in state law governing marijuana use, the line drawn by the federal law between cannabis, a firearm disqualifier, and alcohol use, is becoming increasingly problematic.

4. Can the Right to Keep and Bear Arms Be Forfeited?

In an Amicus Brief submitted on behalf of Gun Owners of America (GOA) and Gun Owners Foundation (GOF) in the Seventh Circuit appeal in *United States v. Skoien*, important questions were posed:

If a citizen may be deprived of his Second Amendment right as a consequence of having been convicted of a M[isdemeanor]C[rime of] D[omestic]V[iolence], what principle would prevent the government from similarly abridging First Amendment rights as well? Could the government, for example, deprive a citizen of his freedom to engage in peaceable assembly on the ground that he had been previously convicted of disorderly conduct in relation to a public protest against an abortion clinic which, in Congress’s predictive judgment, created serious dangers to the public peace and a woman’s right to choose?¹⁶⁴

161. See Michael McAuliff, *Gun-Check System Misses Millions of Drug Abusers, People with Mental Illness, New Report Finds*, HUFFINGTON POST, Nov. 14, 2011, http://www.huffingtonpost.com/2011/11/14/gun-check-system-misses-millions_n_1093899.html.

162. *Id.*

163. See *Topics in Brief: Prescription Drug Abuse*, NATIONAL INSTITUTE ON DRUG ABUSE (Revised Dec. 2011), <http://www.drugabuse.gov/publications/topics-in-brief/prescription-drug-abuse>.

164. Brief for Gun Owners Foundation & Gun Owners of America, Inc. as Amici Curiae Supporting Appellants and Reversal at 14, *United States v. Skoien*, 614 F.3d 638 (2010) (No.

The very idea that an American citizen could be denied his First Amendment rights on the ground that, in the past, he committed a felony or serious misdemeanor is antithetical to the principle of popular sovereignty. In a nation where the government serves the people—not the other way around, the government cannot forcibly divest a citizen of his citizenship.¹⁶⁵ If Congress may not take away an American’s citizenship, then it cannot deny to any citizen any right that is inherent in citizenship. Thus, as a convicted felon may not constitutionally be denied the freedoms of religion, speech, press, and assembly, neither can he, on account of his felony conviction, be denied his right to keep and bear arms. That right, along with the others that are inherent in one’s citizenship, can only be forfeited by a voluntary act renouncing one’s citizenship.¹⁶⁶

C. *The Law of Keeping and Bearing Arms*

1. Balancing the Interests Revisited

In *Moore v. Madigan*,¹⁶⁷ the United States Court of Appeals for the Seventh Circuit addressed the question whether an Illinois statute that, with few exceptions, prohibited a person from carrying a ready-to-use firearm outside one’s home or place of business was unconstitutional under the Second Amendment.¹⁶⁸ In a rare judicial act of conforming his inquiry to *Heller*’s textual analysis, Judge Richard Posner began with the proposition that:

The right to “bear” as distinct from the right to “keep” arms is unlikely to refer to the home. To speak of “bearing” arms within one’s home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.¹⁶⁹

To this textual beginning, Judge Posner added an historical excursion starting with early America and Blackstone’s England, concluding that the

08-3770), 2010 WL 2665129.

165. See *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (“[W]e reject the idea . . . [that] Congress has any general power, express or implied, to take away an American citizen’s citizenship without his assent.”).

166. See *id.* at 262.

167. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

168. *Id.* at 934.

169. *Id.* at 936.

need of arms for self-defense in areas away from home at the time of the adoption of the Bill of Rights had not changed in “[t]wenty-first century Illinois [which] has no hostile Indians[,] [b]ut a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower.”¹⁷⁰

Judge Posner should have ended his opinion right there, but he could not refrain from reviewing “the empirical literature on the effects of allowing carriage of guns in public.”¹⁷¹ He did, however, manage to do what very few of his appellate colleagues have been able to do—he refused to be persuaded by the social scientific data one way or the other.¹⁷² But he declined on what appears to be “pragmatic” grounds, not principle.¹⁷³

One year earlier, D.C. Circuit Judge Brett Kavanaugh offered another rare principled opinion; this one in dissent from his appellate colleague’s ruling that the constitutionality of the D.C. gun control law enacted post-*Heller* was to be tested by “intermediate scrutiny.”¹⁷⁴

Put in simple terms, the issue with respect to what test to apply to gun bans and regulations is this: Are gun bans and regulations to be analyzed based on the Second Amendment’s text, history, and tradition (as well as by appropriate analogues thereto when dealing with modern weapons and new circumstances . . .)? Or may judges re-calibrate the scope of the Second Amendment right based on judicial assessment of whether the law advances a sufficiently compelling or important government interest to override the individual rights?¹⁷⁵

Judge Kavanaugh answered his own question, rehearsing Justice Scalia’s *Heller* opinion in which he specifically denounces the judicial habit of assessing the “usefulness” of the Second Amendment guarantee.¹⁷⁶

170. *Id.* at 937.

171. *Id.* at 939.

172. *See id.* at 939–42.

173. *Id.* at 939 (“In sum, the empirical literature on the effects of allowing the carriage of guns in public fails to establish a pragmatic defense of the Illinois law.”).

174. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1285 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

175. *Id.* at 1271.

176. *See id.* at 1277.

So the constitutional questions concerning the possession and use of arms and the types of arms, like the question of individual entitlement to the right to keep and bear arms, is subject to text, context, and history.

2. The Original Purpose of the Right to Keep and Bear Arms

No doubt Judge Posner was correct to conclude that the right to “bear” arms adds to the right to “keep,” and that the term “bear” includes carry in public places as well as from room to room. But Judge Posner neglected putting “bear” in a fulsome Second Amendment context. According to Judge Posner, the American right to keep and bear arms was designed “for personal self-defense” against “hostile Indians.”¹⁷⁷ In fact, as Justice Scalia observed, the express terms of the Second Amendment settles its purpose, and it is not Judge Posner’s:

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, “Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”¹⁷⁸

Therefore, Justice Scalia reasoned, because “[l]ogic demands that there be a link between the stated purpose and the command,” we must “ensure that our reading of the operative clause is consistent with the announced purpose.”¹⁷⁹ Thus, after determining that the operative clause “guarantee[s] the individual right to possess and carry weapons in case of confrontation,”¹⁸⁰ Justice Scalia checked to see whether that determination was consistent with the Second Amendment’s purpose, namely, to prevent the elimination of a citizen’s militia which was deemed to be necessary to secure a free civil order.¹⁸¹ He found that an armed citizenry for “self-defense and hunting” suited that purpose because it ensured a well-trained body of citizens independent and apart from a state-organized militia and, thus, as a “safeguard against tyranny.”¹⁸²

177. *Moore*, 702 F.3d at 936.

178. *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

179. *Id.* at 577–78.

180. *Id.* at 592.

181. *Id.* at 598.

182. *Id.* at 600.

Thus, the *Heller* Court posited that to be a constitutionally protected “arm,” a weapon must not only be one that a person may “bear,” or carry, but one that is “in common use,” not one that is “dangerous and unusual.”¹⁸³ Any weapon that is suitable self-defense or hunting would clearly qualify.¹⁸⁴ So would so-called “assault weapons” and “large-capacity magazines,” both of which are commonly possessed.¹⁸⁵ Such weaponry is well within capability of use by the ordinary citizen and, therefore, suited to use in a self-governing citizen’s militia composed of self-disciplined and familiarly-trained-in-arms persons.¹⁸⁶

It would be mistake, however, to assume that the weaponry protected by the Second Amendment is limited to those arms in common use today. Rather, as the Oregon Supreme Court has observed:

[T]he term “arms” as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense.¹⁸⁷

While this interpretive standard would not embrace military weapons “never . . . intended for personal possession and protection,” but only for exclusive use by the military, it would not exclude from Second

183. *Id.* at 626–27.

184. *Id.* at 628–29.

185. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1260–61 (D.C. Cir. 2011).

186. That a person well trained in arms for hunting is ready to engage in a war against tyrants is exemplified by an account written by Stephen Ambrose in his book on World War II, *Citizen Soldiers*, of one Lieutenant Waverly Way:

He was from Batesville, Mississippi, and was an avid woodsman, skilled with rifles and shotguns. He claimed he had never missed a shot in his life. . . .

....

. . . He was going to do a one-man reconnaissance to formulate a plan of attack. Wray was going out into the unknown. . . .

....

Wray moved up sunken lanes, crossed an orchard, pushed his way through hedgerows, crawled through a ditch. Along the way he noted concentrations of Germans, in field and lanes. A man without his woodsman’s sense of direction would have gotten lost.

The N-13 was the axis of the German attack. Wray “moving like the deer stalker he was” . . . got to a place where he would hear guttural voices . . . Wray rose up . . . swung his M-1 to a ready position [and shot 10 Germans dead] with one shot each.

STEPHEN AMBROSE, *CITIZEN SOLDIERS* 18–20 (1997).

187. *Oregon v. Kessler*, 614 P.2d 94, 99 (Or. 1980).

Amendment protection the “modern day equivalents of the weapons used by colonial militiamen.”¹⁸⁸ Thus, any modern weapon that is a lineal descendent of the “ordinary military equipment [the use of which] could contribute to the common defense,” should be constitutionally protected.¹⁸⁹

Once a firearm or other weapon is determined to be a constitutionally protected arm, then the “keeping” and “bearing” of that arm is free from all civil limitations, restrictions, and burdens, including registration, permits, training, concealed carry, open carry, and other similar usages. However, applying the interest balancing methodology employed by the dissenters in *Heller*, lower federal courts are generally sustaining the constitutionality of such laws.¹⁹⁰ Without any discussion whether such laws square with the purpose of protecting the right of the people to a citizen’s militia free from regulation by the state, the court of appeals in *Heller II* begins with the presumption that general registration requirements are constitutional because they are “long-standing,” dating back to the beginning of the twentieth century.¹⁹¹ Hence, the *Heller II* Court wrongfully assumed that only “novel registration requirements” are potentially unconstitutional.¹⁹²

Courts generally have also assumed that laws prohibiting the carrying of a lawful firearm in public are presumptively constitutional, the only question being whether the Second Amendment requires that such a permit must be granted, or whether such permit may be withheld unless the person seeking the permit has shown “good’ and ‘substantial’ reason,” such as “a special need for self-defense distinguishable from that of the population at large, often through a specific and particularized threat of harm.”¹⁹³ In essence, such laws presume that the core Second Amendment right is self-defense inside the home in disregard of the core purpose of a citizen’s militia.¹⁹⁴ Such an assumption is doubtless inconsistent with the right of sovereign people to make their own decision whether they needed to carry

188. *Id.*

189. *See* *United States v. Miller*, 307 U.S. 174, 178 (1939). Justice Scalia’s opinion in *Heller* is to the contrary, having mistakenly narrowed *Miller* to include only weapons suitable for self-defense, and thereby, having created an unnecessary dissonance between the Amendment’s operative and prefatory clauses, apparently to foreclose any claim that the Second Amendment might extend beyond semi-automatic firearms to machine guns. *See Heller*, 554 U.S. at 624–28.

190. *See, e.g., Heller II* at 1248–55.

191. *See id.* at 1253–55.

192. *See id.* at 1255–60.

193. *See Drake v. Filko*, 724 F.3d 426, 442 (3d Cir. 2013).

194. *See, e.g., Woollard v. Gallagher*, 712 F.3d 865, 874 (2013).

their weapon at the ready in public, should the need arise. A sovereign people is primarily self-governed and mutually bound as a community, not lorded-over by their civil servants.¹⁹⁵

Additionally, the manufacture and marketing of constitutionally protected arms must be free from any targeted licensure, the access to arms implicit in the right to keep and to bear them.¹⁹⁶ Any such infringements would compromise the very notion of a “well-regulated” militia, that is, a militia of self-governed, able-bodied, well-armed citizens duty-bound to fight for freedom, armed with weapons acquired and readied for use by their own means, and under their own sovereign authority, completely out from under the civil authorities, federal or state. Otherwise, how could the people’s militia described in the Second Amendment be necessary “to the security of a free state,” the first principle of which is the continuing civil sovereignty of the people?¹⁹⁷

3. The Right Presupposes a Moral and Religious People

Modern gun control advocates would perceive such an unregulated regime as anarchy, not freedom. Indeed, they contend that it is the utmost folly to rely on individual or community self-government as a check on “gun violence.” Rather, in their opinion anything short of an all-encompassing civil government-control of firearm would be the functional equivalent of a lawless world.¹⁹⁸ According to their world-view, if civil

195. See *Matthew* 20:25.

196. See *Illinois Ass’n. of Firearms Retailers v. City of Chicago*, No. 10C 04184, 2014 WL 31339 (N.D. Ill. Jan. 6, 2014) (“[J]ust as the gun-range ban [unconstitutionally] prevented Chicagoans from meeting a Chicago Firearms Permit prerequisite of legal gun ownership, the ban on gun sales and transfers prevents Chicagoans from fulfilling, within the limits of Chicago, the *most fundamental* prerequisite of legal gun ownership — that of simple acquisition.”).

197. See Edward J. Erlar, *The Second Amendment as an Expression of First Principles*, 42 *IMPRIMUS* No. 3, 2–5 (2013); see also *District of Columbia v. Heller*, 554 U.S. 570, 595–600 (2008).

198. See, e.g., Editorial, *The Virginia Tech Betrayal*, *N.Y. TIMES*, Feb. 7, 2009, http://www.nytimes.com/2009/02/08/opinion/08sun3.html?_r=0 (“Richmond [Virginia] lawmakers have callously rejected a gun control proposal sought as a memorial to the 32 students slain in the Virginia Tech massacre. Once more, state senators proved more beholden to the gun lobby’s propaganda and campaign money than to public safety. . . . Bereft of courage as public servants, the Richmond senators made clear their crocodile tears about “closure,” shed in the immediate horror of students gunned down. They also made clear the need for a federal law to bypass cowardly statehouses and to close gun-show loopholes.”).

government force is not employed, then there are no restraints upon human behavior, constrained as mankind is only by the genes and the environment.

Such was decidedly not the worldview of America's founders, the architects of the Second Amendment. As John Adams observed: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."¹⁹⁹ From before the founding of the United States of America, the American legal order was explicitly founded upon Christian principles. As Justice Joseph Story proclaimed in his inaugural address as the first Dane Professor of Law at Harvard:

One of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the common law, from which it seeks the sanction of its rights, and by which it endeavours to regulate its doctrines There never has been a period, in which the Common Law did not recognize Christianity as lying at its foundations.²⁰⁰

One of those first founding principles featured in the common law of torts and crimes is the Christian view that man, created in the image of God, is not determined by his genes or environment. Rather, as Jesus taught:

There is nothing from without a man, that entering into him can defile him: but the things which come out of him, those are they that defile the man. . . . Are ye so without understanding also? Do ye not perceive that whatsoever thing from without entereth into the man, it cannot defile him; [b]ecause it entereth not into his heart, but into the belly For from within, out of the heart of men proceed evil thoughts, adulteries, fornications, murders²⁰¹

Applied to the twenty-first century, this teaching affirms that guns don't kill people; people kill people. Ours, however, is an evolutionary age. Our culture has become increasingly relativistic and situational. Nowhere is this

199. Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), in *REVOLUTIONARY SERVICES AND CIVIL LIFE OF GENERAL WILLIAM HULL* 265, 266 (Maria Campbell ed., 1848), available at <http://books.google.com/books?id=E2kFAAAAQAAJ&dq=editions%3AVsZcW99fWPGC&pg=PA265#v=onepage&q&f=false>.

200. Joseph Story, *Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, Aug. 25th, 1829*, reprinted in *LEGAL MIND IN AMERICA* 178 (P. Miller ed., 1962).

201. *Mark* 7:15, 18–20 (King James).

more evident than in the national outcry of politicians, professors, psychiatrists, and other professionals for more and more gun control in the aftermath of the last mass shooting by a madman, allegedly addicted to violent video games, behavior-altering drugs, or some other social or psychological malady.

4. The Right Precludes Preventive Measures

In a revealing concurring opinion upholding a National Park ban on loaded handguns, Fourth Circuit Judge J. Harvie Wilkinson III “eloquently and candidly”²⁰² excused the court’s refusal to extend *Heller I* outside the home, stating: “We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”²⁰³ Unwittingly, Judge Wilkinson revealed why gun control laws undermine the constitutional foundation upon which the right to keep and bear arms rests. No right designed to protect the people from tyranny can possibly be secured against any law that is designed to prevent firearm violence, if the constitutionality of that law is determined by the predictive judgments of any civil authority—legislative, executive, or judicial. As Judge Wilkinson’s statement reveals, those in power need only fear those “mistaken” decisions favoring firearm freedoms, which are bound to be revealed, not those erroneous decisions denying access to a firearm that will never be found out.

Despite this built-in bias against firearm freedoms, modern day civil authorities take advantage of their apparent monopoly on force to control firearm possession and use without asking the question whether civil authorities have jurisdiction to punish today on the ground of what a person might do tomorrow. Such a regime of “preventive justice” is wrong on two grounds. It is based upon the erroneous presumption that man can know the future when, in fact, he knows not even what tomorrow will bring, except for that which God chooses to reveal to him.²⁰⁴ And it is based upon the further mistaken assumption that if man does not use the force of civil government to prevent future harm, there is no alternative effective force to protect the public from harm by the misuse of firearms.²⁰⁵ However, in a legal and political order based upon Biblical principles, we know that

202. Rostron, *supra* note 149, at 758.

203. *United States v. Masciandro*, 638 F.3d 458, 475 (4th Cir. 2011).

204. *See James* 4:13–15.

205. *But see, e.g., Genesis* 20:6.

God not only has the authority, but the power to prevent individual wrongdoing before it happens.²⁰⁶

VI. CONCLUSION

As Chief Justice Roberts indicated at oral argument in *Heller*, there is no good reason for the Second Amendment to pick up the “sort of baggage” of interest balancing and judicial reasoning that the courts have saddled upon the First Amendment.²⁰⁷ After a decent start in *Heller* and *McDonald* to establish a rule of law based upon the written text of the Second Amendment, the *Heller* majority opinion is in danger of being overrun by lower courts that, out of habit or prejudice or both, are substituting their evolving reasoning for the fixed principles. To date, the Court has declined review of any Second Amendment claim on the merits, looking for the best possible case for elaborating and solidifying the textual principles embraced in *Heller*. At stake is whether the right to keep and bear arms will be governed by the rule of law, or will revert to rule by judges.

206. See, e.g., *id.*

207. Oral Argument, *supra* note 84, at 44.