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Owen McGovern

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THE RESPONSIBLE GUN OWNERSHIP ORDINANCE AND NOVEL TEXTUAL QUESTIONS ABOUT THE SECOND AMENDMENT

Owen McGovern*

Although gun ownership is a fundamental right under the Second Amendment of the Constitution,¹ it is subject to reasonable restrictions.² The City of Chicago's most recent attempt to define the contours of those restrictions raises serious textual questions about the meaning of the Second Amendment. This Comment will evaluate various provisions of Chicago's new firearm ordinance and conclude (1) that it is likely unconstitutional and (2) that future gun-control regulations will only be upheld if they respect the full understanding of the contours of the Second Amendment adopted in Heller, rather than merely satisfying its narrow holding.

I. INTRODUCTION

In the wake of *District of Columbia v. Heller*³ and *McDonald v. City of Chicago*,⁴ the City of Chicago promptly amended the Responsible Gun Ownership Ordinance (the Ordinance) to further its interest in protecting the public welfare and safety.⁵ The Ordinance immediately generated federal

* J.D., Northwestern University School of Law, 2012.

¹ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010).

² *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (listing reasonable restrictions, such as “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms”).

³ 554 U.S. 570.

⁴ 130 S. Ct. 3020.

⁵ Chi., Ill., Responsible Gun Ownership Ordinance (July 2, 2010) (codified in scattered sections of CHI., ILL., MUN. CODE (2010)).

lawsuits alleging that several provisions violate fundamental rights under the Second Amendment.⁶ The Second Amendment 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.⁷

The Chicago Ordinance is particularly worthy of evaluation for three reasons. First, now that the Second Amendment has been incorporated against the states,⁸ these suits are the first in the wave of gun-control litigation that has been predicted since *Heller* was decided.⁹ Second, the new Ordinance replaced the provisions struck down in *McDonald*, rendering it particularly relevant for evaluating the implications of that decision.¹⁰ And third, the Ordinance—as originally amended¹¹—contained several provisions that implicate previously unexamined limits to the text of the Second Amendment.

Until recently, scholarship has focused on whether the Second Amendment guarantees an individual right to bear arms and whether that right is incorporated against the states.¹² As those questions have now been resolved in favor of an individual right and incorporation, states are left scrambling to define the line between a legitimate exercise of their police power and infringement on the fundamental rights of their citizens. The new Ordinance is a highly visible example of this kind of legislation. A textual analysis¹³ of the rights protected by the Second Amendment in this context may be beneficial in providing guidance to other states as they seek an understanding of the appropriate reach of the police power.

⁶ See Complaint, *Ezell v. City of Chicago*, 651 F.3d 687 (7th Cir. 2011) (No. 10–3525); *Benson v. City of Chicago*, No. 1:10-cv-04184, 2010 WL 2796263 (N.D. Ill. Jul. 6, 2010).

⁷ U.S. CONST. amend. II.

⁸ See generally *McDonald*, 130 S. Ct. 3020.

⁹ Linda Greenhouse, *D.C. Ban Rejected*, N.Y. TIMES, June 27, 2008, at A1.

¹⁰ See Chi., Ill., Responsible Gun Ownership Ordinance (stating that the Ordinance was amended in light of *McDonald* and *Heller*).

¹¹ In response to the Seventh Circuit's ruling in *Ezell*, which affirmed the grant of a preliminary injunction against the enforcement of provisions forbidding firing ranges within the city limits, *Ezell*, 651 F.3d at 711, the City of Chicago amended CHI., ILL. MUN. CODE § 8-20-280 to allow for firearm training within the city. Coun. J. 7-6-11, p. 3073, § 4 (repealing § 8-20-280, which prohibited shooting galleries and target ranges). However, since this Comment aims to help other legislatures understand the scope of the Second Amendment after *Heller*, it will address the statute as it was initially enacted and explain why such provisions were contrary to the Amendment's purpose.

¹² See, e.g., CLAYTON E. CRAMER, FOR DEFENSE OF THEMSELVES AND THE STATE (1994); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED (Indep. Inst., 2d ed. 1994) (1984).

¹³ Legislatures will most benefit from a textual analysis because this is the analysis used by the Supreme Court. *McDonald*, 130 S. Ct. at 3047 (insisting that “the scope of the Second Amendment right” is determined by textual and historical inquiry, not by interest-balancing).

In *Heller*, the Court engaged in an in-depth analysis of the meaning of the Second Amendment and answered a number of the preliminary questions needed to evaluate these provisions.¹⁴ However, many questions remain unanswered. Part II of this Comment will summarize the *Heller* decision, highlighting the conclusions reached and emphasizing the questions that remain unanswered. It will also briefly recap *McDonald*, which incorporated the Second Amendment against the states, and highlight the points the Court found particularly important in both decisions. Part III will attempt to use the original understanding of the text of the Second Amendment to answer key questions left open by *Heller*. It will then apply those answers to the new Ordinance to evaluate how the provisions will fare under constitutional scrutiny. Finally, Part IV will put the analysis in a broader context, focusing on the implications for legislatures attempting to regulate firearms after *Heller* and *McDonald* and identifying which concerns must be respected as central to effective exercise of the Second Amendment right.

This Comment will conclude that the recently enacted Responsible Gun Ownership Ordinance is likely unconstitutional, as it fails to respect the activities protected by the Second Amendment and intrudes upon concerns that were central to the Amendment’s adoption.

II. BACKGROUND

A. DISTRICT OF COLUMBIA V. HELLER

In *Heller*, the Supreme Court squarely addressed the meaning of the Second Amendment¹⁵ and determined that it “guarantee[s] the *individual* right to possess and carry weapons in case of confrontation.”¹⁶ This conclusion resolved the longstanding debate over whether the Second Amendment guarantees an individual right, or whether “the right of the people” was premised upon membership in a militia.¹⁷

The determination that the Second Amendment protects an individual right and the reasoning in support of that conclusion have significant implications for the meaning of the provisions within the Second Amendment. These provisions, in turn, are essential to understanding the scope of the Second Amendment’s protection and evaluating the constitutionality of the Chicago Ordinance and future attempts by legislators to restrict the right to keep and bear arms. As such, it is

¹⁴ District of Columbia v. Heller, 554 U.S. 570, 577–603 (2008).

¹⁵ *Id.*

¹⁶ *Id.* at 592 (emphasis added).

¹⁷ U.S. CONST. amend. II.

important to understand precisely what the Supreme Court determined in *Heller*, precisely which questions the Court answered, and precisely which questions were not addressed.

1. The Right of the People

The Court in *Heller* determined that the phrase, “the right of the people,” unambiguously referred to an “individual right[], not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body.”¹⁸ This determination was made through reference to other uses of “the people” in the Constitution, which always refer to an individual right.¹⁹

This understanding has significant implications for the meaning of the rest of the Amendment, particularly the Militia Clause. Since the “militia” consisted of “a subset of ‘the people’—those who were male, able bodied, and within a certain age range,”²⁰ membership in the militia was an inherent characteristic, not an organizational construct. This means the Amendment’s scope reaches beyond the militia context to “all members of the political community.”²¹ The majority’s understanding of the Second Amendment as protecting an individual right is the key difference underlying its disagreement with the dissent in *Heller*, and can be seen throughout the Court’s interpretation of each provision.

2. To Keep and Bear Arms

The Court then addressed the substance of the protected right “to keep and bear Arms.” Eschewing the dissent’s suggestion that “to keep and bear Arms” was a term of art,²² the majority opinion addressed the phrase as two separate actions: to keep arms and to bear arms. Before addressing the verbs, however, the Court addressed their object: “Arms.”²³

i. The Meaning of “Arms”

The Court in *Heller* determined that the meaning of the term “Arms” has not changed since 1791, and “extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of

¹⁸ *Heller*, 554 U.S. at 579.

¹⁹ *Id.* at 578–80 (“Nowhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”).

²⁰ *Id.* at 580.

²¹ *Id.*

²² *Id.* at 591 (noting that “[s]tate constitutions of the founding period routinely grouped multiple (related) guarantees under a singular ‘right’”).

²³ *Id.* at 581.

the founding.”²⁴ The term is not limited to arms used in a military context,²⁵ but extends to “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.”²⁶

As used in the Second Amendment, however, the term “Arms” is not given the maximum scope suggested by its dictionary definition as “any thing that a man . . . useth . . . to cast at or strike another.”²⁷ Rather, the term “Arms” has been understood to encompass weapons in the common usage.²⁸ This common-usage understanding includes handguns but excludes “dangerous and unusual weapons,” such as M-16 rifles.²⁹ The Court noted that this restriction on the term “Arms” creates tension with the concept of a militia capable of effective resistance to tyrannical oppression, particularly given the capabilities of modern militaries.³⁰ Despite this tension between the Amendment’s purpose and its practical application, the Court deferred to the limitation on the meaning of “Arms” adopted in *United States v. Miller*,³¹ which the Court interpreted as holding that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”³²

While *Heller* established the form of “Arms” referenced in the Second Amendment, it did not answer the question of whether “Arms,” as applied to an individual, refers to the possession of a single weapon for use in his defense, or multiple weapons, as the plural form of the term “Arms” might suggest.³³ This question will be addressed in Part III.A.

ii. To Keep Arms

After establishing the meaning of “Arms” and its restriction within the Second Amendment, the Court in *Heller* then evaluated what it means to

²⁴ *Id.* at 582.

²⁵ *Id.* at 581 (stating that “[s]ervants and labourers shall use bows and arrows on Sundays, &c. and not bear other arms” to demonstrate that “arms” refers to “weapons that were not specifically designed for military use” (citing 1 T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY 187 (2d ed. 1771))).

²⁶ *Id.* (quoting CUNNINGHAM, *supra* note 25, at 187) (internal quotation marks omitted).

²⁷ *Id.* (quoting CUNNINGHAM, *supra* note 25, at 187) (internal quotation marks omitted).

²⁸ *Id.* at 627 (“[T]he sorts of weapons protected were those ‘in common use at the time.’” (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939))).

²⁹ *Id.* (internal quotation marks omitted).

³⁰ *Id.*

³¹ 307 U.S. 174.

³² *Heller*, 554 U.S. at 625.

³³ Compare *id.* at 581 (“any thing that a man wears for his defence” (emphasis added) (quoting CUNNINGHAM, *supra* note 25, at 187)), with *id.* (“[w]eapons of offence” (alteration in original) (emphasis added) (quoting 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 106 (4th ed., reprinted 1978) (1773))).

keep arms. “[T]he most natural reading of ‘keep Arms’ in the Second Amendment is to ‘have weapons.’”³⁴ As the meaning of “Arms” was not limited to those weapons used for military service, the right to “keep Arms” was likewise unconnected to an organized fighting force. Rather, “[k]eep arms’ was simply a common way of referring to possessing arms, for militiamen *and everyone else*.”³⁵ This is consistent with the Court’s understanding of the “right of the people” as enshrining an individual right, as well as historical texts discussing the right to keep arms for individual defense.³⁶

The question that remains unanswered, however, is whether this right to keep arms for one’s personal defense allows restrictions on the condition in which the arms may be kept. *Heller* established that the District of Columbia’s requirement “that firearms in the home be rendered and kept inoperable at all times . . . makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.”³⁷ The question raised by the Chicago Ordinance—which allows only one operable firearm in the home at a time—is whether it can require that all other firearms in a home be rendered inoperable if a single firearm is kept unlocked and ready for use.³⁸

iii. To Bear Arms

Continuing with the substance of the Second Amendment, the Court determined that the term “to bear” carried the same meaning at the time of the Amendment’s adoption that it does today: “to carry.”³⁹ When used in conjunction with “Arms,” however, the term has a more specific meaning: carrying arms for the purpose of confrontation.⁴⁰ As with the term “keep Arms,” the right to “bear Arms” was not limited to a military context, but referred to the individual right to “wear, 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.”⁴¹ This definition sharply contrasted with the understanding

³⁴ *Id.* at 582.

³⁵ *Id.* at 583 (citations omitted).

³⁶ *Id.* at 583 n.7 (citing historical examples of the right to keep arms for individual defense).

³⁷ *Id.* at 630.

³⁸ CHI., ILL., MUN. CODE § 8-20-040 (2011) (allowing only one operable firearm in the home).

³⁹ *Heller*, 554 U.S. at 584 (internal quotation marks omitted).

⁴⁰ *Id.*

⁴¹ *Id.* (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998)); *see also id.* (stating that “‘bear arms’ was unambiguously used to refer to the carrying of weapons

adopted by the dissent, which gave “bear Arms” an idiomatic meaning: “to serve as a soldier, do military service, fight.”⁴² However, the Court rejected this definition, noting that “if ‘bear arms’ means . . . the carrying of arms only for military purposes, one simply cannot add ‘for the purpose of killing game’” to the end of the phrase,⁴³ as was done in an amicus brief filed by linguistics professors.⁴⁴

iv. The Full Meaning of “to Keep and Bear Arms”

Putting the individual pieces of the clause “to keep and bear Arms” together, the Court determined that it “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”⁴⁵ It further noted that this individual right predates the Constitution and is not dependent upon the Bill of Rights or the federal government for its existence.⁴⁶ The Court explicitly rejected any connection between the right and public service, as “it was secured to [the people] as individuals, according to ‘libertarian political principles,’ not as members of a fighting force.”⁴⁷

The phrase “to keep and bear Arms” was not a term of art limiting that right to military service.⁴⁸ Instead, the core of the right to keep arms and the right to bear arms was the fundamental right to self-defense, as “Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repe[l] force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’”⁴⁹

Having established “the natural right of resistance and self-preservation,” and “the right of having and using arms for self-preservation

outside of an organized militia”); *id.* at 587 n.10 (citing historical usages of “bear Arms” outside of the militia context).

⁴² *Id.* at 586 (citations omitted) (internal quotation marks omitted).

⁴³ *Id.* at 589.

⁴⁴ Brief for Professors of Linguistics and English Dennis E. Barron, et al. in Support of Petitioners at 24, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (“We have reviewed the ‘bear arms’ language in the texts identified by Professor Cornell and concluded that in four of the five instances of non-military use, the use was expressly qualified by further language indicating a different meaning (e.g., ‘bear arms in times of peace’ or ‘bear arms . . . for the purpose of killing game’).”).

⁴⁵ *Heller*, 554 U.S. at 592.

⁴⁶ *Id.* (“[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right [and as] ‘[this] is not a right granted by the Constitution[.] [n]either is it in any manner dependent upon that instrument for its existence.’” (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876))).

⁴⁷ *Id.* at 593 (citations omitted) (noting also that the right “was clearly an individual right, having nothing whatever to do with service in a militia”).

⁴⁸ *Id.* at 591 (“State constitutions of the founding period routinely grouped multiple (related) guarantees under a singular ‘right.’”).

⁴⁹ *Id.* at 595 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *145 n.42).

and defence” as the core of the Second Amendment, the Court in *Heller* then addressed the Prefatory Clause, “a well regulated Militia,” to ensure that its interpretation of “the right of the people to keep and bear Arms” did not create a conflict within the Amendment.⁵⁰

3. *A Well Regulated Militia, Being Necessary to the Security of a Free State*

A Prefatory Clause announces and clarifies the purpose of the operative portion of the Amendment, but does not expand or limit its scope.⁵¹ The meaning of the prefatory phrase, “A well regulated Militia, being necessary to the security of a free State,” then, does not describe a limitation on the right to bear arms; rather, it clarifies the purpose of the right to bear arms. Therefore, understanding the meaning of the prefatory clause—and through it, the purpose of the Second Amendment—is essential to legislators who wish to craft limits on this fundamental right without running afoul of the Constitution.

Citing *Miller*,⁵² the Supreme Court in *Heller* determined that “the Militia comprised all males physically capable of acting in concert for the common defense.”⁵³ This broad meaning of the militia describes an entity that predates the Constitution and exists independent from congressional action.⁵⁴ “Congress is given the power . . . not to create, but to ‘organiz[e]’ [the militia]—and not to organize ‘a’ militia . . . but to organize ‘the’ militia, connoting a body already in existence.”⁵⁵ The militia was not, as the petitioners suggested, limited to government-regulated military forces.⁵⁶ As the Court stated, “[a]lthough we agree . . . that ‘militia’ means the same thing in Article I and the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia.”⁵⁷ The fact that Congress may create an army or navy⁵⁸ from members of the militia, or call forth and organize the militia, does not diminish or alter the composition of the militia itself.⁵⁹ As the Court stated, “[a]lthough the militia consists of

⁵⁰ *Id.*

⁵¹ *Id.* at 577–78.

⁵² *United States v. Miller*, 307 U.S. 174, 179 (1939).

⁵³ *Heller*, 554 U.S. at 595 (quoting *Miller*, 307 U.S. at 179) (internal quotation marks omitted).

⁵⁴ *See id.* at 596.

⁵⁵ *Id.* (first alteration in original).

⁵⁶ *Id.* (“Petitioners take a seemingly narrower view of the militia, stating that ‘[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, § 8, cls. 15–16).’” (citations omitted)).

⁵⁷ *Id.*

⁵⁸ *Id.* (citing U.S. CONST. art. I, § 8, cls. 12–13).

⁵⁹ *See id.*

all able-bodied men, the federally organized militia may consist of a subset of them.”⁶⁰

Thus, the modifier “well regulated” does not indicate that this militia is one controlled by the federal or state government. Instead, “‘well-regulated’ implies nothing more than the imposition of proper discipline and training,”⁶¹ which would be necessary for any group attempting to secure a free state.

“The phrase ‘security of a free state’ meant ‘security of a free polity,’ not security of each of the several States”⁶² While there are many reasons that a well-regulated militia was “necessary to the security of a free State,” *Heller* enumerated three in particular. First, the militia was useful in “repelling invasions and suppressing insurrections.”⁶³ Second, it “render[ed] large standing armies unnecessary,”⁶⁴ which was a major concern of the founding generation.⁶⁵ Finally, and perhaps most important to understanding the scope of the Second Amendment, “when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”⁶⁶

In describing the rationale for a well-regulated militia, the Court placed particular emphasis on the ability of the militia to resist the power of a potentially tyrannical central government.⁶⁷ The founders understood the history of the English right to bear arms and knew 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.”⁶⁸ Among the generation that overthrew British rule through the use of its citizen militia, “[i]t was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”⁶⁹

Viewed in light of the experiences of the founding generation:

⁶⁰ *Id.*

⁶¹ *Id.* at 597.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 597–98.

⁶⁵ *Id.* at 598 (“During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.”).

⁶⁶ *Id.*

⁶⁷ *See id.* at 598–99.

⁶⁸ *Id.* at 598.

⁶⁹ *Id.* at 599.

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.⁷⁰

To reaffirm the individual nature of this right over the militia-oriented understanding, the Court applied the militia understanding to this particular set of concerns. It concluded that if the Second Amendment guaranteed only “the right to keep and use weapons as a member of an organized militia . . . if, that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment's guarantee—it does not assure the existence of a ‘citizens’ militia’ as a safeguard against tyranny.”⁷¹ This interpretation “guarantees a select militia of the sort the Stuart kings found useful, but not the people's militia that was the concern of the founding generation.”⁷²

Therefore, *Heller*'s analysis of the Prefatory Clause is consistent with the individual rights framework it applies to the rest of the Amendment. Further, since the Prefatory Clause announces the purpose of the Amendment, it demonstrates that, at the very least, the right to keep and bear arms is expressly guaranteed for the purpose of maintaining a well-regulated citizens' militia.⁷³ The question left unanswered, however, is the degree of regulation that can be imposed upon this right without interfering with the ability of the militia to remain “well regulated.”

4. *The Holding in Heller, Questions Answered, and Questions Left Undecided*

Despite the Constitution's command that this right “shall not be infringed,” the right to keep and bear arms is not unlimited.⁷⁴ It is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁷⁵ While the holding in *Heller* did not clearly delineate the precise limitations to be placed upon the exercise of this fundamental right, it did provide some examples of the type of regulation

⁷⁰ *Id.*

⁷¹ *Id.* at 600 (citations omitted).

⁷² *Id.*

⁷³ See *id.* at 577 (explaining that the Prefatory Clause “announces a purpose” of the Amendment, but “does not limit the [Amendment] grammatically”).

⁷⁴ *Id.* at 595 (“Of course the right was not unlimited, just as the First Amendment's right of free speech was not” (citations omitted)).

⁷⁵ *Id.* at 626.

that would be acceptable, such as prohibitions on concealed carry. The Court noted that the “majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”⁷⁶ It further stated that its decision would not disturb prohibitions on “the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁷⁷

More informative than what the Court did not strike down, however, are the characteristics of the D.C. statute that rendered it unconstitutional: the law “totally ban[ned] handgun possession in the home . . . [and] also require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.”⁷⁸

In evaluating these provisions, the Court noted that, even beyond the need for a well-regulated militia, “the inherent right of self-defense has been central to the Second Amendment right.”⁷⁹ Even though the right is not unlimited, the D.C. law could not stand, as it “amount[ed] to a prohibition of an entire class of ‘arms’ [handguns] that is overwhelmingly chosen by American society for that lawful purpose [self-defense in the home].”⁸⁰ This prohibition of an entire class of firearms was found particularly objectionable in this case, as it even extended “to the home, where the need for defense of self, family, and property is most acute.”⁸¹ The Court concluded that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family,’ would fail constitutional muster.”⁸² The Court also found unconstitutional the requirement that any lawful firearms in the home be rendered inoperable, as it “makes it impossible for citizens to use them for the core lawful purpose of self-defense.”⁸³

Despite striking down the D.C. statute as an unconstitutional violation of a fundamental right, the Court did not establish the standard of review to be applied going forward. However, it did explicitly reject rational basis

⁷⁶ *Id.*

⁷⁷ *Id.* at 626–27.

⁷⁸ *Id.* at 628.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 628–29 (citations omitted).

⁸³ *Id.* at 630.

review⁸⁴ and the interest-balancing test suggested in Justice Breyer's dissent.⁸⁵ In rejecting the interest-balancing approach, the Court noted that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them . . . [and are] the very *product* of an interest balancing by the people."⁸⁶ The discussion of standard of review concluded with the Court stating that "whatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."⁸⁷

B. *MCDONALD V. CITY OF CHICAGO*

*McDonald v. City of Chicago*⁸⁸ dealt with incorporation under the Fourteenth Amendment rather than the meaning of the text, and therefore added little to the understanding of the meaning of the Second Amendment. However, it is important to highlight briefly two key elements of the case. First, *McDonald* determined that the Second Amendment articulated a fundamental right, and therefore must be applied uniformly to the federal government and the states.⁸⁹ In discussing the fundamental nature of this right, the Court emphasized that "[i]t cannot be doubted that the right to bear arms was regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner."⁹⁰

Like *Heller*, *McDonald* acknowledged that the Second Amendment was codified, in part, because of the fear of a centralized government's ability to impose rule over a disarmed populace.⁹¹ It further emphasized, as did *Heller*, that "self-defense was 'the central component of the right itself.'"⁹²

⁸⁴ *Id.* at 628 n.27 ("Obviously, [rational basis review] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right . . .").

⁸⁵ *Id.* at 689 (Breyer, J., dissenting) ("Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter. I would simply adopt such an interest-balancing inquiry explicitly.").

⁸⁶ *Id.* at 634–35 (majority opinion).

⁸⁷ *Id.* at 635.

⁸⁸ 130 S. Ct. 3020 (2010).

⁸⁹ *Id.* at 3050.

⁹⁰ *Id.* at 3043–44.

⁹¹ *Id.* at 3037.

⁹² *Id.* at 3048 (citations omitted).

McDonald is important to consider because it struck down the predecessor of the new Chicago Ordinance, which the Court determined was similar to the law struck down in *Heller*.⁹³ The law stated that “[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.”⁹⁴ The law then “prohibit[ed] registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City.”⁹⁵ The similarity between the laws struck down in *Heller* and *McDonald* is important because the new Chicago Ordinance is the first legislative response to a state law that has been struck down under the Second Amendment.

III. DISCUSSION

Following *Heller* and *McDonald*, the City of Chicago amended its code to comply with the rules laid out in those decisions. However, the new Ordinance reads those opinions narrowly, restricting their meaning to protect the exact question addressed: possession of firearms in the home.⁹⁶ In doing so, the City of Chicago ignored the broader implications of *Heller* and *McDonald*, which extend beyond the right of an individual to use firearms for self-defense.⁹⁷ By narrowly interpreting the meaning of the Second Amendment, the City of Chicago’s newly approved Ordinance continues to impermissibly restrict this fundamental right.

Applying the understanding of the Second Amendment established in *District of Columbia v. Heller*, this Comment evaluates the new Chicago Ordinance to determine which if any provisions remain in violation of the Second Amendment. It will begin by focusing on the text of the Second Amendment and two issues not addressed by the *Heller* decision. First, it will address the meaning of the term “Arms”—focusing on whether use of the plural form indicates more than one weapon and the term’s relation to “the people”—and its implications for the Ordinance, which allows only one operable firearm in the home. The Comment will then turn to the meaning of “to bear Arms”—focusing on what qualifies as bearing arms—

⁹³ *Id.* at 3026.

⁹⁴ *Id.* (alteration in original) (citing CHI., ILL., MUN. CODE § 8-20-040(a) (2009)).

⁹⁵ *Id.* (citing CHI., ILL., MUN. CODE § 8-20-050(c) (2009)).

⁹⁶ CHI., ILL., MUN. CODE § 8-20-040(a) (providing that it shall be “unlawful for any person to carry or possess a handgun, except when in the person’s home”).

⁹⁷ See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (“Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repe[l] force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *145 n.42)).

and its implications for provisions of the Ordinance that prohibit carrying firearms outside the home.

The Comment will then consider the purpose of “a well regulated Militia” as understood by the Court in *Heller* and evaluate the likely effect of that clause on provisions banning: (i) shooting galleries within the City of Chicago; (ii) discharging a firearm in the city except in self-defense; and (iii) carrying firearms outside the home.

A. THE CHICAGO ORDINANCE AND THE MEANING OF THE TERM
“ARMS”

The Second Amendment guarantees that “the right of the people to keep and bear Arms, shall not be infringed.”⁹⁸ In *United States v. Heller*, the Supreme Court evaluated the meaning of this provision and determined that it “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”⁹⁹ In finding the D.C. statute unconstitutional, the Court placed particular emphasis on the importance of self-defense within one’s home.¹⁰⁰ After *McDonald v. City of Chicago* struck down Chicago’s handgun law as unconstitutional, the city looked to the *Heller* decision for guidance on how to redraft the ordinance.¹⁰¹ The *Heller* Court stated that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.”¹⁰² Reading the mandate in *Heller* narrowly, Chicago amended its firearm law, making it a crime to have more than one firearm assembled and operable in a home at a given time.¹⁰³

This provision does not appear to violate the literal holding in *Heller*, that a city cannot create an absolute prohibition against having or using a gun for self-defense in the home. But it remains unclear whether the term “Arms” indicates multiple weapons, as its pluralized form seems to indicate, or whether “Arms” is a term of art meaning any single weapon. The constitutionality of this prohibition turns on the answer to this question.

⁹⁸ U.S. CONST. amend. II.

⁹⁹ *Heller*, 554 U.S. at 592.

¹⁰⁰ *Id.* at 635 (“And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”).

¹⁰¹ CHL., ILL., MUN. CODE § 8-20-040 (explicitly stating that amendments to the handgun statute were made in response to the Supreme Court’s decisions in *Heller* and *McDonald*).

¹⁰² *Heller*, 554 U.S. at 636.

¹⁰³ CHL., ILL., MUN. CODE § 8-20-040 (“[E]very person who keeps or possesses a firearm in his home shall keep no more than one firearm in his home assembled and operable.”).

1. Support for a Singular Reading of “Arms”

One definition of “Arms” provided in *Heller* is “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.”¹⁰⁴ This definition, on its face, seems to suggest that “Arms” can be read in the singular, as it refers to any “thing,” not “things.” Further, “all firearms constituted ‘arms.’”¹⁰⁵ This reading may support the singular view, for if all firearms constitute arms, then any firearm, as an individual thing, would constitute arms on its own.

Legislation enacted in the period before and after the Revolution provides further support for the proposition that “Arms” may be used in the singular. An Act for the Safeguard and Defence of the Country Against the Indians, which was good law in Virginia in 1676, established death as the punishment for the offense of trading “shot or arms” with the American Indian population.¹⁰⁶ “The act created an irrebutable presumption of such trade for any person living in any Indian town . . . who possessed any arms or ammunition other than one gun and ten charges of powder and shot.”¹⁰⁷ Given that the right protected in the Second Amendment predates the Constitution,¹⁰⁸ the use of “Arms” as referring to a single gun in this context indicates that “Arms” could be understood in its singular form.

Similarly, the 1792 Militia Act, passed into law by the second Congress to provide for the adequate arming of the militia, stated that “every citizen . . . shall . . . provide himself with a good musket or firelock.”¹⁰⁹ This early act of Congress, enacted less than a year after the adoption of the Second Amendment, seems to indicate that a single musket or firearm, in the common usage, was sufficient to qualify as “Arms” for service within the militia.

Finally, in describing “the rights of Englishmen (which every American colonist had been promised into perpetuity),”¹¹⁰ Blackstone’s *Commentaries* from the 1760s stated that “everyone is at liberty to keep or carry a gun.”¹¹¹ These sources indicate that the pluralized term “Arms” could be construed as a single weapon. If that is an accurate characterization, then the Chicago Ordinance’s limit of one ready-to-use

¹⁰⁴ *Heller*, 554 U.S. at 581 (quoting CUNNINGHAM, *supra* note 25, at 187) (internal quotation marks omitted).

¹⁰⁵ *Id.* (citations omitted).

¹⁰⁶ HALBROOK, *supra* note 12, at 56.

¹⁰⁷ *Id.*

¹⁰⁸ *Heller*, 554 U.S. at 603.

¹⁰⁹ 1 Stat. 271 (1792).

¹¹⁰ Clayton E. Cramer & Joseph Edward Olson, *What Did “Bear Arms” Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL’Y 511, 517 (2008).

¹¹¹ 2 WILLIAM BLACKSTONE, COMMENTARIES *441.

firearm in the home may be sufficient to satisfy the Second Amendment's requirement that firearms be allowed for defense in the home.

2. Support for a Plural Reading

According to *Heller*, the "Arms" protected by the Second Amendment are those in common usage.¹¹² To understand potential limitations on quantity of arms possessed, it will be helpful to survey the arms in common usage—i.e., the weapons an ordinary citizen would bring when the militia was called to assemble—and evaluate whether there appeared to be any limit on the number of arms possessed at the time of the Amendment's ratification. Since this survey demonstrates that citizens often possessed more than one weapon,¹¹³ it suggests that the right to bear "Arms" in the Second Amendment may protect the right of citizens to own and keep operable multiple weapons.

To begin with, members of the Continental Congress were very clear that it was the "[r]ight of every English subject to be prepared with Weapons for his Defense," using the plural of "weapon."¹¹⁴ And while the Militia Act of 1792 required all individuals to provide only a "musket or firelock,"¹¹⁵ it required that members of the cavalry provide their own "pistols and a sword," which explicitly indicates two firearms and another weapon.¹¹⁶ Additional support for this position can also be found in *Heller*, which defines "'arms' as '[w]eapons of offence.'"¹¹⁷ *Heller* further states that "[b]y *arms*, we understand those *instruments* of offence."¹¹⁸

Another source cited in the *Heller* opinion, Cunningham's *A New and Complete Law Dictionary*, edited in 1771, defines arms as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast

¹¹² See *Heller*, 554 U.S. at 581 ("The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity.").

¹¹³ See *infra* notes 114–29.

¹¹⁴ David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 29 (1987) (citations omitted) (internal quotation marks omitted).

¹¹⁵ 1 Stat. 271 (1792).

¹¹⁶ Hardy, *supra* note 114, at 27. While there are colorable arguments that modern firearms would invalidate the need to protect the right to own multiple arms, determining whether a functional equivalent of the Second Amendment is sufficient to satisfy its guarantee is beyond the scope of this Comment, which contemplates the text of the Amendment as it was understood upon ratification.

¹¹⁷ *Heller*, 554 U.S. at 581 (emphasis added) (citing 1 JOHNSON, *supra* note 33, at 106).

¹¹⁸ *Id.* at 647 (Stevens, J., dissenting) (second emphasis added) (quoting 1 JOHN TRUSLER, *THE DISTINCTION BETWEEN WORDS ESTEEMED SYNONYMOUS IN THE ENGLISH LANGUAGE* 37 (3d ed. 1794)) (internal quotation marks omitted).

at or strike another.”¹¹⁹ However, the term defined is “Armour or Arms, (Arma).”¹²⁰ The latin “arma” is likewise defined in the dictionary under the phrase “Arma Libera,” which referred to the “sword and a lance which were usually given to a servant, when he was made free.”¹²¹ In this sense, “Arms” is once again given a plural definition in reference to the arms borne by a single individual.

Other sources discussing the arms in common use—that is, arms that would be borne for service in the militia at the time of the founding—also indicate that more than one weapon fell under the definition of “bear Arms.” In a measure considering grievances of Boston freeholders in 1768, a number of items were considered, including one stating that “every listed Soldier and other Householder (except Troopers, who by Law are otherwise to be provided) shall always be provided with a well fix’d Firelock, Musket, Accoutrements and Ammunition.”¹²²

During the military occupation of Boston in 1775, the British confiscated the arms of any colonist attempting to leave the city.¹²³ This effort resulted in the confiscation of a significant number of pistols, which demonstrated the prevalence of pistols around the time of the revolution.¹²⁴ Further, accounts from that period indicate that Americans found it necessary “to carry with us some defensive weapons . . . a pair of pistols.”¹²⁵ Similarly, in a newspaper piece entitled *An American Citizen*, Tench Coxe, a prominent Federalist writing in 1787–1788, discussed the importance of the right to bear arms, describing “Arms” as “[t]heir swords, and every other terrible implement of the soldier” as “*the birth-right of an American*.”¹²⁶

Finally, a 1744 New Jersey enactment demonstrates that the average colonist was expected to own multiple weapons to fulfill his duties as part of the militia.¹²⁷ It stated that “[e]very person . . . shall be armed with a good musket . . . and a bayonet fixed to it, a cutting sword or cutlace . . .

¹¹⁹ *Id.* at 581 (majority opinion) (quoting CUNNINGHAM, *supra* note 25, at 187).

¹²⁰ CUNNINGHAM, *supra* note 25, at 187.

¹²¹ *Id.*

¹²² STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS 1 (1989).

¹²³ HALBROOK, *supra* note 12, at 59.

¹²⁴ *Id.*

¹²⁵ *Id.* at 59 n.24 (quoting GEORGE C. NEUMANN, THE HISTORY OF WEAPONS OF THE AMERICAN REVOLUTION 150 (1967)).

¹²⁶ *Id.* at 68 (quoting Tench Coxe, *An American Citizen*, PA. GAZETTE, Feb. 20, 1788, in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1778–1780 (Microform Supp.)).

¹²⁷ DAVID T. HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 43–44 (1986).

and shall keep at his Place of Abode . . . what is above mentioned.”¹²⁸ It further provided that “[e]ach horseman shall be provided with a good horse . . . a Case of Pistols, a cutting sword . . . and shall keep at the Place of his Abode, beside the Arms abovementioned, a well fix’d Carbine.”¹²⁹

3. A Plural Reading Is More Faithful to the Original Understanding

On the balance of the evidence, it appears that while the technical definition could be read in the singular, the arms in common usage at the time—particularly the widespread use of pistols¹³⁰—provide enough examples of plural usage to indicate that “Arms” was not understood as limited to a single firearm. This conclusion is further supported by the fact that individuals were expected to provide more than a single weapon—a pair of pistols and a sword for cavalrymen, a musket with a bayonet and a sword for infantrymen—when called forth as part of the militia. As such, it is likely that the framers of the Second Amendment understood the term “Arms” to refer to the pluralized form of weapons that could be used for self-defense or service in the militia.

4. Application to the Chicago Ordinance

In light of this understanding, the Chicago Ordinance, which allows only one operable firearm in the home per licensed owner, should be found unconstitutional.¹³¹ The term “Arms,” as understood at the time of the Second Amendment’s ratification, was not limited to a single firearm, so forbidding the possession of more than a single operable firearm likely violates the meaning of that term. While modern firearms are significantly more effective and easier to assemble than those in existence at the time of ratification, the protections of the Second Amendment extend “to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”¹³² Thus, if the original Amendment protected the right to own and have operable multiple firearms, advances in technology are irrelevant to a textual understanding of what right is protected.

Although it is true that the Ordinance allows owning more than a single firearm, historical research and common sense indicate that arms were expected to be kept in working order and ready for battle. The original English right to bear arms was understood to require that

¹²⁸ *Id.*

¹²⁹ *Id.* at 44.

¹³⁰ HALBROOK, *supra* note 12, at 59 n.24.

¹³¹ CHI., ILL., MUN. CODE § 8-20-040 (2010).

¹³² *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

Englishmen were “bound to be ready, at all times” to use their arms in defense of themselves and the realm.¹³³ Indeed, the very notion of the “minutemen” was that they would be ready, with functioning arms and ammunition, to defend themselves and their province at a minute’s notice.¹³⁴ Further, at the time of the founding, it was well understood that there was a “right of every English subject to be prepared with Weapons for his Defense.”¹³⁵

The nature of the arms borne at the time does not support an understanding that only one could be kept operational at a time. For example, if a cavalryman was called to action with his set of pistols, would he be required to keep one unloaded and locked in the case until the other had been discharged? This is a nonsensical interpretation of the right to bear arms, given the arms in common usage at the time. Likewise, there is no indication that civilian ownership of pistols would be subject to such a provision. As such, it is unlikely that the Chicago Ordinance banning the possession of more than one operational firearm at a time adequately protects the scope of the right to bear “Arms.”

B. THE CHICAGO ORDINANCE AND THE PHRASE “BEAR ARMS”

1. *Scope of the Right to Bear Arms*

Heller has determined that the right to “keep Arms” protects, at the least, the right to “have weapons.”¹³⁶ It further determined that “to bear” meant “to carry” at the time of the founding, and that “bearing Arms” referred to carrying them for the purpose of confrontation.¹³⁷ A question not answered by *Heller*, however, was the place and manner in which an individual was permitted to “bear Arms” for purposes of self-defense and confrontation.

As *Heller* indicated, certain regulations on the place and manner in which bearing arms would be permitted, such as regulations restricting concealed carry and the carrying of arms in sensitive places, are not to be disturbed by the decision.¹³⁸ The Chicago Ordinance, however, has placed severe restrictions on where arms may be carried for purposes of self-defense. Section 8-20-020 of the Municipal Code of Chicago provides that it shall be “unlawful for any person to carry or possess a handgun, except

¹³³ Cramer & Olson, *supra* note 110, at 515.

¹³⁴ See HALBROOK, *supra* note 12, at 60.

¹³⁵ Hardy, *supra* note 114, at 27, 29.

¹³⁶ *Heller*, 554 U.S. at 582.

¹³⁷ *Id.* at 584.

¹³⁸ *Id.* at 626–27.

when in the person's home."¹³⁹ "Home" is defined as "the inside of a person's dwelling unit which is traditionally used for living purposes, including the basement and attic," but does not include "any garage, . . . any space outside the dwelling unit, including any stairs, porches, back, side or front yard spaces, or common areas[,] or . . . any dormitory, hotel, or group living."¹⁴⁰

Reviewing the history of the right to keep and bear arms, it is clear that limiting the right's exercise to the confines of one's apartment is an unconstitutional limitation on that right. Beginning with the language in *Heller* itself, the Court cites nine state constitutions establishing the right of a citizen to "bear arms in defense of himself and the state" or citizens to "bear arms in defense of themselves and the state."¹⁴¹ As the Second Amendment guarantees an individual right to bear arms in defense of both an individual and the state, this must imply the ability to carry those arms outside of one's home. It is difficult to imagine how one could exercise the right to bear arms in defense of the state from the confines of one's living room.

Further, *Heller* indicates that "to keep Arms" and "to bear Arms" have separate meanings.¹⁴² Applying the canon of statutory construction that each element of a statute should be given meaning,¹⁴³ "bearing" cannot be limited to carrying inside one's home. If so, it would carry the same meaning as "keep," making the phrase redundant. To "keep Arms" refers to the right to "possess arms,"¹⁴⁴ which would presumably be done within the confines of one's home. Indeed, there is even evidence suggesting that the right to "keep Arms" itself encompassed the right to use arms within the home to oppose the entry of trespassers.¹⁴⁵

The right to "bear Arms," on the other hand, must extend to purposes outside of the home. No application of the history of the Second Amendment to its exercise can possibly warrant limiting the meaning of "bear Arms" to carrying a weapon in one's home. In *Heller*, the Court discussed at length the possible motivations for the Amendment, which could be anything from hunting to fighting off invasion to overthrowing a

¹³⁹ CHI., ILL., MUN. CODE § 8-20-020(a) (2010).

¹⁴⁰ § 8-20-010.

¹⁴¹ *Heller*, 554 U.S. at 584–85.

¹⁴² *See id.* at 582–84.

¹⁴³ *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (stating that effect should be given, when possible, to every word in a statute).

¹⁴⁴ *See Heller*, 554 U.S. at 646 (Stevens, J., dissenting).

¹⁴⁵ *Id.* at 583–84 n.7 (majority opinion) ("[K]eep arms in his house to oppose the entry of the lessor, . . ." (quoting 3 RICHARD BURN, JUSTICE OF THE PEACE AND PARISH OFFICER 88 (29th ed. 1845))).

tyrannical central government.¹⁴⁶ None of these uses can be accomplished if the government can restrict the exercise of bearing arms to the confines of one’s home.

This understanding is further supported by the history of the right to bear arms, as “the intent of the state conventions that requested adoption of a bill of rights and of the framers in Congress . . . was that the Second Amendment recognize[] the absolute individual right to keep arms in the home and to carry them in public.”¹⁴⁷ Indeed, laws requiring that individuals bear arms required that they be borne in public places.¹⁴⁸ This does not, of course, mean that the right to bear arms is unlimited, as the Court in *Heller* acknowledged.¹⁴⁹ Even a communal understanding of the Second Amendment cannot limit the right to the home, as it is impossible to bear arms for militia service if the weapon may not be carried outside the home.

Finally, Blackstone’s *Commentaries* establish that “Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repe[] force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’”¹⁵⁰ Nothing in this understanding of the fundamental rights of citizens implies that this right to self-preservation is only available to those who stay home.

2. Application of Keep and Bear Arms to the Chicago Ordinance

Section 8-20-020 of the Municipal Code of Chicago makes it unlawful to possess or carry a handgun outside of one’s home.¹⁵¹ While the Court has stated that concealed carry laws are not disturbed by its decision in *Heller*, it found the D.C. statute unconstitutional on the basis of its absolute prohibition of the right to bear arms in self-defense within one’s home.¹⁵² By limiting the right to bear arms to the confines of one’s home, § 8-20-020 constitutes an absolute ban on the use of handguns for self-defense outside

¹⁴⁶ See *id.* at 597–98.

¹⁴⁷ HALBROOK, *supra* note 12, at 87.

¹⁴⁸ See, e.g., PATRICK J. CHARLES, THE SECOND AMENDMENT 18 (2009) (citing a Georgia law requiring men to carry guns to church).

¹⁴⁹ *Heller*, 554 U.S. at 626 (“[N]othing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings. . .”).

¹⁵⁰ *Id.* at 595 (alteration in original) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *145 n.42).

¹⁵¹ CHI., ILL., MUN. CODE § 8-20-020(a) (2010) (“It is unlawful for any person to carry or possess a handgun, except when in the person’s home.”).

¹⁵² *Heller*, 554 U.S. at 629.

of one's home.¹⁵³ This understanding of the Second Amendment renders the terms "keep" and "bear" identical, in contrast to the Court's interpretation in *Heller* and the canon of statutory interpretation that all words in a statute must be given meaning. Finally, it conflicts with nearly every purpose the Second Amendment was intended to achieve. In light of these considerations, section 8-20-020 should be struck down as unconstitutional.

C. THE CHICAGO ORDINANCE AND THE WELL-REGULATED MILITIA

1. Implications of the Prefatory Clause as Interpreted in Heller

The Prefatory Clause of the Second Amendment, "[a] well regulated Militia, being necessary to the security of a free State," confirms that the right to bear arms cannot be limited to the home.¹⁵⁴ The meaning of that clause, as understood by the Supreme Court in *Heller*, also indicates that several other provisions of the Chicago Ordinance will likely be struck down as unconstitutional.

The natural right of self-defense¹⁵⁵ applies not only to defense of the individual, but also to the defense of society against tyranny.¹⁵⁶ There was little disagreement on this understanding at the time of the founding.¹⁵⁷ As Hamilton put it, "[i]f the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government."¹⁵⁸ It was universally agreed that the well-regulated militia consisted of the entire general populace, which was to be armed and trained in the use of arms. Indeed, that the people be well trained in the use of arms was central to the founders' understanding of the Second Amendment and was considered the basic source of their liberty.¹⁵⁹ As Madison put it, "[i]f

¹⁵³ Although it is true that the Ordinance allows for the use of firearms for defense in one's place of business, if the firearm is registered to that address, it does not allow use of the firearm—even in cases of self-defense—for an individual en route to his business, even if he operates a cash-heavy business in a dangerous part of town. See CHI., ILL., MUN. CODE § 8-20-100.

¹⁵⁴ U.S. CONST. amend. II.

¹⁵⁵ *Heller*, 554 U.S. at 594 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *136, *139–40).

¹⁵⁶ HALBROOK, *supra* note 12, at 66–67 ("[Thomas] Jefferson stressed the inexorable connection between the right to have and use arms and the right to revolution . . .").

¹⁵⁷ *Id.* at 67 ("The Federalists were actually in close agreement with Jefferson on the right to arms as a penumbra of the right to revolution.").

¹⁵⁸ *Id.* (quoting THE FEDERALIST NO. 28 (Alexander Hamilton)).

¹⁵⁹ *Id.* at 66 ("That the people be continually trained up in the exercise of arms . . . so the power may rest fully in the disposition of their supreme assemblies." (quoting 3 JOHN

the people [of Europe] were armed and organized into militia, ‘the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.’”¹⁶⁰

However, as the Prefatory Clause of the Amendment suggests, it was equally important that the generalized militia be well regulated; that is, well trained.¹⁶¹ The fear that led to the codification of this right was not just that Congress could create either a select militia or standing army that would exercise tyrannical control over the people, but that, in doing so, it would endeavor to disarm the people through disuse of the generalized militia.¹⁶² Pointing to tactics utilized by pro-British strategists, George Mason observed that “the best and most effectual way to enslave them . . . [was] by totally disusing and neglecting the militia.”¹⁶³ Indeed, if only Congress may call up the militia, it has complete control over when and how the people can train in the use of arms. It would be nonsensical to guarantee the right to keep and bear arms as a final protection against tyranny, but then grant the government complete control over the exercise of that right.¹⁶⁴ The importance of training was best stated by Richard Henry Lee, who argued that “to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them.”¹⁶⁵

2. Application of the Prefatory Clause to the Chicago Ordinance

When evaluating the relevance of the well-regulated militia to modern society and its implications for the validity of statutory restrictions on the Second Amendment, it is important to remember *Heller*’s insistence that “[c]onstitutional 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.”¹⁶⁶

In light of this history and the universal understanding that the freedom of the polity depended upon the existence of a universal,¹⁶⁷

ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 471 (1794))).

¹⁶⁰ *Id.* at 67–68 (quoting THE FEDERALIST No. 46 (James Madison)).

¹⁶¹ District of Columbia v. Heller, 554 U.S. 570, 597 (2008).

¹⁶² *Id.* at 599.

¹⁶³ HALBROOK, *supra* note 12, at 74 (quoting 3 JONATHAN ELLIOT, DEBATES OF THE STATE CONVENTIONS ON THE FEDERAL CONSTITUTION 355 (2d ed. 1936)).

¹⁶⁴ *Heller*, 554 U.S. at 599.

¹⁶⁵ HALBROOK, *supra* note 12, at 71–72 (emphasis omitted) (quoting R. LEE, ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER 170 (1788)).

¹⁶⁶ *Heller*, 554 U.S. at 634–35.

¹⁶⁷ *E.g.*, *id.* at 596 (noting that the “ordinary definition of militia [is] all able-bodied men”); HALBROOK, *supra* note 12, at 68–84 (establishing that the well-regulated militia, as

properly trained militia, we evaluate several provisions of the Chicago Ordinance (as the city initially amended it) to understand the intended scope of the regulation. The provisions, when taken together, prohibited shooting galleries,¹⁶⁸ any sale of guns,¹⁶⁹ and any discharge of a firearm within the city limits, except in self-defense.¹⁷⁰ This Section will show that, when viewed in conjunction with the requirements that a resident must have a Chicago firearm permit for each weapon in his possession¹⁷¹ and that attaining such a permit requires at least one hour of range training,¹⁷² the Chicago Ordinance—as originally amended¹⁷³—constituted an absolute ban on the exercise of the right to bear arms within the City of Chicago and destroys the ability of the militia to remain lawfully well regulated without leaving the city limits.

First, a statute forbidding the discharge of firearms within the city limits infringes upon the ability of a militia to be trained and effective for the defense of a free polity. The framers feared that the militia would be disarmed through disuse.¹⁷⁴ By banning the practice of marksmanship, the City of Chicago disarms its local militia in precisely that manner.

Similarly, a complete ban on the sale of firearms within the city limits infringes not only upon the right of the individual to arm himself for his personal defense, but also upon the ability of the militia to arm itself. It is true that *Heller* upheld the constitutionality of “laws imposing conditions and qualifications on the commercial sale of arms.”¹⁷⁵ However, what the Court clearly detests are regulations that constitute absolute bans upon the ability of the people to exercise an explicitly enumerated fundamental right.¹⁷⁶

understood at the time of the founding, was not a select group of citizens such as the state national guard, but rather consisted of the entire general populace, which was to be armed and trained in the use of arms).

¹⁶⁸ CHI., ILL., MUN. CODE § 8-20-280 (2010) (“[S]hooting galleries, firearm ranges, or any other place where firearms are discharged are prohibited . . .”).

¹⁶⁹ § 8-20-100(a) (“Except as authorized by subsection (e) and section 2-84-075, no firearm may be sold, acquired or otherwise transferred within the city, except through inheritance of the firearm.”).

¹⁷⁰ § 8-24-010 (“No person shall fire or discharge any firearm within the city, except in the lawful self-defense or defense of another . . .”).

¹⁷¹ § 8-20-140(a) (“[I]t is unlawful for any person to carry or possess a firearm without a firearm registration certificate.”).

¹⁷² § 8-20-120(a)(7) (requiring “at a minimum . . . one hour of range training and four hours of classroom instruction”).

¹⁷³ See *supra* note 11.

¹⁷⁴ HALBROOK, *supra* note 12, at 74.

¹⁷⁵ *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

¹⁷⁶ See *id.*

This set of regulations also imposes an impermissible obstacle upon the ability of an individual to exercise the precise right protected in *Heller*: ownership and use of a firearm in one’s home for self-defense.¹⁷⁷ A resident of Chicago must attain a Chicago firearm permit, which requires at least four hours of class instruction and one hour of range training.¹⁷⁸ However, the Ordinance prohibits the very actions required to attain the certification, since discharging a firearm within the city limits is prohibited except in self-defense. Even if firearms were allowed to be discharged in the city, the Ordinance initially banned the establishment of firing ranges, which are the only places where certification can be safely accomplished.¹⁷⁹

These prohibitions are not constitutionally justifiable on the grounds that residents may receive training, buy their firearms, or practice with their weapons elsewhere in Illinois. Just as Chicago could not ban the fundamental right to protest within the city limits on the grounds that you can protest outside the city,¹⁸⁰ it cannot ban the exercise of an individual’s fundamental right to keep and bear arms within the city limits.

IV. CONCLUSION

This analysis of *Heller*, the purpose behind the provisions of the Second Amendment, and the Chicago Ordinance provide some general guidelines as to what will and will not be permitted in regulating the “right of the people to keep and bear Arms.” As was made clear in *Heller*, absolute bans on the exercise of a fundamental right—such as Chicago’s absolute ban on bearing arms outside the home or discharging arms in the city—will fail constitutional muster under “any of the standards of scrutiny that [the Justices] have applied to enumerated constitutional rights.”¹⁸¹

The major failing of the Chicago Ordinance is that it interpreted the Court’s decision in *Heller* as limiting the Second Amendment to possession of a handgun for self-defense in the home. In doing so, the city ignored the Court’s embrace of significantly more than the particular holding articulated and set itself up for a constitutional challenge. Legislatures looking to craft legislation that will withstand scrutiny in the courts must respect the three major themes underlying *Heller* and the implications for the scope of the Second Amendment.

¹⁷⁷ *Id.* at 635.

¹⁷⁸ CHI., ILL., MUN. CODE § 8-20-120(a)(7) (2010).

¹⁷⁹ *See supra* note 11.

¹⁸⁰ *See Bd. of Airport Comm’rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–76 (1987).

¹⁸¹ *Heller*, 554 U.S. at 628–29.

First, there can be no absolute bans on the exercise of the fundamental right of the people to keep and bear arms. This applies to each provision of the Amendment. As such, the second takeaway is that the Second Amendment protects the right to “bear Arms” as well as the right to “keep Arms.” No reading of the Amendment’s ratification history can possibly support the City of Chicago’s complete prohibition on carrying guns outside of one’s home. Restricting the right to “bear Arms” to a person’s abode not only renders it redundant with the right to “keep Arms,” but also conflicts with the need for a well-regulated militia and the ability of the people to exercise their fundamental right to self-defense—the core of the Second Amendment.¹⁸²

Finally, and perhaps less obviously in modern society, it is important to recognize the historical justification for the codification of this pre-existing, fundamental right within the Constitution. As the Court recognized in *Heller*, the “right of the people to keep and bear Arms” was necessary not only to preserve the security of the individual within his home, but also to secure the freedom of the polity from all foes—including the tyranny of a strong, centralized government.¹⁸³ At ratification, “[i]t was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”¹⁸⁴ When regulators lose sight of this purpose, and interpret the right too narrowly—as the City of Chicago did in adopting the Responsible Gun Ownership Ordinance—they legislate against the rights enshrined in the Second Amendment. Legislators who keep these three principles in mind will be able to craft effective, constitutional legislation and avoid the founders’ dire fear that they “may now surrender, with a little ink, what it may cost seas of blood to regain.”¹⁸⁵

¹⁸² *Id.*

¹⁸³ *Id.* at 598.

¹⁸⁴ *Id.* at 599.

¹⁸⁵ HALBROOK, *supra* note 12, at 73 (quoting 2 ELLIOT, *supra* note 163, at 404).