

# HUNTING AND THE SECOND AMENDMENT

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## ABSTRACT

*Debates about the meaning and scope of the Second Amendment have traditionally focused on whether it protects the keeping and bearing of arms for self-defense, prevention of tyranny, maintenance of the militia, or some combination of those three things. But roughly half of American gun-owners identify hunting or sport shooting as their primary reason for owning a gun. And while much public rhetoric suggests that these activities fall within the scope of the Second Amendment, some of the most committed gun-rights advocates insist that the Amendment “ain’t about hunting” and that, no matter their heritage and value, such activities are constitutionally irrelevant. This Article argues that these advocates are mostly correct, and that hunting and recreational uses of arms have, at best, a tenuous claim to constitutional protection. This conclusion has implications not only for the potential regulation of hunting and shooting sports, but for broader issues such as determining which arms are “in common use” and therefore protected by the Second Amendment. At a more general level, it suggests that an important and influential part of American gun culture—populated by tens of millions of guns and gun owners—is simultaneously protected and regulated without the direct involvement of the Second Amendment.*

## INTRODUCTION

The Supreme Court’s decision in *District of Columbia v. Heller* affirmed the existence of an “individual” right to keep and bear arms for certain non-militia purposes,<sup>1</sup> and clarified that this right is “not unlimited” and does not “protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”<sup>2</sup> In the wake of *Heller*, one of the central difficulties in Sec-

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1 554 U.S. 570, 602 (2008).

2 *Id.* at 595. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (“It is important to keep in mind that *Heller* . . . recognized that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’”).

ond Amendment law and scholarship is determining which gun-related activities are covered by the right to “keep and bear arms.” The private possession of a handgun for self-defense in one’s home is generally covered, while the use of a gun to rob a bank is certainly not.<sup>3</sup> Separating these and other types of keeping and bearing has become central to Second Amendment analysis.<sup>4</sup>

And yet very little attention has been given to what traditionally were, and might still be, the most common uses of arms.<sup>5</sup> Hunting and recreational uses like target shooting and “plinking”<sup>6</sup> have long been the primary reasons for gun ownership in the United States.<sup>7</sup> And although self-protection might recently have eclipsed recreation as the most common reason for gun ownership<sup>8</sup>—apparently due both to the increasing ownership of guns

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3 *Heller*, 554 U.S. at 636–37 (Stevens, J., dissenting) (“Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it does encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case.” (emphasis omitted)).

4 See, e.g., Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (arguing for a “home-bound” interpretation of the Second Amendment right); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1515–34 (2009) (evaluating the constitutionality of prohibitions on gun possession in certain places); Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486 (2014) (arguing that open carrying is covered by the Second Amendment, but that concealed carrying is not).

5 Few scholars or commentators have analyzed in any depth whether the Second Amendment protects hunting. As noted below, some have said in passing that *Heller* protects the right to hunt. See *infra* notes 109–12. Others have based the argument on state constitutional guarantees, Stephen P. Halbrook, *The Constitutional Right to Hunt: New Recognition of an Old Liberty in Virginia*, 19 WM & MARY BILL RTS. J. 197, 229–33 (2010), or other legal devices like public trust doctrine, Darren K. Cottriel, Comment, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235 (1996).

6 Plinking refers to shooting at informal targets like tin cans.

7 PHILIP J. COOK & JENS LUDWIG, *Guns in America: National Survey on Private Ownership and Use of Firearms*, NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF, May 1997, at 2 (“The most common motivation for owning firearms was recreation.”); see ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 57 (4th ed. 2008) (“By far the most common reasons for gun ownership are hunting and related recreational uses, a fact consistent with the prevalence of long guns over handguns.”); Jan E. Dizard et al., *The War over Guns: Introduction: Numbers Don’t Count*, in *GUNS IN AMERICA* 165, 166 (Jan E. Dizard et al. eds., 1999) [hereinafter *GUNS IN AMERICA*] (estimating 225 million guns in private possession in the late 1980s, and noting that “[m]ost of these firearms are rifles and shotguns primarily used for recreation: hunting and target shooting”).

8 In a Pew Research study conducted in February 2013, approximately 39% of gun owners listed hunting or sport shooting as their primary reason for owning a gun; in 1999, the combined figure was 57%. The same study found that 48% of gun owners listed protection as their primary reason for ownership in 2013, up from 26% in 1999. *Why Own a*

for self-defense and the declining popularity of hunting<sup>9</sup>—millions, and perhaps tens of millions, of Americans identify themselves as hunters every year.<sup>10</sup> That number dwarfs even the highest estimates of people who engage in armed self-defense annually.<sup>11</sup> Beyond the numbers, hunting has long had a special cultural salience in the United States,<sup>12</sup> and is especially treasured in rural communities where gun ownership and gun culture are most prevalent.<sup>13</sup>

This Article analyzes the Second Amendment status of hunting and other recreational uses of guns (referred to collectively as “hunting” except where greater specificity seems required) both as a matter of constitutional rhetoric and as a matter of constitutional doctrine. Though the focus is on hunting specifically, the analysis demonstrates a more general point: that to fully measure the Second Amendment’s influence on gun regulation, one

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*Gun? Protection Is Now Top Reason*, PEW RESEARCH CTR. (Mar. 12, 2013), <http://www.peoplepress.org/2013/03/12/why-own-a-gun-protection-is-now-top-reason/>.

9 Sabrina Tavernise & Robert Gebeloff, *Share of Homes with Guns Shows 4-Decade Decline*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/us/rate-of-gun-ownership-is-down-survey-shows.html> (“According to an analysis of the [2012 General Social Survey], only a quarter of men in 2012 said they hunted, compared with about 40 percent when the question was asked in 1977.”).

10 SPITZER, *supra* note 7, at 9 (“Today, approximately 14 million persons (sixteen years of age and older), about 6 percent of the country’s population, identify themselves as hunters.”); *see also* Matthew DeBell, *Recreational Uses of Guns*, in 2 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 494 (Gregg Lee Carter ed., 2002) (noting that “[a]bout half of gun owners, and about 12 percent of adults, take part” in hunting or target shooting each year). Moreover, “most people who have acquired guns for self-protection are also hunters and target shooters.” Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1047 (2009); *see also* PHILIP J. COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A NATIONAL COMPREHENSIVE SURVEY ON FIREARMS OWNERSHIP AND USE 39 tbl.4.6 (1996).

11 *Compare* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 184 tbl.2 (1995) (estimating 2.5 million defensive gun uses per year), *with* MICHAEL R. RAND, U.S. DEP’T OF JUSTICE, GUNS AND CRIME: HANDGUN VICTIMIZATION, FIREARM SELF-DEFENSE, AND FIREARM THEFT 1–2 (1994) (estimating 80,000 uses).

12 Franklin Foer & Chris Hughes, *Barack Obama Is Not Pleased*, NEW REPUBLIC (Jan. 27, 2013), <http://www.newrepublic.com/article/112190/obama-interview-2013-sit-down-president> (“[I]f you grew up and your dad gave you a hunting rifle when you were ten, and you went out and spent the day with him and your uncles, and that became part of your family’s traditions, you can see why you’d be pretty protective of that.” (quoting President Obama)).

13 Gary Langer, *Some Gun Measures Broadly Backed but the Politics Show an Even Split*, LANGER RESEARCH (Mar. 12, 2013), <http://www.langerresearch.com/uploads/1147a2GunControl.pdf> (reporting that gun ownership is “nearly doubly common in rural compared with urban areas”); Chuck Raasch, *In Gun Debate, It’s Urban vs. Rural*, USA TODAY (Feb. 27, 2013, 12:26 PM), <http://www.usatoday.com/story/news/nation/2013/02/27/guns-ingrained-in-rural-existence/1949479/> (“A compilation of December [2012] Gallup polls showed that rural Americans—roughly one-sixth of the population—are more than twice as likely to have a gun in the home than those living in large cities.”).

must consider not only its relatively limited doctrinal impact,<sup>14</sup> but its enormous rhetorical and political power.<sup>15</sup> Constitutional rhetoric has not only dominated the political debate over gun regulation in the United States—sometimes with little connection to the substance of constitutional law—but has shaped that doctrine in fundamentally important ways.<sup>16</sup>

The first Part of this Article therefore begins by analyzing popular constitutional rhetoric regarding the Second Amendment and the use of guns for hunting and recreation.<sup>17</sup> “Gun rights talk” has long played a massive role in defining the scope and stringency of gun regulation in the United States,<sup>18</sup> and its content is usually predictable: gun-rights advocates celebrate the Second Amendment as a matter of law and rhetoric, while gun regulation advocates downplay the Amendment’s doctrinal scope and fight its political relevance. When it comes to hunting and recreation, however, the traditional battle lines consistently get crossed in interesting ways. Gun regulation advocates—including many liberal politicians—go to great lengths to estab-

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14 Prior to the DC Circuit’s decision in *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff’d sub nom.* *District of Columbia v. Heller*, 554 U.S. 570 (2008), no federal court of appeals in the country had ever struck down a gun control law on Second Amendment grounds. Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2007–2008 CATO SUP. CT. REV. 127, 140. Even after *Heller*, the vast majority of Second Amendment claims have failed. See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 707 (2012) (noting that lower courts have largely embraced a restrained approach “that leads to all but the most drastic restrictions on guns being upheld”).

15 See Spitzer, *supra* note 7, at 18 (“[A]n understanding of the Second Amendment and its consequences is essential precisely because it is a touchstone of the gun debate.”); FRANKLIN E. ZIMRING, *Continuity and Change in the American Gun Debate*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 39 (Bernard E. Harcourt ed. 2003) (“The Second Amendment’s language describing a ‘right of the people to bear arms’ has always played an important symbolic role in the rhetoric of opposition to gun controls, but the Second Amendment has been considered a dead letter as a potential obstacle to state and federal gun laws.”); Frederick Schauer, *The Constitution of Fear*, 12 CONST. COMMENT. 203, 204 n.1 (1995) (“[T]he existence of the Second Amendment has legitimated a certain rhetoric and politics that have made gun control more difficult than would otherwise have been the case.”).

16 See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 194 (2008) (arguing that the “individual rights” interpretation of the Second Amendment was a product of contemporary constitutional deliberation, rather than “one epochal act of eighteenth-century lawmaking”).

17 My interest is in *armed* hunting and recreation, though for the sake of simplicity I will generally refer simply to “hunting.” It is of course possible to protect a right to hunt that does not specifically include a right to do so with arms—most state constitutional guarantees of the “right to hunt” do exactly that. See Halbrook, *supra* note 5, at 229–33 (listing thirteen state provisions that protect a right to hunt, and seven that protect a right to hunt with arms). Since the publication of Halbrook’s article, at least three more states have adopted right-to-hunt provisions. *State “Right to Hunt and Fish” Protections*, NAT’L SHOOTING SPORTS FOUND. (June 19, 2013), <https://www.nssf.org/factsheets/PDF/StateRighttoHunFish.pdf>.

18 See generally Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813 (2014).

lish their bona fides as hunters,<sup>19</sup> swear fealty to hunters' "rights,"<sup>20</sup> and carve out protections in firearms laws for sporting weapons.<sup>21</sup> Meanwhile, gun-rights advocates insist that the Second Amendment "ain't about hunting."<sup>22</sup> Chris Cox, Executive Director of the NRA Institute for Legislative Action, represents the position well: "I'm a hunter myself, but the Second Amendment has really nothing to do with hunting."<sup>23</sup>

Rhetorically, then, hunting seems to draw support from those generally regarded as foes of the Second Amendment, while many gun-rights supporters would deny constitutional coverage to their apparent political allies. This puzzle is interesting and important in its own right. And it is especially significant because Second Amendment rhetoric has so much influence over politics and doctrine.

The second Part of the Article turns to the doctrinal arguments. It concludes that gun-rights supporters' rhetoric largely reflects a better reading of law and history—the case for Second Amendment coverage of hunting and recreation is tenuous. There are at least two major arguments in support of hunting's constitutional salience: that hunting is directly included in the meaning of "keep and bear arms," and that it is instrumentally or penumbally protected as an aid to "core" Second Amendment interests like self-defense. Neither of these arguments yields much fruit.

As a doctrinal matter, the argument for direct coverage of hunting rests largely on *Heller's* statement that "[t]he 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."<sup>24</sup> But the Court offered no support for this apparently offhand remark,<sup>25</sup> and there is little evidence that the framers, ratifiers, or general public either intended or believed the Second Amendment to cover hunting.<sup>26</sup> Indeed, even the reaction to the notorious "game laws" was not premised on support for a right to hunt while armed.<sup>27</sup>

Stronger arguments can be made that hunting is constitutionally protected because it is instrumental to the Second Amendment's core values, or

19 See *infra* notes 37–40, 241–42 and accompanying text.

20 See *infra* notes 41–52 and accompanying text.

21 See Anders Walker, *Shotguns, Weddings, and Lunch Counters: Why Cultural Frames Matter to Constitutional Law*, 38 FLA. ST. U. L. REV. 345, 366 (2011); see also Preston K. Covey, *Sporting Purposes Test*, in 2 GUNS IN AMERICAN SOCIETY 548–52 (Gregg Lee Carter ed., 2002).

22 See *infra* Section I.B.

23 *Talk of the Nation: Analysis: Politics of Guns and the Gun Industry* (National Public Radio broadcast May 15, 2003).

24 *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

25 David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of Guns*, 69 OHIO ST. L.J. 641, 647 (2008) [hereinafter Williams, *Death to Tyrants*] ("[I]t is entirely unclear how hunting entered the scene, as the Court offers no support for the idea that hunting comes within the Amendment's ambit.").

26 See *infra* Section II.A.

27 See *infra* subsection II.A.2.

falls within its penumbras.<sup>28</sup> For example, armed hunting and recreation might make a person better able to use guns for core Second Amendment purposes like self-defense. Hunting might therefore have some degree of constitutional salience.<sup>29</sup> But as with other constitutional rights, the fact that an activity aids the exercise of a core constitutional right does not necessarily mean that it gets any constitutional protection,<sup>30</sup> let alone the same level as the core right.<sup>31</sup> Accordingly, even if hunting has some functional relationship to the core of the Second Amendment, that might not mean much as a doctrinal or practical matter.

The conclusion that hunting has limited, if any, Second Amendment protection carries with it some significant doctrinal implications for gun regulation targeting hunting, hunters, and hunting weapons. For example, the Supreme Court in *Heller* concluded that weapons can be banned if they are not “in common use”<sup>32</sup> for lawful purposes like self-defense.<sup>33</sup> Given hunting’s tenuous constitutional salience, it is unclear whether hunting weapons

28 Glenn Harlan Reynolds, *Second Amendment Penumbra: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 249 (2012) [hereinafter Reynolds, *Second Amendment Penumbra*] (suggesting that “the auxiliary protections that might matter most [to the Second Amendment right of self-defense] would be those that would make th[e] right practicable in the real world”); cf. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (“[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.”).

29 See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–72 (2004).

30 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–36 (1973) (dismissing appellees’ contention that education is a fundamental right because it is essential to effective exercise of First Amendment freedoms, noting that “we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech” (emphasis omitted)).

31 See, e.g., *United States v. Chovan*, 735 F.3d 1127, 1137–38 (9th Cir. 2013) (describing a two-step inquiry under which standard of review varies depending on how close the law comes to the core of the Second Amendment right, and degree to which the law burdens that right); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (“[L]aws restricting activity lying closer to the margins of the Second Amendment right . . . may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.”); *United States v. Skoien*, 587 F.3d 803, 812 (7th Cir. 2009) (“We are not suggesting that keeping and bearing firearms for hunting falls outside the scope of the Second Amendment . . . We make this observation only to clarify that . . . this case does not strike at the heart of the Second Amendment right as explicated in *Heller*.”), *vacated on other grounds by United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc).

32 *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (noting “another important limitation on the right to keep and carry arms”—that only “the sorts of weapons . . . ‘in common use at the time’” are protected (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939))). The Court grounded the common use test in historical tradition. *Id.* (“[T]hat limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” (citation omitted)); see also, e.g., *United States v. Henry*, 688 F.3d 637, 640 & n.3 (9th Cir. 2012).

33 *Heller*, 554 U.S. at 629 (striking down a DC ordinance on the basis that it effectively banned handguns, “the quintessential self-defense weapon”).

should be counted for purposes of this test. And that could be relevant for the constitutional status of AR-15 “assault rifles,” whose commonness appears to be based on their use for hunting.

At a more general level, clarifying the relationship between hunting and the Second Amendment may suggest hope for the frequently dispiriting gun debate. This Article aims to show that an enormous amount of gun-related activity falls outside the scope of the Second Amendment. Indeed, gun-rights supporters have long argued as much. And yet even in the Amendment’s absence, our basic mechanisms of law and politics seem perfectly capable of both regulating and protecting the recreational use of guns, which account for roughly half of gun ownership.<sup>34</sup> Hunting is subject to regulation, to be sure,<sup>35</sup> but it is also widely permitted. For many involved in the gun debate, this state of affairs—freedom to use guns for certain purposes, modest safety regulations, political assurances, and limited demands on the Second Amendment—is close to an ideal. At the very least, it suggests that the Second Amendment’s doctrinal shadow is smaller, and political compromise more feasible, than many or observers or veterans of the debate might suspect.

## I. HUNTING AND GUN-RIGHTS TALK

The Second Amendment has significantly shaped the scope and strength of gun regulation in the United States. But its influence cannot be measured solely by doctrinal tests, nor the number of times it has been successfully invoked in court, because its greatest power is rhetorical—it helps keep gun laws from being passed in the first place. Within that rhetoric, hunting occupies a uniquely fraught position. It is described both as a quintessential, laudable form of arms-bearing and as having nothing at all to do with the Second Amendment. This Part explores and evaluates these two views. For ease of reference, they can be called the “pro-hunting” and “anti-hunting” views, though of course the pro- and anti-refer only to their relationship to the Second Amendment. Those who espouse them may oppose (or support) the activity of hunting even while arguing that it is (or is not) covered by the Amendment.

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34 See Brannon P. Denning & Michael B. Kent, Jr., *Anti-Anti-Evasion in Constitutional Law*, 41 FLA. ST. U. L. REV. 397, 424 (2014) (arguing that the Supreme Court will decline to create anti-evasion doctrines where it believes “that there are robust political protections . . . that sufficiently police the constitutional boundaries and prevent governmental overreaching”).

35 The extent of hunting regulation has become a talking point for gun regulation advocates. Pema Levy, *Why Gun Control Backers Love to Talk About Duck Hunting*, TALKING POINTS MEMO (Jan. 30, 2013, 10:05 AM), <http://talkingpointsmemo.com/dc/why-gun-control-backers-love-to-talk-about-duck-hunting> (“Federal law prohibits me from having more than three shells in my shotgun when I’m duck hunting. So federal law provides more protection for the ducks than it does for citizens.” (quoting Rep. Mike Thompson (D-CA))).

A. *Rhetorical Support for a Right to Hunt with Arms*

Winning over hunters and recreational shooters is part of the American political playbook. Politicians often go to great and sometimes comical lengths to tout their own experiences, enjoyment, and prowess with regard to hunting and shooting sports. Mitt Romney, for example, claimed to have been a “hunter pretty much all my life,”<sup>36</sup> though he had only been hunting twice: once as a child, and once just prior to the campaign with some donors.<sup>37</sup> Though Barack Obama has expressed support for *Heller* and described hunting as “part of a cherished national heritage,”<sup>38</sup> his relationship with the hunting community has been somewhat fraught, a point driven home by the reaction to his comment that some Americans “get bitter, they cling to guns or religion or antipathy to people who aren’t like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations.”<sup>39</sup> When President Obama later claimed to go skeet-shooting “all the time” at Camp David, he was roundly mocked by gun-rights advocates.<sup>40</sup>

Sometimes comments like this are simple political posturing. But politicians often take the further step of describing hunting as a “right” protected

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36 Michael Luo, *Is Romney a Hunter? Depends on What Hunt Is*, N.Y. TIMES (Apr. 6, 2007), <http://www.nytimes.com/2007/04/06/us/politics/06hunt.html>.

37 *Id.*

38 Jacob Sullum, *Obama Still Thinks the Second Amendment Is About Hunting*, REASON.COM (July 26, 2012, 12:42 PM), <http://reason.com/blog/2012/07/26/obama-still-thinks-the-second-amendment> (“I, like most Americans, believe that the Second Amendment guarantees an individual the right to bear arms. And we recognize the traditions of gun ownership that passed on from generation to generation—that hunting and shooting are part of a cherished national heritage.” (quoting Press Release, Office of the Press Sec’y, The White House, Remarks by the President at the National Urban League Convention (July 25, 2012, 8:00 PM), <https://www.whitehouse.gov/the-press-office/2012/07/25/remarks-president-national-urban-league-convention>)).

39 Jeff Zeleny, *Obama Remarks Called ‘Out of Touch’*, N.Y. TIMES (Apr. 12, 2008), <http://www.nytimes.com/2008/04/12/us/politics/12campaign.html> (quoting Mayhill Fowler, *Obama: No Surprise that Hard-Pressed Pennsylvanians Turn Bitter*, HUFFINGTON POST: THE BLOG (Nov. 17, 2008, 10:07 PM), [http://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha\\_b\\_96188.html](http://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha_b_96188.html)); see also *Montana Leaders Decry Comments on Small Town America*, U.S. FED. NEWS, Apr. 15, 2008 (quoting letter from Montana politicians: “Montanans are hunters. Many Montanans feel the Second Amendment is a part of our heritage as sportsmen and recreationists. It is not something we ‘cling to’ out of bitterness.”).

40 Brad Knickerbocker, *Obama Skeet Shooting: NRA Says It’s a Ploy to Confiscate Guns*, CHRISTIAN SCI. MONITOR (Feb. 3, 2013), <http://www.csmonitor.com/USA/DC-Decoder/2013/0203/Obama-skeet-shooting-NRA-says-it-s-a-ploy-to-confiscate-guns> (“One picture [of the President trap-shooting] does not erase a lifetime of supporting every gun ban and every gun-control scheme imaginable.” (quoting NRA spokesman Andrew Arulanandam)). Critics went so far as to question the veracity of photos of President Obama shooting at Camp David. See, e.g., Michael Harlin, *Seven Reasons Why It’s a Photoshop*, AM. THINKER (Feb. 3, 2013), [http://www.americanthinker.com/blog/2013/02/seven\\_reasons\\_why\\_its\\_a\\_photo-opp\\_3.html#ixzz2JqSvYE3R](http://www.americanthinker.com/blog/2013/02/seven_reasons_why_its_a_photo-opp_3.html#ixzz2JqSvYE3R) (“If he’s shooting skeet then I’m Daffy Duck.”); Emily Miller, *Obama’s Browning Shotgun*, WASH. TIMES (Feb. 2, 2013, 4:37 PM), <http://www.washingtontimes.com/blog/guns/2013/feb/2/miller-obamas-browning-shotgun/>.

by the Second Amendment,<sup>41</sup> echoing and perhaps encouraging the popular belief that the Second Amendment protects hunting.<sup>42</sup> As Reva Siegel notes, the 1972 Republican platform promised to “[s]afeguard the right of responsible citizens to collect, own, and use firearms for legitimate purposes, including hunting, target shooting and self-defense.”<sup>43</sup> Romney pledged support for the hunting “right” decades later.<sup>44</sup> This trope is not limited to conservatives playing to their base; it is also invoked by Democrats who are unlikely ever to win points with the NRA.<sup>45</sup> Bill Clinton, whose bona fides as a hunter are probably more secure than Romney’s or Obama’s,<sup>46</sup> repeatedly referred

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41 See, e.g., 140 CONG. REC. H3059 (daily ed. May 5, 1994) (statement of Rep. Hutto) (“The NRA should take the lead in coming up with a national plan to reduce the availability of guns and level of violence in America while maintaining the constitutional right of Americans to hunt and to protect their homes.”); Steve Goldstein, *Despite Tragedy, Congress Cautious About Gun Laws*, PHILA. INQUIRER (Apr. 22, 2007), [http://articles.philly.com/2007-04-22/news/25242554\\_1\\_gun-laws-gun-control-legislation-gun-control](http://articles.philly.com/2007-04-22/news/25242554_1_gun-laws-gun-control-legislation-gun-control) (“We need to respect the Second Amendment guarantees for recreational use, such as hunting.” (quoting Rep. Joe Stesak (D-PA))); Vin Suprynowicz, *Horsford and ‘Military-Designed’ Weapons*, LAS VEGAS REV.-J. (Jan. 27, 2013, 2:11 AM), <http://www.reviewjournal.com/vin-suprynowicz/horsford-and-military-designed-weapons> (“I support the Second Amendment and the right of individuals to bear arms for recreation, hunting or self-defense.” (quoting Rep. Steven Horsford (D-NV))).

42 Tim Donaghy, *The Right to Bear Arms*, 28 VT. B.J. 67, 67 (2002) (“The Second Amendment, the Right to Bear Arms, has affected my life because I like to hunt and shoot. . . . Without the Second Amendment I would not be able to hunt, shoot or own firearms.”); George V. Barr, Letter to the Editor, *Gun Laws and Violence*, L.A. TIMES (Sept. 30, 1993), [http://articles.latimes.com/1993-09-30/local/me-40355\\_1\\_gun-control-gun-laws-work-strictest-gun](http://articles.latimes.com/1993-09-30/local/me-40355_1_gun-control-gun-laws-work-strictest-gun) (“We the people have the right, under the Second Amendment, to own firearms, whether for recreational shooting, competition, hunting, or self-defense.”).

43 Siegel, *supra* note 16, at 215 (alteration in original) (quoting Republican Nat’l Convention, *Republican Party Platform of 1972*, THE AMERICAN PRESIDENCY PROJECT (Aug. 21, 1972), <http://www.presidency.ucsb.edu/ws/index.php?pid=25842>).

44 *Mitt Romney on the Second Amendment*, MITT ROMNEY CENT., <http://mittromneycentral.com/on-the-issues/second-amendment/> (last visited Oct. 4, 2015) (“I do support the right of individuals to bear arms, whether for hunting purposes or for protection purposes or any other reasons. That’s the right that people have.” (quoting Mitt Romney, *Transcript The Republican Debate*, N.Y. TIMES (Jan. 24, 2008), <http://www.nytimes.com/2008/01/24/us/politics/24text-debate.html>)).

45 Andrew J. McClurg, *Sound-Bite Gun Fights: Three Decades of Presidential Debating About Firearms*, 73 UMKC L. REV. 1015, 1019 (2005) (“It is popular among pro-gun control Democrats to tout their ‘sportsmen’ credentials.”); see also Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 123 (1995) (“During a 1990 ABC program on the gun control issue, long-time NRA opponent Senator Howard Metzenbaum assured one woman that he would ‘protect [her] right’ to continue using guns in sporting competitions.” (alteration in original) (quoting ABC News/Time Forum: Guns (ABC television broadcast, Jan. 24, 1990))).

46 Gwen Ifill, *Clinton Hunts, Making Point on Guns*, N.Y. TIMES (Dec. 28, 1993), <http://www.nytimes.com/1993/12/28/us/clinton-hunts-making-point-on-guns.html> (reporting that President Clinton “renew[ed] his sportsman’s credentials” during a duck hunting trip).

to the “right” to hunt.<sup>47</sup> Al Gore did the same.<sup>48</sup> During his campaign for President, John Kerry frequently invoked hunting and the Second Amendment: “I am a hunter. I’m a gun owner. I’ve been a hunter since I was a kid—12, 13 years old. And I respect the Second Amendment, and I will not tamper with the Second Amendment.”<sup>49</sup> NRA Executive Vice President Wayne LaPierre nevertheless declared that “John Kerry is the most anti-gun, anti-hunting presidential nominee in American history.”<sup>50</sup> Arguing in favor of hunting easements, New York Senator Charles Schumer similarly suggested that hunting is protected by the constitution: “I’m a firm believer in the right to bear arms . . . Why shouldn’t I be? The Second Amendment is as important as the First, the Third and all the others.”<sup>51</sup> The NRA nevertheless described Schumer as “The Criminal’s Best Friend in Congress.”<sup>52</sup>

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47 See, e.g., *Clinton Campaigns for Weapons Ban in Letter to Hunters*, N.Y. TIMES (May 1, 1994), <http://www.nytimes.com/1994/05/01/us/clinton-campaigns-for-weapons-ban-in-letter-to-hunters.html> (reporting President Clinton’s open letter to hunters regarding the assault weapons ban and accompanying pledge “that he would ‘not allow the rights of hunters and sportsmen to be infringed upon’”); Thomas B. Edsall, ‘Wedge’ Tack May Not Find an Opening: Administration Has Defenses in Place, WASH. POST (Oct. 18, 1996), <https://www.washingtonpost.com/archive/politics/1996/10/18/wedge-tack-may-not-find-an-opening/5161b81c-a45c-47be-a1a0-f915167f1b69/> (noting Clinton’s argument, after passage of assault weapons ban, “that ‘two hunting seasons have come and gone’ since the two bills were enacted, and no sportsman has lost a gun or the right to hunt” (quoting President Clinton)); see also McClurg, *supra* note 45, at 1024 (“I support the right to keep and bear arms. I live in a state where over half the adults have hunting or fishing licenses or both.” (quoting President Clinton, *The 1992 Campaign; Transcript of 2nd TV Debate Between Bush, Clinton and Perot*, N.Y. TIMES (Oct. 16, 1992), <http://www.nytimes.com/1992/10/16/us/the-1992-campaign-transcript-of-2d-tv-debate-between-bush-clinton-and-perot.html>)).

48 McClurg, *supra* note 45, at 1031 (“I will not do anything to affect the rights of hunters or sportsmen. I think that homeowners have to be respected in their right to have a gun if they wish to.” (quoting Al Gore, *2000 Campaign; 2nd Presidential Debate Between Gov. Bush and Vice President Gore*, N.Y. TIMES (Oct. 12, 2000), <http://www.nytimes.com/2000/10/12/us/2000-campaign-2nd-presidential-debate-between-gov-bush-vice-president-gore.html>)).

49 *Id.* at 1039 (quoting John Kerry, *Transcript of Debate Between Bush and Kerry, with Domestic Policy the Topic*, N.Y. TIMES (Oct. 14, 2004), <http://www.nytimes.com/2004/10/14/politics/campaign/transcript-of-debate-between-bush-and-kerry-with-domestic-policy-the-topic.html>); see also James Dao, *Where Kerry Is Trying to Avoid Gore’s Pitfalls*, N.Y. TIMES (Oct. 13, 2004), <http://www.nytimes.com/2004/10/13/politics/campaign/where-kerry-is-trying-to-avoid-gores-pitfalls.html> (noting that Kerry supporters in West Virginia have “tried to defuse the gun issue by distributing leaflets featuring Mr. Kerry as a hunter who supports the Second Amendment”).

50 Jack Kelly, *NRA Campaigns Against Kerry*, PITTSBURGH POST-GAZETTE, Oct. 14, 2004, at A8; see also James Dao, *In N.R.A. Speech, Cheney’s Mark Is Kerry*, N.Y. TIMES (Apr. 18, 2004), <http://www.nytimes.com/2004/04/18/us/in-nra-speech-cheney-s-mark-is-kerry.html> (“Don’t be fooled, they are poseurs and fakes and they want your guns. And the biggest fraud of all? John Kerry.” (quoting NRA lobbyist Chris Cox)).

51 Fred LeBrun, *Schumer Pushing for Hunting Easements*, ALBANY TIMES UNION (N.Y.), Aug. 5, 2004, at C5, 2004 WLNR 635006.

52 SPITZER, *supra* note 7, at 99.

These politicians are, of course, responding to what they see as political imperatives, and no single body represents those imperatives more forcefully than the NRA. The NRA frequently touts its commitment to hunters: “In truth, the NRA is without doubt the largest pro-hunting organization in the world. Eighty percent of our members hunt.”<sup>53</sup> The NRA also does not hesitate to invoke the Second Amendment, even when addressing such sensitive topics as guns in schools.<sup>54</sup> One might expect, therefore, to find the organization strongly espousing a Second Amendment right to hunt. But despite the NRA’s historical connection to hunting interests, it strenuously denies that hunting is a Second Amendment right. The nuance of this position is important to understand.

The NRA was founded in New York in the early 1870s to promote rifle practice in response to the Union Army’s poor marksmanship in the Civil War.<sup>55</sup> For the first fifty years of its existence, the NRA’s primary focus was on marksmanship and sporting activities.<sup>56</sup> Within three years of the end of World War II, however, “membership had tripled, although most of these new members had a greater interest in hunting than in marksmanship. The NRA quickly adapted to this new priority.”<sup>57</sup> Later, as Congress showed more interest in regulating guns, the NRA

devoted increasing time and resources to its political agenda. These shifting organizational priorities are confirmed in a content analysis of the NRA publication the *American Rifleman*, in which the proportion of space given over to target shooting declined from about 40 percent before World War II to about 20 percent after the war.<sup>58</sup>

The big shift from hunting promotion to gun control prevention came with the palace coup at the 1977 NRA convention,<sup>59</sup> which is often described as the turning point in the NRA’s overall identity.<sup>60</sup> Many accounts suggest

53 Chris W. Cox, *July 2012 Political Report: “On Capitol Hill and Beyond, The NRA Fights for Hunters’ Rights”*, NRA INST. FOR LEGIS. ACTION (June 26, 2012), <http://www.nra.org/news-issues/articles/2012/july-2012-political-report-on-capitol-hill-and-beyond-the-nra-fights-for-hunters%E2%80%99-rights.aspx> [hereinafter Cox, *2012 Political Report*].

54 Timothy Johnson, *What the Media Should Know About the NRA, Guns, and Schools*, MEDIA MATTERS FOR AM. (Apr. 12, 2013, 8:59 AM), <http://mediamatters.org/blog/2013/04/02/what-the-media-should-know-about-the-nra-guns-a/193402>.

55 See OSHA GRAY DAVIDSON, *UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL* 22–28 (expanded ed., Univ. Iowa Press 1998) (1993).

56 SPITZER, *supra* note 7, at 80–81.

57 *Id.* at 81.

58 *Id.*

59 Carl T. Bogus, *Gun Control and America’s Cities: Public Policy and Politics*, 1 ALB. GOV’T L. REV. 440, 464 (2008) (“In 1977, there was a revolution within the National Rifle Association (NRA), often referred to as the Cincinnati Revolt, in which political hardliners seized power. This watershed event turned a principally sporting and shooting association into a principally political advocacy group and lobby.” (footnote omitted)); Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 FORDHAM L. REV. 681, 711 (2004).

60 SPITZER, *supra* note 7, at 96–97 (arguing that prior to 1977, “the NRA leadership had maintained the organization’s primary focus on sporting, hunting, and other recrea-

that the number, influence, and power of hunters within the organization have been shrinking since then. Robert Spitzer, a political scientist who wrote the leading book on the politics of gun control,<sup>61</sup> reports: “I have talked to many sportspeople who are not politically charged, and they say, ‘I am not a member of the NRA . . . It is too political; it is too right wing; it is too rabid. And also it doesn’t focus enough on the hunting and sporting stuff anymore.’”<sup>62</sup>

The NRA’s shifting budget priorities seem to reflect this view.<sup>63</sup> Some strident gun-rights advocates are happy to see the hunters go.<sup>64</sup>

The division between these hunters’ interests and the NRA’s increasing focus on constitutional rhetoric is neatly captured by longtime NRA lobbyist

ditional gun uses,” but that afterwards “the hard-liners have pushed the organization toward total, unwavering opposition to all forms of gun regulation”).

61 See generally SPITZER, *supra* note 7.

62 Chuck Raasch & Kevin Johnson, *NRA Is Mum Amid Calls for Change After Newtown Shooting*, USA TODAY (Dec. 18, 2012, 1:04 AM), <http://www.usatoday.com/story/news/nation/2012/12/17/after-newtown-shooting-nra-is-mum/1776557/> (quoting Robert Spitzer); see also Jeff Burns, Letter to the Editor, *The N.R.A. and Hunters: It’s Complicated*, N.Y. TIMES (Apr. 27, 2012), <http://www.nytimes.com/2012/04/28/opinion/the-nra-and-hunters-its-complicated.html> (“The rifle association has little to do with hunting or public safety. It has long since lost its way.”); Richard Ford, *Armed but Not Alarmed*, N.Y. TIMES (Mar. 21, 2000), <http://www.nytimes.com/2000/03/21/opinion/armed-but-not-alarmed.html> (“I find it hard to believe that my current hunting buddies and I have found a natural mouthpiece for our interests in the person of Wayne LaPierre and the National Rifle Association.”); A.B. Hayes, Jr., *NRA Stands Fast—For Whom?*, VIRGINIAN-PILOT & LEDGER-STAR (Norfolk, VA), Aug. 26, 1994, at A18, 1994 WLNR 1883980 (“The NRA continues its radical no-compromise position on gun control; therefore, I have not renewed my membership. . . . I have been a member of two hunt clubs for many years; never have I seen an assault weapon or any need for one.”); John Krajewski, Letter to the Editor, *President’s Action*, CHI. TRIB. (Jan. 22, 2013), [http://articles.chicagotribune.com/2013-01-22/opinion/ct-vp-0122voicelettersbriefs-20130122\\_1\\_gun-control-gun-owners-gun-violence](http://articles.chicagotribune.com/2013-01-22/opinion/ct-vp-0122voicelettersbriefs-20130122_1_gun-control-gun-owners-gun-violence) (“I was a member of the National Rifle Association as an avid sports person and hunter. I sent back requests for continued membership when the NRA took a liking to the 50-caliber rifles. I told the organization that it no longer represented me since I will not hunt with a sidearm, 50-caliber gun, or an assault weapon.”); Lily Raff McCaulou, *I Hunt, but the N.R.A. Isn’t for Me*, N.Y. TIMES (Apr. 25, 2012), <http://www.nytimes.com/2012/04/25/opinion/i-hunt-but-i-oppose-the-nra.html>.

63 SPITZER, *supra* note 7, at 88 (“Fewer NRA resources have been devoted to traditional hunting, shooting, and other programs. In 1980, 19 percent of the NRA budget went to hunter safety programs, police training courses, and the like. By 1988, only 11 percent of the budget was devoted to such programs.”).

64 DAN BAUM, GUN GUYS 82 (2013) (“The truth was, a lot of gun-rights activists didn’t even consider hunters allies in the cause. They called them ‘Fudds’ and dismissed them as dilettantes who lolled comfortably in their privileged status as the only legitimate gun users.”); see, e.g., Scott Gilmore Milton-Freewater, Letter to the Editor, *Departure of NRA Member Won’t Be Cause for Tears*, EAST OREGONIAN (Pendleton, OR), Feb. 4, 2013, 2013 WLNR 2886527 (“The Elmer Fudd fantasy regarding hunting and the Second Amendment was cooked up to divide hunters and recreational shooters on the purpose of the Second Amendment. . . . The amendment has absolutely nothing to do with hunting, and never has.”).

Tanya Metaksa: “Isn’t it so that sport was the furthest thing from the minds of the Founding Fathers? They were building a country, not a country club.”<sup>65</sup> To be sure, the organization counts eighty percent of its members as hunters,<sup>66</sup> assures them that it will defend their “right to hunt, shoot and own a gun for self-defense,”<sup>67</sup> and until recently maintained a website called NRAHuntersRights.org.<sup>68</sup> The organization also notes:

NRA’s commitment to hunting is enshrined in our bylaws, which state, in part, that one of the organization’s core objectives is “to promote hunter safety, and to promote and defend hunting as a shooting sport and as a viable and necessary method of fostering the propagation, growth and conservation, and wise use of our renewable wildlife resources.”<sup>69</sup>

It is worth noting, however, that this commitment to hunting is listed fifth out of five purposes and objectives in the bylaws.<sup>70</sup> The first is to “[p]rotect and defend the Constitution of the United States.”<sup>71</sup> The last is “[t]o foster and promote the shooting sports.”<sup>72</sup>

65 Tanya K. Metaksa, *Self-Defense: A Primary Civil Right*, in GUNS IN AMERICA, *supra* note 7, at 194–95 (“Could it be that the Founding Fathers, after protecting religious freedom, then set about to protect hunting? Could it be that the Founding Fathers, after safeguarding free speech and free assembly, then hastened to safeguard target shooting?”).

66 Cox, *2012 Political Report*, *supra* note 53, at 2.

67 Herz, *supra* note 45, at 104 n.211 (quoting Letter from Tanya Metaksa, Exec. Dir., Institute for Legislative Action, to NRA Members (May 20, 1994) (on file with *Boston University Law Review*)); Editorial, *National Rifle (Selling) Association*, N.Y. TIMES (Dec. 20, 2012), <http://www.nytimes.com/2012/12/21/opinion/national-rifle-selling-association.html> (“Officials from the N.R.A. have repeatedly said that their main goal is to protect the Second Amendment rights of rank-and-file members who like to hunt or want guns for protection.”).

68 *New Brochure*—“NRA: Fighting for Hunters’ Rights”, NRAHUNTERSRIGHTS.ORG (June 6, 2012), <https://web.archive.org/web/20130125194409/http://www.nrahuntersrights.org/Article.aspx?id=6644>. The website was taken down sometime in 2013 while this Article was being written, but can be accessed by searching for NRAHuntersRights.org in the Internet Archive index. The brochure was apparently replaced with another, *What NRA Does for Hunters*, which makes many of the same points and also does not invoke the Second Amendment even once. See *What NRA Does for Hunters*, NRA-ILA.ORG, [http://www.nraila.org/media/PDFs/NRA\\_hunting.pdf](http://www.nraila.org/media/PDFs/NRA_hunting.pdf).

69 *New Brochure*—“NRA: Fighting for Hunters’ Rights”, *supra* note 68.

70 Bruce H. Kobayashi & Joseph E. Olson, In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons”, 8 STAN. L. & POL’Y REV. 41, 41 n.5 (1997) (quoting NRA Bylaws, Art. II(1) (1996)). The NRA’s bylaws are not publicly available, and despite repeated requests I have been unable to obtain a copy. Kobayashi and Olson quote from the Bylaws in their 1997 article, however, and Olson is a member of the NRA’s board of directors, so I believe that the text they use must have been accurate at least as of that date. Moreover, a current NRA publication reproduces the fifth article—numbered as such—on its first page. See also *What NRA Does for Hunters*, *supra* note 68, at 1.

71 Kobayashi & Olson, *supra* note 70, at 41 n.5 (quoting NRA Bylaws, Art. II(1) (1996)).

72 NRA Bylaws, Art. II(1) (1996).

The space between the first and last of these purposes seems significant, as evidenced by the fact that the NRA advocates hunters rights without relying on the federal Constitution. NRA Hunters Rights.org did not even mention the Second Amendment. There is one way, however, in which the NRA does explicitly invoke the “right to hunt.” Exemplary in this regard is a brochure the organization produced called *NRA: Fighting for Hunters’ Rights*.<sup>73</sup> Though invoking “rights,” it says nothing at all about the Second Amendment, instead emphasizing *state* constitutional law—and properly so, because some state constitutions now have provisions guaranteeing the right to hunt with arms.<sup>74</sup> As Akhil Amar notes, “[t]hese state constitutional references to hunting and recreation appear to be of a distinctly recent vintage, enacted in the 1980s and 1990s.”<sup>75</sup> In fact, they were largely a product of NRA advocacy.<sup>76</sup> And it stands to reason that they were added precisely *because* the Second Amendment alone was not seen as sufficient to protect the right to hunt.

### B. “*The Second Amendment Ain’t About Hunting*”

That the NRA does not endorse the pro-hunting view of the Second Amendment is perhaps unexpected. It is less surprising that the anti-hunting view is often voiced by gun regulation advocates and those favoring a militia-based reading of the Amendment. The reason for this is straightforward: if the Amendment covers only armed service in a militia, then by definition it does not include a right to hunt, either on its own terms<sup>77</sup> or alongside other

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73 *New Brochure—“NRA: Fighting for Hunters’ Rights”*, *supra* note 68.

74 See Halbrook, *supra* note 5, at 229–33 (listing thirteen state provisions that protect a right to hunt, seven of which specifically protect a right to hunt with arms).

75 Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 902 n.37.

76 See *NRA’s Right to Hunt and Fish Amendments Adopted in Three States*, NAT’L RIFLE ASS’N POL. VICTORY FUND (Nov. 5 2010), <http://www.nrapvf.org/news-alerts/2010/11/nra%E2%80%99s-right-to-hunt-and-fish-amendments-adopted-in-three-states.aspx> (quoting Chris Cox, NRA-ILA executive director, as saying that the “NRA will continue to lead efforts to pass these [right-to-hunt] amendments across the nation”).

77 See, e.g., Rachana Bhowmik, *Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry*, 11 J.L. & POL’Y 67, 87 (2002) (“[T]he Second Amendment was not meant to protect the rights of hunters or sportsmen, but was purely a means of protecting a state’s right to maintain an organized armed force.”); Garry Wills, *Gun Question Broadens*, CHI. SUN-TIMES, April 5, 1997, at 16, 1997 WLNR 7143819 (“The Second Amendment authorizes the government’s militia; it has nothing to do with hunting.”).

personal uses of arms.<sup>78</sup> Some commentators simply emphasize the fact that the right to hunt is not enumerated in the Amendment's text.<sup>79</sup>

On this particular issue of the Amendment's scope, gun regulation advocates find themselves in an unlikely alliance with gun-rights supporters. One of the central oddities of gun-rights rhetoric is that many of the Second Amendment's most vociferous supporters also regularly insist—often indignantly—that some of the most widespread uses of guns in the United States are *not* protected by the Amendment. This sentiment is captured by the title of an oft-cited law review article by former NRA Assistant General Counsel Thomas Moncure: *The Second Amendment Ain't About Hunting*.<sup>80</sup> This epigram (sometimes appearing in a more specific “duck hunting” variety<sup>81</sup>) is perhaps not as well-known as other famous lines like “Guns don't kill people; people

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78 Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898, 903 (2004) (book review) (“The preamble reminds us of something that is obvious from the eighteenth-century sources and contested today only by extremists, which is that the Second Amendment was not about hunting, or target shooting, or scaring off burglars. It was intended to preserve the militia.”); Robert J. Spitzer, *The Second Amendment “Right to Bear Arms” and United States v. Emerson*, 77 ST. JOHN'S L. REV. 1, 6 (2003) (“The Second Amendment provides no protection for personal weapons uses, including hunting, sporting, collecting, or even personal self-protection . . . .”); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 597 (2000) (“I hope to discredit a libertarian version of the revisionist approach, which sees activities like hunting and recreational shooting as interests protected by the Second Amendment. This position, while it may be widespread among lay Second Amendment enthusiasts, cannot be supported by the historical record.”).

79 See, e.g., Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79, 105 (1997) (“[T]here is little reason to believe that the failure to mention hunting within the language of the Second Amendment was an oversight or a belief that it was already covered elsewhere.”). The same argument is sometimes embraced by those seeking to defend the Amendment's honor. See, e.g., Brandon Harvey, Opinion, *Your Turn NH: Some Anti-Gun Arguments Are So Lame that One Has to Respond*, N.H. UNION LEADER (Feb. 10, 2013, 4:25 PM), <http://www.unionleader.com/apps/pbcs.dll/article?AID=/20130211/OPINION02/130219921/1016/news07&template=printart> (“[T]he Second Amendment . . . does not say ‘the right to hunt deer.’ In fact, deer hunting is not a right.”); E.L. Ward, Letter to the Editor, NEW ORLEANS TIMES PICAYUNE, Apr. 16, 1989, at C16 (“If I am not mistaken, the Second Amendment says nothing about hunting or recreational use. The Second Amendment was for the protection of oneself, family and nation.”).

80 Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991).

81 David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333, 1333 (1995); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1316 (1997) (“[B]y its very terms, the Amendment is addressed to the militia and military. Therefore, it is not about duck hunting either . . . .” (footnote omitted)); Siegel, *supra* note 16, at 227–28 (quoting Neal Knox assuring the NRA membership that the Republication leadership had promised to adopt a “coherent Second Amendment strategy to define gun ownership as a constitutional right, not a duck-hunting right”); S. Vaughn Binzer, Opinion, *Against Handgun Ban*, ADVERTISING AGE, Mar. 30, 1992, at 28 (“The Second Amendment is not about duck hunting.”).

kill people.”<sup>82</sup> But it has nonetheless become deeply embedded in gun-rights rhetoric. A recent article in the *National Review* exemplifies the argument:

The Second Amendment is not about Bambi and burglars—whatever a well-regulated militia is, it is not a hunting party or a sport-clays club. It is remarkable to me that any educated person . . . believes that the second item on the Bill of Rights is a constitutional guarantee of enjoying a recreational activity.<sup>83</sup>

The anti-hunting argument is important enough that many politicians seeking to curry favor with pro-gun voters are careful to make it;<sup>84</sup> others are criticized when they fail to do so.<sup>85</sup>

At least as a matter of political rhetoric, these anti-hunting arguments are presumably directed at a constituency that supports guns but does not believe the Second Amendment protects their use for hunting and recreation. The size of this constituency is difficult to establish, but its existence is apparent to anyone who makes even a cursory review of letters to the editor, political speeches, blog posts, and online comments. Defenders of the Second Amendment and opponents of gun regulation proclaim the anti-hunting argument on bumper stickers<sup>86</sup> and t-shirts.<sup>87</sup> They write letters to the

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82 See Philip J. Cook & Jens Ludwig, *Five Myths About Gun Control*, WASH. POST (June 13, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/11/AR2010061103259.html> (arguing that the “[g]uns don’t kill people, people kill people” slogan “has infected the public imagination with the mistaken belief that it’s just criminals, not weapons, that lead to deadly violence”); John J. Lennon, *A Perspective on Guns, Murder, Suicide from Attica*, N.Y. TIMES (Dec. 14, 2013), <http://kristof.blogs.nytimes.com/2013/12/14/a-perspective-on-guns-murder-suicide-from-attica/> (“The mantra ‘guns don’t kill people, people kill people’ reverberates throughout our society.”).

83 Kevin D. Williamson, *Regulating the Militia*, NAT’L REV. ONLINE (Dec. 28, 2012, 4:00 AM), <http://www.nationalreview.com/article/336529/regulating-militia-kevin-d-williamson>.

84 See, e.g., Chuck Raasch, *Gun-Friendly States Woo Firearms Manufacturers; Leaders Promise to Keep Government Hands off Business*, USA TODAY (Feb. 25, 2013), <http://www.usatoday.com/story/news/nation/2013/02/24/gun-manufacturers-second-amendment-states/1942633/> (“This isn’t about deer hunting . . . . The Second Amendment is about our right to keep and bear arms to defend ourselves.” (quoting Rep. Jeff Duncan (R-S.C.))); Jennifer Steinhauer, *Senator Unveils Bill to Limit Semiautomatic Arms*, N.Y. TIMES (Jan. 24, 2013), <http://www.nytimes.com/2013/01/25/us/politics/senator-unveils-bill-to-limit-semiauto-matic-arms.html> (“The Second Amendment wasn’t written so you can go hunting, it was to create a force to balance a tyrannical force here.” (quoting Sen. Tom Coburn (R-O.K.))).

85 Richard Burrow, Letter to the Editor, CHARLESTON GAZETTE (WV), Apr. 2, 2013, at 4A (“[Sen. Joe Manchin] stated that he believes 75 percent of West Virginians, like him, think the only purposes behind gun ownership and the Second Amendment are hunting and recreational shooting. . . . In other words, he does not believe what the Second Amendment truly means.”).

86 Allen Rostron, *Protecting Gun Rights and Improving Gun Control after District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 392 (2009).

87 David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 886 (1996) [hereinafter Williams, *Militia Movement*] (“The Militia of Montana (MOM) markets a T-shirt bearing an image of an eighteenth-

editor arguing that “[t]he Second Amendment is not about hunters, gun collectors or recreational target shooters. The Second Amendment to the Constitution is about the security of a free state.”<sup>88</sup> And the social and political movement they represent has been enormously successful in shaping both political debate and constitutional doctrine.

What, then, are they arguing for? As suggested by the tone and substance of the passages quoted above, the anti-hunting argument is often accompanied by arguments that the Second Amendment is really about the prevention of tyranny.<sup>89</sup> Allen Rostron notes:

Gun rights advocates have heavily emphasized that point for years, arguing that the primary purpose of the Amendment was to enable Americans to deter and to resist tyranny. The idea has even been captured in a slogan emblazoned on bumper stickers: “The Second Amendment is not about duck hunting.” Although the meaning of that saying may be opaque to many, it is well understood by gun rights proponents . . . .<sup>90</sup>

The prevention-of-tyranny view itself comes in many variations.<sup>91</sup> Some of the most strident (albeit unrepresentative) supporters of the anti-tyranny view have been those associated with the modern militia movement, and they

century militia member and the legend: “The Second Amendment isn’t about hunting or target shooting . . . It’s about FREEDOM!” (alteration in original).

88 John Lester, *Paranoia over Packing*, ROANOAKE TIMES, May 8, 2012, at A15, 2012 WLNR 9694304; see also Faust P. Barron, *Second Amendment: Ultimate Check and Balance*, NEW ORLEANS TIMES PICAYUNE, July 14, 1992, at B6, 1992 WLNR 814699 (“The Second Amendment wasn’t written to protect sport hunting or recreational shooting. It was written to protect freedom.”); John Kunkel, Letter to the Editor, *Second Amendment is About Weapons to Fight Revolution*, SACRAMENTO BEE, Mar. 22, 2013 (“The Second Amendment is not about self-protection or recreational shooting. It’s about revolution—citizens need to be armed with weapons that closely equal those of their would-be oppressors.”); Michael A. Thiac, *Viewpoints, Amendment Not for Recreation*, HOUSTON CHRON., Nov. 8, 1999, at A23, 1999 WLNR 7657161 (“Remember why the Founders put the Second Amendment into the Constitution? Not for hunting or for recreation, but in case the power of government over time became abusive.”).

89 See, e.g., Gregory A. Inskip, *Our Right to Bear Arms*, 8 DEL. LAW. 21, 22 (1991) (“The reason that we have a constitutional right to bear arms is not so that we can go deer hunting or skeet shooting. It is so that the general militia—the armed citizenry—will be ready at need to repel foreign invasion, to rise against domestic tyranny, and to suppress insurrection or crime.”); Kevin Kirk, Letter to the Editor, *Guns Against Tyranny*, KANSAS CITY STAR (MO), Mar. 1, 2013 (“The Second Amendment does not exist to preserve recreational use of firearms . . . . Nor is its purpose to allow use of guns for self/home defense . . . . Its true purpose is to allow people to defend themselves against a totalitarian government.”); Aeon J. Skoble, Letter to the Editor, *Voices of Hunters, and the N.R.A.*, N.Y. TIMES (Mar. 27, 2000), <http://www.nytimes.com/2000/03/27/opinion/1-voices-of-hunters-and-the-nra-478539.html> (“The Second Amendment was not included to protect sport hunters like Mr. Ford and his chums. Rather, the Second Amendment was specifically intended as a hedge against tyrannical government.”).

90 Rostron, *supra* note 86, at 391–92 (footnotes omitted).

91 For particularly thoughtful studies of the anti-tyranny view, see Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939 (2011); Williams, *Death to Tyrants*, *supra* note 25.

sharply distinguish their view from the notion of a Second Amendment right to hunt.<sup>92</sup> Somewhat less frequently, the pro-hunting position is contrasted with the self-defense view of the Second Amendment.<sup>93</sup> This is significant, since *Heller* recognized self-defense as the “core” and “central component” of the Second Amendment.<sup>94</sup>

Naturally, people who endorse the anti-hunting argument as a constitutional matter need not oppose hunting. It is perfectly coherent to believe, as many do, that hunting should be celebrated and legally protected, even though the Second Amendment has nothing to do with it. As one group put it, “Use of firearms for self-defence against criminals, or for hunting, is time-honored, lawful, and praiseworthy.”<sup>95</sup> But “[t]he point of the Second Amendment . . . is not hunting or self-defense; otherwise, the framers would have said so ‘in plain English.’”<sup>96</sup> Others say that the framers considered duck hunting to be “morally laudable.”<sup>97</sup> Indeed, some scholars perceive a kind of reluctance behind the anti-hunting view—a concession, rather than

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92 Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1097 & n.9 (2000). Professor Massey notes that Linda Thompson is the self-proclaimed “Adjutant General of the Unorganized Militia of the United States.” *Id.*; see also David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 424 (1999) [hereinafter Williams, *Constitutional Tales*] (“[T]he militia movement distrusts the media and the government, believes that a conspiracy is afoot to deprive Americans of their constitutional liberties, and argues that the prime purpose of the Second Amendment was to prevent tyranny, not to guarantee hunting or self-defense rights.”).

93 See, e.g., Derek Smith, *The Challenges and Nuances of Defending Firearms Offense Charges in Washington State*, in STRATEGIES FOR DEFENDING FIREARM OFFENSE CHARGES 129, 149 (2013) (“On the anti-gun side, I think there needs to be understanding that the Second Amendment is about self-defense, not hunting.”); see also Dowd, *supra* note 79, at 104 (“[W]hile there is legitimate argument that self-defense is an inalienable right, and the right to keep arms was given to support this right, there is no similar argument for hunting, shooting, gun collecting or other recreational uses of guns.”). Nelson Lund seems to draw the distinction as well, though in a more oblique way. See Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 59–60 n.139 (1996) (“It is an even greater mistake, and a morally questionable one at that, to suggest that there are no constitutionally significant differences between self-defense and recreation, or between either of them and criminal behavior.”).

94 *District of Columbia v. Heller*, 554 U.S. 570, 599, 630 (2008); see also *McDonald v. City of Chicago*, 560 U.S. 742, 767–68 (2010).

95 Williams, *Constitutional Tales*, *supra* note 92, at 422 (quoting JAY SIMKIN ET AL., *JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP, LETHAL LAWS: GUN CONTROL IS THE KEY TO GENOCIDE* 3 (1994)).

96 *Id.*

97 David B. Kopel, *On the Firing Line: Clinton’s Crime Bill*, THE HERITAGE FOUNDATION LECTURES (Sept. 24, 1993), <http://www.heritage.org/Research/Crime/HL476.cfm> (“The Second Amendment isn’t about duck hunting, nor about shooting lone criminals, although both activities were considered morally laudable. The Second Amendment at its core is about fear of a criminal federal government in general, and fear of a federal standing army in particular.”).

an affirmative claim, that hunting does not fall within the scope of the Amendment.<sup>98</sup>

All of this makes sense, since one motivation behind the anti-hunting argument is apparently to ennoble the Second Amendment by separating it from such seemingly trivial things as hunting and recreation.<sup>99</sup> Moncure's article clearly had this target in mind: "To suggest that the second amendment is entitled to less dignity than other amendments is to disparage the entire Bill of Rights. The second amendment is not about hunting but it is, in its final analysis, about liberty."<sup>100</sup> Much of the indignation in the anti-hunting argument might be a reaction against the perceived denigration of the right to keep and bear arms. This helps explain why some scholars and commentators dismiss the issue as a distraction:

The "recreational and sporting uses" often cited by both sides in the contemporary gun control debate, on the other hand, are not relevant. They are cited by those who favor gun control in the hopes of not arousing the fears of hunters and target shooters, and by those who oppose gun control in the hopes of mobilizing those same groups. But they have nothing to do (directly) with the purpose of maintaining an armed citizenry.<sup>101</sup>

Perhaps, then, the anti-hunting argument should be better understood as an argument that the Amendment is about something more than hunting,

98 Daniel Abrams, Note, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488, 503 (1992) ("Even staunch gun advocates concede that the Second Amendment had nothing to do with hunting, target shooting, or any other non-militia purpose.").

99 Metaksa, *supra* note 65, at 194 ("Could it be that the Founding Fathers, after protecting religious freedom, then set about to protect hunting? Could it be that the Founding Fathers, after safeguarding free speech and free assembly, then hastened to safeguard target shooting?"); Paul Danish, Letter to the Editor, USA TODAY, Aug. 8, 1989, at 7A ("The point is that the Second Amendment isn't about duck hunting any more than the First Amendment is about recreational reading."). Interestingly, some have apparently concluded that there is a "right" to hunt precisely *because* it is so trivial. While criticizing the "individual rights" view of the Second Amendment, Chief Justice Warren Burger (himself a lifelong hunter) wrote: "Nor does anyone seriously question that the Constitution protects the right of hunters to own and keep sporting guns for hunting game any more than anyone would challenge the right to own and keep fishing rods and other equipment for fishing—or to own automobiles." Warren E. Burger, *The Right to Bear Arms*, PARADE, Jan. 14, 1990, at 4–6. David Kopel calls this a "real shocker," noting (prior to *Heller*) that "the Supreme Court [had] never recognized" a right to bear arms for hunting, "and its lone decision on the subject is to the contrary." David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 129 n.88 (1999).

100 Moncure, *supra* note 80, at 597. The NRA still employs this line. Chris W. Cox, Letter to the Editor, *The View from the N.R.A.: 'We'll Fight for You'*, N.Y. TIMES (May 4, 2012), [http://www.nytimes.com/2012/05/04/opinion/the-view-from-the-nra-well-fight-for-you.html?\\_r=0](http://www.nytimes.com/2012/05/04/opinion/the-view-from-the-nra-well-fight-for-you.html?_r=0) ("Whether liberal or conservative, Republican or Democrat, man or woman, we'll fight for you because at its core, the Second Amendment isn't about hunting. It's about self-defense and freedom.").

101 Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995) [hereinafter Reynolds, *Critical Guide*].

but that the greater includes the lesser. Maybe the Second Amendment was added to the Constitution to prevent tyranny or enable self-defense, but has the effect of protecting other gun-related activities such as hunting. This is plausible—it is, in fact, the best argument in favor of Second Amendment coverage of hunting, and is addressed more detail below.<sup>102</sup> But it is not the common form of the anti-hunting argument, which emphasizes that hunting is *no* part of the Second Amendment.<sup>103</sup> As the NRA’s Chris Cox puts it, “the Second Amendment has really nothing to do with hunting.”<sup>104</sup>

The discussion up until this point has focused more on constitutional rhetoric than on constitutional doctrine. But the two are deeply intertwined, which is precisely why it is important to consider one in order to make sense of the other. One person who seems to understand this point quite clearly is Justice Scalia. As he has noted: “There is a perhaps inevitable but nonetheless distressing tendency to equate the existence of a right with the *nonexistence* of a responsibility”—that a legal right to engage in an activity suggests that it is “*proper* and perhaps even *good*” to do so.<sup>105</sup> The Justice is also an “enthusiastic hunter,”<sup>106</sup> and during the course of a speech to a hunting organization, he called for efforts to change “[t]he attitude of people associating guns with nothing but crime.”<sup>107</sup> Two years after that speech, he authored the majority opinion in *Heller*. Perhaps that opinion, and the gen-

102 See *infra* Section II.B.

103 See, e.g., John W. Bissell, *Bench Opinion on the Second Amendment*, 10 SETON HALL CONST. L.J. 807, 808 (2000) (“[T]he Second Amendment quite clearly has absolutely nothing to do with hunting or target shooting.”); John W. Lesniak, Letter to the Editor, *Gun Control Advocates Are Again Showing How Illogical They Are*, ALBANY TIMES UNION (NY), Nov. 20, 1993, at A6 (“The Second Amendment has nothing to do with hunting or recreation.”); John D. Priest, Letter to the Editor, HUNTSVILLE TIMES (AL), Jan. 23, 2013, at 012A (“Arguments from the ‘gun control advocates’ are often intentionally dishonest. Here’s a classic: ‘You don’t need an assault weapon to hunt.’ Of course not, but the second amendment has NOTHING to do with hunting.”).

104 *Talk of the Nation: Analysis: Politics of Guns and the Gun Industry* (National Public Radio broadcast May 15, 2003).

105 Antonin Scalia, *Law, Liberty and Civic Responsibility*, in RIGHTS, CITIZENSHIP AND RESPONSIBILITIES 3 (1984); cf. MARY ANN GLENDON, INTRODUCTION: FORGOTTEN QUESTIONS, in SEEDBEDS OF VIRTUE 1, 21 (Mary Ann Glendon & David Blakenhorn eds. 1995); Mary Ann Glendon, *Looking for “Persons” in the Law*, FIRST THINGS, Dec. 2006, <http://www.firstthings.com/article/2006/12/looking-forpersons-in-the-law> (“[C]itizens . . . tend to regard the Supreme Court’s pronouncements not merely as legal rulings but also as moral teachings grounded in the country’s most sacred civil document.”).

106 Rostron, *supra* note 86, at 388 n.15 (alteration in original) (quoting Clay Carey, *Scalia Champions Hunting and Conservation*, TENNESSEAN, Feb. 26, 2006, at 1B). The year before he authored the majority opinion in *Heller*, Scalia received the “Sport Shooting Ambassador Award” from the World Forum on the Future of Sport Shooting Activities, “an international association of gun makers and gun rights organizations such as the NRA.” *Id.* (citing Josh Sugarmann, “Sport Shooting Ambassador Award” Winner Antonin Scalia’s 2nd Amendment Ruling Does His Gun Pals Proud, THE HUFFINGTON POST (June 26, 2008, 10:54 AM), [http://www.huffingtonpost.com/josh-sugarmann/sport-shooting\\_ambassador\\_b\\_109367.html](http://www.huffingtonpost.com/josh-sugarmann/sport-shooting_ambassador_b_109367.html)).

107 Rostron, *supra* note 86, at 388 n.15 (citing Carey, *supra* note 106).

eral effort to describe hunting as a right, will help ennoble gun possession and use, including hunting. But, as the next Part shows, it is hard to justify a Second Amendment right to hunt as a matter of constitutional doctrine.

## II. TWO THEORIES OF HUNTING AND THE SECOND AMENDMENT

In addition to their political significance, the pro-hunting and anti-hunting arguments also represent claims about the Second Amendment.<sup>108</sup> This Part considers two possible ways in which hunting could be constitutionally salient as a doctrinal matter: either because it is directly covered by the Second Amendment or because it is peripherally covered.

The analysis shows that those who say the Amendment “ain’t about hunting” generally have the better of the argument. Hunting and other recreational uses of guns have no explicit or otherwise direct protection in the text of the Constitution or under existing doctrine, nor does the historical evidence support such a conclusion. It is, however, plausible that hunting might be peripherally protected on the grounds that it falls within the Amendment’s penumbras or is instrumentally useful to core Second Amendment’s interests like self-defense. Such instrumental or penumbral protection would be relatively weak.

### A. *Hunting is Directly Protected*

#### 1. *Heller v. District of Columbia*

Doctrinally, if not chronologically, the argument for direct Second Amendment coverage of hunting begins with *Heller* itself. Some judges,<sup>109</sup> politicians,<sup>110</sup> and scholars<sup>111</sup> (even those otherwise skeptical of the Court’s holding<sup>112</sup>) read the opinion as constitutionalizing a right to armed hunting and recreation. And some post-*Heller* cases have effectively reached that conclusion as a matter of law. In *Ezell v. City of Chicago*, for example, the Seventh Circuit considered a Chicago ordinance banning firing ranges within city lim-

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108 SPITZER, *supra* note 7, at 18 (arguing that the “meaning and consequences of the Second Amendment” must be assessed before one can “judge the abundant ‘rights talk’ surrounding the gun control debate”).

109 *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (Niemeyer, J., concurring) (citing *Heller* for the proposition that “the right to keep and bear arms was found to have been understood to exist not only for self-defense, but also for membership in a militia and for hunting, neither of which is a home-bound activity” (citation omitted)).

110 Press Release, Senator Jeff Sessions, Sessions Comments on Supreme Court’s Second Amendment Opinion (June 26, 2008) (“[T]he Court issued a strong holding that the Second Amendment protects the right of Americans to possess firearms for lawful purposes like recreation, hunting, and self-defense.”).

111 See, e.g., David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 327 (2012) (concluding that *Heller* and *McDonald* both “hold that . . . sporting uses such as hunting are part of the Second Amendment”).

112 Carl T. Bogus, *Heller and Insurrectionism*, 59 SYRACUSE L. REV. 253, 260 (2008) (“By the end of its opinion, [the Court] opted for the kitchen sink approach and threw in hunting and threats of foreign invasions for good measure.”).

its, and found that range training is not categorically unprotected by the Second Amendment.<sup>113</sup> It is important, therefore, to evaluate both what *Heller* says about hunting and whether what it says makes sense.

To the extent that claims about *Heller* refer to the text of the opinion, they typically point to the majority's claim that "most [Americans] undoubtedly thought [the right] even more important for self-defense and hunting" than for militia service.<sup>114</sup> Elsewhere, the *Heller* majority referred to hunting in support of the individual rights view:

Justice Stevens thinks it significant that the Virginia, New York, and North Carolina Second Amendment proposals were "embedded . . . within a group of principles that are distinctly military in meaning," such as statements about the danger of standing armies. But so was the highly influential minority proposal in Pennsylvania, yet that proposal, with its reference to hunting, plainly referred to an individual right.<sup>115</sup>

The dissenting Justices, unsurprisingly, argued to the contrary that the framers did not intend, nor were they understood, to create an individual right to private uses of weapons, including hunting.<sup>116</sup> Here is the entirety of Justice Breyer's argument about hunting and shooting sports:

The majority briefly suggests that the "right to keep and bear Arms" might encompass an interest in hunting. But in enacting the present provisions, the District sought to "take nothing away from sportsmen." And any inability of District residents to hunt near where they live has much to do with the jurisdiction's exclusively urban character and little to do with the District's firearm laws. For reasons similar to those I discussed in the preceding subsection—that the District's law does not prohibit possession of rifles or shotguns, and the presence of opportunities for sporting activities in nearby States—I reach a similar conclusion, namely, that the District's law burdens any sports-related or hunting-related objectives that the Amendment may protect little, or not at all.<sup>117</sup>

Justice Stevens similarly noted that "the Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense[] is especially striking."<sup>118</sup> Disputing the majority's reliance on a citation to Joseph Story, Stevens argued that "[t]here is not so much as a whisper in the passage above that Story believed that the right

113 651 F.3d 684, 704 (7th Cir. 2011).

114 *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

115 *Id.* at 604 (citation omitted).

116 These arguments should not be dismissed simply because they appear in dissents. The fact that Stevens and Breyer dissented with regard to the holding about self-defense does not mean that they were necessarily also in dissent with regard to hunting—an issue the Court did not reach, *see infra* note 121—and indeed they have been cited to support the pro-hunting view. Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 350–51 (2009) [hereinafter O'Shea, *Defensive Arms*] (citing the Breyer and Stevens dissents for the proposition that "participating in shooting sports" is a "legitimate purpose[] for arms").

117 *Heller*, 554 U.S. at 709–10 (Breyer, J., dissenting) (citations omitted).

118 *Id.* at 642 (Stevens, J., dissenting).

secured by the Amendment bore any relation to private use or possession of weapons for activities like hunting or personal self-defense.”<sup>119</sup>

This represents the sum total of *Heller*’s direct references to hunting, and it is difficult to construct from them a right to armed hunting or recreation.<sup>120</sup> A more modest and faithful reading of *Heller* is that it neither establishes nor forecloses constitutional coverage for hunting. That should not be surprising, since the Second Amendment status of hunting was not before the Court—Dick Heller did not argue for it,<sup>121</sup> and the challenged regulation specifically exempted “lawful recreational purposes” from its safe storage requirement.<sup>122</sup>

The Court did, however, suggest that “future evaluation” might bring further interests under the Second Amendment’s umbrella.<sup>123</sup> The Third Circuit subsequently noted that *Heller* discussed “hunting’s importance to the pre-ratification conception of the right,” and concluded that, in addition to “protect[ing] the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home,” the Amendment “must protect the right of law-abiding citizens to possess firearms for other, as-yet-undefined, lawful purposes.”<sup>124</sup> Scholars, too, have recognized the possibility that hunting might one day fall within the ambit of the Second Amendment.<sup>125</sup>

119 *Id.* at 668.

120 The court of appeals decision came closer to identifying a Second Amendment right to hunt. *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff’d sub nom. Heller*, 554 U.S. 570 (concluding that the Second Amendment protects an individual right to keep and bear arms that “existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense”).

121 Dennis A. Henigan, *The Woollard Decision and the Lessons of the Trayvon Martin Tragedy*, 71 MD. L. REV. 1188, 1196 (2012) (“[T]he only issue posed and resolved in *Heller* was the right to have a handgun in the home for self-defense. Mr. Heller never asserted that the District’s handgun ban limited his hunting activities.”); see also Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 184 (2008) (noting that a hunting-based view of the Second Amendment “would be much narrower than most Second Amendment advocates demand and would be insufficient to strike down the laws at issue in *Heller*”); O’Shea, *Defensive Arms*, *supra* note 116, at 369 (“The *Heller* Court has little occasion to discuss other legitimate personal purposes for firearms, such as hunting and target shooting, since the District of Columbia prohibitions challenged in the case so directly implicate the core purpose of self-defense.”).

122 *Heller*, 554 U.S. at 630 (majority opinion) (stating that the safe storage requirement does not apply to arms “being used for lawful recreational purposes within the District of Columbia” (citing D.C. CODE § 7-2507.02 (2001))).

123 *Id.* at 635 (“[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”).

124 *United States v. Marzarella*, 614 F.3d 85, 92 (3d Cir. 2010) (footnote omitted).

125 Williams, *Death to Tyrants*, *supra* note 25, at 641 (“[I]n the future, the Court may find other uses [besides self-defense] protected by the Second Amendment—hunting and target shooting come to mind—and so the Constitution will presumably then limit what game wardens and zoning boards can and cannot do.”).

*Heller* itself suggests that Second Amendment doctrine is to be constructed based on the Amendment's original public meaning,<sup>126</sup> and the majority confidently declared that "most [Americans] undoubtedly thought [the right] even more important for self-defense and hunting."<sup>127</sup> And yet there is little evidence that the framers, ratifiers, or general public at the time intended or believed hunting to be covered by the Second Amendment. Unsurprisingly, scholars skeptical of the "individual right" reading of the Amendment emphasize that the debates surrounding the Second Amendment say nothing at all about hunting.<sup>128</sup> Perhaps more notably, even scholars sympathetic to *Heller* do not identify historical support for the hunting point. An article co-authored by Clayton E. Cramer, Nicholas J. Johnson, and George A. Mocsary applies the original understanding approach comprehensively to the "abundant evidence about the public understanding of the Second Amendment between 1791 and the Civil War."<sup>129</sup> They find support for the individual right view, and note that there "was something of a divide as to the *purpose* of the right,"<sup>130</sup> but nowhere do they indicate that hunting was one of those possible purposes.

## 2. Understanding the Game Laws

The best historical case for an original understanding argument in favor of the right to hunt is the one identified by scholars like Calvin Massey, who wrote long before *Heller* that "[s]ome Americans, remembering the game laws of England that disarmed the yeomanry to prevent poaching the gentry's game, wanted to protect the people's right to hold and to use arms for purposes of hunting."<sup>131</sup> But Massey stops short of saying that this particular desire was written into the Second Amendment,<sup>132</sup> and a careful review of the historical sources indicates that opposition to the game laws—while his-

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126 *Heller* itself is generally read as employing an original public meaning approach to interpretation, Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1346 (2009), though its fidelity to that approach is not uniform, *id.* at 1358 (noting that "Justice Scalia does not even pretend to make . . . a claim" that Americans were forbidden from carrying firearms in schools and government buildings before 1791, despite *Heller's* endorsement of such prohibitions).

127 *Heller*, 554 U.S. at 599.

128 See, e.g., Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 33 (1989); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 506 (2000).

129 Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, "This Right Is Not Allowed by Governments that Are Afraid of the People": *The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. 823, 825 (2010).

130 *Id.*

131 Massey, *supra* note 92, at 1135; see also LEONARD LEVY, ORIGINS OF THE BILL OF RIGHTS 136–37 (1999) (discussing game laws and concluding that "[t]he right to have arms is an inheritance from England").

132 See Massey, *supra* note 92, at 1135–36 (referring to hunting as one of "multiple and partially conflicting concerns" in a list of "theoretical purposes" for the right to bear arms).

torically significant—did not inspire the creation or recognition of a right to hunt with guns.

The English game laws have long been intertwined with Second Amendment debates. Though the connection between the two may well have been exaggerated,<sup>133</sup> the game laws do provide a backdrop for understanding the right to keep and bear arms as it existed in England prior to the ratification of the Second Amendment—an important source, especially since the right to bear arms is often described as a “pre-existing” right.<sup>134</sup> Some scholars argue, for example, that St. George Tucker’s influential edition of Blackstone’s *Commentaries* “described the Second Amendment right to arms as an expansion of the arms right from the 1689 English Declaration of Right, and as including the right to arms for self-defense and for hunting.”<sup>135</sup>

This reads too much into Tucker. He did focus on the game laws, but did not describe the right to keep and bear arms as including a right to do so for hunting. In the interests of thoroughness, here is Tucker’s commentary on the text of the Second Amendment, including all references to the game laws and hunting:

This may be considered as the true palladium of liberty . . . . The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.<sup>136</sup>

This passage has often been invoked as recognizing a Second Amendment right to hunt. Randy Barnett and Don Kates, for example, point to it

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133 See Patrick J. Charles, “Arms for Their Defence”?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in *McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351 (2009). For present purposes, I accept the connection but argue that it does not support a right to hunt.

134 *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (emphasis omitted).

135 David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 104; see also Kopel, *supra* note 99, at 130 n.88 (“Various common law sources (such as St. George Tucker’s enormously influential American edition of Blackstone) likewise support hunting rights.”).

136 *Appendix to I WILLIAM BLACKSTONE, COMMENTARIES* \*300 (St. George Tucker ed., 1803). I assume that this is the passage Kopel has in mind, as it is the only plausible candidate.

and say that “the militia is only the second of three purposes mentioned for the right to arms. The first is self-defense and the third is hunting.”<sup>137</sup>

Tucker, however, was not concerned with a right to hunt, but with the use of the game laws as a pretext for generalized disarmament and oppression. To be sure, he bemoaned the English game laws—both in this passage and elsewhere in the *Commentaries*—for disarming citizens, not for denying them the ability to hunt: “Whoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England.”<sup>138</sup> Tucker’s complaint was that the English had “been disarmed, generally, under the specious pretext of preserving the game,” and that this “lure” had gained the support of the “landed aristocracy . . . under that mask, though calculated for very different purposes.”<sup>139</sup> The loss of hunting opportunities is not the problem.

William Rawle has played a similar role in debates about the right to hunt. Barnett and Kates say that Rawle “did give first and most emphatic mention to the militia as a reason for the [Second Amendment] guarantee, but also mentioned self-defense and hunting.”<sup>140</sup> What Rawle said is that Blackstone recognized “that the prevention of popular insurrections and resistance to government by disarming the people, is oftener meant than avowed by the makers of forest and game laws.”<sup>141</sup> Rawle also wrote that although English subjects have a right to arms, “[a]n arbitrary code for the preservation of game in that country has long disgraced them.”<sup>142</sup> This certainly constitutes a “mention[ ]” of hunting, but it is a far cry from calling it “a reason for the guarantee” of a right to keep and bear arms. Like Tucker, Rawle simply noted that nominal anti-hunting laws were a threat to the people’s ability to keep and bear arm for *any* reason, not that the right necessarily encompassed hunting.

A review of the game laws’ history helps explain why. Restrictions on hunting and the use of guns for that purpose were longstanding in England. Many of the earliest legal restrictions imposed property requirements on

137 Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1220 (1996).

138 Kopel, *supra* note 81, at 1333 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*144 n.41 (St. George Tucker ed., 1803)). It seems that Kopel is citing Volume 2 of Blackstone’s *Commentaries*. See 2 WILLIAM BLACKSTONE, COMMENTARIES \*143 n.41 (St. George Tucker ed., 1803).

139 1 BLACKSTONE, *supra* note 136, at \*300.

140 Barnett & Kates, *supra* note 137, at 1221 (citing WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 122 (2d ed. 1825)). Though the text is correct, there seems to be a minor error in the citation—the passage appears at WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125–26 (2d ed. 1829); and at WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 122 (1st ed. 1825).

141 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 122–23 (1st ed. 1825).

142 Kopel, *supra* note 81, at 1334 (quoting WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 122 (1st ed. 1825)).

hunters,<sup>143</sup> thereby preserving hunting as a pastime for the nobility and aristocracy—a theme that would persist for hundreds of years. Beginning in the early 1600s during the reign of James I, the game laws became increasingly stringent, raising the property requirements and prohibiting the use of certain weapons for taking certain game.<sup>144</sup> These changes were not motivated by a desire to protect game, but because of James I's fear of insurrection<sup>145</sup> and desire to disarm the supposedly violent lower classes.<sup>146</sup>

Restrictions became even more severe under Charles II.<sup>147</sup> Perhaps most notorious was the 1670 Game Act, which historian Joyce Lee Malcolm has described as having “deprived the great majority of the community of all legal right to have firearms.”<sup>148</sup> It has been said that this law was later invoked by James II as grounds for ordering the militia to search private homes for “muskets or guns” because “a great many persons not qualified by law under pretence of shooting matches keep muskets or other guns in their houses.”<sup>149</sup> Fifty years later, the Black Act was passed, nominally to prosecute poachers (who would blacken their faces for purposes of disguise) in the Waltham forests.<sup>150</sup> It, too, is frequently described as a tool of disarmament and oppression.<sup>151</sup>

These game laws might well have been on the minds of many who supported the inclusion of the Second Amendment in the Constitution. But just because those laws nominally related to hunting does not mean that the Second Amendment does. The problem with the game laws was not that they violated a right to hunt with firearms, but that they denied *other* asserted rights, among them the right to armed self-defense against private violence

143 *Id.* at 1340 (discussing fourteenth-century laws); *see also* JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* 72, 198 n.83 (1994) (giving an example of a law providing that “[n]one shall hunt but they which have a sufficient living”).

144 MALCOLM, *supra* note 143, at 13 (describing the 1604 Act, 1605 Act, and 1609 Act).

145 *See, e.g.*, Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 *CHI-KENT L. REV.* 27, 35 (2000).

146 *See, e.g.*, T. Markus Funk, *Is the True Meaning of the Second Amendment Really Such a Riddle? Tracing the Historical “Origins of an Anglo-American Right”*, 39 *HOW. L.J.* 411, 421 n.36 (1995) (book review); *see also generally* Kopel, *supra* note 81.

147 Robert Hardaway et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms*, 16 *ST. JOHN’S J. LEGAL COMMENT.* 41, 65 (2002).

148 MALCOLM, *supra* note 143, at 65; Powe, *supra* note 81, at 1347 (noting that the law “made possession of weapons illegal for most people”).

149 William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 *MIL. L. REV.* 1, 13 (1992) (citing 2 *CALENDAR OF STATE PAPERS, DOMESTIC, JAMES II*, 1212, at 314 (Dec. 6, 1686)).

150 For a more thoughtful treatment, *see generally* E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975).

151 *See, e.g.*, JOYCE LEE MALCOLM, *GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE* 64–71 (2002) (describing the Black Act as “draconian” and “repressive”); *see also generally* P.B. MUNSCHKE, *GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1671–1831* (1981) (arguing that the Game Act of 1671 was part of the systematic class-based restriction of weapons available to the peasantry that continued up through the Waltham Black Acts).

or government tyranny. This is why Tucker noted that the laws were passed under the “specious pretext” of protecting game.

### 3. Evidence from the States

Nevertheless, the historical record is not entirely silent with regard to hunting and the right to keep and bear arms. Perhaps the most commonly cited piece of pro-hunting language appeared in a proposal from the Dissent of the Minority of the Convention of Pennsylvania declaring that:

[T]he people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.<sup>152</sup>

The next proposition in the proposal provided:

The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not inclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.<sup>153</sup>

Supporters of a broad Second Amendment right have often pointed to this language as supporting the “individual rights” view of the Amendment,<sup>154</sup> and even as supporting the idea of a Second Amendment right to hunt.<sup>155</sup>

152 Proposition 7, “Right to Bear Arms,” *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents* (Dec. 18, 1787), reprinted in *THE CASE AGAINST THE CONSTITUTION* 77 (John F. Manley & Kenneth M. Dolbeare eds., 1987).

153 *Id.*, Proposition 8, “Liberty to Fowl and Hunt.”

154 See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008) (“[T]he highly influential minority proposal in Pennsylvania . . . with its reference to hunting, plainly referred to an individual right.”); David B. Kopel & Clayton E. Cramer, *Credentials Are No Substitute for Accuracy: Nathan Kozuskanich, Stephen Halbrook, and the Role of the Historian*, 19 *WIDENER L.J.* 343, 371 (2010) (citing the Proposal to support the argument that “[h]unting, or ‘killing game,’ is obviously a personal, nonmilitia purpose for which one could ‘bear arms’” (quoting *THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS*, in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND COMPROMISES THAT GAVE BIRTH TO OUR FORM OF GOVERNMENT* 237, 239–40 (Ralph Ketcham ed., New American Library 1986) (1787))); Thomas B. McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 *N.C. L. REV.* 781, 847 (1997) (“This Pennsylvania minority proposal . . . undercuts completely the idea that the connection between the right to arms and military issues stands as a barrier to the individual rights understanding of the right to bear arms.”).

155 See, e.g., McAfee & Quinlan, *supra* note 154, at 861.

But the framers *rejected* this language.<sup>156</sup> And it is hard to build a case for a constitutional right to hunt on the rejected language of a dissenting faction from a single state.<sup>157</sup> It seems more reasonable to conclude, as Paul Finkelman does, that the Pennsylvania minority's proposals "help us understand the intentions of the framers of the Second Amendment. This understanding, however, is a negative one. By seeing what the framers of the Second Amendment *did not do*, we can better understand what they did do."<sup>158</sup>

Marginally better support for the right to bear arms for hunting can be found in the fact that two states had constitutional provisions guaranteeing a right to hunt. Pennsylvania adopted for itself language similar to that proposed by the Antifederalist Minority, adding a provision (Section 43) in the state's Declaration of Rights stating: "The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable waters, and others not private property."<sup>159</sup> *Separately*, Article XIII of the Pennsylvania Constitution provided that "the people have a right to bear arms for the defence of themselves and the State."<sup>160</sup> The Vermont Constitution similarly provided:

The inhabitants of this State, shall have liberty, to hunt and fowl, in seasonable times, on the lands they hold, and on other lands (not enclosed;), and in like manner, to fish in all boatable and other waters, not private property, under proper regulations, to be hereafter made and provided by the General Assembly.<sup>161</sup>

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156 Paul Finkelman, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHL-KENT L. REV. 195, 208 (2000) ("Madison and his colleagues in the First Congress emphatically rejected the goals and the language of the Pennsylvania Antifederalists on these issues."); Miller, *supra* note 4, at 1348–49 ("The Framers rejected a version of the Second Amendment that would have explicitly preserved a right to arms for hunting.").

157 Amar, *supra* note 75, at 902 (referring to the Pennsylvania Anti-Federalists' proposed language, and explaining "[m]y claim is not that no one at the Founding ever used the phrase 'bear Arms' to encompass, say, hunting. In fact, we can find such uses—but they are rare, the proverbial linguistic exceptions that prove the rule . . . ." (footnote omitted)).

158 Finkelman, *supra* note 156, at 208.

159 PA. CONST. of 1776, § 43; *see* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3083 (Francis Newton Thorpe ed., 1909).

160 PA. CONST. of 1776, art. XIII; *see* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 159, at 3083. It is not uncommon to see the two provisions cited together, even though only one refers to arms. *See, e.g.*, Derek P. Langhauser, *Gun Regulation on Campus: Understanding Heller and Preparing for Subsequent Litigation and Legislation*, 36 J.C. & U.L. 63, 72 (2009) ("Pennsylvania's 1776 Declaration of Rights expressly provided its citizens with self-defense and sporting rights: '[T]he people have a right to bear arms for the defence of themselves and the state' and 'shall have the liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed.'" (alteration in original)).

161 VT. CONST. of 1777, ch. I, § 15. Taking a belt-and-suspenders approach, Vermonters actually included this guarantee twice. *See id.*; *id.* ch. II, § 39; *see also* 6 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3191, 3753–54, 3760 (Fran-

And, like Pennsylvania's, the Vermont Constitution separately provided that "the people have a right to bear arms, for the defence of themselves and the State."<sup>162</sup>

State constitutional guarantees of the right to keep and bear arms have often been said to support a Second Amendment right to keep and bear arms for private purposes.<sup>163</sup> For example, Eugene Volokh pointed out in a pre-*Heller* article that many state constitutional provisions contained the same kind of prefatory language as the Second Amendment.<sup>164</sup> This was presented, and taken by many, to support the individual rights view—since the Amendment had similar language to state constitutional provisions, and the latter had been interpreted to protect an individual right, the thought was that the two should be read in harmony.<sup>165</sup>

But these same state constitutional provisions provide strong evidence *against* a Second Amendment right to hunt. If the commonality of prefatory clauses in state constitutions should influence our understanding of the prefatory clause in the Second Amendment, then the relative *rarity* of "right to hunt" provisions in early state constitutions suggests that the authors of the Second Amendment did not mean to protect such a right. Their existence indicates that the framers knew perfectly well how to protect a constitutional right to hunt and that they chose not to.<sup>166</sup>

Moreover, even if one accepts the Vermont and Pennsylvania provisions as statements of the original understanding of the Second Amendment, they provide little support for a right to bear arms for hunting. Neither provision even mentions arms-bearing in conjunction with hunting. Indeed, both constitutions *separately* protected "a right to bear arms for the defence of them-

cis Newton Thorpe ed., 1909) (including both guarantees in the subsequent Vermont Constitution of 1786).

162 VT. CONST. of 1777, ch. I, § 15.

163 See, e.g., Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 252 (2004) (book review).

164 Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814–21 (1998).

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

166 *Id.* at 643 (Stevens, J., dissenting) (contrasting the language of the Second Amendment with that of the Pennsylvania Declaration of Rights, arguing that the omission of private uses like hunting from the former shows the framers' "single-minded focus . . . on military uses of firearms, which they viewed in the context of service in state militias"); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 276 (2008) (noting that proposals of the Pennsylvania minority, such as the inclusion of a right to hunt and fish, were intentionally omitted from the Constitution and arguing that "it is clear that if Madison and the First Congress had wanted to produce an Amendment that protected an individual's right to own weapons, for self-preservation or hunting—the kind of Amendment Justice Scalia incorrectly claims they did produce—the ideas and wording were available"); Herz, *supra* note 45, at 66 (noting that, while the founders were aware of broader right-to-bear-arms formulations that explicitly included hunting, "they refused to adopt several such proposals offered by the Antifederalists and by the various state ratifying conventions").

selves and the state.”<sup>167</sup> Their provisions for hunting did not mention arms-bearing; their provisions for arms-bearing did not mention hunting.

The focus of the Vermont and Pennsylvania provisions was not on arms but on *where* a person could hunt. The Pennsylvania guarantee, for example, referred to the “liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed.”<sup>168</sup> Vermont’s nearly identical guarantee protected the “liberty to hunt and fowl, in seasonable times, on the lands they hold, and on other lands (not enclosed[ ]).”<sup>169</sup> Again, the history is illuminating. Though the issue has largely receded from memory, in the late 1700s the debate about hunting was largely about the liberty of would-be hunters to pursue their quarry onto enclosed land.<sup>170</sup> Among other things, the game acts limited people’s access to hunting grounds, as Tucker’s reference to the “landed aristocracy” suggests. Right-to-hunt provisions, then, seem to be more about access to land than the right to hunt, let alone to carry arms while doing so.<sup>171</sup>

Consider the fact that James Madison, then a Virginia legislator, introduced a “Bill for the Preservation of Deer” that would have penalized anyone who would “bear a gun out of his inclosed ground.”<sup>172</sup> Madison apparently did so at the urging of Thomas Jefferson,<sup>173</sup> and so both men have often

167 PA. CONST. of 1776, art. XIII.; VT. CONST. of 1777, ch. I, § 15 (same); 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 161 at 3741.

168 PA. CONST. of 1776, § 43.

169 VT. CONST. of 1777, ch. I, § 39.

170 Brian Sawers, *Keeping Up with the Joneses: Making Sure Your History Is Just as Wrong as Everyone Else’s*, 111 MICH. L. REV. FIRST IMPRESSIONS 21, 25 (2013) (“In the eighteenth century, legislatures shaped the boundaries of private property law by enacting statutes that defined trespasses and acknowledged the right to hunt on private land.”); *see also* Kopel, *supra* note 81, at 1339 (stating that in England, “the idea of commoners hunting was anathema. Unlike in the United States, private aristocratic estates held most English hunting land, and hunting by commoners was generally illegal.” (footnote omitted)); *Hunting*, OXFORD ENCYCLOPEDIA OF THE MODERN WORLD (Peter N. Stearns ed., 2008) (noting that under the Black Act, “there was much more at stake than the life of some selected wild animals in the forest and the private privileges of parts of the nobility. At stake was also the established political order itself and the establishment of a new sense of property rights, namely rights with a strict sense of exclusivity.”).

It has been argued that even *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805), the fox hunting dispute that has long been a staple of property courses, was in fact motivated by a dispute over hunting on unenclosed land, rather than about when a hunter can claim ownership over pursued game. Bethany R. Berger, *It’s Not About the Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089, 1090 (2006).

171 Halbrook, *supra* note 5, at 198–99 (noting, in the course of “exploring the potential contours of the right to hunt,” that the state right to hunt provisions “sought to guard against royal privilege as practiced in England”).

172 Thomas Jefferson, *A Bill for Preservation of Deer* (1785), in 2 THE PAPERS OF THOMAS JEFFERSON 443–44 (Barbara B. Oberg & J. Jefferson Looney eds., digital edition 2008); *see also* SAUL CORNELL, A WELL-REGULATED MILITIA 29 (2006).

173 David Thomas Konig, *Thomas Jefferson’s Armed Citizenry and the Republican Militia*, 1 ALB. GOV’T L. REV. 250, 270–71 (2008). Jefferson’s apparent concern was the protection of game. He complained that, in the colonial period, “idle people [had made it] a practice,

been conscripted into Second Amendment battles.<sup>174</sup> Gun-rights supporters have traditionally invoked the language of the Virginia law to show that the phrase “keep and bear arms” in the Second Amendment is not limited to militia service.<sup>175</sup> (This elides the potentially significant difference between bearing a “gun” and bearing “arms,” but that debate has been played out elsewhere.<sup>176</sup>) Madison, they point out, authored the Second Amendment, and since the Virginia law used “bear” in a decidedly non-military context then the Second Amendment should arguably be read in the same fashion. But if the Virginia bill is a reliable guide as to whether the Amendment protects a non-militia right, then it also seems sensible to use it as evidence that hunting is *not* covered by the right. Since the game bill shows that Madison clearly knew how to draft language about bearing arms for purposes of hunting, shouldn’t the omission of that language in the Second Amendment be significant?

These sources have been picked over before, in the context of the long-running debate about whether the Second Amendment protects an “individual” right to keep and bear arms. The point of this brief discussion is not to re-engage that question—as a matter of constitutional doctrine, the answer is plainly yes. My concern here is whether the individual right recognized in *Heller* includes a right to hunt. And even if these sources suggest the exist-

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in severe frozen weather, and deep snows, to destroy deer, in great numbers, in great numbers, with dogs, so that the whole breed is likely to be destroyed in the inhabited parts of the colony.” Jefferson, *supra* note 172, at 444.

174 BAUM, *supra* note 64, at 256 (“Poor Thomas Jefferson probably had more guns stuffed into his long-dead mouth than anybody.”); see also Christina Zdanowicz, *Jefferson: The Face of the Modern Gun Debate*, CNN (July 19, 2013, 1:00 PM), <http://www.cnn.com/interactive/2013/07/us/jefferson-rorschach-guns/index.html> (noting various pro-gun quotes misattributed to Jefferson). Interestingly, Jefferson has also been deployed, again with invented quotes, to fight against the hunting view of the Second Amendment: “The majority of American’s [sic] today, believe the reason that our fore fathers [sic] wanted the people to have the right to keep and bear arms was for the purpose of self defense against criminals, hunting, etc. This is *NOT* the primary reason for the enactment of the 2nd Amendment. Let’s let Thomas Jefferson explain it for us: ‘*The strongest reason for the people to retain the right to keep and bear arms is, as a last resort, to protect themselves against tyranny in government.*’” Williams, *Militia Movement*, *supra* note 87, at 894 (quoting MILITIA OF MONTANA, THE MILITIA 3 (pamphlet from Militia of Montana in Noxon, Montana)).

175 See, e.g., *United States v. Emerson*, 270 F.3d 203, 231 (5th Cir. 2001); Barnett, *supra* note 163, at 244 (offering the game bill and its “bear a gun” language as the first example under the header “Early Uses of ‘Bear Arms’ Outside the Military Context”); Clayton E. Cramer & Joseph Edward Olson, *What Did “Bear Arms” Mean in the Second Amendment?*, 6 GEO. J.L. & PUB. POL’Y 511, 517–18 (2008); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms”*, 49 LAW & CONTEMP. PROBS. 151, 153 (1986).

176 *District of Columbia v. Heller*, 554 U.S. 570, 646–47 (2008) (Stevens, J., dissenting); see also PATRICK J. CHARLES, *THE SECOND AMENDMENT* 137 (2009) (reviewing hunting laws through the late eighteenth century and not finding any that used the phrase “bear arms”); Amar, *supra* note 75, at 891 (“The Amendment . . . uses a distinctly military phrase: ‘bear Arms.’ A deer hunter or target shooter carries a gun but does not, properly speaking, bear arms.” (emphasis omitted)); Powe, *supra* note 81, at 1337 (“No one has heard a hunter state that he is ‘going to bear arms and shoot ducks.’”).

tence of an individual right to keep and bear arms, that does not mean that they support an individual right to hunt with them.

There is one final source of law—one not rooted in original understanding—that might support a finding that the Second Amendment directly protects the right to hunt. Contemporary state constitutional law can sometimes provide a useful interpretive guide for the federal Constitution.<sup>177</sup> In addition to the Vermont and Pennsylvania provisions cited above, some states have recently enacted constitutional provisions guaranteeing the right to hunt,<sup>178</sup> and some specifically include a right to hunt with guns.<sup>179</sup> Should these right-to-hunt provisions also influence interpretation of the Second Amendment?

The best answer is “not yet.” Only seven states guarantee a right to bear arms for hunting; of these, six were adopted in the 1980s, and one was adopted in the 1990s.<sup>180</sup> This is not the kind of longstanding or near-unanimous agreement one finds with regard to other state constitutional matters that might properly influence federal counterparts, such as the use of a “reasonableness” test in evaluating gun regulation.<sup>181</sup> Even if one includes right to hunt provisions that do not contain arms-bearing guarantees, barely a third of states are represented. And the very fact that the NRA and other organizations fought to add these provisions to state constitutions suggests that the right to hunt was not otherwise protected by the Federal Constitution—a fact that undermines, rather than supports, the argument for a Second Amendment right to hunt.

### B. *Hunting is Peripherally Protected*

Just because hunting and recreational uses of firearms are not *directly* covered by the Second Amendment does not mean that they necessarily lack any constitutional protection. Sometimes activities are covered by the Constitution even though—in fact, because—they are peripheral to other activities that are explicitly protected. It is possible that they are protected either instrumentally, because they are useful to effectuate a core interest, or penumbraally, because they constitute some lesser-but-still-constitutional inter-

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177 See generally Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011).

178 Halbrook, *supra* note 5, at 229–33; Volokh, *supra* note 4, at 1448 (counting seven states guaranteeing a “right to keep and bear arms . . . for hunting and recreational use” (alteration in original)); see also Halbrook, *supra* note 5, at 198 (“Currently, ten states recognize hunting as a constitutional guarantee, and proposed amendments are pending in other states.”).

179 Halbrook, *supra* note 5, at 229–33.

180 *Id.*; see also Amar, *supra* note 75, at 902 n.37 (“These state constitutional references to hunting and recreation appear to be of a distinctly recent vintage, enacted in the 1980s and 1990s.”).

181 Blocher, *supra* note 177, at 383–84 (arguing, *inter alia*, that federal courts interpreting the Second Amendment should consider adopting the same standard of review that has been nearly unanimously applied by state courts interpreting their own gun-rights provisions).

est. This set of arguments provides the strongest support for a Second Amendment right to hunt. And yet that support has important limitations.

The idea behind instrumental protection for hunting is straightforward: using arms for purposes like hunting and sport shooting can help a person develop proficiency in arms, which can in turn be useful for central Second Amendment purposes like self-defense and the prevention of tyranny.<sup>182</sup> *Heller* cited Thomas Cooley's "massively popular 1868 Treatise on Constitutional Limitations" to this effect: "[T]o bear arms implies something more than the mere keeping; it implies the learning to handle and use them . . . it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order."<sup>183</sup> Contemporary scholars like Glenn Harlan Reynolds invoke and employ similar language: "The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective."<sup>184</sup> And some version of this conclusion has appeared in post-*Heller* case law, most prominently the Seventh Circuit's conclusion in *Ezell v. City of Chicago* that range training is not categorically unprotected by the Second Amendment.<sup>185</sup>

The instrumental argument would therefore protect hunting *because*, and presumably to the degree that, it is useful for core Second Amendment interests. The penumbral argument would not focus on that utility directly, but rather on whether hunting and recreation bear sufficient relationship to activities that are undoubtedly protected—they would be covered as "convenient spinoffs,"<sup>186</sup> rather than as facilitators. Similar arguments are some-

182 Reynolds, *Second Amendment Penumbra*, *supra* note 28, at 250.

183 *District of Columbia v. Heller*, 554 U.S. 570, 616–18 (2008); *see also* *Andrews v. State*, 50 Tenn. 165, 178 (1871) (concluding that individual right to bear arms under state constitution includes "the right to practice their use, in order to attain to this efficiency"); O'Shea, *Defensive Arms*, *supra* note 116, at 369 ("As for target shooting: since the Second Amendment protects the ability to keep and use arms for self-defense, this also seems to entail the right to practice regularly with one's arms (subject to ordinary safety regulations) so as to be able to defend oneself effectively.").

184 Reynolds, *Second Amendment Penumbra*, *supra* note 28, at 250 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)). Reynolds concludes that "[t]he right to practice at a firing range, then, is at the very least one of the aspects of the Second Amendment right to arms that reinforces its core purpose." *Id.*

185 651 F.3d 684 (7th Cir. 2011).

186 Seth Mydans, *California Gun Control Law Runs Into Rebellion*, N.Y. TIMES (Dec. 24, 1990), <http://www.nytimes.com/1990/12/24/us/california-gun-control-law-runs-into-rebellion.html?pagewanted=all> (quoting Fred Romero, NRA's field representative for Southern California: "The Second Amendment is not there to protect the interests of hunters, sports shooters and casual plinkers, although those are convenient spinoffs . . . . The Second Amendment is there as a balance of power."); *see also* AKHIL REED AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION 49 (2000) ("[T]o see the . . . amendment as primarily concerned with an individual right to hunt or to protect one's home is like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge or to have sex."); Akhil Reed Amar, *An(Other) Afterword on the Bill of Rights*, 87 GEO. L.J. 2347, 2361 (1999) ("[T]he Second Amendment as originally drafted seems to me

times made for First Amendment protection of nude dancing, which is covered not because it aids core political speech, but because it is itself some kind of marginally protected speech.<sup>187</sup> Under this approach, the question is whether hunting and recreation bear sufficient connection to core purposes like self-defense, not whether they are useful to advancing it.<sup>188</sup>

These are novel problems for the Second Amendment, but not for constitutional law. First Amendment doctrine—frequently if controversially used as a guide to the Second<sup>189</sup>—reflects difficult decisions about whether to cover, and how much to protect, activities falling outside the Amendment’s “core” of political speech. Constitutional rights often need room to breathe. But that does not mean that every activity that facilitates a constitutional right is itself constitutionally protected. Free speech would presumably be facilitated by access to court records<sup>190</sup> and a right to education,<sup>191</sup> but neither of those things are covered by the First Amendment. And even when such instrumental or penumbral rights are constitutionally covered, they often receive lessened protection.<sup>192</sup>

The emerging Second Amendment standard of review seems to incorporate these two dimensions of coverage and protection. Courts generally apply a two-part test, which first asks whether a challenged law burdens conduct within the scope of the Second Amendment, and then asks whether the burden can be justified in light of the burden imposed.<sup>193</sup> The first of these inquires is about coverage—whether a particular activity implicates the Sec-

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more about the army than about hunting, more about collective than individual self-defense.”); Michael P. O’Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 YALE L.J. ONLINE 359, 363 (2014) (arguing that “hunting arms, as such, deserve ‘penumbral’ protection under the Second Amendment”).

187 *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).

188 Kopel, *supra* note 111, at 327 (“[W]hile sporting uses such as hunting are part of the Second Amendment, the ‘core’ and ‘central component’ of the Second Amendment is self-defense.”); Reynolds, *Critical Guide*, *supra* note 101, at 480 (“Recreation and sport, to the extent they are protected at all, are covered only penumbally; the Second Amendment is not about sport or recreation.”).

189 See Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012); see also Joseph Blocher, *Second Things First: What Free Speech Can and Can’t Say About Guns*, 91 TEX. L. REV. SEE ALSO 37 (2012).

190 *IDT Corp. v. eBay*, 709 F.3d 1220, 1222, 1225 (8th Cir. 2013) (agreeing with “[t]en other circuits” that “the common-law right of access applies to judicial records in civil proceedings,” but following those other circuits in refusing to uphold the right of access under the First Amendment).

191 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–36 (1973) (dismissing appellees’ contention that education is a fundamental right because it is essential to effective exercise of First Amendment freedoms).

192 See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978))).

193 See, e.g., *Nat’l Rifle Ass’n v. ATF*, 700 F.3d 185, 194 (5th Cir. 2012); *Georgia-Carry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

ond Amendment at all.<sup>194</sup> The second inquiry is about protection—whether the challenged law can be sufficiently justified in light of the burdens it places on the constitutionally covered activity. Stronger justifications are required for laws that burden the “core” Second Amendment interest of self-defense.<sup>195</sup>

Assuming that hunting’s instrumental or penumbral relationship to the Second Amendment’s core is enough to survive the threshold coverage inquiry, the second question would be whether the law’s burdens are appropriate in light of the governmental interests involved—a test that is sometimes treated as a sliding scale<sup>196</sup> and sometimes as intermediate scrutiny.<sup>197</sup> This is a difficult question to answer in the abstract, since it would of course depend on the details of the law and its implementation. Whatever else may be said in favor of extending constitutional protection to hunting and sport shooting, they are not the “core” of the Second Amendment.<sup>198</sup> As *Heller* and *McDonald* make clear, the “core” and “central component” of the right is self-defense.<sup>199</sup> Because hunting is not a core Second Amendment interest, government interests in regulating hunting-related activities need not be as strong.

If hunting and recreation do in fact fall within the scope of the Second Amendment, that does not mean they are immune from regulation—even a flat ban on hunting might nonetheless be constitutional. If training with arms is constitutionally protected only because it facilitates expertise, then providing alternative methods of attaining that expertise should obviate a constitutional claim for hunting. The availability of a shooting range would undermine the argument in favor a right to hunt, for example, and vice versa. Even an advanced simulator might be sufficient, if what the constitution requires is a means of attaining firearms proficiency. This would of course require courts to determine whether training opportunities are ade-

194 *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013) (finding that concealed carrying is not covered by the Second Amendment).

195 *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011); *see also Caba v. Weaknecht*, 64 A.3d 39, 57–59 (Pa. Commw. Ct. 2012) (concluding that the right to bear arms for self-defense “is an enumerated, constitutionally-protected interest that, in our view, is worthy of more protection than an interest in engaging in the sport of hunting”).

196 *See, e.g., Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93–97 (2d Cir. 2012); *Nat’l Rifle Ass’n*, 700 F.3d at 195–98.

197 *See, e.g., Heller II*, 670 F.3d at 1260–64; *United States v. Staten*, 666 F.3d 154, 160–67 (4th Cir. 2011).

198 Reynolds, *Second Amendment Penumbra*, *supra* note 28, at 250 (“The right to practice at a firing range, then, is at the very least one of the aspects of the Second Amendment right to arms that reinforces its core purpose.”); *see also Reynolds, Critical Guide, supra* note 101, at 480 (“Recreation and sport, to the extent they are protected at all, are covered only penumbraally; the Second Amendment is not about sport or recreation.”).

199 *District of Columbia v. Heller*, 554 U.S. 570, 599, 630 (2008).

quate, but that is not necessarily any harder than the “alternative channels of communication” analysis they already perform in some free speech cases.<sup>200</sup>

If a law were to ban *all* forms of practice shooting, it would properly be subject to the burden-testing, interest-balancing second prong of the test. In other words, it would have to be justified in light of the private burdens and public interests. This too is an empirical question, and its answer would depend on what evidence a government could marshal to prove the strength of its interest. In addition to the usual asserted harms from gun ownership, activities like hunting carry risks of their own,<sup>201</sup> which the government has a legitimate interest in preventing. Against this, gun owners would assert their need to practice with arms, so as to acquire and maintain proficiency in their use. If a municipality were to make training a prerequisite for gun ownership, and then make such training virtually impossible to obtain, the Second Amendment arguments would be even stronger.<sup>202</sup>

Sometimes these private interests might be particularly weighty. For example, people occasionally “bear arms” against animals for reasons that are neither recreational nor intended for training.<sup>203</sup> Consider the case of a person who is threatened by a wild animal, or who wants to bear arms because she has legitimate fear that she will be.<sup>204</sup> Gun-rights advocates often point to a letter written by Samuel Nasson of Massachusetts to his Congressman,

200 The First Amendment permits “regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)); see also Joseph Blocher & Darrell Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEGIS. (forthcoming 2015).

201 Thomas B. Cole & Michael J. Patetta, *Hunting Firearm Injuries, North Carolina*, 78(12) AM. J. PUB. HEALTH 1585, 1585 (1988) (“Approximately one-fifth of unintentional firearm injuries have been attributed to hunting.”); see also *State v. Bontrager*, 683 N.E.2d 126, 131?32 (Ohio Ct. App. 1996) (upholding Ohio ordinance requiring the wearing of orange vests while hunting as a reasonable firearm regulation, noting the risks inherent in hunting and comparing the regulation to the requirement of seatbelt use by drivers); Lolomai Örnehult & Anders Eriksson, *Accidental Firearm Fatalities During Hunting*, 8(2) AM. J. FORENSIC MED. & PATHOLOGY 112, 112 (1987) (studying accidental firearm fatalities in Sweden).

202 See, e.g., *Ezell v. City of Chicago*, 651 F.3d 684, 689–90 (7th Cir. 2011) (striking down municipal ordinance that required one hour of range training while prohibiting ranges in the city).

203 Green, *supra* note 121, at 184 (noting that hunting “is itself valuable not merely because it provides food for one’s family, but also because it is an important form of recreation and the expression of a particular conception of the good life”). Whether hunting can be defended purely as recreation is a hotly contested issue. Cass Sunstein says that it cannot: “We ought to ban hunting, I suggest, if there isn’t a purpose other than sport or fun. That should be against the law. It’s time now.” Aaron Sharockman, *Obama Regulatory Adviser Cass Sunstein Wants to Ban Hunting, NRA Claims in Mailer*, TAMPA BAY TIMES, JUN. 13, 2012, 2012 WLNR 12452458; see also *id.* (quoting NRA executive vice president Wayne LaPierre as saying that “Sunstein is a radical animal rights extremist who makes PETA . . . look like cheerleaders with pooper-scoopers”).

204 SPITZER, *supra* note 7, at 8 (noting that arms-bearing “was a key method for protection from animal predators, including bears, panthers, and wolves”).

commenting on the language of what would become the Second Amendment:

[T]hen their will be no Dispute Between the people and rulers in that may be secured the right to keep arms for Common and Extraordinary Occations such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy.<sup>205</sup>

Nasson describes arms-bearing as both a means of recreation and of defense against animals. Michael O'Shea notes that *Heller* protects "the right to possess and carry arms in case of confrontation,"<sup>206</sup> and argues, in the context of hunting, that "[i]t is not far-fetched to argue that this right should extend to at least some 'confrontations' with nonhuman animals."<sup>207</sup> This makes sense, at least for "confrontations" in which people defend themselves against animals rather than hunting them. Jurisprudentially speaking, it is hard to imagine that the Second Amendment would protect the right to bear arms against human threats, but not against animal ones. Indeed, at oral argument in *Heller* Justice Kennedy referred to "the right of people living in the wilderness to protect themselves" and the right of "the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that."<sup>208</sup> This locates animal confrontation within the self-defense "core" of the Amendment. It does not involve a right to hunt.

People also sometimes hunt for food.<sup>209</sup> And like self-defense against animals, this form of gun usage (assuming that it can properly be called arms-bearing<sup>210</sup>) has a long history tracing back at least to the Founding era.<sup>211</sup> Even the staunchest gun regulation advocates recognize that guns

205 Halbrook, *supra* note 5, at 201 (quoting Letter from Samuel Nasson to George Thatcher (Jul. 9, 1789), *reprinted in* CREATING THE BILL OF RIGHTS 261 (Helen E. Veit et al. eds., 1991)); *see also* United States v. Emerson, 270 F.3d 203, 253 (5th Cir. 2001) (same); George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 *FORDHAM L. REV.* 2113, 2128 (2008) (same).

206 O'Shea, *Defensive Arms*, *supra* note 116, at 369 (quoting District of Columbia v. Heller, 554 U.S. 570, 592). The quoted passage actually refers to "weapons," not "arms," though for present purposes nothing necessarily turns on the distinction. *Heller*, 554 U.S. at 592; *see also* *Heller*, 554 U.S. at 646 (Stevens, J., dissenting) ("No party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth.").

207 O'Shea, *Defensive Arms*, *supra* note 116, at 369.

208 Transcript of Oral Argument at 8, 30, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

209 Dwight Garner, *A New Breed of Hunters Shoots, Eats and Tells*, *N.Y. TIMES* (Oct. 1, 2012), <http://www.nytimes.com/2012/10/02/books/new-breed-of-hunter-shoots-eats-and-writes.html>; *see also* JAMES A. SWAN, *IN DEFENSE OF HUNTING* 17–19 (1995) (reporting results of Yale University survey finding that 45.5% of hunters hunt for meat, 38.5% hunt for sport or hobby, and 17% for enjoyment in being out in nature); SPITZER, *supra* note 7, at 9.

210 *See supra* note 176 and accompanying text.

211 Bissell, *supra* note 103, at 813 ("In that [colonial] society, people hunted for food."); *see also* LEVY, *supra* note 131, at 139 ("Hunting was necessary for meat."). *But see* JAN E. DIZARD, *GOING WILD: HUNTING, ANIMAL RIGHTS, AND THE CONTESTED MEANING OF NATURE* 96 (rev. ed. 1999) ("Though modern hunters like to imagine the colonial period

were once common for this purpose.<sup>212</sup> Still today, many hunters, like many fishermen, prefer to eat what they kill. Some might even say that they *need* to do so for sustenance. But in the unlikely event that such a person were prosecuted for violating a gun control law, the most natural legal defenses would be the doctrines of necessity or justification,<sup>213</sup> not the Second Amendment.<sup>214</sup>

In sum, the strongest case for constitutional protection of hunting and recreational shooting is that they are important—or, better yet, necessary—to the successful exercise of the core Second Amendment right of armed self-defense. But whatever the strength of this case, it is limited in scope. At most, it provides a reason to extend *some* protection to those activities under some limited circumstances.

### III. DISENTANGLING HUNTING FROM THE SECOND AMENDMENT

The preceding discussion has shown that the case for a robust Second Amendment right to hunt is tenuous, and that the strongest argument for any right extends only to a limited set of circumstances and provides modest protections. That conclusion raises a new and difficult set of questions. What does it *mean* to say that hunting is unprotected, or less protected than other forms of gun possession and use? What of the many millions of people who own guns for hunting *and* self-defense purposes?<sup>215</sup> Are high-powered hunting rifles “in common use” for purposes of the Second Amendment, or must they be excluded from consideration on the basis that (as many gun advocates argued in *Heller*) they are ill suited for self-defense? These are hard questions to answer, precisely because hunting has become so thor-

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as a golden age, a time when game was extraordinarily abundant and hunting was celebrated as a manly art, the fact is that the early settlers, though dependent upon game for survival, fretted about the carnal pleasures afforded by the hunt.”).

212 Ehrman & Henigan, *supra* note 128, at 14 n.66 (“[F]rontier life and the need for self-sufficiency created a climate in which almost everyone had guns, whether to hunt food or to fight off bandits and Indians.”).

213 These doctrines have, for example, been used to protect those who trespass or steal to save their own lives. *State v. Davenport*, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (“[T]he necessity defense would bar a trespass conviction for a hiker, stranded in a snow-storm, who spends the night in a vacant cabin rather than risking death sleeping in the open.” (alteration in original) (quoting TENN. CODE ANN. § 39-11-609 cmt. (TENN. SENTENCING COMM’N 1989))); Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1550 n.97, 1558 (2005) (citing *Davenport* for the proposition that “[n]ecessity claims clearly authorize, in an appropriate case, the theft of food to avoid starvation”).

214 See, e.g., *United States v. Gomez*, 81 F.3d 846 (9th Cir. 1996) (supporting justification defense for a felon in possession).

215 Cook et al., *supra* note 10, at 1047 (“[M]ost people who have acquired guns for self-protection are also hunters and target shooters.”); see also *NSSF Survey Tracker*, HUNTER-SURVEY.COM (Sept. 2011), [http://www.nssf.org/share/PDF/0911Survey\\_Tracker.pdf](http://www.nssf.org/share/PDF/0911Survey_Tracker.pdf) (reporting that 50.8% of hunters and shooters who purchased a firearm in July 2011 bought handguns).

oughly interwoven with American gun culture—picking out its single thread is a challenge.

Whatever its constitutionality, a flat ban on hunting is difficult to imagine as a political matter.<sup>216</sup> The practical impact of hunting's lack of constitutional salience would therefore be most likely to appear in the ripple effects it has on other areas of gun regulation. Subtracting hunting interests from other Second Amendment arguments could significantly alter their weight. For example, gun-rights advocates often say that state-level preemption laws—which forbid or limit local gun regulation—are necessary to protect hunters and sport shooters who want to transport their guns from place to place.<sup>217</sup> But if these activities lack constitutional salience, then the debate is largely one over convenience and the desire of recreational gun users to be exempt from local laws. That may be a political winner, but it is not a strong Second Amendment argument.

Removing hunting from the scale might also be significant with regard to restrictions on particular classes of weapons. *Heller* held that prohibitions of “dangerous and unusual weapons” are “presumptively lawful” under the Second Amendment.<sup>218</sup> *Heller* also indicated that the Second Amendment’s definition of “Arms” does not cover “weapons not typically possessed by law-abiding citizens for lawful purposes.”<sup>219</sup> This “common use” test has been central to many recent cases.<sup>220</sup>

The connection, or lack thereof, between hunting and the Second Amendment could play a role in these disputes. The common use test does not count all guns that are commonly owned—if a gun is not “typically possessed by law-abiding citizens for lawful purposes”<sup>221</sup> it can be banned notwithstanding its widespread use. Self-defense clearly counts as a “lawful purpose” when applying this test.<sup>222</sup> Whether hunting should count as well is somewhat less clear. To be sure, it is generally “lawful,” albeit subject to regulation. But it seems unlikely that all non-prohibited purposes are constitu-

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216 See Paul Finkelman, “A Well Regulated Militia”: *The Second Amendment in Historical Perspective*, 76 CHI-KENT L. REV. 195, 236 (2000) (“Could Congress ban hunting rifles? It would be politically impossible and constitutionally absurd, although it would be possible and reasonable to ban hunting, and hunting rifles, in national parks.”).

217 See, e.g., *July 2012 Political Report: “On Capitol Hill and Beyond, The NRA Fights for Hungers’ Rights”*, NRA INST. FOR LEGIS. ACTION (June 26, 2012), <https://www.nra.org/articles/20120626/july-2012-political-report-on-capitol-hill-and-beyond-the-nra-fights-for-hunters-rights>.

218 *District of Columbia v. Heller*, 554 U.S. 570, 627, 627 n.25 (2008).

219 *Id.* at 625.

220 See, e.g., *United States v. Henry*, 688 F.3d 637 (9th Cir. 2012) (upholding conviction for possession of a homemade machine gun); *United States v. Shaw*, 670 F.3d 360 (1st Cir. 2012) (upholding conviction under the Federal Firearms Act for possession of a sawed-off shotgun); *People v. Liscotti*, 162 Cal. Rptr. 3d 225 (2013) (upholding conviction for possession of a “billy”).

221 *Heller*, 554 U.S. at 625.

222 *Id.* at 629 (“Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).

tionally salient. It makes more sense to say that these purposes are relevant to Second Amendment coverage when they have some connection to the Second Amendment's own core concerns, which—as shown above—do not include hunting. At the very least, it is plausible that common use for peripheral purposes like hunting should “count” less than use for self-defense.

Consider the class of guns commonly referred to as assault weapons. These are semi-automatic rifles with certain features—a telescoping stock, pistol grip, or the ability to be converted quickly to automatic firing—that make them appear “military” and, in many people's minds, more dangerous. Many high profile mass shootings have been perpetuated with AR-15s—Newtown, Aurora, and the DC sniper murders, for example.<sup>223</sup> As a result, and despite the fact that assault weapon murders represent a small proportion of overall gun deaths,<sup>224</sup> assault weapons regulation has received extensive political and constitutional attention.

Perhaps the strongest argument in favor of the constitutionality of regulating assault weapons is that they are precisely the kind of “dangerous and unusual” weapon whose prohibition *Heller* calls “presumptively lawful.”<sup>225</sup> Justice Scalia himself suggested in *Heller* that it would be permissible to ban M-16s,<sup>226</sup> and the Court has elsewhere described the AR-15 as “the civilian version of the military's M-16 rifle.”<sup>227</sup> And yet the case for describing assault weapons as dangerous and unusual is not so clear-cut as it might appear. AR-15s can be purchased at Wal-Mart,<sup>228</sup> and there are at least half a million of them registered with the federal government<sup>229</sup>—more than the hundreds of thousands of machine guns that Justice Scalia clearly suggested

223 George Zornick, *How Walmart Helped Make the Newtown Shooter's AR-15 the Most Popular Assault Weapon in America*, NATION (Dec. 19, 2012), <http://www.thenation.com/article/how-walmart-helped-make-newtown-shooters-ar-15-most-popular-assault-weapon-america/>.

224 See FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *Crime in the United States 2012: Uniform Crime Reports*, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/20tabledatadecpdf> (showing that 322 out of 8,855 firearm murders in 2012 were committed with rifles, or about 3.6%).

225 LAWRENCE E. ROSENTHAL & ADAM WINKLER, *REDUCING GUN VIOLENCE IN AMERICA* 232 (Daniel W. Webster & Jon S. Vernick eds., 2013) (“Just as ‘dangerous and unusual weapons’ like machine guns, which can also be used for self-defense, can be restricted consistent with the Second Amendment, so can assault weapons.”); Geoffrey R. Stone, *The Second Amendment*, THE HUFFINGTON POST (Jan. 30, 2013, 10:35 AM), [http://www.huffingtonpost.com/geoffrey-r-stone/the-second-amendment\\_b\\_2581625.html](http://www.huffingtonpost.com/geoffrey-r-stone/the-second-amendment_b_2581625.html) (last updated Apr. 1, 2013) (arguing that restrictions on the manufacture and sale of high-capacity ammunition magazines and assault weapons are likely valid due to the presumptively lawful language of *Heller*). *But see Heller II*, 670 F.3d at 1260 (“We are not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity magazines are longstanding and thereby deserving of a presumption of validity.”).

226 *Heller*, 554 U.S. at 627 (indicating that M-16 rifles are exemplary of “dangerous and unusual weapons”).

227 *Staples v. United States*, 511 U.S. 600, 603 (1994).

228 Zornick, *supra* note 223.

229 BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP'T OF JUSTICE, *Firearms Commerce in the United States: Annual Statistical Update 2012*, at 14, <http://www.atf.gov/>

are “dangerous and unusual.”<sup>230</sup> Some industry groups say that the AR–15 Bushmaster is the fastest-selling model gun in the country, even after (in fact, especially after) Newtown.<sup>231</sup>

What is less clear is *why* these rifles are owned, and to what purposes they are being put. Are they the kinds of constitutionally salient uses that should count for purposes of the common use test? The DC Circuit faced this very question in *Heller II*, which involved the District of Columbia’s ban on assault weapons. The majority concluded that such weapons are commonly owned, but was unsure whether they are useful for the kinds of lawful purposes protected by *Heller*—the court specifically mentioned self-defense and hunting.<sup>232</sup>

Though precise figures are hard to find,<sup>233</sup> it is plausible that AR–15s are in common use for hunting but not for self-defense. Gun regulation advocates often say that assault weapons are not appropriate for hunting,<sup>234</sup>

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files/publications/firearms/050412-firearms-commerce-in-the-us-annual-statistical-update-2012.pdf.

230 Transcript of Oral Argument at 22, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

231 NRA INST. FOR LEGISLATIVE ACTION, *Not Quite All “The Facts” About the AR–15*, NRA-ILA.ORG (Nov. 8, 2013), <http://www.nra.org/news-issues/articles/2013/11/not-quite-all-the-facts-about-the-ar-15.aspx> (noting that it “is certainly the case, based upon recent firearm manufacturer reports” that “the AR-15 is ‘America’s most popular rifle’”). Gun sales typically spike in the wake of a prominent gun-related tragedy like Newtown. The most common explanation for this is that gun owners fear the threat of gun regulation. Natasha Singer, *The Most Wanted Gun in America*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/business/the-ar-15-the-most-wanted-gun-in-america.html> (noting that “[s]ince the massacre in Newtown, Conn., in December, the AR–15 . . . has been selling fast here and across the nation” likely due to significantly increased demand in anticipation of gun control legislation).

232 *Heller II*, 670 F.3d at 1261 (“We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in ‘common use’ . . . Nevertheless, based upon the record as it stands, we cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting . . .”).

233 O’Shea, *Defensive Arms*, *supra* note 116, at 389 n.188 (noting that “[i]t is currently difficult to calculate with precision the number” of assault weapons sold in any given year).

234 *Hearing Before the S. Comm. on the Judiciary on S. 150 Regulating Assault Weapons* (2013) (testimony of Milwaukee Chief of Police Edward A. Flynn), <http://www.judiciary.senate.gov/imo/media/doc/2-27-13FlynnTestimony.pdf> (“Assault weapons are not built for sportsmen. Assault weapons are not built to hunt deer or elk or bear or other large game. Assault weapons are built to inflict violence against humans.”); Stephanie Ebbert & Michael Levenson, *Brown Reverses Stance on Gun Laws*, BOS. GLOBE (Dec. 19, 2012), <https://www.bostonglobe.com/news/politics/2012/12/19/senator-elect-elizabeth-warren-backs-assault-weapon-ban/0rgmqDijV6xoVNJF2XF59O/story.html> (quoting then-candidate Elizabeth Warren as saying that she learned to shoot when she was in grade school, but “no one needs military-grade assault weapons to hunt”); *Reid’s Remarks on Assault Weapons Ban Vote*, N.Y. TIMES (Apr. 17, 2013), <http://www.nytimes.com/2013/04/18/us/politics/reid-remarks-on-assault-weapons-ban-vote.html> (“Where I come from, people own guns as a matter of course for self-defense and for hunting. But I have always had trouble understanding why people need assault weapons to hunt or to protect their homes.”).

and denigrate hunters who use them.<sup>235</sup> But many hunters and gun-rights advocates claim that so-called assault rifles, including the AR-15, have become common for hunters and target shooters. Michael O’Shea writes that “AR-15 rifles are now mainstream equipment for so-called ‘varmint’ hunters, who must make rapid, long-range shots on small targets such as prairie dogs and coyotes.”<sup>236</sup> David Kopel and Richard Gardner similarly say that “so-called ‘assault weapons’ are used for competitive target shooting, for hunting, for ‘plinking,’ and for collecting.”<sup>237</sup>

At the same time, many gun-rights supporters have argued strenuously that assault weapons are *not* appropriate guns for self-defense purposes. The laws at issue in *Heller* effectively banned handguns, but permitted private individuals to own an arsenal of long guns. Opponents of the law maintained that rifles are not sufficient for self-defense.<sup>238</sup> *Heller* itself noted that “the American people have considered the handgun to be the quintessential self-

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235 Christopher Keating, *Dodd, Back in Connecticut, Says Colorado Shootings Show Need for More Restrictions on Weapons*, HARTFORD COURANT (July 23, 2012), [http://articles.courant.com/2012-07-23/news/hc-dodd-0724-20120723\\_1\\_assault-weapons-dodd-gun-restrictions](http://articles.courant.com/2012-07-23/news/hc-dodd-0724-20120723_1_assault-weapons-dodd-gun-restrictions) (Sen. Christopher J. Dodd: “There’s not a decent hunter I know who would hunt anything with an assault weapon.”); *Fox News Sunday* (Fox News television broadcast Dec. 30, 2012) (Sen. Dianne Feinstein (D-CA) stated: “I mean, no hunter, in my view, worth his or her salt, would use an assault weapon to hunt, and, they’re not necessarily good defensive of weapons.”); *Talk of the Nation: Analysis: Politics of Guns and the Gun Industry* (NPR broadcast May 15, 2003) (Mike Barnes, President, Brady Campaign to Prevent Gun Violence, stated: “You know, hunters don’t need the semiautomatic, high-powered assault weapons to hunt unless they are very bad hunters.”).

236 O’Shea, *Defensive Arms*, *supra* note 116, at 388 n.182; *see also* Abrams, *supra* note 98, at 499 (“Furthermore, some features that make a weapon ‘military-like’ and, consequently, more attractive to drug dealers, also enhance the weapon’s use for hunting.”); O’Shea, *Defensive Arms*, *supra* note 116, at 389 n.188 (noting that “[i]t is currently difficult to calculate with precision the number” of assault weapons sold in any given year (citing industry publications)); Ray Long & Rafael Guerrero, *House Lawmakers Clash Over Assault Weapons Ban*, CHI. TRIB. (Feb. 28, 2013), [http://articles.chicagotribune.com/2013-02-28/news/ct-met-illinois-assault-weapons-ban-0301-20130301\\_1\\_assault-weapons-high-powered-guns-gun-homicides](http://articles.chicagotribune.com/2013-02-28/news/ct-met-illinois-assault-weapons-ban-0301-20130301_1_assault-weapons-high-powered-guns-gun-homicides) (“We’re trying to pass a bill [banning assault weapons] to make us feel good, and it isn’t going to do a thing . . . I deer hunt with an assault weapon.”).

237 David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 755 (1995).

238 *See, e.g.*, Brief for Amici Curiae Disabled Veterans for Self-Defense and Kestra Childers at 29–30, *District of Columbia v. Heller*, 554 U.S. 570 (No. 07-290) (noting that rifles are more dangerous to keep in the home because of their relative muzzle velocity); Brief Amicus Curiae of the Heartland Institute at 16–17, *Heller*, 554 U.S. 570 (No. 07-290) (noting that “[t]he vast majority of American gun owners prefer handguns to other firearms for self-defense” and that “the FBI found that handguns accounted for over 83 percent of all firearms used in legally justified defensive homicides by private citizens, while shotguns and rifles together accounted for less than 7.5 percent of such”); Brief of Amici Curiae Se. Legal Found., Inc. et al. at 17–21, *Heller*, 554 U.S. 570 (No. 07-290) (listing reasons why “[h]igh powered rifles are not recommended for self-defense,” including (1) the fact that dialing 911 while aiming one is difficult, (2) they are awkward to get into action quickly, and (3) they are less useful in close quarters (internal quotations omitted)).

defense weapon.”<sup>239</sup> If it is true, as these arguments suggest, that long guns are useful for hunting but *not* for self-defense, then the Second Amendment protection of those guns should be correspondingly weaker.

#### CONCLUSION

That hunting largely falls outside the Second Amendment of course does not mean that it is or should be illegal, only that its protection and regulation should be left to the political process rather than the courts.<sup>240</sup> Given the degree to which even gun control advocates go out of their way to emphasize their commitment to hunting, the political process seems to offer relatively significant protections to hunters.<sup>241</sup> Areas where hunting is culturally embedded will never ban it, and even the relatively stringent law struck down in *Heller* permitted guns to be used for “lawful recreational purposes.”<sup>242</sup> From the perspective of the Second Amendment, of course, the issue is not whether hunting weapons *should* be regulated, but whether they *can* be regulated in ways that are different from self-defense weapons. Given hunting’s tenuous relationship to Second Amendment values, the answer is generally yes.

At a more general level, the conclusion that hunting falls largely, and perhaps entirely, outside the scope of the Second Amendment might make the dysfunctional gun debate somewhat more manageable. That debate is largely locked up by disparate cultural visions that seem impossible to bridge. Moreover, with hundreds of millions of guns in circulation, the problem of appropriate and constitutional sometimes seems too big, and the Second Amendment’s shadow too heavy. But if roughly half of gun ownership raises no Second Amendment issues, and has been adequately protected through normal political processes, then perhaps there is cause for hope after all.

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239 *Heller*, 554 U.S. at 629.

240 Miller, *supra* note 4, at 1350 (arguing that “hunting, trap shooting, or other public uses of firearms” should fall outside the Second Amendment and be left to the political process).

241 Dowd, *supra* note 79, at 105 n.98 (arguing that “respect for hunters’ interest groups is a powerful influencing factor on gun control legislation”); Bob Herbert, Opinion, *A Threat We Can’t Ignore*, N.Y. TIMES (June 19, 2009), <http://www.nytimes.com/2009/06/20/opinion/20herbert.html> (noting that “the politicians always claim to be defending”); *On the Record: The Democratic Debate; Transcript of Democratic Candidates’ Debate in New York*, N.Y. TIMES (Mar. 29, 1984), <http://www.nytimes.com/1984/03/29/us/record-democratic-debate-transcript-democratic-candidates-debate-new-york.html> (Rev. Jesse Jackson: “I favor gun control. In those areas—in the rural areas where they hunt rabbits, having guns is all right, but in urban American they hunt people. We need to go another way.”); see also NAT’L SHOOTING SPORTS FOUND., AMERICANS ATTITUDES TOWARD HUNTING, FISHING AND TARGET SHOOTING 2011 (Sept. 2011), [http://www.nssf.org/PDF/research/RM\\_2011-AttitudesTowardHuntingFishingTargetShooting.pdf](http://www.nssf.org/PDF/research/RM_2011-AttitudesTowardHuntingFishingTargetShooting.pdf) (reporting that 74% of American adults have a favorable view of hunting).

242 D.C. CODE § 7-2507.02 (2001), *invalidated by Heller*, 554 U.S. 570.