CREATING AN INDIVIDUAL RIGHT TO BEAR ARMS THROUGH MANDATORY REGISTRATION LAWS

INTRODUCTION

The Supreme Court has held that the Second Amendment right to bear arms is inextricably tied to the purpose of promoting state security through "well regulated militias." But what is the relevance of such a limitation in a day when private citizens no longer enroll in state militias? I will argue that a state's ability to regulate, organize and potentially summon its gun-owners for state security satisfies the "well regulated militia" limitation of the Second Amendment. Further, because a state's ability to organize gun-owners at minimum requires knowing who the gun-owners are, only by the states' enacting mandatory registration laws does the constitutional right to bear arms become a cognizable individual right. Further, these mandatory registration laws, especially if enacted on the state level, will be acceptable to the general population while also promoting effective gun control policies.

I

THE NATURE OF THE RIGHT TO BEAR ARMS

A. The Second Amendment is a hybrid of right and duty.

The Second Amendment confers a unique and inextricable blend of both right (to possess arms) and duty (to serve in militias for the protection of the state). This hybrid nature of the Second Amendment's conferral is clear from the text of the amendment and its history.

The text reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[i] The prefatory clause of the amendment—unique among Constitutional provisions[ii]—expresses its civic purpose: to assure the availability of militias for the security of the states.[iii] The right conferred must be

interpreted with that end in view.[iv] Only the keeping and bearing of arms that has "some reasonable relationship to the preservation or efficiency of a well regulated militia" is protected by the amendment.[v] Thus, the text suggests that the duty to serve in a state-summoned militia inheres in the very right conferred.

History further reveals the intrinsic "duty-like" nature of this right. The "right" to possess arms originated as a begrudging duty of citizen law enforcement.[vi] Additionally, the founding-era Congress and state legislatures passed laws requiring all qualifying men to enroll in their state militias and subsequently arm themselves.[vii] Finally, the first proposed version of the Second Amendment contained a conscientious objector provision, allowing an exemption from bearing arms for the "religiously scrupulous."[viii] Such an exception only makes sense if the Second Amendment imposes a duty, for an exemption from exercising a private right would be nonsensical and superfluous.[ix]

B. The right to bear arms is circumscribed by its civic purpose of preserving the efficacy of militias.

In *United States v. Miller*, the Supreme Court held that the Second Amendment does not protect gun ownership that does not bear "some reasonable relationship to the preservation or efficiency of a well regulated militia."[x] Because the issue in *Miller* was whether the Second Amendment protected a particular *type* of firearm (in that case, a short-barreled shotgun),[xi] some courts have tried to limit its holding to imposing conditions on the types of guns to be owned, but not their owners.[xii] However, not only does this limitation rely on an arbitrary distinction between arms and people not supported by *Miller*,[xiii] it ignores further Supreme Court precedent. In *Lewis v. United States*,[xiv] the Supreme Court cited *Miller*'s "some reasonable relationship" language for the proposition that a federal law barring an individual from gun ownership—

irrespective of gun type—did not violate the Second Amendment,[xv] indicating that the "reasonable relationship" to the militia limits both the types of guns and types of persons protected by the amendment.[xvi] Thus, to the extent that the Second Amendment confers an individual right on private citizens to possess firearms, such a right exists only insofar as such possession bears a reasonable relationship to militia service.[xvii]

II

MANDATORY REGISTRATION LAWS ARE NECESSARY TO SUSTAIN AN INDIVIDUAL CONSTITUTIONAL RIGHT TO POSSESS ARMS

Given the argument above, one cannot simply write out the "well regulated militia" connection from the right to bear arms. However, the nature of this limitation has caused considerable debate. After all, state militias are largely defunct.[xviii] The "hue and cry" of mandatory citizen law enforcement is long past.[xix] Understandably troubled by this change in legitimating circumstances, and based on the fact that, at the time of founding, virtually every free man was a "member" of the militia,[xx] many scholars and courts have argued that the individual right to possess arms is entirely independent from the existence or absence of a state fighting force.[xxi] However, this argument proves too much.

Though a militia may merely be the "raw material" of the state fighting force,[xxii] comprising entirely ordinary private citizens,[xxiii] the popular nature of the militia is not logically sufficient to eliminate the relevance of the militia altogether. The essence of a militia is that its members *could* be called for military service.[xxiv] Even if many never are in fact called for such service, a militia is not a militia, unless it is at least *susceptible* to state organization.[xxv]

In addition, the Second Amendment can continue to serve its civic purpose in the modern day. The militia's essential purpose—the enlistment of citizens to act in concert for the common

defense of the state and its laws[xxvi]—is not obsolete; an armed populace can still provide a deterrent effect against the possibility of tyranny and oppression from the federal government or a foreign invader.[xxvii]

A militia must be inherently under the state's control, organization, and regulation. Registration of the militia's members and weaponry is a baseline requirement to a state's ability effectively to assert control and impose organization over the militia, as a state cannot organize without first knowing who and what to organize.[xxviii] It is up to the state to summon the militia, and determine which threats warrant its assistance.[xxix] The Second Amendment itself requires militias be "well regulated."[xxx] Finally, the right that the Second Amendment preserved[xxxi] was defined by state laws and contemporaneous practices,[xxxii] which included mandatory enrollment in state militias for qualifying men.[xxxiii] In fact, the states maintained a register of who could be called for service, their whereabouts and which weapons they possessed.[xxxiv] Thus, the very right protected by the Second Amendment *presupposed* the equivalent of gun registration laws.[xxxv]

Because any individual right to keep and bear arms must be "reasonably related" to the preservation of state militias,[xxxvi] and state militias cannot exist without registration of their members,[xxxvii] an individual constitutional right to gun ownership is not cognizable without mandatory registration laws.

III

MANDATORY REGISTRATION LAWS ENACTED ON STATE LEVEL WILL BE AN EFFECTIVE MEANS OF GUN CONTROL AND ACCEPTABLE TO THE GENERAL POPULATION

Not only are mandatory registration laws constitutionally required for an individual right to gun ownership, such laws can be both palatable to gun rights activists and effective at meaningful gun control.

Mandatory registration laws will promote effective gun control. Registration laws will apply equally to the primary (formal) and secondary (informal) market, thus avoiding the pitfalls of much gun control legislation.[xxxviii] Registration laws will promote traceability of guns used in crime,[xxxix] provide crucial data about gun ownership,[xl] aid in identification of individuals barred from ownership,[xli] and may possibly even deter some criminals from owning and using guns.[xlii] In addition, such registration laws will be more effective and legitimate when issued by the state than the federal government. Because the Second Amendment does not apply to states,[xliii] and indeed the very purpose of the Second Amendment is to protect the security of the "states,"[xliv] states are in the best position to determine exactly what level of regulation is necessary to their "security." Further, local legislators can better tailor regulation to target their own community's secondary market, and local citizens will be more receptive to state laws over which they feel they have a more meaningful influence.[xlv]

But even pro-gun activists will not recoil at mandatory registration laws, if introduced properly. Even those embracing an individual-rights model of the Second Amendment acknowledge that gun control regulation is permissible.[xlvi] Indeed, registration laws would not be considered impermissible "prior restraints" on gun rights, for mandatory registration, as opposed to discretionary licensing, leaves no room for government discretion in granting or denying gun ownership.[xlvii] Additionally, rather than fearing registration as stigmatizing and foreboding of a total ban on ownership, gun owners will feel affirmed that registration laws actually recognize and make cognizable their individual Constitutional rights to gun ownership, and feel relieved that ultimate dispossession of their weapons is made thereby further unlikely.[xlviii] They will also feel validated in that instead of connoting moral deviancy, registration symbolizes the praiseworthy exercise of a civic duty, consonant with founding-era

state militias and the fundamentally duty-imbued nature of the Second Amendment right to bear arms.[xlix]

Conclusion

Only by the adoption of mandatory registration laws will the Second Amendment confer on private citizens an individual right to bear arms.

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

[ii] Silveira v. Lockyer, 312 F.3d 1052, 1061 (9th Cir. 2002).

[iii] Wiggum v. City of Springfield, 555 F.3d 373, 374 (12th Cir. 2007). *See also* United States v. Miller, 307 U.S. 174, 177 (1939).

[iv] *Miller*, 307 U.S. at 177; *see also Silveira*, 312 F.3d at 1067 ("The first clause does more than simply state the amendment's purpose or justification: it also helps shape and define the meaning of the substantive provision contained in the second clause, and thus of the amendment itself.").

[v] *Miller*, 307 U.S. at 177.

[vi] JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 1 (1994). All the American colonies as well as England imposed on adult males a duty to be armed, and come to the aid of their neighbors on pain of legal sanction, as a cheap and practical means of maintaining order in local communities. *Miller*, 307 U.S. at 178; MALCOLM, *supra*, 1-2. *See also* Akhil Reed Amar, Enduring and Empowering: The Bill of Rights in the Third Millenium: Second Thoughts, 65 LAW & CONTEMP. PROBS. 103, 105 (2002) ("[M]ilitia participation was both a right and duty of qualified voters, who were regularly summoned to discharge their public obligations.") Many resented the duty, regarding it as onerous and dangerous. MALCOLM, *supra*, at 1.

[vii] *Miller*, 307 U.S. at 179-81; *Wiggum*, 555 F.3d at 379-80.

[viii] Silveira v. Lockyer, 312 F.3d 1052, 1065, 1074 (9th Cir. 2002); United States v. Emerson, 270 F.3d 203, 222 (5th Cir. 2001).

[ix] *Silveira*, 312 F.3d at 1065, 1074; Amar, *supra* note 6, at 104.

[x] United States v. Miller, 307 U.S. 174, 177 (1939).

[xi] *Id.* at 175.

[xii] *See* Wiggum v. City of Springfield, 555 F.3d 373, 385 (12th Cir. 2007) (holding that *Miller* limited the term "Arms" to require a relationship between the weapon and the militia, but did not require a relationship between the individual owner and the militia); *Emerson*, 270 F.3d at 227 (holding the Second Amendment protects individual Americans in their right to keep and bear arms regardless of their connection to a militia). *But see* Gillespie v. City of Indianapolis, 185 F.3d 693, 696 (7th Cir. 1999) (holding that no individual has a constitutional right to gun ownership unless "he can demonstrate a reasonable relationship between his own inability to carry a firearm and the preservation or efficiency of a well regulated militia"); Love v. Pepersack, 47 F.3d 120, 123 (4th Cir. 1995) ("The courts have consistently held that the Second

Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia.'").

[xiii] *Miller* does not purport to limit the civic purpose requirement to arms only. *Miller*, 307 U.S. at 178 (stating that "*these* men"—i.e., those who had been called for militia service—were expected to bring arms in common use at the time) (emphasis added). The Twelfth Circuit unnaturally strained *Miller* to support the contention that the arms must relate to the civic purpose but the people need not. *Wiggum*, 555 F.3d at 387 (finding that once the type of gun meets *Miller*'s "common use" test, anyone, even someone "unsuitable for militia service," has a presumptive Second Amendment right to own such a gun).

[xiv] Lewis v. United States, 445 U.S. 55, 55 (1980).

[xv] *Lewis*, 445 U.S. at 61, n.4 (citing *Miller*, 307 U.S. at 178) ("These legislative restrictions . . . do not trench upon any constitutionally protected liberties. . . . [T]he Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'").

[xvi] *Id.*

[xvii] *See* Gillespie v. City of Indianapolis, 185 F.3d 693, 696 (7th Cir. 1999) ("*Miller* and its progeny do confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia."); *see also* Silveira v. Lockyer, 312 F.3d 1052, 1056 (9th Cir. 2002) (proposing such a view as the "limited individual rights" model). The *Silveira* court ultimately rejected the limited individual rights model in favor of the "collective rights" model, which denies any individual right to arms altogether (reposing the right to arm and field a militia with the state only). *Silveira*, 312 F.3d at 1075. Though my argument would be consistent with a "collective rights" model, my argument does not require such a further limitation of the right.

[xviii] *See, e.g.*, United States v. Emerson, 270 F.3d 203, 214 (5th Cir. 2001); Amar, *supra* note 6, at 106 ("The legal and social structure upon which the [Second Amendment] is built no longer exists. The Founders' . . . militia is [no longer around today]. . . . Voters no longer muster for militia practice in the town square.").

[xix] MALCOLM, *supra* note 6, at 2.

[xx] *See* Wiggum v. City of Springfield, 555 F.3d 373, 381 (12th Cir. 2007) (finding "people" and "militia" to be almost, though not quite, synonymous, as "the militia itself was the raw material from which an organized fighting force was to be created"); Amar, *supra* note 6, at 104 ("At the founding, the militia was the people and the people were the militia."); *see also* United States v. Miller, 307 U.S. 174, 178 (1939) ("[T]he militia comprised all males physically capable of acting in concert for the common defense."). *But see Silveira*, 312 F.3d at 1061 (finding that "militia" refers to a state-created and -organized military force, not to its individual potential members).

[xxi] *Wiggum*, 555 F.3d at 381-82, 386 (arguing that the popular nature of the militia naturally supports an individual right to keep and bear arms, independent of individual's enrollment in militia); *Emerson*, 270 F.3d at 227 (holding that the individual right to keep and bear arms is not dependent on government provision for militias); Jerry Bonanno, *Exploring the Implications of Adopting an Individual Rights Interpretation of the Second Amendment to the United States Constitution*, 29 HAMLINE L. REV. 463, 467 (2006) (finding Second Amendment most plausibly protects individual right to keep and bear arms independent of militia service).

[xxii] *Wiggum*, 555 F.3d at 381.

[xxiii] *Miller*, 307 U.S. at 178 ("[T]he Militia [were] civilians primarily, soldiers on occasion.").

[xxiv] *See Miller*, 307 U.S. at 178 (defining militia as "a body of citizens enrolled for military discipline"); *Wiggum*, 555 F.3d at 380 (concluding a militia was all free, white able-bodied men of a certain age, who had "enrolled," that is, given their names to the local militia officers as eligible for militia service); *id.* at 382 (finding that armed citizens' being *subject* to organization by the states, as distinct from being *actually* organized, was the key requirement of a well-regulated militia); *Emerson*, 270 F.3d at 227 ("The militia . . . consists of those persons who, under the law, are liable to the performance of military duty, and are officered or enrolled for service when called upon.").

[xxv] *Wiggum*, 555 F.3d at 382 (finding militia must be subject to state organization); Amar, *supra* note 6, at 106 (stating that private gun-owners acting without the potential of state organization and legal summons are not a well-regulated militia of the people—they are gun clubs); *see also Miller*, 307 U.S. at 179 (noting legislative history of New England colonies reveals intent to ensure the possession of arms and ammunition by all *who were subject to military service*) (emphasis added); Gillespie v. City of Indianapolis, 185 F.3d 693, 696 (7th Cir. 1999) (suggesting that a militia, to become active, would be called into service by the state's governor).

[xxvi] United States v. Miller, 307 U.S. 174, 177 (1939) (suggesting variously the purpose of the militia is to "contribute to the common defense," to assure "adequate defense of country and laws," to "act[] in concert for the common defense," and "to cooperate in the work of defence [sic]"); Silveira v. Lockyer, 312 F.3d 1052, 1075 (9th Cir. 2002) (holding primary purpose of militia was to defend state against federal tyranny); Gillespie v. City of Indianapolis, 185 F.3d 693, 695-96 (7th Cir. 1999) (suggesting a militia serves the people's "common interest in protection," as determined by the state governor).

[xxvii] Wiggum v. City of Springfield, 555 F.3d 373, 377 (12th Cir. 2007).

[xxviii] *See Wiggum*, 555 F.3d at 387 (noting that requiring registration of firearms promotes the purpose of a well regulated militia by giving the government information as to how many people would be armed if called for militia service); *see also* Amar, *supra* note 6, at 109 (arguing that gun control legislation, including registration requirements, is the closest modern equivalent of the Framers' requirement that the armed citizenry be "well regulated").

[xxix] *See* notes 24-26, *supra*.

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

[xxxi] The Second Amendment did not create the right to keep and bear arms; rather, it simply recognized that the pre-existing right, whatever its content, cannot be infringed by the federal government. Wiggum v. City of Springfield, 555 F.3d 373, 376, 391 (12th Cir. 2007).

[xxxii] *See* United States v. Miller, 307 U.S. 174, 181 (1939) (allowing state laws to define the scope of the right guaranteed by the Second Amendment).

[xxxiii] The states required potential militia members to enroll in the militia, and arm themselves according to specific standards. *Miller*, 307 U.S. at 178-81; *Wiggum*, 555 F.3d at 379. Indeed, only by so doing did the citizens in fact become a militia at all. *Miller*, 307 U.S. at 179 (noting that history "plainly" shows that the militia was limited to those citizens who were "enrolled for military discipline"); *Wiggum*, 555 F.3d at 379 (citing *Miller*, 307 U.S. at 179). In addition, the second Militia Act of 1792 required all qualifying males to "enroll" in their state militias, by "providing one's name and whereabouts to a local militia officer." *Wiggum*, 555 F.3d at 380. Further, the right to keep and bear arms was subject to various other restrictions at common law prior to the Constitution. *Wiggum*, 555 F.3d at 387.

[xxxiv] The second Militia Act of 1792 required all qualifying males to "enroll" in their state militias, by "providing one's name and whereabouts to a local militia officer." *Wiggum*, 555 F.3d at 380. The law further specified which weaponry each man was required to have. *Id.*

[xxxv] *See* Amar, *supra* note 6, at 109 ("The authors of the Second Amendment, after all, were perfectly comfortable knowing that the government would know who had guns . . . and also were perfectly comfortable requiring those who owned guns to be properly trained and monitored in their use.").

[xxxvi] *See supra* Part I.B.

[xxxvii] *See supra* notes 24, 28, 32-35 and accompanying text.

[xxxviii] *See* George J. Thomas, *Re-emphasizing Localism in Gun Control Legislation*, 30 UWLA L. REV. 23, 28 (1999); Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 FORDHAM L. REV. 589, 602, 606 (2004). Thomas concludes that the secondary market—barter, trade, secondary private sale, theft, or other non-licensed method—supplies most of the guns used in crimes, and "[a]ttempts at regulation have consistently focused on the wrong market," i.e., only the primary market. Thomas, *supra*, at 32-33. Registration can be enforced at the secondary market level through incentives, such as registration rewards, or punishments, such as fines for failing to register the gun. Private sellers and people whose guns have been stolen can be encouraged to report the sale or theft by imposing liability on the registered owner for injury subsequently caused by the gun used for criminal purposes. *See* Cook & Ludwig, *supra*, at 606.

[xxxix] Kareem Fahim, *In Newark, Proposing a First Step in Regulating Guns*, N.Y. TIMES, Aug. 17, 2007, at B5; Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 578 (2006).

[xl] Fahim, *supra* note 39; Thomas, *supra* note 38, at 30; Emma Schwartz, *In Congress, the Uphill Battle for Gun Control: Why It's Been Years Since Significant Federal Legislation*, U.S. NEWS & WORLD REPORT, Mar. 17, 2008, at 41, *available at* http://www.usnews.com/articles/news/politics/2008/03/06/in-congress-the-uphill-battle-for-gun-control.html.

[xli] *See* Cook & Ludwig, *supra* note 38, at 593-94; *see also* H.R. REP. NO. 103-344, at 1986-87 (1993).

[xlii] Criminals are not homogenous in their determination to obtain a gun; prices, regulations, and legal sanctions can all serve as a deterrent to some criminals from gun ownership. Cook & Ludwig, *supra* note 38, at 596.

[xliii] Love v. Pepersack, 47 F.3d 120, 123 (4th Cir. 1995); *see also* Jessica Reese, Note, *The Lone Second Amendment Interpretation: Has It Reached the Status of "Superprecedent"?*, 32 S. ILL. U. L.J. 211, 223 (2007).

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

[xlv] Thomas, *supra* note 38, at 30.

[xlvi] Bonanno, *supra* note 21, at 475; Wiggum v. City of Springfield, 555 F.3d 373, 387 (12th Cir. 2007); United States v. Emerson, 270 F.3d 203, 229 (5th Cir. 2001); Amar, *supra* note 6, at 107.

[xlvii] *See* Bonanno, *supra* note 21, at 476-77. But note that such registration laws would not preempt federal or state laws barring certain individuals from ownership, e.g., felons.

[xlviii] Braman & Kahan, *supra* note 39, at 577.

[xlix] *Id.*