

# A Different Constitutionality for Gun Regulation

by LINDSAY SCHAKENBACH REGELE\*

*District of Columbia v. Heller* hinged on the Second Amendment, defining for the first time an individual's right to own a firearm unconnected with militia use, so long as the firearm is in "common use."<sup>1</sup> In announcing this right, Justice Scalia applied the precedent set by *United States v. Miller*, which suggested that the Second Amendment protects firearms that are regularly used for "common defense."<sup>2</sup> This essay argues that because the government determined which firearms were in "common use" throughout the nation's early history, the Second Amendment allows regulating the types of weapons available to civilians and their usage. A better understanding of the historical regulations that shaped "common use" could help guide legislators who wish to enact gun violence prevention measures that are consistent with the Second Amendment.

Jurisdictional and scholarly contentiousness around the Second Amendment dates to the 1960s, when an increase in gun violence, compounded by the assassinations of President John F. Kennedy, Martin Luther King, Jr., and Robert Kennedy, provided impetus for the passage of the Gun Control Act of 1968.<sup>3</sup> Following the original proposal of this legislation in 1963, the National Rifle Association lobbied for its defeat<sup>4</sup> and the *American Bar Association Journal* published an essay on "The Lost Amendment," which advocated an expanded interpretation of the Second Amendment as an individual right.<sup>5</sup> Since then, legal scholars, historians,

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\* Assistant Professor of History, Miami University.

1. 554 U.S. 570 (2008).
2. *Id.* at 621–22 (citing *United States v. Miller*, 307 U.S. 174 (1939)).
3. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).
4. Carl T. Bogus, Symposium on the Second Amendment, *Fresh Looks: The Politics of Second Amendment Scholarship: A Primer*, 76 CHI-KENT L. REV. 3, 6 (2000).
5. Robert A. Sprecher, *The Lost Amendment*, 51. A.B.A. J. 554 (1965).

and political commentators have debated whether the Amendment confers an individual, collective or civic right.<sup>6</sup>

The Amendment, which states that, “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,” was rarely invoked in the century after its passage. The first court case to address the “right to bear arms” was the 1822 case of *Bliss v. Commonwealth of Kentucky*, when a Kentucky court ruled that a state law, which fined individuals for carrying concealed arms, violated the state constitution.<sup>7</sup> Not until 1846 did a court overturn a gun regulation based on the Second Amendment to the U.S. Constitution, and not until 1857 did the Amendment undergo debate in the Supreme Court, when the Court observed that if black men were citizens they would have the constitutional right to bear arms.<sup>8</sup>

Until then, Americans’ use of arms for common defense owed less to the Second Amendment than it did to Article 1, Section 8 of the Constitution, which gave Congress the power to support armies and provide arms for the militia.<sup>9</sup> In accordance with its constitutional obligation, the federal government subsidized and improved arms manufacturing and expanded the market for guns.<sup>10</sup> The Militia Act of 1792 required militia members to provide themselves with a musket, but many struggled to arms themselves in the face of post-war shortages.<sup>11</sup> To redress the shortages, Congress prohibited the export of arms, and made their import mostly duty-free during the early 1790s.<sup>12</sup> It also constructed two federal armories, and began to invest in private gun factories to supplement the armories’ output.<sup>13</sup>

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6. For most of the Amendment’s history, the right to bear arms was considered as a collective militia right, rather than an individual one. See Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WILL. & MARY L. REV. 1959, at 381–406; Sprecher, *supra* note 6, at 665–69 (this essay won the 1964 Samuel Pool Weaver Constitutional Law Essay Competition). For an overview of the Second Amendment and constitutional law, see Bogus, *supra* note 4; Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WILL. AND MARY Q. 39, 40 (1998). See also, SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2008); MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* (2015).

7. 12 Ky. 90, 94 (1822).

8. See *Nunn v. State*, 1 Ga. 243 (1846); *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

9. U.S. CONST. art. I, § 8.

10. LINDSAY SCHAKENBACH REGELE, *MANUFACTURING ADVANTAGE: WAR, THE STATE, AND THE ORIGINS OF AMERICAN INDUSTRY, 1776-1848* (2019).

11. Militia Act of 1792, ch. 28, 1 Stat. (1792).

12. Andrew Fagal, *The Political Economy of War in the Early American Republic, 1774-1821* (October 14, 2013) (unpublished Ph.D. dissertation, Binghamton University) (on file with author).

13. REGELE, *supra* note 10 at 15.

An Act of Congress in 1792 gave the president power to select two sites for the nation's federal armories.<sup>14</sup> George Washington chose Springfield, Massachusetts, and Harpers Ferry, Virginia.<sup>15</sup> In 1795, the Springfield Armory manufactured the nation's first public musket, known as the Model 1795 musket.<sup>16</sup> This .69 caliber flintlock was modeled after the French Charleville, which many American soldiers fought with during the Revolution, and which U.S. officials considered superior to other European guns.<sup>17</sup> It became the standard U.S. musket until the War of 1812.<sup>18</sup> Production was slow at first. Although the Springfield Armory produced about 10,000 muskets a year in 1810, in the late 1790s, it manufactured fewer than one thousand annually.<sup>19</sup> The federal government's solution was to subsidize production in private armories.<sup>20</sup>

The first step was actually creating a small arms industry. During the American Revolution, the Continental Army had relied on imported arms, many of which were in disrepair, and following the war, private producers had little incentive to increase output for a limited civilian market.<sup>21</sup> What gun manufacturing did exist was mostly small-scale craftwork. Throughout the eighteenth and early nineteenth centuries, the most established of these gunsmiths worked in Pennsylvania.<sup>22</sup> Government intervention, however, shifted the loci to the Connecticut River Valley in New England for its proximity to the federal armory at Springfield, Massachusetts.<sup>23</sup> Additionally, the fact that the region had fewer experienced arms manufacturers appealed to government officials, who complained about established gunsmiths' unwillingness to conform to government standards.<sup>24</sup>

14. Derwent Stainthorpe Whittlesey, "The Springfield Armory: A Study in Institutional Development," (1920) (unpublished Ph.D. dissertation, University of Chicago).

15. *Id.*

16. S. REP. NO. 25, 4TH CONG., MILITARY FORCE, ARSENAL, AND STORES COMMUNICATED TO THE SENATE, DECEMBER 15, 1795 (1ST SESS. DEC. 12, 1795); JAMES B. WHISKER, *THE UNITED STATES ARMORY AT SPRINGFIELD, 1795–1865* 19 (1997).

17. John W. Wright, *The Rifle in the American Revolution*, 29 AM. HIST. REV. 293, (1924).

18. WHISKER, *supra* note 16 at 19.

19. S. REP. NO. 37, 6TH CONG., ARMORY AT SPRINGFIELD, COMMUNICATED TO THE SENATE JANUARY 7, 1800 (1st Sess. Jan. 6, 1800).

20. REGELE, *supra* note 10 at 53.

21. Fagal, *supra* note 12.

22. See Stephen V. Gramscay, *The Craft of the Early American Gunsmith*, 6 MET. MUSEUM ART BULL. 54 (1947).

23. FELICIA JOHNSON DEYRUP, *ARMS MAKERS OF THE CONNECTICUT VALLEY: A REGIONAL STUDY OF THE ECONOMIC DEVELOPMENT OF THE SMALL ARMS INDUSTRY, 1798–1870* (Smith College Studies 1948).

24. Letter from Oliver Wolcott to Daniel Gilbert (Sept. 8, 1798) (on file with National Archives and Record Administration: Post-Revolutionary War Papers, Record Group 45).

Beginning in the 1790s, the government contracted with new manufacturers seeking to enter the industry. Eli Whitney, for example, the Massachusetts-born inventor and manufacturer, most famous for patenting the cotton gin, pivoted to firearms manufacturing when he learned about government subsidies.<sup>25</sup> He convinced several acquaintances in the executive branch that he could successfully manufacture arms if given the opportunity.<sup>26</sup> Before he even constructed an armory, Whitney received a contract for 10,000 muskets, which included a cash advance, and funding for several storehouses on his property in New Haven, Connecticut.<sup>27</sup> Several years later, the Militia Act of 1808 standardized these sorts of contracts, which ultimately shaped the development of the arms industry.<sup>28</sup> Congress appropriated \$200,000 annually to arm the state militias, and stipulated that these funds go to private manufacturers (the choice of private armories reflected many congressmen's apprehensions about centralizing all national arms production at the federal armories).<sup>29</sup>

For the next three decades, the War Department issued five-year renewable contracts that came with ten to twenty percent cash advances, as well as a slate of requirements.<sup>30</sup> All gun parts had to conform to federal standards and pass regular inspections. Following the war, ordnance officials asked the superintendent at the Springfield Armory to figure out the "best means to be devised and adopted for bringing the manufacture of arms to a uniform standard and pattern in all of their parts."<sup>31</sup> They requested that, "muskets given out as patterns from the armories be strictly alike . . . in order that the conditions of the contracts now entered into by this department be made conformably thereto."<sup>32</sup> The Ordnance Department mandated that all contract arms be examined by a government proof-master, who would verify

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25. See generally James V. Joy, Jr., *Eli Whitney's Contracts for Muskets*, 8 PUB. CONTRACT L.J. 140 (1976).

26. Oliver Wolcott to Eli Whitney, October 9, and October 17, 1798, Box 1, Folder 13, Eli Whitney Papers, Yale University Manuscripts and Archives.

27. Letter from Henry Dearborn to Eli Whitney (Feb. 25, 1803) (on file with National Archives and Record Administration, Records Group 7); Letter from Oliver Wolcott to Daniel Gilbert, *supra* note 26.

28. Eli Whitney to Samuel Dexter January 8, 1801, Box 1, Folder 17, Eli Whitney Papers, Yale University Manuscripts and Archives.

29. Militia Act of 1808, ch. 55, 1 Stat. 490 (1808).

30. Fagal, *supra* note 12.

31. John Morton to Roswell Lee, November 14, 1817, Box 1, Target #2, Letters Received from Officials and Officers of the War and Treasury Departments, Box 1, Target #3, Records of the Springfield Armory, MA, Record Group 156, Entry 1362, NM-59, 94-066; National Archives Building, Waltham, Mass.

32. Letter from John Morton to Roswell Lee (Nov. 14, 1817) (on file with the Springfield Armory, Mass, Record Group 156, Entry 1362, NM-59, 94-066);

that all “contractors’ arms be equal to those produced at the national armories.”<sup>33</sup> Contractors had little choice but to conform because, according to arms contractor Asa Waters, “if the patronage of the government is not continued, our factories will be worth but little.”<sup>34</sup>

Government patronage required significant management and oversight. The first head of the Ordnance Department, Decius Wadsworth, established a coordinated set of standards for the federal armories and its arms contractors.<sup>35</sup> He designed a timeline for achieving weapon uniformity, requiring the national armories to produce pattern muskets by 1815 and begin full-scale production of the “Model 1816” the following year.<sup>36</sup> Eventually, all armories machine-produced identical gun parts, a manufacturing characteristic known as “interchangeability,” but this was a slow and uneven process.<sup>37</sup> Historians of technology have demonstrated that a factory needed to produce at least 1,000 guns to make interchangeable parts production worthwhile.<sup>38</sup> In the early nineteenth century, only the federal government was willing and able to devote the resources to this. Private makers frequently modified the models they made, which made interchangeability impractical.<sup>39</sup> Their civilian consumers had little desire for interchangeable guns because they were unlikely to have multiple identical guns from which to scavenge parts. Soldiers, on the other hand, needed to be able to change and repair defective parts quickly in the field.<sup>40</sup> Members of Congress recognized their obligation to contribute to this

33. Letter from John Morton to Roswell Lee (March 4, 1818), Box 1, Target #2; Letter from George Bomford to Roswell Lee, June 1, 1823, Box 2, SA-LRO.

34. Memorial of Private Contractors to U.S. Congress, 1835?, Waters Family, Papers, 1749-1873, BoxW1, Folder 4 1835, AAS.

35. Merritt Roe Smith, *Army Ordnance and the ‘American System’ of Manufacturing, 1815-1861*, in *MILITARY ENTERPRISE AND TECHNOLOGICAL CHANGE: PERSPECTIVES ON THE AMERICAN EXPERIENCE* 53 (Merritt Roe Smith, ed. 1985).

36. The Springfield Armory complied successfully with this order, Harper’s Ferry did not. See, Smith, *supra* note 35.

37. Older studies of small arms manufacturing offer exhaustive details about private and public gun production in early America, MERRITT ROE SMITH, *HARPERS FERRY ARMORY AND THE NEW TECHNOLOGY: THE CHALLENGE OF CHANGE* (1977). See also DEYRUP, *supra* note 23; WHISKER, *supra* note 16; JAMES B. WHISKER & KEVIN SPIKER, *THE ARMS MAKERS OF MASSACHUSETTS, 1610–1900* (2012).

38. Joshua L. Rosenbloom, *Anglo-American Technological Differences in Small Arms Manufacturing*, 23 *J. OF INTERDISCIPLINARY HISTORY* 683, 691 (1993). Also, U.S. troops used rifles and muskets, which were less precise and so could more easily be made by interchangeable manufacture. Robert A. Howard, *Interchangeable Parts Reexamined: The Private Sector of the American Arms Industry on the Eve of the Civil War*, 19 *TECH. AND CULTURE* 633, 649 (1978).

39. Howard, *supra* note 39, at 645.

40. Howard, *supra* note 39, at 634, 646–48 (arguing that private arms makers were more responsible for innovation in interchangeable production than the federal armories).

objective. In his argument for the reestablishment of the Ordnance Department as an independent bureau, Representative Wiley Thompson of Georgia noted that, “unparalleled gallantry would become an easy prey to a well equipped and well disciplined foe,” if using weapons of “a variety of calibres.”<sup>41</sup> Thompson’s statement suggests that firearms management was a cooperative, rather than oppositional, undertaking between government officials and private producers, such as Whitney’s armory, in the nineteenth century.

The federal government not only subsidized and standardized the construction of firearms, it also regulated their safety. In the 1830s, as Congress reevaluated the balance between private and public production for the military, lawmakers asked military officers to conduct a series of experiments to compare the safety and effectiveness of firearms manufactured at both the federal armories and those of private contractors.<sup>42</sup> During the first round of tests in 1837, the officers preferred the standard U.S. musket and decided there was “risk to the national safety by adopting new inventions without being convinced of their superiority.”<sup>43</sup> The government would not agree to purchase weapons from new contractors without testing them first. This had ramifications for the origins of gun companies that supply arms in “common use” today. Samuel Colt, for example, solicited government patronage in the 1830s, and had to adapt to safety standards when a board of ordnance officers expressed concern that several features of new revolvers caused safety risks, namely “the possibility of two or more chambers going off at the same time” and the “deafening sharpness . . . which must injure the hearing of those who use them.”<sup>44</sup> Once Colt improved the revolvers, the U.S. military purchased them for use on the frontier and in the Mexican American War (1846–1848).<sup>45</sup>

The sum total of this government regulation and subsidization determined what was in the market, and thus what firearms were in “common

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41. UNITED STATES CONGRESS, REPORTS OF COMMITTEES OF THE HOUSE OF REPRESENTATIVES FOR THE THIRD SESSION OF THE FORTY-SECOND CONGRESS 125 (1873).

42. S. REP. NO. 743, 25TH CONG., REP. OF THE PRESIDENT OF A BOARD OF OFFICERS ON IMPROVEMENTS IN FIRE-ARMS BY HALL, COLT, COCHRAN, LEAVITT, AND BARON HACKETT, AS COMPARED WITH THE UNITED STATES MUSKET AND THEIR RELATIVE QUALITIES AND EFFICIENCY (1st Sess. Oct. 3, 1837).

43. *Id.*

44. S. REP., 26TH CONG., REP. FROM THE SECRETARY OF WAR, TRANSMITTING, THE REPORT OF A BOARD OF DRAGOON OFFICERS APPOINTED TO WITNESS AN EXHIBITION OF THE REPEATING FIRE-ARMS AND WATER-PROOF AMMUNITION INVENTED BY SAMUEL COLT (2d Sess. Dec. 16, 1840).

45. S. MISC. DOC. NO. 3, 30TH CONG., PETITION OF SAMUEL COLT, PRAYING A CONTRACT FOR SUPPLYING THE GOVERNMENT WITH AN ADDITIONAL NUMBER OF HIS REPEATING FIRE-ARMS, (2d Sess. Dec. 12, 1848).

use.” In *Gunning America*, Pamela Haag argues that civilian consumption of firearms was limited until arms makers employed strategic sales and marketing to create a civilian market for guns in the second half of the nineteenth century.<sup>46</sup> Samuel Colt, who became one of the most iconic patent arms makers of the mid nineteenth century, claimed that prior to the Mexican American War, there did not exist a civilian market for revolvers.<sup>47</sup> Once the civilian market expanded, the guns that were produced and purchased reflected the influence of government intervention. In the 1850s Colt included battlefield testimony in advertisements, which helped him reach a larger civilian market.<sup>48</sup> One of Colt’s first print advertisements from the early 1850s depicted scenes from the Mexican American war, and an advertisement from 1858 advertisements harkened back to their being “the first rifle fired” in Florida in 1837.<sup>49</sup> His success selling to civilians increased throughout the 1850s: in 1851, he employed 300 workers and produced 40,000 revolvers a year and by 1854, 500 workers, and 50,000 revolvers.<sup>50</sup> During the 1850s firearms produced for the civilian market by private arms makers began to exceed those produced by the government for the first time.<sup>51</sup> Arms makers owed their newfound profitability, however, to early federal patronage.

Today, supporters of an absolute individual right to bear arms cite *Heller’s* reference to arms in “common use” as an argument against government interference with the firearms market. They look to gun company sales to determine what arms consumers commonly purchase, and argue that such arms are in “common use” and cannot be restricted.<sup>52</sup> For the nation’s first one hundred years, however, the guns that were in “common

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46. PAMELA HAAG, *THE GUNNING OF AMERICA: BUSINESS AND THE MAKING OF AMERICAN GUN CULTURE* 58–59 (2016).

47. *See generally* *Colt v. Massachusetts Arms Co.*, 6 F. Cas. 161 (1851).

48. HARTFORD COURANT, Jan. 20, 1849, at 10.

49. Richard A. Dillio, *Samuel Colt’s Peacemaker: The Advertising that Scared the West*, (Dec. 9, 2017) (unpublished manuscript), <https://www.scribd.com/document/126270948/Samuel-Colt-s-Peacemaker-The-Advertising-that-Scared-the-West>.

50. BARBARA M. TUCKER & KENNETH H. TUCKER, JR., *INDUSTRIALIZING ANTEBELLUM AMERICA: THE RISE OF MANUFACTURING ENTREPRENEURS IN THE EARLY REPUBLIC* 70 (2008).

51. Howard supports his argument about civilian markets by citing the 400,000 firearms produced by Colt and Sharps between 1851 and 1860, versus the 218,493 produced by the federal armories. This evidence obscures the fact that both manufacturers also sold their arms to federal troops on the frontier, but indeed, the civilian market for firearms grew in the decade following the Mexican American War. Howard, *supra* note 39, at 634.

52. *See, e.g.*, Brief of Appellant at 24, 44, *Peña v. Lindley*, 898 F.3d 969 (9th Cir. 2018) (No. 15-15449) (arguing that California’s handgun design safety regulations violate the Second Amendment by prohibiting handguns in “common use,” and claiming that “it is the regulatory environment that must accommodate itself to the choices made by the lawful, constitutionally protected market for arms, and not the other way around”).

use” were determined by federal subsidization and regulation. We must consider these historical origins of “common-use,” as well as the fact that some of the biggest gun companies today—Colt’s Manufacturing Company LLC (Hartford, Conn.), Smith and Wesson (Springfield, Mass.), and Sturm, Ruger & Co., Inc., (Southport, Conn.)—have their roots in armories where the government played an essential role in shaping arms development.<sup>53</sup>

As lawmakers face opposition when they attempt to regulate guns favored by the industry, we need to reevaluate policy aims based on true historical precedent. It is not historically sound for policymakers to allow gun manufacturers and marketers to determine what arms are in common use. By fully understanding the historical relationship between the firearms industry and the government, lawmakers could assert their prerogative to intervene with gun safety regulations. Armed with historical knowledge, sensible gun control might be seen as both constitutionally and politically sound.

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53. Kari Huus, *The Biggest Gun Companies in the Market*, MONEY TALKS NEWS (Feb. 27, 2018), <https://www.moneytalksnews.com/slideshows/the-biggest-gun-companies-in-the-u-s-market/?all>.