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## ESSAYS



In his opinion in *District of Columbia v. Heller* (2008), the late Justice Antonin Scalia insisted that the phrase "bear arms" did not refer to military contexts in the founding era. An examination of corpus data not available in 2008 clearly shows that founding-era sources almost always use "bear arms" in an unambiguously military sense. This suggests that the plain, ordinary, natural, and original meaning of bear arms in the eighteenth century was 'carry weapons in war,' or in other forms of military or quasi-military action, not in hunting or individual self-defense. Corpus evidence shows as well that the phrases "keep arms" and "bear arms" were frequently used in the context of weapons regulation. Even after the *Heller* decision, which was based in part on a flawed interpretation of bear arms, we should bear in mind that corpus evidence suggests that any public carry right is limited, not broadly applicable to everyone who desires to defend themselves in public.



*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." 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. It uses evidence from Congress, the War Department, and private arms manufacturers to examine the role of the federal government in develo ping and shaping the firearms industry from the nation's founding throughout the first half of the nineteenth century. This evidence

reveals historical precedent for government regulations of "common use" that could help guide legislators who wish to enact gun violence prevention measures that are consistent with the Second Amendment.



Since *Heller* Second Amendment litigation and scholarship has focused in large part on questions about the historical understanding of the Second Amendment. One area where this historical analysis has been especially pronounced is in litigation over the scope of the Second Amendment right outside of the home. Litigants, amici, and scholars fiercely debate the meaning of historical statutes, treatises, and cases, arguing about the scope of the right to carry arms outside of the home at the time of the Second and Fourteenth Amendments' ratifications. Most law review articles attempt to address difficult or hotly contested legal issues. This is not one of those kinds of articles. This article will instead address the frivolous arguments made by many plaintiffs in public carry Second Amendment cases, some of which have unfortunately made their way into district and circuit court decisions. These arguments, often made in a misleading sentence or two, usually take a few paragraphs to effectively rebut, paragraphs which the state and local governments defending against challenges to gun laws generally do not have the time, necessary expertise, or word count to include in their briefing. This article aims to provide easy answers to these arguments, hopefully allowing both the courts and the parties to focus on the actual issues in the Second Amendment debate.



In the past decade, "gun rights" advocates have attempted to strategically articulate a Second Amendment privacy interest in being free from interference from both governmental actors and private actors with ownership of, access to, or use of firearms. This essay explores why privacy is an appealing framework for these purposes, and how courts have responded to such claims thus far. Part I analyzes privacy as a legal and sociocultural construct, assesses claims that firearms ownership and use are stigmatized, and discusses how privacy doctrine can be a stigma management strategy. Part II examines three cases in which gun rights

supporters and organizations have claimed privacy rights: addressing doctor-patient counseling about firearms and firearm safety, disclosure of handgun permit holders' identifying information, and disclosure of litigants' identities. This essay concludes that, while most courts have declined to extend privacy protections to Second Amendment activities, they do so in ways that suggest that they are quite sympathetic to Second Amendment concerns, reinforcing the stigmatized nature of the Second Amendment.

## ARTICLES



Legislation introduced in recent congressional sessions would enact some version of "concealed carry reciprocity" for firearms. This legislation would create a regime in which a holder of a concealed firearms carry permit issued by one state can carry a concealed weapon in any state that allows some form of concealed carry. Concealed carry reciprocity legislation raises a complex web of constitutional issues. After Part I of this Article introduces the concept of concealed carry reciprocity, as exemplified by a bill that the House passed in December, 2017, Parts II and III consider those constitutional issues. Part II considers the three potential bases of congressional authority to enact such legislation: its Article I power to regulate interstate commerce, its power under Section 5 of the Fourteenth Amendment to enforce that amendment's other provisions, and its Article IV power "to prescribe the Manner" in which "the public Acts, Records and judicial Proceedings of every other state" "shall be proved, and the Effect thereof." It concludes that Congress likely lacks such power under the Fourteenth Amendment's Enforcement Clause, and that serious questions cloud its power under the other two sources of power it identifies. Part III assumes the existence of some constitutional foundation for concealed carry reciprocity legislation, and considers whether such legislation would nevertheless transgress any affirmative limit on congressional power. It suggests that such legislation may unconstitutionally commandeer state governments, and may unconstitutionally delegate federal legislative power to states. The Article's analysis suggests that concealed carry reciprocity legislation raises serious constitutional issues, with regard to both Congress's underlying authority and these affirmative limits.

The Second Amendment has been suffering from an inferiority complex. Litigants, scholars, and judges have complained that the right to keep and bear arms is not being afforded the respect and dignity befitting a fundamental constitutional right. They have asserted that on its own terms and relative to rights in the same general class, the Second Amendment is being disrespected, under-enforced, and even orphaned. Reviewing the available evidence, this Article generally rejects second-class claims as either false or significantly overstated. Many of the claims are based on false premises, including the notion that the Supreme Court and lower courts immediately and aggressively expand the scope of fundamental rights once they are recognized, that all fundamental rights are created and enforced equally, that the absence of strict scrutiny is demonstrative of lower-class status, and that low success rates demonstrate under-enforcement. The Second Amendment exhibits all of the hallmarks of a fundamental constitutional right: It is a non-economic, individual dignity right that is considered implicit in the concept of ordered liberty. The available evidence does not show that lower court decisions are generally the product of judicial hostility, resistance, or ideology. The Supreme Court's decade-long silence, which is about to be broken, did not signal abandonment of the Second Amendment. It, too, is consistent with the treatment of other fundamental rights. Whatever the Second Amendment becomes, its path should not be charted according to an inaccurate assessment of its current status.

## NOTE



In recent years, the U.S. has experienced an unprecedented number of mass shootings and other gun-related injuries and deaths. In spite of all of this gun violence, there is still an unyielding resistance against the passage of common sense gun laws. Many laws restricting large capacity magazines and gun silencers, for example, are continuously shot down by federal and state courts, and the National Rifles Association and its constituents in Congress continue to hitch their arguments to the decision of the Supreme Court in *District of Columbia v. Heller*.

In this time of political gridlock, perhaps the best solution is to find a middle ground. Such a middle ground exists in Extreme Risk Protection Orders (ERPOs), which allow close friends, family, and law enforcement to file a petition barring a dangerous individual from possessing firearms and ammunition. While this law currently exists in eight states, it is far from being passed in the remaining forty-two states. Through an analysis of existing case law in each of the twelve federal circuits, this Note posits that the passage of ERPO laws is not only plausible in the jurisdictions of each of these circuits, but necessary in the fight to end gun violence in this country.