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UNITED STATE COURT OF APPEALS

NINTH CIRCUIT

GEORGE K. YOUNG JR., Plaintiff, vs. STATE OF HAWAII ET. AL.; Defendants.	No. 12-17808 CASE No. 12-00336 HG BMK NOTICE OF SUPPLEMENTAL AUTHORITY

Notice of Supplemental Authority

COMES NOW THE PLAINTIFF-APPELLANT, George K. Young Jr., submits the recently published opinion *Bonidy v. United States Postal Service*, 2013 - Dist. Court, D. Colorado in support of his argument that H.R.S. §§ 134-23, 134-24, 134-25, 134-27 bans the transport of firearms and ammunition to locations Defendants do not have an important governmental interest in prohibiting transport to. The Court held that the States Postal Service's ban on storing firearms in

vehicles located in USPS parking lots was unconstitutional as applied to the location at issue in the suit. In doing so the Court found the parking lot was not a sensitive place. Mr. Young cannot as much transport a firearm to a USPS parking lot. bMr. Young also attachés Page, Daniel Richard, Dangerous and Unusual Misdirection: A Look at the Common Law Tradition of Prohibiting Going Armed with Dangerous and Unusual Weapons to the Terror of the People, as Cited in District of Columbia versus Heller (May 4, 2011) as it may be helpful in assisting this Court when it renders a decision in Mr. Young's case.

Respectfully submitted this 7th day of November, 2013

s/ Alan Beck
Alan Beck (HI Bar No. 9145)

CERTIFICATE OF SERVICE

On this, the 7th day of November, 2013, I served the foregoing pleading by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. I declare under penalty of perjury that the foregoing is true and correct.
Executed this the 11th day of March, 2013

s/ Alan Beck
Alan Beck (HI Bar No. 9145)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Richard P. Matsch

Civil Action No. 10-cv-02408-RPM

TAB BONIDY, and
NATIONAL ASSOCIATION FOR GUN RIGHTS,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,
PATRICK DONAHOE, Postmaster General, and
MICHAEL KERVIN, Acting Postmaster, Avon, Colorado,

Defendants. [1]

MEMORANDUM OPINION AND ORDER

The United States Postal Service ("USPS") was established to "provide prompt, reliable, and efficient services to patrons in all areas," 39 U.S.C. § 101(a), and, to that end, "establish and maintain postal facilities of such character and in such locations, that postal patrons throughout the Nation will . . . have ready access to essential postal services," *id.* § 403(b). Congress empowered the United States Postmaster General to prescribe regulations necessary for the protection of property owned or occupied by the USPS and persons on the property, and to include reasonable penalties for violations thereof. 18 U.S.C. § 3061(c)(4)(A-B).

[1] The National Association for Gun Rights ("NAGR") has joined Mr. Bonidy, an NAGR member himself, in its representative capacity. The USPS officials are sued in their official capacities.

In 1972, the Postal Service enacted 39 C.F.R. § 232.1(*l*) ("USPS Regulation"), which provides:

> Weapons and explosives. Notwithstanding the provisions of any other law, rule or regulation, no person while on postal property may carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, or store the same on postal property, except for official purposes.

A violation of this regulation may result in a fine, imprisonment up to thirty days, or both. *Id.* § 232.1(p)(2).[2]

Tab Bonidy brought this civil action for declaratory and injunctive relief claiming that applying the USPS Regulation to him, by prohibiting him from carrying a concealed handgun when he picks up and deposits mail at the Post Office in Avon, Colorado, infringes upon his freedom to bear arms guaranteed by the Second Amendment to the United States Constitution. After full discovery, both Plaintiffs and Defendants have moved for summary judgment. The relevant facts are not in dispute.

The Town of Avon, population 6,365, is high in the Rocky Mountains of Colorado. The Avon Post Office is a freestanding building, with a 57-space parking lot reserved for Post Office patrons, and an employee parking lot behind the building. There are five public parking spaces in front of the Post Office on West Beaver Creek Boulevard. Parking on that street is prohibited when there are more than two inches of snow on the ground.

The Avon Post Office does not provide delivery services to the public. It provides free post office boxes in an area of the Post Office that is open to the public at all times. The mail service counter opens and closes on a regular schedule. There are no security personnel

[2] The USPS Regulation was enacted along with a number of other prohibitions on conduct on Postal Service grounds, 37 Fed. Reg. 24346 (Nov. 16, 1972), including littering and damaging property (39 C.F.R. § 232.1(c)); causing disturbances (*id.* § 232.1(e)); smoking, drinking alcohol, and using controlled substances (*id.* § 232.1(g)); gambling (*id.* § 232.1(f)); and bringing non-service dogs and animals onto postal premises (*id.* § 232.1(j)).

or devices on the site. Access to the area behind the mail service counter, the mail sorting area, and the employee parking lot is restricted. Approximately 500 window customers are served at the Post Office each day it is in operation.

The parking lot adjacent to the Avon postal building is openly available to the public. There is a sign at the front of the lot reading: "US POSTAL PROPERTY / 30 MINUTE PARKING / VIOLATORS WILL BE TOWED AT OWNERS EXPENSE." That time limit is not enforced. There are two mailboxes in the lot for customers to drop off outgoing mail while driving through.

Tab Bonidy lives in a rural area and drives several miles from his home to the Avon Post Office to pick up mail from his free PO box in the open area of the building. He routinely carries a concealed handgun, as authorized by the Sheriff of Eagle County under Colorado's Concealed Carry Act, C.R.S. § 18-12-201 *et seq*. In July 2010, counsel for Mr. Bonidy sent a written inquiry asking if he would be prosecuted under the USPS Regulation if he carried his firearm into the Post Office or stored it in his vehicle in the public parking lot when picking up his mail. Mary Ann Gibbons, General Counsel for the USPS, responded in the affirmative, stating that that "the regulations governing Conduct on Postal Property prevent [Mr. Bonidy] from carrying firearms, openly or concealed, onto any real property under the charge and control of the Postal Service. . . . There are limited exceptions to this policy that would not apply here." [Doc. 33 at 9.]

Because of the firearms restriction, Mr. Bonidy has an employee pick up and deliver his mail at the Avon Post Office.

As required by controlling precedent, there are two questions to be asked in approaching Plaintiffs' Second Amendment claim.[3] First, does the challenged regulation impose a burden on conduct falling with the scope of the Second Amendment guarantee?

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court freed the right to keep and bear arms from the restriction suggested by the prefatory clause that its purpose was to maintain a well-regulated militia in each of the several states. The decision changed the view of the amendment as protecting a collective interest in participating in a military organization to protect the inhabitants of each state that had been prevailing in the courts since the Court's opinion in *United States v. Miller*, 307 U.S. 174 (1939). Justice Scalia's majority opinion explained, in depth, the history of a common-law concept of an individual's freedom to use firearms for self-protection that the American colonists understood to be an essential element of individual liberty. The Second Amendment protects that liberty from disarmament by those who exercise the coercive powers of government.

The Court recognized that there is a collective interest in public safety that trumps individual liberty in given circumstances. Just as the liberty protected by the First and Fourth Amendments may be limited by restrictions necessary to preserve a well-ordered society, the freedom to keep and bear arms may be restrained by majoritarian governmental action.

When and how those restraints may be applied has been and will be the subject of extensive litigation. In *Peterson*, 707 F.3d at 1201, the Tenth Circuit held that the scope of the Second Amendment's protection does not include a right to carry a concealed firearm outside the home. That ruling is binding on this Court and defeats the Plaintiffs' contention

[3] *See Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013) (citing *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010)).

that Mr. Bonidy should be free to carry his concealed handgun on his person in the Avon Post Office and parking lot. But the *Peterson* panel did not address whether open carry of firearms outside the home is similarly unprotected; indeed, it explicitly declined to do so. *See id.* at 1208-09.

Those who believe in the primacy of collective security read *Heller* narrowly within the factual context in which the case arose. *See* discussion as to Part III.B in *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *Piszczatoski v. Filko*, 840 F. Supp. 2d 813 (D. N.J. 2012). Judge Posner persuasively discredited that reading by his textual analysis in the opinion deciding *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). Aside from the textual meaning of "bear arms," he recognized the common-sense view that armed self-defense is important outside the home and that hunting takes place outside the home.

Accordingly, the Court concludes that the Second Amendment protects the right to openly carry firearms outside the home for a lawful purpose, subject to such restrictions as may be reasonably related to public safety.

In *Heller*, the Court recognized that there are many circumstances in which restrictions on the freedom to carry firearms are presumptively valid—including the exclusion of firearms from government buildings. *See* 554 U.S. at 626, 627 n.26. Those challenging such restrictions must present sufficient evidence to rebut that presumption. The Avon Post Office building is used for a governmental purpose by significant numbers of people, with no means of securing their safety; therefore, it is a sensitive place, and the USPS Regulation is presumed to be valid as applied to the building. Mr. Bonidy has failed to rebut that presumption of validity. Mr. Bonidy's claim to carry his gun into the building must therefore be denied.

There is no such easy answer as to the public parking lot. The Defendants first assert that USPS' ownership of the lot is, itself, a sufficient basis for the exclusion of firearms. But as the country's First Amendment jurisprudence demonstrates, constitutional freedoms do not end at the government property line. *See, e.g.*, *Initiative and Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299 (D.C. Cir. 2005) (subjecting 39 C.F.R. 232.1(h)(1) (1997), preventing people from political solicitation on USPS property, to First Amendment scrutiny). There is more to a sensitive place analysis than mere government ownership.

Next, Defendants point out that the Fifth Circuit upheld the precise regulation at issue here, after concluding that a USPS employee parking lot qualified as a sensitive place because "the Postal Service used the parking lot for loading mail and staging its mail trucks"; in other words, "as a place of regular government business." *United States v. Dorosan*, 350 Fed. App'x 874, 875 (5th Cir. 2009) (unpublished). This case is different. In terms of postal business being conducted in the parking lot, Defendants have offered evidence that there are mailboxes in the lot that patrons may use to drop off mail while driving through. But lone mail receptacles used by an undetermined number of transient patrons is easily distinguishable from the lot at issue in *Dorosan*, which was regularly used by Postal Service employees for processing high volumes of mail via USPS mail trucks. *See Dorosan*, 350 Fed. App'x at 875. In addition, there are no restrictions on access to the Avon Post Office parking lot beyond a sign posted at the front of the lot limiting parking to 30 minutes, which is not meaningfully enforced. As shown by the aerial photographs in the record, there is little to distinguish the USPS parking lot from other public parking lots in the near vicinity. By contrast, *Dorosan* involved a USPS employee parking lot that was enclosed by a gate, with a sign on both entrances warning that vehicles entering the lot were subject to search. *United*

States v. Dorosan, No. 08-042, 2008 WL 2622996, at *1 (E.D. La. June 30, 2008) (Knowles, M.J.). Therefore, *Dorosan*'s reasoning and facts are not helpful to Defendants' position.

Considering other indicia of sensitive places, an official, core government function is not performed in the Avon Post Office parking lot; rather, except for the presence of a few mailboxes, the lot merely facilitates the government function taking place inside by giving patrons a place to park. The government business done in the parking lot is thus not of the "same extent or nature as that done in schools, post offices, and courthouses." *Doe v. Wilmington Housing Auth.*, 880 F. Supp. 2d 513, 532 (D. Del. 2012) (applying reasoning to common areas of public housing). Moreover, Defendants have offered no evidence that a substantial number of people congregate or are present in the parking lot. *Cf. Nordyke v. King*, 563 F.3d 439, 459-60 (9th Cir. 2009) (noting parking lots of public buildings "[seem] odd as a 'sensitive place,'" because they are not "places where high numbers of people might congregate"), *vacated on other grounds by* 611 F.3d 1015 (9th Cir. 2010). And while patrons may reasonably expect that the Postal Service will take measures to keep the parking lot safe, that expectation is less compelling than the expectation of safety inside the building, where the USPS does business and exercises greater control.

Defendants maintain that postal parking lots in general have been targeted by criminals seeking to steal valuable mail from patrons as they walk out of post offices to their cars [Doc. 31 at 12] and used by criminals for drug trafficking transactions [*id.* at 13]. They fail to present evidence showing that this particular parking lot has been the site of such activity.

Thus, the Avon Post Office parking lot is not a sensitive place, and there is accordingly no presumption that the USPS Regulation is a valid restriction on Mr. Bonidy's right to carry a firearm onto it.

It is, therefore, incumbent upon the USPS to show sufficient support for its absolute ban on firearms without any consideration of the possible accommodations that may lessen the burden on Mr. Bonidy's individual interest in self-protection. The USPS's objective in preserving and promoting public safety in the Avon Post Office parking lot is important. The question is whether the USPS Regulation is substantially related to that objective. *See Reese*, 627 F.3d at 802 (quoting *United States v. Williams*, 616 F.3d 685, 692 (10th Cir. 2010)).

Defendants rely on the Declaration of Keith Milke, Inspector in Charge of Security and Crime Prevention for the United States Postal Inspection Service. He recites a history of firearm violence on postal property based on a study of workplace violence, and makes broad, conclusory statements, including the following:

> 46. Allowing storage of weapons in Postal Service parking lots would increase security risks and undermine law enforcement authority by making firearms accessible to individuals with criminal intent, whether those individuals use vehicles as temporary storage during commission of a crime, or whether firearms stored in vehicles parked on Postal Service property are improperly secured and become the target of theft. Inspectors surveilling criminal suspects in the course of investigations may observe them entering property with firearms on their person or in their vehicle, but if the firearm ban does not cover the full perimeter of Postal Service property, there would be no authority to apprehend these suspects before they enter the inside of a postal facility, placing the Inspectors, postal employees, customers, and bystanders at greater risk.
>
> 47. Customer parking lots, as opposed to secured employee lots, are subject to criminal activity involving postal customers. Sometimes customers are the perpetrators of intentional gun violence, including firearm suicides committed in vehicles, as occurred in separate incidents in parking lots in Post Office locations in Florida in 2005 and 2011. Unintentional harm can also result from the storage of firearms in vehicles, however, and the Inspection Service is aware of at least one incidence of damage to Postal Service property in 2008 when a customer accidentally

> discharged his concealed handgun while in his vehicle, shooting out the front window of a Post Office lobby in Henderson, Texas.
>
> 48. Where parking lot robberies occur, customers returning to their vehicles with valuables obtained through the U.S. Mail or retail postal services may be subject to predation from armed perpetrators surveilling the lot from their vehicles. For example, in 2006, occupants of a vehicle in a customer lot in Florida shot a customer returning to his car in the course of robbing him of the Postal Service money orders he had just purchased. In Louisiana (2005), Mississippi (2005), and Virginia (2004), customers have been robbed at gunpoint in parking lots, in some cases by acquaintances. In other cases, criminals may use Postal Service parking lots as a base to target customers and valuables of the U.S. Mail in more involved ways. Such an incident occurred in March, 2006, when a postal customer was kidnapped at gunpoint and ordered to enter the Mount Holly, North Carolina Post Office to collect a pay check scheduled to arrive in his Post Office Box while his kidnappers waited in a vehicle in the parking lot. The victim alerted the Postmaster, who immediately called 911 and cleared employees and customers away from the service window area. On a monitor in the Postmaster's office, one of the armed kidnappers was observed entering the Post Office lobby, looking for the victim. When local police arrived, the kidnapper attempted to dispose of his firearm in a lobby waste bin, was arrested without incident, and was later sentenced on state charges for Possession of a Firearm by a Convicted Felon.
>
> 49. In addition, Postal Service parking lots have become sites for criminal activity due to the increased use of the U.S. Mail to conduct drug trafficking and the ability of criminals to track movements of shipments and target letter carriers departing for delivery. See, e.g., John Ingold, *Colorado Post Offices See Increase in Marijuana Packages*, Denver Post (Feb. 28, 2012) (attached as Ex. Milke-12). ("Package tracking numbers offer the ability to keep an eye on the shipment [of marijuana]. [This] practice places letter carriers in potential jeopardy, . . . because they end up unwittingly carrying around packages that could be targets for robbers.").

[Doc. 31, Ex. A-1 at 15-16.]

The USPS contends that its Regulation must be uniform without any consideration of differences in persons or places because the Postal Inspection Service manages 30,000 facilities nationwide and has made an executive policy decision that the Regulation is necessary, given the concerns cited above, to protect USPS employees and customers from firearm violence. That may be a reasonable justification if this were an Administrative Procedure Act review attacking the Regulation as arbitrary and capricious. What it ignores is

Mr. Bonidy's interest in protecting himself. That is the core concern of the Second Amendment.

There is nothing in the Milke Declaration that the "one-size-fits-all" approach serves any purpose other than administrative convenience and saving expenses. The fit between this approach and the USPS' public safety objective is unreasonable. Presumably, a police officer could not pick up his personal mail without disarming himself before entering the parking lot at the Avon facility. There is no recognized difference between this small-town, low-use postal facility and the post office in downtown Denver or midtown Manhattan.

In this case, specifically, Mr. Bonidy is a law-abiding individual who has demonstrated competency with a handgun, and has been approved by the Eagle County Sheriff to carry a concealed handgun almost everywhere in Colorado. [Doc. 33 at 8; Doc. 34 at 8.] And yet the USPS Regulation makes no accommodation for him and his circumstances by, for example, delegating authority to the Avon Postmaster to issue a permit for a person with a concealed carry permit to use the parking lot with the gun in a locked vehicle concealed in a glove compartment or console. Instead, the Regulation broadly prohibits anyone, regardless of risk, from possessing firearms anywhere on USPS property. When it comes to the building itself, a blanket firearms restriction applied to a law-abiding individual like Mr. Bonidy is sufficiently tailored, because the building is sensitive, and the presence of an individual openly carrying a firearm may excite passions, or excited passions may lead to the use of the firearm. Someone could also attempt to take the firearm from its lawful carrier and use it for criminal purposes.

By contrast, prohibiting Mr. Bonidy from securely storing his firearm in his vehicle sweeps too far; the parking lot is not similarly sensitive, and the public safety concerns

associated with open carry in the building are not similarly implicated. Therefore, as applied to Mr. Bonidy and his request to use the parking lot with his gun securely stored in his car, the USPS Regulation is not substantially related to the government's public safety interest. It is an unconstitutional burden on Mr. Bonidy's freedom under the Second Amendment.

In sum, openly carrying a firearm outside the home is a liberty protected by the Second Amendment. The Avon Post Office Building is a sensitive place and the ban imposed by the USPS Regulation is a presumptively valid restriction of that liberty. The Plaintiff has failed to present evidence to rebut that presumption. The parking lot adjacent to the building is not a sensitive place and the Defendants have failed to show that an absolute ban on firearms is substantially related to their important public safety objective. The public interest in safety and Mr. Bonidy's liberty can be accommodated by modifying the Regulation to permit Mr. Bonidy to "have ready access to essential postal services" provided by the Avon Post Office while also exercising his right to self-defense. Accordingly, it is

ORDERED, that the Defendants take such action as is necessary to permit Tab Bonidy to use the public parking lot adjacent to the Avon Post Office Building with a firearm authorized by his Concealed Carry Permit secured in his car in a reasonably prescribed manner, and it is

FURTHER ORDERED, that the other claims of unconstitutionality of 39 C.F.R. § 232.1(*l*) made by Plaintiffs are denied.

Dated: July 9, 2013.

BY THE COURT:

s/Richard P. Matsch

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Richard P. Matsch
Senior District Judge

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Dangerous and Unusual Misdirection

A look at the common law tradition of prohibiting going armed with dangerous and unusual weapons to the terror of the people as cited in District of Columbia v. Heller

by
Daniel Page*

Abstract

In dicta, the Supreme Court in Heller cited the historical ban on "Dangerous and Unusual Weapons" to support a common use test on statutes that ban certain types of weapons considered to be "dangerous and unusual". This paper examines the historical use and definition of the phrase "Dangerous and Unusual Weapons" and concludes that it refers not to a class of weapons, but to a class of behavior.

Not a blacksmith could be found in the whole land of Israel, because the Philistines had said, "Otherwise the Hebrews will make swords or spears!"[1]

In District of Columbia v. Heller, Justice Scalia wrote,

> We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U.S., at 179, 59 S.Ct. 816. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." See 4 Blackstone 148-149 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804); J. Dunlap, The New-York Justice 8 (1815); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822); 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 271-272 (1831); H. Stephen, Summary of the Criminal Law 48 (1840); E. Lewis, An Abridgment of the Criminal Law of the United States 64 (1847); F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852). See also State v. Langford, 10 N.C. 381, 383-384 (1824); O'Neill v. State, 16 Ala. 65, 67 (1849); English v. State, 35 Tex. 473, 476 (1871); State v. Lanier, 71 N.C. 288, 289 (1874).[2]

This paper seeks to review the tradition to which Justice Scalia refers. This paper will examine each of the sources the Court cites in the portion quoted above, and will then examine other sources to attempt to determine the nature and extent of the historical tradition to which the court refers. Finally, this paper will examine what, if any, impact that tradition will have on future firearms litigation.

As will be shown later in this paper, most of the Court's cited case law is in the context of a common law crime known as the affray.

I. Affrays and the English Common Law

Timothy Cunningham's 1789 law dictionary defines an affray as follows.

> Affray, Is derived from the French word *effrayer*, to *affright*, and it formerly meant no more, as where persons appeared with armour or weapons not usually worn, to the terror

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[1] 1 Samuel 13:19, New International Version.

[2] Dist. of Columbia v. Heller, 554 U.S. 570, 627, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637 (2008).

> of others; and so is the word used in the statute of Northampton, 2 Ed. 3 c 3. It is now commonly taken for a skirmish, or fighting between two or more. … Yet, as it is there said, they differ in this, that where an assault is but a wrong to the party, an affray is wrong to the commonwealth, and therefore both inquirable and punishable in a leet. … Beside this signification, it may be taken for a terror wrought in the subject by an unlawful fight or violence, &c. as if a man shew himself furnished with armour or weapons not usually worn, it may strike a fear into others unarmed; and so it is used in flat 2 Ed 3 c 3. But altho' no bare words, in the judgement of law, carry in them so much terror as to amount to an affray, yet it seems certain, than in some cases there may be an affray, where there is no actual violence, as where a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the Common law and is strictly prohibited by Statute. [3]

It is clear from the sources above that an affray is a crime against the public peace.[4] One possible way to commit this crime against the public peace is by "riding armed with dangerous and unusual weapons, to the terror of the public." However, sometimes riding armed with dangerous and unusual weapons to the terror of the public is listed as an offense in of itself, separate from an affray. Whether the two are separate offenses or whether riding armed is a crime unto itself is unclear. What is clear is that both terms cite back to 2 Edw. 3 Stat. Northampt. c. 3 (1328). At least three of the sources cited by the Court in Heller to support a common use test, Blackstone, Wharton, and Stephen, referenced the same statute, enacted in 1328 by King Edward III which reads as follows:

> ITEM, it is enacted, That no Man great nor small, of what Condition soever he be, except the King's Servants in his presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace, and the same in such places where Acts happen, (footnote omitted) be so hardy to come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part

[3] Timothy Cunningham A new and complete law-dictionary, or, General abridgment of the law: on a more extensive plan than any law-dictionary hitherto published: containing not only the explanation of the terms, but also the law itself, both with regard to theory and practice. Very useSul to barristers, justices of the peace, attornies, solicitors, &c. Affray, 1789.
[4] See 2 Blackstone 145 (1803).

> elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure.[5]

This appears to be the origin of the law against affrays, to which the Supreme Court's sources cite.

Cunningham defines Riding Armed, with dangerous and unusual weapons as

> an offense at Common law. [citation omitted] By the stat. 2 Ed. 3. Cap. 3. None shall ride armed by day or night to the terror of the people; or come with force and arms before the King's justices...but men may wear common arms according to their quality and fashion, and have attendants with them armed agreeable to their characters; all persons may ride or go armed take felons, suppress riots, execute the King's process…[6]

Unfortunately, this definition merely states the name of the law, followed by the origins. The name of the law is filled with contestable definitions. Which weapons are dangerous and unusual? What does the word, "terror" mean?

A. Dangerous and Unusual Weapons

The term dangerous weapons, in the English common law, is a legal term of art[7] that usually included weapons designed to kill human beings.[8]

The term, "unusual weapons" does not mean, contrary to the Heller court's opinion, "weapons not in common use". As it was used in the time of the founding fathers, the term, "unusual weapons" appears to mean "surprising or uncommon force". In an English case called Baron Snigge v. Shirton, a long term tenant was in a dispute with his landlord, and "kept the possession [of the house he rented] with drum, guns, and halberts".[9] This was considered

[5] 2 Edw. 3 Stat. Northampt. c. 3 (1328).
[6] Cunningham, supra, Riding.
[7] See The King v. Hutchinson and Others 168 E.R. 273 (1784).
[8] "[S]howing weapons calculated to take life, such as pistols or dirks, putting [the victim] in fear of his life…is…the use of dangerous weapons" United States v. Hare, 26 F. Cas. 148, 163-64 (C.C.D. Md. 1818). See also The King v. Oneby 92 E.R. 465 (Court of the King's Bench 1727) "any dangerous weapon, as a pistol, hammer, large stone, &c. which in probability might kill B. or do him some great bodily hurt".
[9] See Generally Baron Snigge v. Shirton 79 E.R. 173 (1607).

keeping "his house with unusual weapons against a purchaser".[10] In another English case, a sailor was firing warning shots with a "musqet and ball" across the bow of another ship as a signal, and killed a man.[11] This firing was not done with unusual weapons.[12] In both cases, the weapons were in common use at the time. However, in one case, the weapon was unusual, while in the other case, it was not. The main difference between the cases is whether the use of force was a reasonable one.

Other, stricter laws outlawed specific types of weapons for certain individuals. "The keeping or carrying any gun-powder, shot, club, or other weapon, whatsoever, offensive or defensive, by any negroe or mulatto whatsoever (except in certain special cases) is an offence, for which the gun or other weapon may be seized, and the offender whipped, by order of a justice of the peace."[13] if these weapons were dangerous and unusual, within the meaning of the term, why did the legislators exhibit such verbosity? Why not simply save paper and ink and time and say, "The keeping of dangerous or unusual weapons by any negroe or mulatto is an offence"? It seems unlikely that the legislature would find this proposed language outlawed certain types of weapons that they wanted black people to be able to keep. After all, the legislature outlawed possession of "any weapon whatsoever" by black people. Similarly, King George III issued a statute outlawing the possession of "pistol, hanger, cutlass, bludgeon, or other offensive weapon with intent feloniously"[14] and declared, "such a person shall be deemed a rogue and a vagabond". [15] Why didn't the lawmakers use the term dangerous and unusual weapons in this case? There are three options. The first is that the terms mean the same, but the lawmakers simply preferred

[10] Id.
[11] See generally Rex v. Rowland Phillips 98 E.R. 1385
[12] Id.
[13] 4 Blackstone 175 (1803).
[14] 5 Blackstone 169 (1803).
[15] Id.

other language. The second option is that the term, "dangerous and unusual weapons" did not describe enough weapons to suit the lawmakers' desires. The third option is that the term, "dangerous and unusual weapons" does not describe a class of weapons, but rather describes a class of behavior.

This last option appears to make the most sense when one examines the way the word "unusual" is used in other legal contexts.

When discussing forcible entry or detainer, Blackstone states, "so that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained, with force, with violence, and unusual weapons."[16] It would make little sense to think that the distinction was being drawn between peaceable entry and entry with weapons that are difficult to purchase or hard to find. Instead, the term "unusual weapons" means weapons that are being used in a threatening or shocking manner, or weapons that are being used to facilitate an unlawful endeavor.

This definition of unusual is supported by Blackstone's discussion of forfeited recognizance. "A recognizance for the good behavior may be forfeited … by going armed with unusual attendance, to the terror of the people."[17] In other words, terrifying people with gangs constitutes unusual attendance. Presumably, just as people may own weapons, large people may gather together, so long as their purpose is lawful. It is when those groups of people become threatening (or terrifying), that those groups are labeled as unusual attendance to the terror of the public. Similarly, when the manner in which one carries a weapon becomes threatening, it is labeled an unusual weapon to the terror of the public.

[16] 5 Blackstone 148 (1803).
[17] 5 Blackstone 256 (1803).

When used to describe weapons, the word, "unusual" is not being used in a different way than when it is being used to describe attendance. Blackstone states, "Any justice of the peace may… bind all those… who make any affray; or threaten to kill or beat another ; or contend together with hot and angry words ; or go about with unusual weapons or attendance, to the terror of the people"[18]. Just as the common law is not outlawing the assembly of misfits or strange people, the common law is not referring to the type of weapon involved when it mentions unusual weapons. Therefore, when the historical phrase, "dangerous and unusual weapons" is used to justify a ban on a class of weapons, it is a misuse, and an abuse of the historical definition.

Does Timothy Cunningham's definition contradict this analysis? "Beside this signification, it may be taken for a terror wrought in the subject by an unlawful fight or violence, &c. as if a man shew himself furnished with armour or weapons not usually worn, it may strike a fear into others unarmed; and so it is used in stat 2 Ed 3 c 3." One might argue that this definition supports the Supreme Court's contention that the weapons protected by the second amendment are those in common use at the time. However, this does not seem to make rational sense. Would Timothy Cunningham have argued that a rare pistol was more frightening than a common pistol? Perhaps a less common weapon, such as an intricate morning star would be more` frightening than a normal club, but the crime described as an affray is essentially a breach of the peace. People used to wear ornamental and defensive weapons as part of their everyday dress[19] or as a necessary accessory to their vehicle[20], and this, more likely, is to what Timothy

[18] 5 Blackstone 254 (1803).
[19] George Neumann, The History of Weapons of the American Revolution 150 Harper & Row 1967. "It was considered normal for civilians to carry pocket pistols for protection while traveling."
[20] John George, English Pistols and Revolvers 47 Wheaton and Co. 1938. "Travelers…went heavily armed, and had to be prepared to use their weapons at any moment. … [N]o gentleman would dream of starting upon a journey without a pair of pistols in the pockets of his carriage.

Cunningham referred when he wrote, "weapons not usually worn". With this in mind, a lance-wielding knight in shining armor would be in great contrast to (and much more frightening than) a man in shirt and pantaloons with a rapier.

The mention of armor in Edward III's law[21], and in Blackstone's commentary on it[22] suggests the prohibition is primarily upon the types of armament that the military would use, not upon the small, concealable weapons that were in more common use by the people.[23] Clearly, the English and the Americans know how to outlaw weapons, whether they wish to outlaw all types, or only weapons of a certain class. The term, "dangerous and unusual weapons" did not describe a class of weapons. Rather it described a class of behavior with weapons.

B. Terror of the People

A 1675 dictionary defines terror as, "dread, great fear or fright"[24]

An affray may not be committed in private,[25] presumably because then, the public would not be terrified.

Another plain English dictionary from 1768 describes the word, "Bo" (which, I assume, is an older equivalent to the modern day "Boo!") as "A word of terror".[26]

Unfortunately, for our purposes, the oldest legal dictionaries that I could find with a definition of the word, "terror" come from the turn of the twentieth century. The cyclopedia Law Dictionary from 1922 defines terror as

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[21] 2 Edw. 3 Stat. Northampt. c. 3 (1328).
[22] 2 St. George Tucker Blackstone's Commentaries with of Reference to the Constitution and Laws of the Government of the United States and of the of Virginia 145 1803.
[23] The Complete Encyclopedia of Arms & Weapons, Leonid Tarrassuk and Clause Blair, 369 Simon and Schuster 1982. "Among civilians the pistol became the weapon most commonly used for personal attack and defense." See also George Neumann supra.
[24] An Universal Etymological Dictionary (R. Ware, W. Innys and J. Richardson, J. Knapton (and twelve others)) (1675).
[25] F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852).
[26] Samuel Johnson, A Dictionary of the English Language (1768).

> That state of mind which arises from the event or phenomenon that may serve as a prognostic of some catastrophe; affright from apparent danger. One of the constituents of the offense of riot is that the acts of the persons engaged in it should be to the terror of the people, as a show of arms, threatening speeches, or turbulent gestures; but it is not requisite, in order to constitute this crime, that personal violence should be committed. [27]

The Collegiate Law Dictionary from 1925 defines terror as "1. The state of mind which arises from the event or phenomenon that may serve as a prognostic of some catastrophe. 2. Affright from apparent danger."[28]

It seems as though the gravamen of the word, "terror" is an apprehension of harm to come. In describing a mugging, James Wilson writes, "If one assault another with such circumstances of terror as to put him in fear, and he, in consequence of his fear, deliver his money; this is a sufficient degree of violence".[29] Later, Wilson describes arson as "a crime of deep malignity … The confusion and terror which attend arson, and the continued apprehension which follows it, are mischiefs frequently more distressing than even the loss of the property."[30] In describing an ideal judge, Wilson writes, "He ought, indeed, to be a terror to evil doers".[31] Wilson writes, in describing interrogation methods, "terror is frequently added to fraud. The practice… is said… to have been derived its origin from the customs of the inquisition."[32] Giles Jacob's law dictionary states, when describing a legal device known as a Surety of the Peace (which appears to be a promise not to harm), "the demand of the Surety of the Peace ought to be soon after the cause of fear; for the suffering much time to pass before it is demanded, shews that

[27] The Cyclopedia Law Dictionary (Walter a. Shumaker and George Foster Longsdorf, ed. Callaghan and Company 1922) (1901).
[28] The Collegiate Law Dictionary (James John Lewis ed., The American Law Book Company 1925) (1925). See also Bouvier's law Dictionary (Francis Rawle, ed., Vernon Law Book Company and West Publishing Company 1914) (1839).
[29] 3 Wilson 59 (1804).
[30] Id. At 63.
[31] 2 Wilson 300 (1804).
[32] 3 Wilson 155 (1804).

the party has been under no great terror."[33] Jacob further describes the difference between mere fear and terror while defining the word, "robbery". Jacob writes, "[a]nd when it is laid to be done by putting in fear, this does not imply any great degree of terror, or affright in the party robbed. It is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent."[34] From these sources, terror, is more than mere apprehension of danger; it might more aptly be described as the apprehension of an extreme danger, or a catastrophe.

Some American case law comports with the above view. A 1795 case describes "a defence based upon the ground of duress and terror".[35] Another 1795 case states, "raising a body of men to …oppose and prevent by force and terror, the execution of a law, is an act of levying war."[36]

However, other old American case-law treats the word, "terror" as if it were synonymous with the word, "threat". One case mentions people "armed with all the terrors of forfeiture"[37]. Another case mentions "the terror of public censure"[38]. A third case mentions "the terrors of a law-suit"[39].

Clearly, it will be difficult to determine what the word terror means in the context of the common law tradition that the court in Heller describes, as "terror" has varying levels of severity, ranging from the feeling one gets when someone says, "bo" to the anticipation of a great catastrophe.

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[33] Giles Jacob, The law-dictionary : explaining the rise, progress, and present state of the English law; defining and interpreting the terms or words of art; and comprising copious information on the subjects of law, trade, and government. 149(P. Bryne 1811 first American from the second London edition) (1811).
[34] Id at 546.
[35] U.S. v. Vigol 2 U.S. 346 (1795).
[36] U.S. v. Mitchel 2 U.S. 348 (Pennsylvania circuit court 1795).
[37] Warder v. Arell 2 Va. 282 (1796).
[38] State v. Norris 2 N.C. 429 (1796).
[39] Neilson & Sarrazin v. Dickenson 1 Des. 133 (1785).

II. Heller's secondary sources

A. Blackstone

Justice Scalia first cites Blackstone who, in his commentaries, lists the following offense:

> The offence of *riding* or *going armed* with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edw. III, c. 3 upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner, as by the laws of Solon, every Athenian was finable who walked about the city in armour.[40]

Notice that this is a crime against the public peace. Presumably, if the public peace was not harmed, or if the peace was disturbed through a means that did not terrify the good people of the land[41], this crime would not be charged. Furthermore, this crime appears to be a crime one cannot commit while alone in the privacy of one's own home. However, as we will see, modern courts use this common law history to uphold laws banning private, solitary possession of certain classes of weapons, such as fully automatic rifles. Blackstone does not mention any way of classifying different types of weapons, unless the fallacious definition of dangerous and unusual weapons is applied. In no way does this source fairly support a prohibition based on which weapons are presently in common use.

B. James Wilson

Justice Scalia then cites the James Wilson's explanation of an affray. James Wilson wrote,

> Affrays are crimes against the personal safety of the citizens; for in their personal safety, their personal security and peace are undoubtedly comprehended. An affray is a fighting

[40] 2 St. George Tucker Blackstone's Commentaries with of Reference to the Constitution and Laws of the Government of the United States and of the of Virginia 145 1803

[41] For example, if one were to disturb the peace by playing a minstrel tune with a very loud trumpet, while carrying a concealed knife, that behavior would probably not terrify anyone and would presumably not constitute a violation of the common law rule against riding with dangerous and unusual weapons to the terror of the public.

> of persons in a publick place, to the terror of the citizens. They are considered as common nuisances. They may, and ought to be suppressed by every person present; and the law, as it gives authority, so it gives protection, to those who obey its authority in suppressing them, and in apprehending such as are engaged in them ; if by every person present ; then still more strongly by the officers of peace and justice (footnote omitted). In some cases, there may be an affray, where there is no actual violence ; as where a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terror among the people.[42]

Again, we see that an affray is a crime committed only in the presence of others. The exception listed at the end of the quoted section is not an exception to the public requirement, but is rather an exception to the actual violence requirement. Heller cites this as part of the common law tradition that supports a test of whether a class of weapon was in common use.[43] However, the only possible class of weapons in this quote comes a fallacious definition of the term "dangerous and unusual". To say that this source fairly supports a restriction based on which weapons were in common usage at the time is dubious.

C. John A. Dunlap

Justice Scalia next points us to John A. Dunlap's The New-York Justice, which discusses the crime of affray,

> An affray is the fighting of two or more persons in some public place to the terror of the people; for if the fighting be in private it is not an affray, but an assault ; neither will threatening words amount to an affray, although it seems that the constable may, at the request of the party threatened, carry the person using the threats before a justice of the peace, in order that he may find sureties. … As where two persons coolly and deliberately engage in a duel; this being attended with an apparent intention and danger of murder, and being a high contempt of justice, is a strong aggravation of the affray, though no mischief has actually ensued. It is likewise said to be an affray, at common law, for a man to arm himself with dangerous and unusual weapons, in such manner as will naturally cause terror to the people. [44]

[42] 3 James Wilson, Works of the Honourable James Wilson 79 (1804).
[43] D.C. v. Heller, 554 U.S. at 627.
[44] John Dunlap, The New-York Justice; or, a Digest of the Law Relative to Justices of the Peace in the State of New-York 8 Isaac Riley 1815.

Dunlap's description of an affray also includes the public place requirement, as well as the terror of the people requirement. Here, Dunlap compares carrying dangerous and unusual weapons with dueling people, with the intention and danger of murder.[45] This is once again an exception to the Affray's element of actual violence. Dunlap's exception to actual violence includes a manner element. The manner in which these arms are carried is what is being compared to dueling. The manner that is outlawed is the manner that would naturally cause terror to the people. Dunlap does not support a restriction on the type of weapons being used, but rather on the manner in which they are used.

D. C. Humphrey

The court then refers to C. Humphrey's A Compendium of the Common Law in Force in Kentucky,[46] which says,

> Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land, which is punishable by forfeiture of the arms, and fine and imprisonment. But here it should be remembered, that in this country the constitution guaranties to all person the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily. We have a statute on the subject, relating to concealed weapons.[47]

The crime mentioned by Humphry is a public one that involves terrifying the people. Notice that it is the manner that the right is exercised, not the type of weapon that is carried that constitutes the crime. Humphrey makes it explicit that one may carry weapons so long as it is not in a manner that excites people to unnecessary terror. The unnecessary terror of the people appears to be an essential element. At no point does Humphrey refer to a test of whether the

[45] Dueling often resulted in no harm to either party. "If a duel should lead to the death of one of the principals, an event which was by no means so common as the reader of modern historical novels might be led to suppose". John George, English Pistols and Revolvers 74 Wheaton and Co. 1938. See also "A duel could be declared ended with honor without a wound's being inflicted… a number of duelists pointedly chose to miss their targets." Jack Williams, Dueling in the Old South: Vignettes of Social History 58 Texas A&M University Press 1980.
[46] D.C. v. Heller 554 U.S. at 627.
[47] H. Stephen, Summary of the Criminal Law 48 (1840).

arms mentioned were in common use at the time, unless one uses the fallacious definition of "dangerous or unusual".

E. W. Russell

The court then refers to A Treatise on Crimes and Indictable Misdemeanors by W. Russell,[48] which states in relevant part,

> [Y]et it seems certain that in some cases there may be an affray where there is no actual violence; as where persons arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the common law, and is strictly prohibited by several statutes. (citation omitted.)[49]

Russell is providing an exception to the violence requirement of the affray. Notice again that there is a manner requirement. Presumably, if one were to arm himself with dangerous and unusual weapons in a manner that did not naturally cause a terror to the people, one would not be guilty. One might do this in several ways. First, one could do it out of sight, in private. One might conceal the weapon from public view. One might carry the weapon in a peaceable manner that did not excite anyone to terror. From the plain meaning of the text, those manners of carrying dangerous and unusual weapons were not outlawed. It is worth noting that it is the manner that is the essential element, not the type of weapon involved, unless one applies the fallacious definition of dangerous and unusual weapons.

F. H. Stephen

The court then refers to H. Stephen's Summary of the Criminal Law, which states, "Riding or going armed with dangerous or unusual weapons. By statute of Northampton, 2 Edw.

[48] D.C. v. Heller 554 U.S. at 627.
[49] Sir William Oldnall Russell, A Treatise on Crimes and Indictable Misdemeanors 271-272 (1831).

III c. 3, this is a misdemeanor, punishable by forfeiture of the arms and imprisonment during the King's pleasure. "[50]

This source was rather bare. However, it uses the same language and cites the same statute as Blackstone. It should be noted that in the statute that Stephens cites, the crime of riding armed was conditioned on being in a public place or before a public official.[51] Because Stephen uses the same language and cites the same sources as the other authors listed by the Heller court, one should not take the bareness of the language to mean that, according to Stephen, the exceptions and restrictions on the common law are not present. All Stephen does is name the offense, cite to Statutes of the Realm, and then state the punishment. It does not investigate the intricacies of what constitutes a violation of the law, nor does it define the law. Rather than read into the bareness of the language, one should assume Stephen simply declines to investigate the details of the common law.

G. F. Wharton

The Supreme Court then refers to F. Wharton's A Treatise on the Criminal Law of the United States.

> An affray, as has been noticed, is the fighting of two or more persons in some public place, to the terror of the citizens. (footnote omitted) There is a difference between a sudden affray and a sudden attack. An affray means something like a mutual contest, suddenly excited, without any apparent intention to do any great bodily harm. (footnote omitted). … yet it seems certain that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by the statute. For by statute 2 Edw. 3., s. 3, in force in several of the United States, it is enacted…[52]

[50] Henry John Stephen, Summary of the Criminal Law, 1840.
[51] See 2 Edw. 3 Stat. Northampt. c. 3 (1328).
[52] F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852).

Wharton describes the affray as a crime committed in public, to the terror of the citizens. Wharton includes a restriction on the affray that other sources do not. Namely, Wharton distinguishes between a sudden attack and a sudden affray. Supposedly, people committing an affray do not wish to do any great bodily harm. Notice that Wharton seems to contradict Dunlap, where Dunlap discusses dueling with the intent to commit murder as an aggravation of an affray.

In addition, Wharton includes in his definition of the affray a requirement that the affray be committed in public. If the fight takes place in private, rather than in public, the fighters may be charged with assault, but not an affray.

Wharton also includes a manner requirement to the rule against dangerous and unusual weapons. The text appears to suggest that if a man armed himself with a dangerous and unusual weapon in such a manner that did not naturally cause a terror to the people, he would not be guilty of an affray.

Once again, a manner restriction as to where and how someone can carry weapons will later be used, by modern courts, to justify a complete prohibition on certain classes of weapons.

After discussing the King's statute, Wharton continues,

> In Tennessee, however, it was ruled, that the act of 1837-8 c. 137 s. 2, which prohibits any person from wearing any bowie-knife, or Arkansas tooth-pick[53], or any knife or weapon in form, shape or size resembling a bowie-knife or Arkansas tooth-pick, under his clothes, concealed about his person, conflicts with the 26th section of the first article of the bill of rights, securing to the free white citizens the right to keep and bear arms for their common defence. (Aymette v. State, 2 Hum. 154). The contrary rule, it would seem, has been laid down in Indiana, where it was held that a similar statute was in conformity with the federal and state constitutions (State v. Mitchell, 3 Blackf. 229). An act of the same character is in force in Virginia. (footnote omitted). If a person, not being a traveler, carry a pistol concealed on his person, he is guilty of an indictable offence, under the revised statutes of Indiana, of 1843, and his motive for carrying the pistol is immaterial (rev. stat. page 982; Walls v. State, 7 Blackf. 572). It has been said generally, that the public and open exhibition of dangerous weapons by an armed man, to the terror of good citizens, is a misdemeanor at common law. (State v. Huntley, 3 Iredell, 418; but see State

[53] An Arkansas toothpick is a type of Bowie knife with a blade that can be as large as one foot long. See Robert E. Hunt, Randell Military Models: Fighters, Bowies, and Full Tang Knives, 208, Turner Publishing Company 2003).

> v. Simpson, 5 Yerger 356). On the same general reasoning, it has been held indictable to drive a carriage through a crowded street, in such a way as to endanger the lives of the passers-by ; (footnote omitted) to disturb a congregation when at religious worship; (footnote omitted) to beset a house, with intent to wound, tar and feather ; (footnote omitted) to raise a liberty-pole, in the year 1794, as a notorious and riotous expression of ill-will to the government ; (footnote omitted) to tear down forcibly and contemptuously an advertisement set up by the commissioners of a sale of land for county taxes ; (footnote omitted) to break into a house in the day-time, and disturb its inhabitants ; (footnote omitted) and to violently disturb a town-meeting, though the parties engaged were not sufficient in number to amount to a riot.'[54]

While Wharton does describe restrictions on certain classes of weapons, all of those restrictions occurred after the constitution was ratified. If this is the common law to which the Heller court refers, it is common law that would have been subject to the bounds of the constitution. Normally, when common law is persuasive, it is the common law that came before the constitution was ratified. That common law speaks to what was considered normal at the time. Common law that arises after the constitutional amendment was adopted and conflicts with the constitution should not be cited as support for a particular interpretation of the constitution. In a first amendment setting, this would be comparable with citing the Alien and Sedition Acts as speaking to the founders' views on the freedom of speech. The constitution has been violated on numerous occasions, many of them shortly after the document was ratified. Simply pointing to a tradition of violating the constitution does not make a statute that is in line with that tradition constitutional. It is therefore puzzling to see references to cases from the 1870s in an originalist opinion.

Wharton goes on to describe the reasoning behind the rule against "open exhibition of dangerous weapons by an armed man, to the terror of good citizens". The first thing to which

[54] F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852). It should be noted that Aymette v. State, 2 Hum. 154 actually upheld the ban, rather than striking it down. In Bliss v. Commonwealth 12 Ky. 90, 13 Am. Dec. 251 (Ky. Ct. App. 1822), a Kentucky court held that a similar statute conflicted with the portion of its state constitution that is analogous to the second amendment. (Special thanks to Robert Dowlut, who alerted me to this error).

Wharton compares carrying dangerous weapons is to reckless driving and reckless endangerment. This makes sense as a manner restriction based upon the terror of the people element. Presumably, just as one may drive a carriage through a crowded street with due care, one could carry a dangerous weapon in a nonthreatening and careful manner without violating a law. Wharton then compares carrying dangerous weapons with disturbing a congregation when at religious worship. This comparison is a little more puzzling. Perhaps if one were to disturb a religious congregation (by, say, entering a church during the middle of Easter mass and screaming that there is no god), it would excite them to violence or to such a state of uproar that the interruption should be illegal. The next comparison makes more sense. To beset a house is to "surround and harass" it or to assail the house on all sides.[55] Tar and feathering was not a pleasant practice, and any reasonable person would raise a general hullaballoo if such a performance would save him from this practice.[56] Therefore, to "beset a house with intent to wound, tar, and feather", is to have an angry mob surround a house with the desire to wound and assault and humiliate the occupants. Wharton is saying that the same reasoning used to outlaw besetting a house with intent to wound, tar, and feather is being used to outlaw riding armed with dangerous weapons to the terror of the people.

The next two examples have to do with insurrection. Raising a liberty pole[57] as a riotous expression of ill-will toward the government and contemptuously tearing down advertisements

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[55] The New Oxford American Dictionary 156 Erin McKean, 2nd ed (2005).

[56] "When heated, tar would blister the skin, but there is little evidence to suggest it regularly was… Yet even when tar was applied cool, it made for a painful experience. Once dry, tar clung tenaciously to the skin and could be removed only with a tremendous amount of scrubbing, possibly with the aid of turpentine or other chemical solvents that would further irritate the skin. Presumably, most victims lost a good deal of body hair; others may have developed tar acne, a skin condition…" Benjamin Ervin, Tar, Feathers, and the Enemies of American Liberties, pg. 204 New England Quarterly, Vol.76 No.2 Jun. 2003.

[57] "Liberty poles originated as large wooden columns--often fashioned out of ship masts--erected in public squares as part of the "rites of resistance" to British authority during the American Revolution. Simon P. Newman, Parades and the Politics of the Street: Festive Culture in the Early American Republic 25-29 (1997). After the revolution, they were used as symbols of resistance during the Whiskey Rebellion. Id. at 172-73; see In re Fries, 9 F. Cas. 826,

meant to alert people to an auction meant to finance the government were both activities outlawed primarily to curb active resistance against the government. Wharton says that same reasoning being used to outlaw those two activities is used to outlaw carrying dangerous weapons to the terror of the people. This suggests that there is an element of curbing insurrection present in the prohibition against carrying dangerous weapons to the terror of the people. It seems doubtful that the government was outlawing people carrying weapons for self defense. Instead, the government had an interest in outlawing the type of show of force that could help encourage insurrection the same way a liberty pole could encourage insurrection. The government also had an interest in outlawing the type of armed presence that would undermine the rule of law in a similar way that hindering tax auctions would undermine the rule of law.

Next, Wharton compares the reasoning behind outlawing the carrying of dangerous weapons to the terror of the people with the reasoning behind outlawing breaking and entering in the middle of the day to disturb the home's inhabitants. When one imagines the kind of uproar that would happen when one engages in breaking and entering a home to disturb its inhabitants, it speaks to the kind of uproar that might happen if one were to parade down the middle of the street, firing guns into the air, waiving weapons at the population. It also speaks to the level of danger that is discussed. If someone suddenly bursts into a man's home, there is at least some likelihood that the occupant will fear for his life or his family members' lives and will attack the

862, 864, 870 (C.C.D. Pa. 1799) (No. 5,126) (describing the erection of a liberty pole during the Whiskey Rebellion); Respublica v. Montgomery, 1 Yeates 419, 421 (Pa. 1795) (referring to liberty poles as one of the "avowed standards of rebellion"). They were also adopted by Jeffersonian Republicans as "prominent and easily recognizable symbols of liberty, equality, and republicanism," and as symbols of opposition to the Federalist government and to the Sedition Act. Newman, supra at 80, 97, 170-76. By the middle of the nineteenth century, the erection of liberty poles "on highways and public squares" by "each political party of the country to express its greater devotion to the rights of the people" had come to be viewed as "a custom sanctioned by a hundred years and interwoven with the traditions, memories and conceded rights of a free people." City of Allegheny v. Zimmerman, 95 Pa. 287, 294 (1880). The custom apparently disappeared at the end of the nineteenth century." Seth F. Kreimer, Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet, 150 U. Pa. L. Rev. 119, 171 (2001)

intruder. Even if the intruder meant no violence, but only meant to disturb the inhabitants of the home, there was a risk of violence. Perhaps, in the same way, the common law outlaws such provocative and public use of weapons in the hopes of avoiding violence when none was intended.

Finally, Wharton compares the reasoning behind outlawing riding with dangerous weapons to the terror of the public with the reasoning behind outlawing the violent disruption of a town-hall meaning, even if it does not amount to a riot.

In order to be charged with rioting, a certain number of people had to be involved. Blackstone defines a riot as follows,

> Riots, routs, and unlawful assemblies, must have three persons at least to constitute them (footnote omitted). … A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel (footnote omitted): as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner. [58]

Here, it is clear that the link between the reasoning behind the two common law rules is clear. In a riot, the situation can spiral out of control. The rule against riots is meant to help preserve the public peace and to avoid unruly mobs. Similarly, to preserve the peace, the common law has outlawed reckless displays of firearms in public.

III. Heller's cited caselaw

A. State v. Langford

In Heller, the Supreme Court also directs the reader to three cases concerning what the court calls "the historical tradition of prohibiting the carrying of 'dangerous and unusual

[58] 5 St. George Tucker, Blackstone's Commentaries: with Notes of Reference, to the Constitution and the Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia 146 1803.

weapons'".[59] The first of these, State v. Langford, is a case discussing the sufficiency and clarity of an indictment. Here, the defendant and several other men armed with guns fired at an elderly woman's house and killed her dog, "thus exciting her alarm for the safety of her person and her property".[60]

During the opinion, the court discusses whether the actions that led to the indictment were a private trespass or a forcible breach of the public peace. The court wrote,

> For the counsel for the prosecution, in arguing, say, 'one man may commit a breach of the peace, though not a riot; he might be armed with pistols for aught that appears, and this might be, possibly, proved.' To this the Court answers, "coming with a pistol, though possible, is not to be supposed;' thereby implying, that if the fact of coming with a pistol had been laid in the indictment, it would have been a circumstance in itself naturally implying such a degree of force as was indictable.

One who wishes to interpret this in a manner unfavorable to the civil right to the means to self-defense could suppose that this is an example of presuming anyone armed with a pistol to be an aggressor. The anti-civil rights argument would be that the common law made negative assumptions about people armed with pistols. If this is the case, it is unclear whether the court would make a distinction between loaded and unloaded pistols, holstered or unholstered pistols. It seems as though one who is armed "for aught that appears" is ready to shoot anything that moves. However, it seems less than likely that "being armed with pistols for aught that appears" could describe an unloaded or holstered weapon.

Furthermore, a passage later on in the case would contradict the argument that there was a negative presumption against people armed with pistols, "[l]aying the offence to have been committed vi et armis[61] does not itself show … as applied to forcible entry … that a breach of

[59] D.C. v. Heller 554 U.S. at 627.
[60] State v. Langford 3 Hawks 281, 10 N.C. 381 (N.C.), 1824 WL 380 (N.C. 1824),
[61] Latin for with force of arms, See Walter Shumaker and George Longsdorf, The Cyclopedic Law Dictionary, 1058 Chicago Callaghan and Company (1922).

the peace had been committed in the cases"[62]. That is to say that just because someone behaved while armed does not show that a breach of the peace has been committed. Here, it is the manner in which the person with the arms behaved that is the gravamen of the crime. If, instead of shooting at an old woman's house and killing her dog, the defendant had politely knocked on the old woman's door, with his rifle slung over his shoulder, there would have been much less cause for the old woman to fear for her life, her property, and her dog.

Here, the gravamen of the crime seems to be the breach of the peace. The court said, "All the law requires in an indictment of this kind is, that the facts shall be so charged, as to show that a breach of the peace had been committed, and not merely a civil trespass."[63] Here, it seems like the offense was not based on how unusual the weapons were (the court simply said they were armed with guns[64]). It might be argued that the dangerousness of the weapons was the gravamen of the crime. However, the death of the dog (the result of the dangerous weapons) was a matter of aggravation, not the "corpus delicti" or body of the crime. Instead, it was the frightening and threatening behavior of the defendant that constituted the crime. The defendant terrified the victim, and it is the actions that made her feel threatened and fear for her safety and the safety of her property that seem to be the focus of the court, not the type of weapons used.

In any case, it is unclear how the Supreme Court in Heller did or would place significance on this opinion.

B. O'Neill v. State

Justice Scalia then references O'Neill v. State, where a man insulted a second man, who then beat the first man with a cane. The first man did not resist, and the question before the court

[62] Id
[63] Id.
[64] Id. "These men were armed with guns, which they fired at the house of an unprotected female, thus exciting her alarm for the safety of her person and her property."

was whether the first man was also guilty of the affray. The Court states, "[i]t is probable, however, that if persons arm themselves with deadly or unusual weapons *for the purpose of an affray*, and in such a manner as to strike terror to the people, they may be guilty of this offence, without coming to actual blows."[65] With this language, the judge seems to suggest that if the persons had armed themselves for a reason other than an affray, and did not actually come to blows, they might not be guilty of the offense. If we were to apply this rule to modern day statutes, laws that prohibit people arming themselves with intent to engage a public fight would probably fall under the limitation on the second amendment to which Justice Scalia referred. [66]

C. English v. State

The next case Justice Scalia mentions is English v. State. In this 1872 Texas case, Judge Walker, says the following concerning the second amendment, "Arms of what kind? Certainly such as are useful and proper to an armed militia. The deadly weapons spoken of in the statute are pistols, dirks[67], daggers, slungshots,[68] swordcanes,[69] spears, brass-knuckles and bowie knives." [70] Judge Walker continues,

> If we look to this question in the light of judicial reason, without the aid of specific authority, we shall be led to the conclusion that the provision protects only the right to 'keep' such 'arms' as are used for purposes of war, in distinction from those which are employed in quarrels and broils, and fights between maddened individuals, since such are

[65] 16 Ala. 65, 1849 WL 407 (Ala.) Emphasis added.
[66] See D.C. v. Heller 554 U.S. at 627.
[67] "Dirk and dagger are used synonymously and consist of any straight stabbing weapon, as a dirk, stiletto, etc. (Century Dict.) They may consist of any weapon fitted primarily for stabbing. The word dagger is a generic term covering the dirk, stiletto, poniard, etc. (Standard Dict.)'" People v. Bain, 5 Cal. 3d 839, 851, 489 P.2d 564, 570 (1971).
[68] California case law provides a clear definition of "slungshot." In People v. Williams (1929) 100 Cal.App. 149, 279 P. 1040 (Williams), the court adopted the following dictionary definition: "a small mass of metal or stone fixed on a flexible handle, strap or the like, used as a weapon." People v. Fannin, 91 Cal. App. 4th 1399, 1401-02, 111 Cal. Rptr. 2d 496, 498 (Cal. Ct. App. 2001)
[69] "A sword cane looks like an ordinary cane but is in fact a sword with a sheath made to look like the lower part of a cane." State v. McCoy, 618 N.W.2d 324, 326 (Iowa 2000), quoting Commonwealth v. Walton, 252 Pa.Super. 54, 380 A.2d 1278, 1279 n. 1 (1977).
[70] English v. State 35 Tex 473 (Supreme Court of Texas, 1872).

> properly known by the name of 'arms'. … To refer the deadly devices and instruments called in the statute "(sic)"deadly weapons," to the proper or necessary arms of a "well-regulated militia," is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit. The word "arms" in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine; of artillery, the field piece, siege gun, and mortar, with side arms. The Terms dirks, daggers, slungshots, swordcanes, brass-knuckles and bowie knives, belong to no military vocabulary. Where a soldier on duty found with any of these things about his person, he would be punished for an offense against discipline. … We confess it appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together.[71]

It seems as though Judge Walker believes that the Second Amendment only protects military arms. Confusingly, he glosses over the fact that pistols are, by his own admission, used by the military and regulated by the challenged statute. In retrospect, his reasoning is also suspect, as several of the other weapons mentioned have been used by the military at one point or another. American soldiers used brass-knuckle knives for trench warfare in WWI.[72] Bowie knives, dirks, and daggers are not so different from the K-Bar knives carried by the Navy Seals[73] or the Kukri carried by some of the most feared soldiers in the world, the Gurkhas,[74] or the trench knives that have been standard issue in various armed forces around the world.[75] Spears were standard for the Spartan military[76]. Perhaps Judge Walker meant that the Second

[71] Id.
[72] See Evan Nappen, Knuckle Down With Knuckle Knives, Knives 2008 at 42 (2007). See also Sharon Spencer, Weapon: a Visual History of Arms and Armor 284 Dk Publishing (2006).
[73] See Fred Pushies, Weapons of the Navy Seals, 93-95 MBI publishing company (2004).
[74] See Mike Chappell, The Gurkhas 31 Osprey Publishing, 1994.
[75] Sharon Spencer, Weapon: a Visual History of Arms and Armor 284 Dk Publishing (2006).
[76] Nick Sekunda, The Spartan Army 52 Osprey Publishing 1998.

Amendment only protected what the U.S. military currently used. It seems doubtful that the founders would allow the state to ban muskets on the basis that the military now uses M-16s.

The Supreme Court did not adopt Judge Walker's reasoning, nor did the Supreme Court adopt Judge Walker's interpretation of the Second Amendment. Justice Scalia merely cited to Judge Walker's opinion when referring to "historical prohibitions on the carrying of 'dangerous or unusual weapons'"[77].

Perhaps this is part of the history to which the Supreme Court refers. After all, this 1872 case misuses the term, "dangerous and unusual weapons" in much the same way that Supreme Court misuses it in Heller. However, English v. State does not rely upon the phrase "dangerous and unusual weapons". Instead, they rely upon an interpretation of the prefatory clause that is contrary to the interpretation that the Supreme Court in Heller used[78], combined with a definition of arms that is contrary to the interpretation that the Supreme Court in Heller used.[79]

D. State v. Lanier

It is perplexing that the court cites State v. Lanier. The court in Heller was pointing to the tradition of riding armed with dangerous and unusual weapons as support for the constitutionality of legislation against particular types of uncommon weapons as seen in Miller. In State v. Lanier, a man rode unarmed through an empty courthouse. The Lanier court does say "The elementary writers say that the offence of going armed and dangerous or unusual weapons

[77] See D.C. v. Heller 554 U.S. at 627.
[78] Compare English v. State 35 Tex. 473 (Texas Supreme Court 1872) "To refer the deadly devices and instruments called in the statute 'deadly weapons', to the proper or necessary arms of a 'well-regulated militia,' is simply ridiculous" with D.C. v. Heller 544 U.S. 570, 578(2008), "apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."
[79] Compare English v. State 35 Tex. 473 (Texas Supreme Court 1872) "The word 'arms' in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense" with D.C. v. Heller 544 U.S. 570, 581 (2008), "The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity."

is a crime against the public peace by terrifying the good people of the land, and this Court has declared the same to be the common law in State v. Huntley 3 Ired. 418"[80]

However, the court also states, "In this case we attach no importance to the fact that the defendant had no arms, for we think it may be conceded that driving or riding without arms through a court house or a crowded street at such a rate or in such a manner as to endanger the safety of the inhabitants amounts to a breach of the peace and is an indictable offence at the common law."[81] Clearly this is not a case about outlawing certain types of weapons. If dangerous and unusual weapons really did describe classes of weapons rather than classes of dangerous behavior, why mention dangerous and unusual weapons in this case where the defendant was unarmed? State v. Lanier is a case punishing a certain types of behavior, whether the person was armed or not. It mentions dangerous and unusual weapons because that is common law outlawing a certain type of dangerous behavior; it is not common law outlawing certain classes of rare weapons.

IV. Post-Heller interpretations of dangerous and unusual weapons

In the third district of California, Judge Sims upheld California's ban on so-called "assault weapons" based primarily on Heller's reasoning that prohibitions based upon classes of weapons were fairly supported by the traditional prohibition on the carrying of dangerous and unusual weapons.[82] California law outlaws possession of so-called "assault weapons", a term that is defined in a way that baffles the mind. The law outlaws a semi-automatic centerfire rifle that can accept a clip and has a thumbhole stock.[83] A thumbhole stock is a stock that one can put his

[80] State v. Lanier 71 N.C. 288, 1874 WL 2582 (N.C.) (1874).
[81] Id at 2
[82] See Generally People v. James 174 Cal. App. 4th 662, 94 Cal. Rptr. 3d 576 (2009).
[83] Id at 669.

thumb through as he grips the rifle. The same rifle without a thumbhole stock is legal.[84] That legal rifle would then be illegal if the owner installed a forward pistol grip.[85] A forward pistol grip is a piece of material (usually plastic or metal) that attaches to the underside of the barrel. It allows the shooter to hold the rifle with his knuckles facing horizontally rather than vertically. With and without the modifications, the rifle has the same capabilities. With the modifications, the rifle is deemed to be an "assault weapon", and is therefore illegal. Without it, the rifle is not classified as an "assault weapon" and is therefore lawful. Other authors have noticed the misleading definition of the scare term "assault weapons".[86] "For example, the term 'assault weapon' has become so elastic that it has been applied to a revolving firearm and even a single shot firearm."[87]

The part of this statute that was challenged was the prohibition on so-called "assault weapons" and a prohibition on a gun that shoots a particular type of bullet, a 50 caliber bmg.[88] The court upheld this law based on a faulty definition of dangerous and unusual. The court found that "the Legislature enacted the [law]in order to address the proliferation and use of unusually dangerous weapons."[89] "[The Second Amendment] is the right to possess and carry weapons typically possessed by law-abiding citizens for lawful purposes such as self-defense. …as the court's discussion makes clear, the Second Amendment right does not protect possession of a military M-16 rifle."[90] This represents a fundamental misunderstanding of the term "dangerous and unusual weapons" as well as a fundamental misunderstanding of the Second Amendment.

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[84] Id.
[85] Id.
[86] For a more in-depth look at the absurdity for California's "assault weapons" ban, see Eric C. Morgan's note, Assault Rifle Legislation: Unwise and Unconstitutional, 17 Am. J. Crim. L. 143 (1990). Available online at http://www.saf.org/LawReviews/EMorgan1.html.
[87] Robert Dowlut 5 St. Thomas L. Rev. 203, 208 (1992).
[88] Id at 666.
[89] Id at 674.
[90] Id at 676.

To review, the Second Amendment states, "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."[91] Judge Sims interpreted that amendment to not protect the possession of the United States Army's standard issue rifle. This rifle is used by all branches of the military, including the National Guard. He arrived at this conclusion through the reasoning in Heller that was supposedly supported by the tradition of prohibiting the carrying of dangerous and unusual weapons.

Judge Sims goes on to say, "These are not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather, these are weapons of war."[92] Reading this alongside a case Heller cited, English v. State (the case that upheld a law banning non-military weapons), the government could ban all firearms. Obviously, one of these cases must be wrong. Judge Sims continues,

> [O]ur conclusion that Heller does not extend Second Amendment protection to assault weapons and .50 caliber BMG rifles is supported by post-Heller federal precedent. In U.S. v. Fincher (8th Cir. 2008) 548 F.3d 868 (Fincher), the Eighth Circuit Court of Appeals held that Fincher's possession of a machine gun was "not protected by the Second Amendment" because "[m]achine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.'[93]

Judge Sims also states that .50 caliber BMG rifles are also dangerous and unusual.[94] This case upheld an asinine law through historically inaccurate reasoning.

The defendant in the case over which Judge Sims presided, Michael Eugene James, was on a state registry for firearms. He was then subject to a restraining order that directed him to "turn in

[91] U.S. Const. amend. 2.
[92] People v. James 174 Cal. App. 4th at 676.
[93] Id.
[94] Id.

or sell all firearms in his possession by a certain date."[95] The information on the state database was enough to obtain a search warrant for his house. The police then found the banned weapons in Mr. James' house. Michael Eugene James went to prison because of a law that was upheld through the misinterpretation of a historical phrase. A similar law was upheld in Cook county, Illinois in Wilson v. Cook County.[96]

In Heller v. District of Columbia[97], Heller challenges, among other things, the ban on so called "assault weapons" in the District of Columbia.[98] The district court says the following, "As the Heller Court made clear, the Second Amendment does not confer the right to use *any* type of firearm in self-defense. [citation omitted] Rather, the Second Amendment protects only those weapons 'in common use' and 'typically possessed by law-abiding citizens for lawful purposes' [citation omitted], as opposed to weapons considered 'dangerous and unusual'".[99]

V. Common Use as Used Today

Under the current interpretation of the Second Amendment, the common use test is valid and is being used by several lower courts.[100] Under this test, courts are upholding prohibitions on certain classes of firearms. The courts ask whether a type of firearm is commonly used by law-abiding citizens. This is an insidious question, as some of these bans have been in place for some time. When the government prohibits the possession of a type of firearm, the possessors of those firearms cease to be law-abiding citizens. Therefore, under a common use test, no court would strike down a firearms ban that had been in place for an

[95] Id at 665.
[96] See generally, Wilson v. Cook County 943 N.E. 2d 768, 348 ill. Dec. 160 (appellate Court of Illinois, First District, Third Division, 2011).
[97] This is not to be confused with D.C. v. Heller. Heller v. D.C. is a case involving the same parties and was brought in D.C. District Court.
[98] See Generally, Heller v. District of Columbia 698 F. Supp. 2d 179 (D.C. District Court, 2010).
[99] Id at 193.
[100] See generally, Wilson v. Cook County 943 N.E. 2d 768, People v. James 174 Cal. App. 4th 662, and Heller v. District of Columbia 698 F. Supp. 2d 179.

extended period of time. Applying the common use test without falling into this circular trap is a difficult task. It is also difficult to determine how much weight the Supreme Court is willing to place on a common use test. After all, in Heller, the Supreme Court struck down a ban on pistols that had in effect since 1976.[101]

Apparently, the Supreme Court did not think these weapons were dangerous and unusual enough to outweigh the plaintiffs' rights to self defense. But if no law-abiding private citizen our nation's capital had a handgun for thirty-two years, what could be more unusual? Or did the court look to see if the weapon were unusual in places where it was not banned? Many questions about the nature of this test remain unresolved. This murky test is bound to bring about differing results to similar fact patterns.

Another puzzle arises when one considers the idea of a new weapon. Suppose the starship Enterprise landed in Oklahoma tomorrow, and set up a factory producing phasers. A court would have no problem upholding a ban on these 'dangerous and unusual' weapons. Nobody owns them, and they can be set to stun or disintegrate a victim. This type of reasoning could ban any type of new weapon, yet this is obviously not what the Supreme Court envisioned. It said,

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, e.g., Reno v. American Civil Liberties Union, 521 U.S. 844, 849, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and the Fourth Amendment applies to modern forms of search, e.g., Kyllo v. United States, 533 U.S. 27, 35-36, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.[102]

[101] See http://voices.washingtonpost.com/rawfisher/2008/06/dc_gun_ban_the_decision.html.
[102] D.C. v. Heller 554 U.S. at 582

So if the court wants modern firearms to be protected under the Second Amendment, how should the common use test be applied to newly invented weapons?

The most frustrating part of the common use test is that it doesn't measure how dangerous a society would be if a given ban remained in effect or if it was lifted.[103] What place does popularity have in determining whether a gun ban should be constitutional? Under Heller, the answer is "it has at least some weight".

The common use test is not supported under an originalist style of interpretation, and it was not included in the original meaning or understanding of the Second Amendment. It is circular, allows for arbitrary and cosmetic distinctions between firearms, and will result in differing outcomes for similar fact patterns. However, it is currently the law of the land. Why is this included in D.C. v. Heller?

There are several possible reasons. First, it could be a mistake. The authors could have wanted a one hundred percent historically accurate originalist interpretation. Maybe the court missed it.

Another possibility is that the court did not care about the history as much as they did the outcome of the case and the precedent it sets. But if this is the case, why write an originalist opinion? Was Justice Scalia simply trying to inundate the reporters with his style of interpretation? And if this is the case, why not explain why the policy outweighs the history in this particular matter?

[103] Both sides of the gun control debate can probably agree with this statement. On one side, people who want more gun control want the court to be able to determine how dangerous a weapon is to society when deciding whether to keep a ban. On the other side, people who want less gun control want a court to consider how undesirable society will become when that option for self defense (against private or governmental aggressors) is taken away, along with their liberty to possess a type of weapon.

A third possibility is strategic fallacy. If Justice Scalia wanted to write an opinion that protected firearms, save for three exceptions,[104] and if one of the other judges that was needed for a majority wanted a fourth exception,[105] what does a strategic judge do? A strategic judge would provide the strongest possible support for every part of the majority opinion, save for the part with which he or she disagreed. Perhaps, in the hopes that someday when the makeup or the disposition of the court is different the court will revisit the issue, Justice Scalia posited the shakiest argument that he thought would escape unnoticed by his colleagues. This would set the stage for a future court to examine the case, upholding three of the exceptions, striking down the fourth, and declaring, "The Supreme Court never had a good reason for this."

Conclusion

The future of firearms litigation is far from clear. So long as courts continue to use the historically inaccurate definition of "dangerous and unusual weapons" embraced in Heller, common use tests are bound to be a part of second amendment jurisprudence. A re-examination of the definition of "dangerous and unusual weapons" may result in a more historically accurate Second Amendment jurisprudence, as well as a more rational approach to firearms regulation.

[104] For example, restrictions on place, manner of use, and manner of manufacture.
[105] For example, an exception to certain classes of weapons.