



TO HELLER AND BACK: WHY MANY SECOND AMENDMENT QUESTIONS REMAIN UNANSWERED AFTER UNITED STATES V. HAYES

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THE SECOND AMENDMENT TO THE U.S. CONSTITUTION READS AS FOLLOWS: “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.”¹ THE UNIQUE PHRASING OF THE AMENDMENT HAS CAUSED SIGNIFICANT CONFUSION AMONG THE COURTS.² OVER THE YEARS, MANY COURTS HAVE ERRONEOUSLY CONCLUDED THAT THE JUSTIFICATION CLAUSE (“A WELL REGULATED MILITIA, BEING NECESSARY TO THE SECURITY OF A FREE STATE”), LIMITS THE OPERATIVE CLAUSE (“THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS, SHALL NOT BE INFRINGED.”).³

On June 26, 2008, the U.S. Supreme Court addressed this issue directly in *District of Columbia v. Heller* by stating that the justification clause does not limit the operative clause as well as by striking down the District of Columbia’s law that severely restricted firearms on the theory that the Second Amendment protects an individual right to possess firearms unrelated to militia service.⁴ Writing for the majority, Justice Scalia wrote, “There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”⁵ In his dissent, Justice Stevens agreed that the Second Amendment protects an individual right, though he disagreed on the decision to strike down the District of Columbia’s prohibition on handguns.⁶

On Feb. 24, 2009, the Court released its opinion in *United States v. Hayes*, in which the Court upheld the federal Gun Control Act of 1968⁷ and its 1996 amendment,⁸ which criminalizes the possession of firearms by persons previously convicted of misdemeanor domestic violence offenses.⁹ Although *Hayes* clearly touched on a Second Amendment issue, neither the majority opinion nor the dissenting opinions mention the amendment or the *Heller* ruling. In

Heller, the Court noted that its holding should not “cast doubt” upon laws prohibiting convicted felons from possessing firearms, but the majority opinion was silent on the issue of whether the federal government could lawfully prohibit the possession of firearms by persons convicted of misdemeanor domestic violence offenses.

The first part of this essay offers a brief examination of early attempts at incorporating the Second Amendment against the states.¹⁰ The second part addresses the confusion caused by the Supreme Court’s 1939 decision in *United States v. Miller*. This discussion is followed by a review of the Court’s opinions in *Heller* and *Hayes*. The next part argues that the *Hayes* decision cannot be squared with the individual right to keep and bear arms enunciated in *Heller*. Finally, the essay concludes with a discussion of the uncertainty of Second Amendment rights in light of the federal restrictions that were upheld in *Hayes*.

Early Attempts to Incorporate the Second Amendment

The incorporation of the Second Amendment against the states remains a difficult question. The *Heller* ruling purportedly upheld an individual right to keep and bear arms

(including handguns), but the decision said little about incorporation.¹¹ It is true that earlier Supreme Court decisions have refused to incorporate the amendment,¹² but early decisions of the Court have also refused to incorporate the other amendments, many of which are now incorporated against the states.¹³ After the *Heller* decision, the issue of incorporation has been slowly working its way through the federal courts.¹⁴

Early Supreme Court decisions plainly held that the Second Amendment was not incorporated through the Due Process Clause of the Fourteenth Amendment against the states. In a case heard in 1876, *United States v. Cruikshank*, the Court held that the Second Amendment was only a restraint on Congress and therefore individual states were free to limit the right to keep and bear arms under their police powers.¹⁵

Ten years later, in *Presser v. Illinois*, the Court upheld the conviction of Herman Presser, an unlicensed militiaman who had marched through the streets of Chicago with his company of about 400 men, armed with swords and rifles.¹⁶ Again, the Court held that the Second Amendment was a limitation only on the federal government, not on the states; therefore, the Court held, the states were free to regulate the right to keep and bear arms.¹⁷ In *Miller v. Texas*, which was heard eight years after *Presser*, the Court rejected another Second Amendment challenge, again holding that the Second Amendment is not a restraint upon the states.¹⁸ This interpretation still stands today.¹⁹

These decisions are of questionable validity. In none of these three cases did the Supreme Court undertake an analysis of the Second Amendment under the modern incorporation test, because it was not yet established. The modern incorporation test asks if the right is “fundamental to the American scheme of justice,”²⁰ or “necessary to an Anglo-American regime of ordered liberty.”²¹ The test looks to the purpose behind the right,²² the historical acceptance of the right,²³ and any trends related to state recognition of the right.²⁴

In light of the historical evidence discussed in *Heller*, the right to keep and bear arms clearly meets this incorporation standard.²⁵ However, in *Heller*, the Court was able to avoid the incorporation issue, because the suit challenged an act of the District of Columbia, which is inherently limited by the federal Constitution.²⁶ Even though the issue of incorporation appears almost certain to present itself in the future, the Court has not hinted how it would rule on such a case.

The Confusion Caused by *United States v. Miller*

The Supreme Court handed down the only decision made in the 20th century involving the Second Amendment in *United States v. Miller*, which was heard in 1939.²⁷ In *Miller*, the Court upheld a federal law prohibiting the interstate transport of unregistered short-barreled weapons.²⁸ Two defendants had been charged with transporting unregistered sawed-off shotguns across state lines.²⁹ In regard to the Second Amendment, the Court wrote the following:

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has

some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.³⁰

Even though this dictum offers little substance, *Miller* is frequently cited in support of both the collective right and the individual right to keep and bear arms under the Second Amendment.³¹ In fact, the Court adopted neither view explicitly.³²

Miller is an odd case for advocates of gun control to champion for two reasons.³³ First, the government’s brief argued that the Second Amendment refers to “the militia, a protective force of government; to the collective body and not individual rights.”³⁴ Second, the Court heard *Miller* without any participation from the opposing side.³⁵ Thus, even though the government argued in favor of the theory of collective rights without opposition, the Court nevertheless decided against adopting the government’s interpretation of collective rights. Regardless of what *Miller* may have meant in 1939, today it stands merely for the proposition that the right to keep and bear arms under the Second Amendment extends “only to certain types of weapons.”³⁶

It would be 68 years after the *Miller* decision before the Court would hear another Second Amendment challenge—this was the case of *District of Columbia v. Heller* heard in 2008. Shortly after the *Heller* ruling, the Court decided to hear another case involving federal restrictions on the right of individuals to possess firearms: the case of *United States v. Hayes*. As discussed below, the decisions made in these two cases are incongruous and only compound the perplexity of Second Amendment doctrine.

District of Columbia v. Heller

In *Heller*, the Supreme Court struck down the District of Columbia’s ban on the possession of handguns and other firearms. The decision represented the Court’s first attempt to address the scope of the right to keep and bear arms under the Second Amendment. The Court unanimously agreed that the Second Amendment conferred an individual right to keep and bear arms, but only five justices held that this individual right encompasses a right to keep arms at home for self-defense.

While the District of Columbia’s law did not expressly prohibit the possession of handguns, it prohibited both the registration of handguns and the possession of unregistered firearms.³⁷ The district’s law also required that any lawful arms be kept unloaded and disassembled or kept under a protective device such as a trigger lock. Thus, the firearm law amounted to a de facto ban on handguns.³⁸

The facts in *Heller* are not particularly interesting. Dick Heller, a police officer in the District of Columbia, had a license to carry a handgun for his job, but his application to register a handgun for self-protection in his home was denied. Heller filed suit in federal district court challenging the district’s gun laws on Second Amendment grounds. The

district court rejected the challenge and *Heller* appealed.³⁹ On appeal, the D.C. Circuit reversed the district court's ruling and held that the Second Amendment confers an individual right to possess firearms and, thus, the District of Columbia's gun laws infringed on that right.⁴⁰ In a 5-4 decision, the Supreme Court affirmed the decision.

Justice Scalia, in writing for the majority, first addressed the unique two-clause structure of the Second Amendment.⁴¹ He noted that the clause relating to militia merely announces the purpose behind the Second Amendment and therefore does not limit the right to keep and bear arms. Moreover, the majority found that the Second Amendment protects the limited possession of weapons in "common use," thus distinguishing the case from *Miller*, which involved a weapon that was not in common use (a sawed-off shotgun).⁴² The Court noted that handguns are "the most popular weapon chosen by Americans for self-defense in the home," and found, therefore, that the District of Columbia's de facto ban on their use was unconstitutional.⁴³

Without doubt, Justice Scalia's majority opinion in *Heller* tremendously aids our textual and historical understanding of the Second Amendment. The problem is that *Heller* simply presumes that the prohibition on the right to keep and bear arms by convicted felons is lawful, but the opinion does not explain why. Despite its thorough historical analysis, *Heller* leaves many questions about the right to keep and bear arms unanswered.

The most interesting aspect of the *Heller* decision is its failure to address the scope of the right of "the people" to possess firearms under the Second Amendment.⁴⁴ Although the majority opinion appears to limit the right to keep and bear arms to "law-abiding, responsible citizens,"⁴⁵ the dissent observes that there is no such limitation on the rights of the people under the First and Fourth Amendments.⁴⁶ Certainly, ex-convicts (felonious or otherwise) and irresponsible citizens do not permanently forfeit their right to be free from unreasonable searches and seizures or their freedom of speech. Yet, the majority opinion in *Heller* cavalierly dismisses these individuals' chances of gun ownership under the Second Amendment with a single sentence, which the author has dubbed "*Heller's asterisk*"⁴⁷:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁴⁸

Heller's list of exceptions to Second Amendment rights has provided lower courts with an easy way out when they are presented with constitutional challenges to criminal convictions for possession of a firearm by felons, the mentally ill, or spousal abusers.⁴⁹ Perhaps there are good reasons for denying certain persons their rights under the Second Amendment, but those reasons ought to be more

detailed than what appears in one sentence.

Moreover, much of the case law upholding federal laws criminalizing the possession of firearms by felons is based on the very constitutional theory that *Heller* abandoned: the collective rights theory. In *United States v. Haney*, for example, the U.S. Court of Appeals for the Tenth Circuit was presented with a defendant who challenged the constitutionality of his conviction for the possession of machine guns.⁵⁰ The defendant claimed that the statute under which he had been convicted violated the Commerce Clause and the Second Amendment. The Tenth Circuit, citing *Miller*, upheld the federal statute and noted that the federal statute "does not violate the Second Amendment unless it impairs the state's ability to maintain a well-regulated militia."⁵¹ Many other circuit courts have held similarly.⁵²

Ironically, the presumptively lawful "longstanding prohibitions on the possession of firearms by felons" mentioned by *Heller* were themselves based on the very constitutional arguments that the *Heller* majority purportedly dismissed—namely, that the right to keep and bear arms under the Second Amendment is necessarily connected to service in the militia. Yet *Heller* does not answer why these "longstanding prohibitions," which were based on the collective rights theory eschewed in *Heller*, remain valid. If *Heller* remains the law, then cases based on a collective rights theory of the Second Amendment certainly merit re-examination.

United States v. Hayes

Even though *Heller's* brief presence in summary decisions denying felons relief from convictions of possession of firearms is notable, it is the absence of *Heller* in other decisions that may be more unusual. In its recent decision in *United States v. Hayes*,⁵³ the U.S. Supreme Court upheld a federal law that prohibits the possession of firearms by persons previously convicted of misdemeanor domestic violence offenses.⁵⁴

What is strange is that neither the majority opinion nor the dissent saw fit to mention the *Heller* decision or the Second Amendment. Whereas the *Heller* ruling noted the aforementioned and presumptively lawful "longstanding prohibitions on the possession of firearms by felons,"⁵⁵ the majority opinion in *Heller* did not discuss the issue of whether the federal government could prohibit the possession of firearms by persons convicted of misdemeanor domestic violence.⁵⁶

Despite the recency of the *Hayes* decision, some are already criticizing the opinion for its broad interpretation of a federal criminal statute that clearly infringes on the right enunciated in *Heller*—all without a single mention of the Second Amendment or the *Heller* decision.⁵⁷ Even those who praised the *Hayes* decision found it odd that it contained no mention of *Heller* or the Second Amendment.⁵⁸ Still, the Court's opinion in *Hayes* raises a troubling issue: Can the government criminalize the otherwise lawful possession of a firearm by a person convicted of even the most minor misdemeanor?⁵⁹ The answer to this question must include a discussion of the right of the people under the Second Amendment.

The Uncertainty of Second Amendment Rights

Concern about the *Hayes* decision has already begun to be raised.⁶⁰ Granted, there may be some relation between firearms and domestic violence, as Justice Breyer noted in his dissenting opinion in *Heller*, but firearms are involved in any number of crimes ranging from suicide to drug sales.⁶¹ The forfeiture of a fundamental right protected under the Constitution cannot be based on the presumption that a person is permanently unfit to possess a firearm because that person was convicted of a crime that often involves some type of firearm.

Persons involved in certain crimes may be forever prohibited from possessing firearms if they were convicted of a crime *punishable* by more than one year in prison.⁶² This distinction is important, however, because it does not matter what sentence the person ultimately received. The simple fact that the person could have received more than a one-year sentence is enough for the federal government to prohibit any future firearm possession by that person.⁶³

After *Heller*, many defendants convicted of possession of a firearm by a felon pursuant to 18 U.S.C. § 922 (g)(1) argued that the statute runs afoul of the Second Amendment.⁶⁴ These arguments were simply answered with *Heller's* asterisk and summarily dismissed. Still, given the *Heller* opinion's reading of the Second Amendment, one wonders whether Congress really has the power to punish the purely intrastate possession of a handgun by a convicted felon.⁶⁵

As regrettable as these fleeting decisions are, they are at least partially consistent with historical and judicial precedent. However, the same cannot be said for denying firearms to persons convicted of misdemeanor offenses. Although some concern was raised in the amicus briefs in *Hayes*,⁶⁶ the Court upheld the federal statute prohibiting the possession of firearm by a defendant convicted of misdemeanor domestic violence. In doing so, the Court eroded the distinction between felonies and misdemeanors, despite the lack of tradition in American or English law of "depriving misdemeanants of civil rights or barring misdemeanants from gun possession."⁶⁷ Surely, a person could not lose their rights under the Second Amendment for merely jaywalking or littering (as one amicus brief suggested), but, after *Hayes*, such a ramification is not unimaginable.

Another problem is that the government has interpreted the domestic violence statute (18 U.S.C. § 922(g)(9)) to apply retroactively.⁶⁸ Thus, a person who pleads guilty to a misdemeanor domestic violence offense also unwittingly waives his or her fundamental right under the Second Amendment. Such a result cannot be squared with the fact that a waiver of a fundamental right must be made both knowingly and voluntarily.⁶⁹

Restrictions on the possession of firearms are not just limited to individuals who have been convicted of a crime. For example, the federal Adam Walsh Act imposes a condition for release on bail that the accused "refrain from possessing a firearm."⁷⁰ This is true even when the alleged offense, such as the passive receipt of child pornography, lacks any connection to firearms. At least one district court

has found this condition to be unconstitutional,⁷¹ but it is nevertheless demonstrative of Congress' efforts to limit the right to possess a firearm to persons other than felons and the mentally ill.

Conclusion

By itself, the *Heller* decision is of little use for persons living outside of the District of Columbia who wish to possess handguns in their homes lawfully for self-defense purposes, because the Second Amendment currently has no effect against the states. The Supreme Court has the extraordinary power to incorporate the Second Amendment and thereby extend the fundamental right of individuals to keep and bear arms to all the states. When the proper case presents itself, the Court should exercise this authority.

Moreover, federal courts should not be so quick to dismiss the right to keep and bear arms. If *Heller* does proclaim the right of an individual to possess a firearm in his or her home for the purpose of self-defense, then the courts ought to exercise caution and care when treading on this right. Certainly, a one-sentence dismissal of any fundamental right cannot comport with our system of justice. Even though we may agree that rights under the Second Amendment are not unlimited, those limits ought to be based on something more than the now-discredited theory of a collective right to keep and bear arms. As with all our constitutional rights, it will take time for the judiciary to develop protections and limits on these rights.

However, the rights contained in the Second Amendment cannot allow for individuals to lose their right to possess a firearm permanently on the sole grounds that they, as Professor Doug Berman wrote in his mock *Hayes* dissent, "may have long ago pled guilty to a misdemeanor that the state now says makes him too dangerous to retain his constitutional right to personal self-defense in the home."⁷²

However, if *Hayes* is any indication of how the Supreme Court intends to address our Second Amendment rights, it is difficult to fathom the limits of federal regulation of firearms. The government will argue that a conviction for domestic violence demonstrates a defendant's propensity for violence, yet the prohibition on firearm possession by felons is not limited to those convicted of violent felonies. Persons who plead guilty to misdemeanor crimes of violence against strangers do not lose their right to keep and bear arms. If the government can indeed permanently prohibit the possession of firearms by persons previously convicted of domestic violence, then the possession of firearms by all misdemeanants is in jeopardy. That should worry us all.

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Endnotes

¹U.S. CONST. AMEND. II.

²Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 794–796 (1998) (discussing the

unique textual structure of the Second Amendment and the narrow interpretation of the Amendment by many courts).

³*Id.*

⁴128 S. Ct. 2783 (2008).

⁵*Id.* at 2799.

⁶*Id.* at 2822 (Stevens, J., dissenting).

⁷18 U.S.C. § 921.

⁸18 U.S.C. § 922(g)(9).

⁹129 S. Ct. 1079 (2009).

¹⁰Incorporation is the process by which portions of the Bill of Rights are applied against the states via the Due Process Clause of the Fourteenth Amendment. Many scholars argue, however, that a more appropriate vehicle for incorporation would have been the Privileges or Immunities Clause. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992). Though this essay examines a federal statute, which is unaffected by incorporation altogether, a brief discussion of Second Amendment incorporation efforts provides a helpful background to the understanding of the amendment itself.

¹¹*Heller*, 128 S. Ct. at 2813, n.23. This footnote merely noted that the question of incorporation was not presented in *Heller*, because the District of Columbia is not a state.

¹²*United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894).

¹³Compare *Cruikshank*, 92 U.S. at 552–555 (refusing to incorporate both First and Second Amendment protections against the states) and *Hurtado v. California*, 110 U.S. 516 (1884) (refusing to incorporate the Fifth Amendment right to an indictment by a grand jury) with *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating the Fifth Amendment prohibition against double jeopardy against the states), *In re Oliver*, 333 U.S. 257 (1948) (incorporating the Sixth Amendment right to a public trial against the states) and *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the First Amendment right to free speech against the states).

¹⁴Compare *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009) (holding that the Second Amendment is incorporated against the states through the Fourteenth Amendment Due Process Clause), *reh'g en banc granted*, No. 07-15763 (9th Cir. July 29, 2009), with *NRA v. City of Chicago*, 567 F.3d 856, 858-860 (7th Cir. 2009) (relying on pre-incorporation cases to hold that Second Amendment is not incorporated against the states), *petition for cert. filed*, (U.S. June 3, 2009) (08-1497); *Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2nd Cir. 2009) (per curiam) (holding that the Second Amendment has no direct application on the states without resolving the incorporation issue), *petition for cert. filed*, (U.S. June 26, 2009) (08-1592).

¹⁵92 U.S. at 553. The *Heller* opinion cited *Cruikshank* as an example of the individual rights interpretation of the Second Amendment, *Heller*, 128 S. Ct. at 2812–2813.

¹⁶116 U.S. at 252.

¹⁷*Id.*

¹⁸*Miller*, 153 U.S. at 535.

¹⁹Geoffrey R. Stone et al., CONSTITUTIONAL LAW 784 (2d ed. 1991) (“The only provisions of the first eight amendments that have not been incorporated are the second and third

amendments, the fifth amendment’s requirement of grand jury indictment, and the seventh amendment.”).

²⁰*Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

²¹*Id.* at 150, n.14.

²²*Id.* at 156, n.23.

²³*Id.* at 150, n.14.

²⁴*Id.* at 150.

²⁵See *Heller*, 128 S. Ct. at 2798 (“By the time of the founding, the right to have arms had become fundamental for English subjects.”) (citations omitted); Nicole Manara, *A Process Long Overdue: Finding A Fundamental Right to Bear Arms*, 6 GEO. J.L. & PUB. POL’Y 729, 736–744 (2008) (discussing incorporation and the Second Amendment).

²⁶*Heller*, 128 S. Ct. at 2813, n.23.

²⁷307 U.S. 174 (1939); see also Volokh, *supra* note 2, at 807 (noting, pre-*Heller*, that *United States v. Miller* was the most recent Supreme Court opinion discussing the Second Amendment at length).

²⁸*Id.* at 175.

²⁹*Id.*

³⁰*Id.* at 178.

³¹Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 NYU J.L. & LIBERTY 48, 69 (2008) (“Both individual and collective rights theorists claim *Miller* adopted their position. But few Second Amendment scholars spend much time analyzing *Miller*, because few take it seriously.”).

³²*Id.* at 77 (noting that *Miller* did not explicitly adopt a collective or individual right theory of the Second Amendment).

³³*Heller*, 128 S. Ct. at 2813–2817 (criticizing Justice Stevens’ dissenting opinion for placing “overwhelming reliance” on *Miller*).

³⁴Frye, *supra* note 31, at 66 (citing Brief for the United States at 21, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696)).

³⁵Before oral argument in *Miller*, counsel for the respondents telegraphed the Court, informing the justices that his clients had not paid him to present their case before the Court and suggested that the case be submitted solely on the government’s brief; Frye, *supra* note 31, at 67 (citations omitted).

³⁶*Heller*, 128 S. Ct. at 2814 (“*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.”).

³⁷*Id.* at 2788; see also D.C. CODE ANN. § 7-2507.02 (2001).

³⁸See Comment, *District of Columbia v. Heller: The Individual Right to Bear Arms*, 122 HARV. L. REV. 139, 140 (2008) (“D.C. law prohibited citizens both from carrying unregistered firearms and from registering handguns, thereby creating a de facto blanket ban on handgun possession.”).

³⁹*Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004).

⁴⁰*Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

⁴¹*Heller*, 128 S. Ct. at 2783; see Volokh, *supra* note 2.

⁴²*Id.* at 2815–2816.

⁴³*Id.* at 2818.

⁴⁴Justice Stevens’ dissent, for example, notes that the protections afforded by the Second Amendment under

Heller are vastly different than those afforded by the other amendments; *id.* at 2827 (Stevens, J., dissenting).

⁴⁵*Id.* at 2816 (majority opinion).

⁴⁶*Id.* at 2827 (Stevens, J., dissenting).

⁴⁷Asterisks are commonly used to denote exceptions to the preceding sentence, thus confining important information to the fine print that many people subsequently ignore. See, for example, Gregory Karp, *Mouseprint Could Leave You Screaming*, CHI. TRIB., at 8 (Oct. 28, 2007) (“An ad might say, ‘Everything on sale!’ but with an asterisk, which leads to a footnote that spells out a list of items that are not on sale.”). The asterisk metaphor is used here to emphasize *Heller*’s flippant dismissal of an important constitutional issue.

⁴⁸*Heller*, 128 S. Ct. at 2816–2817 (majority opinion). This sentence is followed with a footnote stating that these restrictions are presumptively lawful and that the aforementioned list is nonexhaustive; *id.* at 2817, n.26.

⁴⁹See, for example, *United States v. Anderson*, No. 08-40160, 2009 U.S. App. LEXIS 2774, at n.5 (5th Cir. Feb. 11, 2009); *United States v. McRobie*, No. 08-4632, 2009 U.S. App. LEXIS 617, at *1 (4th Cir. Jan. 14, 2009); *United States v. Fincher*, 538 F.3d 868, 873–874 (8th Cir. 2008); *United States v. Booker*, 570 F. Supp. 2d 161, 162 (D. Me. 2008); *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1020 (E.D. Wis. 2008); see also Adam Liptak, *Few Ripples From Supreme Court Ruling on Guns*, N.Y. TIMES, at A14 (Mar. 17, 2009).

⁵⁰264 F.3d 1161 (10th Cir. 2001); see 18 U.S.C. § 922(o)(1) (“Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.”).

⁵¹*Id.* at 1165.

⁵²See, for example, *United States v. Napier*, 233 F.3d 394 (6th Cir. 2000) (holding that the Second Amendment confers a collective right to keep and bear arms having a “reasonable relationship to the preservation or efficiency of a well regulated militia”); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992); *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974).

⁵³129 S. Ct. 1079 (2009).

⁵⁴*Id.*

⁵⁵*Heller*, 128 S. Ct. at 2816–2817.

⁵⁶Justice Breyer’s dissent in *Heller* notes that handguns are often present in cases of domestic violence but does not mention § 922(g)(9) or whether those convicted of domestic violence offenses lose their Second Amendment rights; *id.* at 2864 (Breyer, J., dissenting).

⁵⁷See, for example, Posting of Douglas Berman to Sentencing Law and Policy, sentencing.typepad.com/sentencing-law-and-policy/2009/02/scotus-undercuts-constitutional-gun-rights-without-even-mentioning-heller-or-second-amendment.html (Feb. 24, 2009).

⁵⁸Editorial, *Gun Sense and Nonsense*, N.Y. TIMES, at A22 (Feb. 28, 2009) (“It is notable that not even the two dissenters in the [*Hayes*] case—Chief Justice John Roberts and Justice Antonin Scalia—asserted that depriving domestic

abusers of guns raises a Second Amendment issue.”).

⁵⁹See, for example, Posting of Douglas Berman to Sentencing Law and Policy, sentencing.typepad.com/sentencing-law-and-policy/2009/02/given-hayes-can-jurisdictions-criminalize-gun-possession-by-any-misdemeanant.html (Feb. 25, 2009).

⁶⁰Recently, Gov. Dave Freudenthal of Wyoming signed into law a bill allowing residents convicted of domestic violence to petition the courts, after a five-year wait, to expunge their record and regain their right to possess firearms; see H.B. 106, 60th Leg., Gen. Sess. (Wyo. 2009).

⁶¹*Heller*, 128 S. Ct. at 2864 (Breyer, J., dissenting); *Bailey v. United States*, 516 U.S. 137 (1995).

⁶²18 U.S.C. § 922(g)(1).

⁶³This is true even if the person’s sentence was reduced to probation; *United States v. Williams*, 442 F.3d 1259 (10th Cir. 2006).

⁶⁴See *United States v. Anderson*, 559 F.3d 348 (5th Cir. 2009); *United States v. Frazier*, No. 07-6135, 2008 U.S. App. LEXIS 24023 (6th Cir. Nov. 19, 2008); *United States v. Brunson*, 292 Fed. Appx. 259 (4th Cir. 2008); *United States v. Irish*, 285 Fed. Appx. 326 (8th Cir. 2008).

⁶⁵See Sanford Levinson, *Second Amendment Symposium: Is the Second Amendment Finally Becoming Recognized as Part of the Constitution?*, 1998 B.Y.U.L. REV. 127, 130 (“If, however, the Second Amendment is read to confer a personal right to ‘keep and bear arms,’ a colorable argument exists that the Federal Government’s regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment’s protections.”).

⁶⁶Brief for Eagle Forum Education and Legal Defense Fund as Amicus Curiae at 2–3 (“While the Court in *Heller* suggested that prohibiting gun ownership by felons may be constitutional given its sound footing in our nation’s tradition and history, prohibiting gun ownership for misdemeanors is another matter.”); see also Brief for Second Amendment Foundation as Amicus Curiae at 4 (“Like other enumerated fundamental rights, Second Amendment rights may be relinquished only upon a voluntary, knowing, and intelligent waiver.”).

⁶⁷Congressional Research Service, *Gun Ban for Persons Convicted of Misdemeanor Crime of Domestic Violence: Ex Post Facto Clause and Other Constitutional Issues* 5 (Dec. 30, 1996).

⁶⁸63 FED. REG. 35,521 (June 30, 1998).

⁶⁹*Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

⁷⁰See 18 U.S.C. § 3142(c)(1)(B)(viii).

⁷¹See *United States v. Arzberger*, 592 F. Supp. 2d 590 (S.D.N.Y. 2008) (finding a condition for release on bail unconstitutional because it required the accused to surrender his Second Amendment right to possess a firearm).

⁷²Posting of Douglas Berman to Sentencing Law and Policy, sentencing.typepad.com/sentencing-law-and-policy/2009/02/even-the-chief-and-justice-scalia-content-to-damning-gun-possession-with-faint-praise.html (Feb. 24, 2009).