

REGULATING ARMED PRIVATE MILITIA GATHERINGS: A  
CONSTITUTIONAL STATE-LEVEL PROPOSAL TO PROMOTE  
PUBLIC SAFETY IN A POST-*HELLER* WORLD

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## INTRODUCTION

“Yesterday, in my view, was one of the darkest days in the history of our nation.”<sup>1</sup> President Joseph R. Biden spoke these words following the January 6, 2021 riots at the U.S. Capitol Building that left five people, including a police officer, dead.<sup>2</sup> The mob that stormed the Capitol sought to prevent Congress from certifying then-President-elect Biden’s Electoral College victory.<sup>3</sup> In the weeks following the riot, investigators began arresting rioters associated with extremist right-wing militia groups, such as the Oath Keepers and Three Percenters.<sup>4</sup> While January 6, 2021, can accurately be labeled a dark day in American history, the events that unfolded did not necessarily surprise those familiar with the activity of extremist private militia groups in the preceding months.

On October 8, 2020, federal agents arrested seven members of the Wolverine Watchmen militia who plotted to kidnap Michigan Governor Gretchen Whitmer.<sup>5</sup> One week earlier, in front of a national audience, then-President Donald Trump told the Proud Boys, a far-right extremist group, to “stand back and stand by.”<sup>6</sup> In August 2020, seventeen-year-old Kyle Rittenhouse killed two protestors in Kenosha, Wisconsin, where armed militia groups sought to assume security functions during protests for racial justice.<sup>7</sup> Although these

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1. *Joe Biden: Capitol Riots Were ‘Darkest Day’ in US History*, BBC NEWS (Jan. 7, 2021), <https://www.bbc.com/news/av/world-us-canada-55582016> [<https://perma.cc/T6PS-2U5U>].

2. *See id.*; Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html> [<https://perma.cc/MV9M-EF9L>].

3. Adam Goldman, Katie Benner & Alan Feuer, *Investigators Eye Right-Wing Militias at Capitol Riot*, N.Y. TIMES (Jan. 24, 2021), <https://www.nytimes.com/2021/01/18/us/politics/capitol-riot-militias.html> [<https://perma.cc/BLJ2-ZGFD>].

4. *Id.*

5. Frank Witsil, *Expert: Michigan ‘A Hotbed for Militia Activity,’ with Growing Potential for Violence*, DETROIT FREE PRESS (Oct. 8, 2020, 9:16 PM), <https://www.freep.com/story/news/local/michigan/2020/10/08/michigan-militia-wolverine-watchmen-gretchen-whitmer/5924615002/> [<https://perma.cc/92L7-JMRP>].

6. Rachael Levy & Erin Ailworth, *Who Are the Proud Boys? Canada Names Far-Right Group a Terrorist Organization*, WALL ST. J. (Feb. 5, 2021, 5:02 PM), <https://www.wsj.com/articles/who-are-proud-boys-11601485755?tesla=y> [<https://perma.cc/4ZY5-NJXG>].

7. David Shortell, Christina Carrega & Josh Campbell, *Vigilante Group Activity on the Rise, Worrying Law Enforcement and Watchdog Groups*, CNN (Aug. 30, 2020, 2:22 PM), <https://www.cnn.com/2020/08/30/politics/vigilante-group-activity-kenosha/index.html> [<https://perma.cc/4ZY5-NJXG>].

incidents differ, they all highlight a troubling reality: the increased presence of armed private militia groups in public spaces.<sup>8</sup>

While elements of private militias have existed since America's colonial period, the modern militia movement traces its roots to the 1990s.<sup>9</sup> The movement, which is generally "anti-government and radically pro-Second Amendment," quieted in the early 2000s, but has undergone a resurgence in recent years.<sup>10</sup> Groups vary greatly in ideology and activity, but three recent trends have emerged. First, many groups have shifted from a strict anti-government stance to open support for right-wing politicians.<sup>11</sup> Second, militia members have been emboldened by tacit support from politicians and law enforcement, as demonstrated by the Proud Boys' positive reaction to then-President Trump's comments.<sup>12</sup> Third, armed groups recently have appeared more regularly at peaceful protests, particularly those dedicated to racial justice.<sup>13</sup> As one analyst noted, the militia movement has "normaliz[ed] the idea that vigilante justice is not just justifiable but is necessary."<sup>14</sup>

As demonstrated in Kenosha, as well as in Charlottesville, Virginia, three years earlier, the presence of armed private militias in public spaces can have deadly consequences.<sup>15</sup> Of course, those who go so far as to enact violence, fire a weapon, or take a life can be prosecuted under various laws.<sup>16</sup> However, all fifty states have at least one additional statutory or constitutional provision that they could use to regulate armed private militias.<sup>17</sup> For example, some

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perma.cc/BPF5-AK8V].

8. *See id.*; Witsil, *supra* note 5.

9. *See* Michael J. Golden, *The Dormant Second Amendment: Exploring the Rise, Fall, and Potential Resurrection of Independent State Militias*, 21 WM. & MARY BILL RTS. J. 1021, 1030-31 (2013); Claire Hansen, *The Problem with Militias and the Constitution*, U.S. NEWS (Sept. 22, 2020), <https://www.usnews.com/news/national-news/articles/2020-09-22/the-problem-with-militias-and-the-constitution> [<https://perma.cc/D7VN-DKCH>].

10. Hansen, *supra* note 9.

11. *See id.*

12. *See* Levy & Ailworth, *supra* note 6.

13. *See* Shortell et al., *supra* note 7.

14. *Id.*

15. *See id.*

16. *See, e.g.*, VA. CODE ANN. § 18.2-280 (2021) (state statute proscribing willful discharge of a firearm).

17. *See* INST. FOR CONST. ADVOC. & PROT., PROHIBITING PRIVATE ARMIES AT PUBLIC RALLIES: A CATALOG OF RELEVANT STATE CONSTITUTIONAL AND STATUTORY PROVISIONS 1 (3d ed. 2020), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibit>

states criminalize paramilitary activity, such as instructing others to use firearms or explosives knowing the weapons “will be unlawfully used in furtherance of a civil disorder.”<sup>18</sup> Other laws regulate gatherings of armed militia groups.<sup>19</sup> States have failed to effectively use these provisions, likely due in part to a lack of precedent, a lack of political will, and the limited penalties associated with a conviction.<sup>20</sup>

Private militias have contested that these anti-militia laws are unconstitutional. It is likely not merely coincidental that the resurgence of the private militia movement has overlapped with the recent increase in Second Amendment jurisprudence.<sup>21</sup> In 2008, in the foundational case *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm for lawful purposes, such as protection in the home.<sup>22</sup> Two years later, the Court incorporated the Second Amendment right to bear arms to apply its protection to the states.<sup>23</sup>

Nevertheless, over the past decade, lower courts have repeatedly upheld gun safety restrictions as constitutional public safety measures.<sup>24</sup> In fact, Virginia utilized its anti-militia laws in a successful suit that banned some groups from armed public gatherings in Charlottesville following 2017’s violent “Unite the Right” rally.<sup>25</sup> While laws preventing private militias from carrying firearms in public may raise Second Amendment concerns, their application is

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ing-Private-Armies-at-Public-Rallies.pdf [https://perma.cc/J5WM-RQNN] [hereinafter PROHIBITING PRIVATE ARMIES].

18. *E.g.*, COLO. REV. STAT. § 18-9-120(2) (2021).

19. *See, e.g.*, ALA. CODE § 31-2-125 (2021).

20. *See* Alex Yablon, *How to Neutralize a Militia*, SLATE (Dec. 9, 2019, 7:34 PM), <https://slate.com/news-and-politics/2019/12/paramilitary-groups-anti-private-army-laws.html> [https://perma.cc/EE7H-MV3M].

21. *See* Hansen, *supra* note 9 (discussing gun lobbyists’ arguments that the Second Amendment protects private militia activity).

22. 554 U.S. 570, 628-29 (2008).

23. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

24. *See* Eric Tirschwell & Mark Frassetto, *What the 2020 Supreme Court Term Means for US Gun Laws*, NAT’L L.J. (July 20, 2020, 3:15 PM), <https://www.law.com/nationallawjournal/2020/07/20/what-the-2020-supreme-court-term-means-for-us-gun-laws/> [https://perma.cc/LEF7-XYUX].

25. PROHIBITING PRIVATE ARMIES, *supra* note 17, at 1.

consistent with the courts' understanding of the Amendment's outer limits.<sup>26</sup>

This Note argues that state laws that regulate private militia groups are constitutional and not violative of the Second Amendment. To supplement this argument, this Note proposes that all states should adopt the same standard to consistently regulate armed militia gatherings in public spaces. This standard, modeled on Alabama's statute regulating unauthorized military organizations, would cover a variety of armed groups gathering at protests, rallies, and public events.<sup>27</sup> Additionally, this proposed law would increase penalties for those convicted to enhance deterrence and give the law more bite.<sup>28</sup> The application of this standard across all fifty states could de-escalate tensions, prevent violence, and save lives.

To begin its analysis of laws regulating armed groups, this Note must first define what constitutes a "private militia," a term that has taken on new meaning in recent years.<sup>29</sup> Part I defines the term and examines key differences between unofficial private militias and state-sanctioned forces. Part I also traces the origins of militia groups in America, from their colonial roots through the present day, exploring some of the key features animating the modern movement. Part II examines recent Second Amendment jurisprudence to analyze some of the theories that private militias draw on in arguing for their right to gather in public while armed.

Part III describes the existing provisions used to regulate armed groups and examines their constitutionality under the Second Amendment. Part IV then details this Note's proposed standard, addressing practical challenges of implementation and responding to anticipated counterarguments. Finally, a brief conclusion summarizes this Note's argument and reexamines the current landscape

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26. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) ("[A] lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home.").

27. See ALA. CODE § 31-2-125 (2021).

28. Cf. Sara Rathod, *Why the Law Turns a Blind Eye to Militias*, MOTHER JONES (Oct. 25, 2016), <https://www.motherjones.com/politics/2016/10/paramilitary-militia-laws-training/> [<https://perma.cc/A9FT-CT57>] ("[A]nti-paramilitary laws are often ignored because they have few teeth.").

29. See Hansen, *supra* note 9.

for private militia groups. States have the tools at their disposal to limit the negative influence of armed private militias. These laws are constitutional, and states can, and should, use them to protect communities.

## I. DEFINING “PRIVATE MILITIAS” AND TRACING THEIR ORIGINS

One of the challenges of regulating armed private militia groups is the lack of clarity regarding what constitutes a “private militia.” No two groups are identical.<sup>30</sup> However, regardless of the terminology used, private armed groups share common characteristics, often utilizing similar themes and theories to support their actions.<sup>31</sup> Private militias also trace their origins to a common colonial heritage.<sup>32</sup> The concept of “the militia” changed significantly over time, taking on a federal character in the nineteenth and twentieth centuries.<sup>33</sup> Nevertheless, by the late twentieth century, armed private militia groups were appearing across the country.<sup>34</sup> Section A seeks to set out a workable definition of “private militia,” while Section B tracks the development of the militia movement from colonial forces fighting against British tyranny to today’s modern vigilante extremists. Section B concludes by examining the recent increased presence of armed groups in public spaces.

### A. *What Is a “Private Militia?”: Choosing a Workable Definition*

Before applying “anti-militia” provisions, states must first define which groups fall under the laws’ prohibition. This task is easier said than done, as evidenced by the variety of terms used to refer to armed actors. Different groups have been labeled, or self-identify, as “vigilante[s],”<sup>35</sup> “paramilitary groups,”<sup>36</sup> “antigovernment

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30. Compare Witsil, *supra* note 5 (describing the Michigan Wolverine Watchmen militia group), with Hansen, *supra* note 9 (describing the Three Percenters and Oath Keepers militia groups).

31. See Hansen, *supra* note 9.

32. See Golden, *supra* note 9, at 1030-31.

33. See *id.* at 1032-37.

34. See Hansen, *supra* note 9.

35. Shortell et al., *supra* note 7.

36. Yablon, *supra* note 20.

groups,”<sup>37</sup> “citizen militias,”<sup>38</sup> and “neomilitias.”<sup>39</sup> Some are also characterized as “hate groups”<sup>40</sup> or “far-right” extremists<sup>41</sup> by experts and media commentators.

According to *Merriam-Webster*, a militia is “a part of the organized armed forces of a country liable to call only in emergency” or “a body of citizens organized for military service.”<sup>42</sup> Using these definitions, most Americans might interpret the militia as state-sponsored forces, such as the National Guard.<sup>43</sup> In *District of Columbia v. Heller*, much of Justice Scalia’s analysis focused on how the Second Amendment’s “well regulated Militia” language should be interpreted.<sup>44</sup> Rather than restrict the term to the “organized militia,” Justice Scalia interpreted “militia” to include “all able-bodied men.”<sup>45</sup> This definition was essential to the Court’s holding that the Second Amendment includes an individual right to bear arms for lawful purposes, regardless of affiliation with a formal militia.<sup>46</sup> Thus, while the dictionary definition of “militia” may be limited to official forces, the legal definition includes any able-bodied individual.

Private militia members have seized on the *Heller* holding to argue for their right to bear arms in public.<sup>47</sup> Interestingly, *Merriam-Webster* includes another definition for “militia”: “a private group of armed individuals that operates as a paramilitary force and is typically motivated by a political or religious ideology.”<sup>48</sup> This

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37. *Antigovernment Movement*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/antigovernment> [<https://perma.cc/BD7D-6D2G>].

38. R.J. Larizza, Comment, *Paranoia, Patriotism, and the Citizen Militia Movement: Constitutional Right or Criminal Conduct?*, 47 *MERCER L. REV.* 581, 582-83 (1996).

39. Brannon P. Denning & Glenn Harlan Reynolds, *It Takes a Militia: A Communitarian Case for Compulsory Arms Bearing*, 5 *WM. & MARY BILL RTS. J.* 185, 187-89 (1996).

40. Rathod, *supra* note 28.

41. Levy & Ailworth, *supra* note 6.

42. *Militia*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/militia> [<https://perma.cc/4ULX-5WVU>].

43. See JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 22-23 (2018) (discussing the federalization of state militias under the National Guard).

44. 554 U.S. 570, 595-97 (2008).

45. *Id.* at 596.

46. See *id.* at 628-29. For further analysis of the Court’s holding and Justice Scalia’s reasoning in *Heller*, see *infra* Part II.A.

47. See *infra* Parts I.B, II.C.

48. *Militia*, *supra* note 42.



definition could accurately be used to describe many modern groups. However, because this Note analyzes and advocates for state anti-militia laws, it will adopt the legal language used in existing state provisions. For the purposes of this Note, a private militia is “[a]ny two or more persons, whether with or without uniform, who associate, assemble, or congregate together by or under any name in a military capacity ... or otherwise take up or bear arms in any such capacity without authority of the Governor.”<sup>49</sup> As discussed below, this definition encompasses various groups, providing states wide latitude to regulate armed actors.<sup>50</sup> Ultimately, it is not a group’s ideology or beliefs that are cause for concern; rather, the proliferation of dangerous weapons, the escalation of tensions, and the potential for violence in public spaces demand regulation.<sup>51</sup>

### *B. How Did We Get Here?: The Origins of Modern Private Militias*

Militia groups can trace their origins back to the English common law. Prior to the 1600s, “criminal justice was reliant upon the private citizen.”<sup>52</sup> In the seventeenth and eighteenth centuries, citizens began to organize and operate as “thief-catchers” and community watch groups.<sup>53</sup> Eventually, militias formed to serve as a check on the monarchy.<sup>54</sup> British citizens perceived militia membership as a fundamental individual right.<sup>55</sup> This important conception crossed the Atlantic, and colonists would later advocate the militia’s anti-tyranny purpose in their fight for independence.<sup>56</sup> Prior to the Constitution, militias flexibly served the needs of their communities.<sup>57</sup>

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49. ALA. CODE § 31-2-125 (2021).

50. See *infra* Part IV.

51. See Shortell et al., *supra* note 7.

52. See Jessica Conaway, Comment, *Reversion Back to a State of Nature in the United States Southern Borderlands: A Look at Potential Causes of Action to Curb Vigilante Activity on the United States/Mexico Border*, 56 MERCER L. REV. 1419, 1430-31 (2005).

53. *Id.* at 1431.

54. Joelle E. Polesky, Comment, *The Rise of Private Militia: A First and Second Amendment Analysis of the Right to Organize and the Right to Train*, 144 U. PA. L. REV. 1593, 1597 (1996).

55. *Id.* at 1598.

56. See *id.*

57. Golden, *supra* note 9, at 1030-31.

However, as the new nation moved into the nineteenth century, the militia became more formalized and structured. As cities and populations expanded, “public law enforcement was born.”<sup>58</sup> The First Militia Act of 1792 enumerated federal authority to call state militia forces.<sup>59</sup> Later, the First Dick Act of 1903 and the Second Dick Act of 1908 created the federal “organized militia”—the National Guard—and allowed the President to determine the length and location of militia service, respectively.<sup>60</sup> The National Defense Act of 1916 then gave the national government “near complete control of state militias.”<sup>61</sup> Today, for the most part, official militia service is co-opted, run, and regulated at the federal level.<sup>62</sup>

While the official militia became increasingly federalized throughout the nineteenth and twentieth centuries, private actors continued to take the law into their own hands. Citizen’s arrest laws have allowed private actors to arrest those who have committed a crime when police are not present.<sup>63</sup> Hate groups, most notably the Ku Klux Klan, took the law into their own hands in forming lynch mobs to carry out extrajudicial killings or threaten violence against minority groups.<sup>64</sup> Even the Black Panthers might be considered a private militia, as the group openly advocated for carrying arms for collective self-defense.<sup>65</sup>

“[T]he modern militia movement” rose to national prominence in the 1990s following “government standoffs [with armed groups] at Ruby Ridge, Idaho, and Waco, Texas.”<sup>66</sup> This anti-government strain appeared to wane during the George W. Bush administration, but rapidly increased during President Barack Obama’s two terms, with the Southern Poverty Law Center identifying at least 1,360

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58. Conaway, *supra* note 52, at 1431.

59. Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264, 264.

60. Act of Jan. 21, 1903, ch. 196, § 1, 32 Stat. 775, 775; Act of May 27, 1908, ch. 204, § 4, 35 Stat. 399, 400.

61. Golden, *supra* note 9, at 1035-36; National Defense Act, ch. 134, 39 Stat. 166 (1916).

62. See Golden, *supra* note 9, at 1037.

63. See Frances Robles, *The Citizen’s Arrest Law Cited in Arbery’s Killing Dates Back to the Civil War*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/article/ahmaud-arbery-citizen-arrest-law-georgia.html> [<https://perma.cc/C89Y-VCP6>].

64. See, e.g., *Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 206-07 (S.D. Tex. 1982).

65. See Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 181 (2018).

66. See Hansen, *supra* note 9.

“anti-government Patriot” groups in 2012 alone.<sup>67</sup> Many analysts view the election of Donald Trump as a turning point for several militia groups.<sup>68</sup> Rather than maintaining a strict anti-government stance, many armed groups began to identify with fringe right-wing politicians.<sup>69</sup> While private militias differ greatly in their makeup and beliefs, the overlap between some vocal groups and nationalist, extremist, or white supremacist views raises alarms.<sup>70</sup>

The greatest threat posed by private militias occurs when they appear armed at public gatherings.<sup>71</sup> When armed—mostly white—groups appear for “protection” and “self-defense” at protests for racial justice, escalated tensions and violence often follow.<sup>72</sup> Arguing that they are protecting property and local communities, private militias have used theories of self-defense, as well as favorable “stand your ground” and citizen’s arrest laws, to justify carrying assault rifles and other weapons.<sup>73</sup> Framing their actions as self-defense or defense of others, these armed actors sometimes take the law into their own hands with tragic results, as highlighted by the killings in Kenosha.<sup>74</sup> Although private militias can vary greatly in their views and activity levels, all groups, to some degree, cite the Second Amendment as providing them with a right to bear arms in public.<sup>75</sup> Thus, prior to analyzing the laws currently used to regulate private militias, it is critical to examine Second Amendment jurisprudence to understand the theories underpinning these groups’ interpretations of their right to bear arms.

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67. *Active ‘Patriot’ Groups in the United States in 2012*, S. POVERTY L. CTR. (Mar. 1, 2013), <https://www.splcenter.org/fighting-hate/intelligence-report/2013/active-%E2%80%98patriot%E2%80%99-groups-united-states-2012> [<https://perma.cc/T485-Z2DC>]; see also Hansen, *supra* note 9.

68. See Hansen, *supra* note 9.

69. See *id.*

70. See *id.*

71. See Shortell et al., *supra* note 7.

72. See *id.*; see also Mara Hvistendahl & Alleen Brown, *Armed Vigilantes Antagonizing Protesters Have Received a Warm Reception from Police*, THE INTERCEPT (June 19, 2020, 1:55 PM), <https://theintercept.com/2020/06/19/militia-vigilantes-police-brutality-protests/> [<https://perma.cc/X3MK-WEQ9>] (noting “nearly 200 appearances by vigilantes and far-right extremists at protests” for racial justice in the weeks following George Floyd’s death).

73. See, e.g., Shortell et al., *supra* note 7. While an analysis of “stand your ground” and citizen’s arrest laws is beyond the scope of this Note, it is worth pointing out the theoretical overlap between these laws and private militias’ justifications for arming themselves.

74. See *id.*

75. See Hansen, *supra* note 9.

## II. ROOTING THE SECOND AMENDMENT IN HISTORY AND THEORY

In *District of Columbia v. Heller*, the Supreme Court fundamentally altered conceptions of the Second Amendment. Prior to *Heller*, the dominant reading of the Amendment limited the right to bear arms to people associated with the militia.<sup>76</sup> This view “prevailed for more than two centuries,” with nearly all challenges to the Amendment dismissed because the claimant had no connection to the formal militia.<sup>77</sup> However, in *Heller* the Court interpreted the right to bear arms as a fundamental individual right.<sup>78</sup> Nevertheless, courts received little guidance from *Heller* regarding the scope of this individual right.<sup>79</sup> Since *Heller*, gun rights activists, including private militias, have used *Heller*’s interpretation to call for the repeal of gun control laws.<sup>80</sup> Courts have been reluctant to expand the right beyond *Heller*, with the Supreme Court also denying challenges to gun safety measures.<sup>81</sup>

Section A discusses the Court’s reasoning in *Heller*, with a focus on the historical and textual analysis undertaken by Justice Scalia. Section B examines several post-*Heller* cases to explore how most courts have interpreted and applied the Second Amendment’s individual right to bear arms. Finally, Section C analyzes theories of the Second Amendment that private militia groups have drawn upon to justify their actions.

### A. *District of Columbia v. Heller: Defining the Individual Right to Keep and Bear Arms*

In *Heller*, the respondent was a special police officer who was denied a license to register a handgun that he wished to keep in his home.<sup>82</sup> *Heller* brought suit against the District of Columbia, challenging the constitutionality of the District’s prohibition on

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76. See BLOCHER & MILLER, *supra* note 43, at 59.

77. *Id.*

78. See *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008).

79. See BLOCHER & MILLER, *supra* note 43, at 61.

80. See Tirschwell & Frassetto, *supra* note 24.

81. See *id.*

82. 554 U.S. at 575.

registering handguns.<sup>83</sup> The Supreme Court granted certiorari after the Court of Appeals for the District of Columbia Circuit reversed the district court's dismissal of Heller's complaint.<sup>84</sup> Utilizing an originalist approach, Justice Scalia focused on the text and history of the Second Amendment in authoring the majority opinion.<sup>85</sup>

Justice Scalia began his analysis of the Amendment's text by examining its two clauses: (1) the prefatory clause, the portion reading, "[a] well-regulated Militia, being necessary to the security of a free State"; and (2) the operative clause, which states, "the right of the people to keep and bear Arms, shall not be infringed."<sup>86</sup> The prefatory clause, while "clarifying," did not "limit or expand the scope of the operative clause."<sup>87</sup> Thus, Justice Scalia emphasized that, while the drafters viewed the militia as worthy of protection, an *individual* right to keep and bear arms lies at the core of the Amendment.<sup>88</sup> Analogizing to similar language in other Amendments, Justice Scalia interpreted "the people" to "unambiguously refer to individual rights."<sup>89</sup> Additionally, relying on historical records, commentary, and textual analysis, the opinion took the phrase "to keep and bear arms" to mean simply to possess and carry weapons "in common use" and the word "militia" to mean "all able-bodied men."<sup>90</sup> Finally, the "free State" language did not mean the individual American states, but rather any "free polity" or society.<sup>91</sup>

Having conducted a textual and historical analysis of the Amendment, the Court held the ban on handgun registration to be an unconstitutional violation of the individual right to bear arms.<sup>92</sup> A few takeaways from the Court's opinion are noteworthy. First, the Court held that the Second Amendment protects possession of a firearm for a "lawful purpose," such as self-defense in one's home.<sup>93</sup> This language—as well as what the Court did not say about the

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83. *Id.* at 575-76.

84. *Id.* at 576.

85. *See generally id.* at 576-628.

86. *Id.* at 576-78.

87. *Id.* at 578.

88. *Id.* at 595.

89. *Id.* at 579.

90. *Id.* at 596, 622, 627.

91. *Id.* at 597.

92. *Id.* at 628-29.

93. *Id.*

scope of the right beyond the home—would prove significant to post-*Heller* analysis and theories advocated by private militias.<sup>94</sup> Second, while this specific law did not pass constitutional muster, Justice Scalia recognized that gun regulation is allowed, noting some examples, such as restrictions on possession by felons and the mentally ill or limits on carrying weapons in “sensitive places.”<sup>95</sup> Finally, although *Heller* clarified Second Amendment protection for an individual right to keep and bear arms, the opinion left many questions unanswered for future cases.<sup>96</sup> Some of these questions have arisen in subsequent litigation, with many yet to be answered as *Heller* transitions into its second decade.<sup>97</sup>

The *Heller* dissents help to fill out the larger debate surrounding the Second Amendment. In his dissent, Justice Stevens, joined by Justices Breyer, Ginsburg, and Souter, also used history and text to argue that the Amendment’s scope should be limited to “certain military purposes.”<sup>98</sup> Justice Breyer, joined by Justices Stevens, Ginsburg, and Souter, argued in his dissent that the individual right to bear arms must be balanced against public interests.<sup>99</sup> Furthermore, Justice Breyer argued for deference to the political branches, criticizing the Court for engaging in judicial overreach.<sup>100</sup> Taken together, the *Heller* majority and dissents recognized that the right to bear arms does not prevent regulation.<sup>101</sup> As the next Section addresses, where the line should be drawn on restrictions remained to be answered in subsequent litigation and debated among experts and activists.

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94. See *infra* Part II.B-C.

95. *Heller*, 554 U.S. at 626-27.

96. See BLOCHER & MILLER, *supra* note 43, at 77.

97. *Id.* at 90.

98. *Heller*, 554 U.S. at 637 (Stevens, J., dissenting) (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

99. *Id.* at 689 (Breyer, J., dissenting).

100. *Id.* at 719; see also BLOCHER & MILLER, *supra* note 43, at 81.

101. See BLOCHER & MILLER, *supra* note 43, at 73.

B. “A Vast Terra Incognita”: *The Scope of the Second Amendment After Heller*

Following *Heller*, judges were left with a “vast *terra incognita*,” uncertain how far to venture into uncharted territory.<sup>102</sup> Although *Heller* clarified that the Second Amendment protects an individual right to bear arms, the Court’s holding did little to explain what that right encompasses.<sup>103</sup> In his *Heller* dissent, Justice Stevens wrote, “that the Second Amendment protects an individual right does not tell us anything about the scope of that right.”<sup>104</sup> Left with minimal guidance, lower courts have been forced to determine whether the Amendment applies to a given challenge and, if so, what level of scrutiny is proper.

In 2010, the Supreme Court issued some minor guidance in *McDonald v. City of Chicago*, holding that the individual right to bear arms applied equally to the states and federal government.<sup>105</sup> In that case, Otis McDonald challenged a Chicago ordinance that “effectively bann[ed] handgun possession by almost all private citizens.”<sup>106</sup> The Court held that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment, thereby protecting an individual’s right to bear arms for lawful purposes.<sup>107</sup> In its holding, the Court noted that *Heller* protected the right to bear handguns “in the home for the purpose of self-defense.”<sup>108</sup> Thus, although *McDonald* extended the right to the states, the holding did little to clarify the scope of that right beyond in-home defense.<sup>109</sup>

*Heller* and *McDonald* left important questions unanswered.<sup>110</sup> What kinds of weapons are protected? Under what circumstances? *United States v. Masciandaro* was among the first of over one thousand Second Amendment challenges that flooded the courts

102. *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

103. See BLOCHER & MILLER, *supra* note 43, at 102.

104. *Heller*, 554 U.S. at 636 (Stevens, J., dissenting).

105. 561 U.S. 742, 791 (2010).

106. *Id.* at 750.

107. *Id.* at 791.

108. *Id.*

109. See BLOCHER & MILLER, *supra* note 43, at 97.

110. *Id.* at 101.

post-*Heller*.<sup>111</sup> In that case, Sean Masciandaro was arrested when he was found in possession of a handgun after falling asleep in his car at Daingerfield Island near Alexandria, Virginia.<sup>112</sup> The area was operated by the National Park Service, which banned carrying handguns in a vehicle on park land.<sup>113</sup> According to the Fourth Circuit, Masciandaro's challenge of the regulation fell short, since the government could demonstrate that the restriction was "reasonably adapted to a substantial government interest"—public safety.<sup>114</sup> Crucially, the court noted that while strict scrutiny is "important to protect the core right of the self-defense of a law-abiding citizen in his home," a lesser standard of scrutiny can apply to the right outside of the home.<sup>115</sup> Thus, even if Masciandaro's possession was covered by the Second Amendment, the government could still ban carrying guns in the park if it could show the law was tailored to a substantial interest.<sup>116</sup>

Another Fourth Circuit case, *Kolbe v. Hogan*, highlights the developing post-*Heller* Second Amendment analysis.<sup>117</sup> In that case, the plaintiffs challenged Maryland's prohibitions on assault weapons and large-capacity magazines.<sup>118</sup> Relying on the "M-16 rifles and the like" language in *Heller*,<sup>119</sup> the Fourth Circuit held that, regardless of their popularity, assault weapons are "most useful in military service" and therefore not protected by the Second Amendment.<sup>120</sup> As it did in *Masciandaro*, the Fourth Circuit noted that its holding did not alter *Heller's* protection of the right to lawfully possess a handgun in the home for self-defense.<sup>121</sup> However, even if assault weapons and large-capacity magazines were considered part of the protected Second Amendment right, Maryland's prohibitions

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111. *Id.* at 101.

112. *United States v. Masciandaro*, 638 F.3d 458, 460 (4th Cir. 2011).

113. *Id.* (citing 36 C.F.R. § 2.4(b) (2009)).

114. *Id.* at 471.

115. *Id.*

116. *See* BLOCHER & MILLER, *supra* note 43, at 108-09.

117. *See* 849 F.3d 114, 120-21 (4th Cir. 2017).

118. *Id.* at 120.

119. 554 U.S. 570, 627 (2008).

120. *Kolbe*, 849 F.3d at 144.

121. *Id.*



would survive intermediate scrutiny due to the government's substantial interest in public safety.<sup>122</sup>

Left with little guidance and many unanswered questions from *Heller*, lower courts have been reluctant to expand the scope of the Second Amendment's individual right to keep and bear arms. The federal circuits have largely adopted the two-part approach applied in *Masciandaro* and *Kolbe*.<sup>123</sup> First, courts must determine whether the law burdens conduct covered by the Second Amendment.<sup>124</sup> This analysis begins with the uncovered categories enumerated in *Heller*—possession by felons or the mentally ill, possession in sensitive places, and arms not in “common use” or not “typically possessed by law-abiding citizens.”<sup>125</sup> Courts also draw on “precedent, history, and tradition” to determine whether conduct is covered.<sup>126</sup> Second, if the law indeed burdens covered conduct, courts must then apply the appropriate level of judicial scrutiny—intermediate scrutiny for non-core conduct and strict scrutiny for core exercises.<sup>127</sup> As exhibited by *Heller*, possession of a handgun for self-defense in the home is a core exercise, requiring strict scrutiny.<sup>128</sup> In contrast, in both *Kolbe* and *Masciandaro*, the Fourth Circuit held that the respective laws were reasonably adapted to the substantial government interest in public safety, thereby satisfying the lower standard of intermediate scrutiny.<sup>129</sup>

Despite the countless Second Amendment challenges raised in the decade following *Heller*, little has changed in terms of the scope of the individual right to bear arms. Courts have widely adopted the two-part approach, with intermediate scrutiny applied “[f]requently, although not universally,” in determining that laws are substantially related to important government interests, namely public safety.<sup>130</sup> A minority of judges would look to text, history, and

122. *Id.* at 146.

123. *See id.*

124. *Id.*

125. 554 U.S. 570, 625-27 (2008).

126. BLOCHER & MILLER, *supra* note 43, at 110.

127. *See Kolbe*, 849 F.3d at 133-34.

128. *See* 554 U.S. at 628-29.

129. *Kolbe*, 849 F.3d at 146; *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011).

130. BLOCHER & MILLER, *supra* note 43, at 110. Some critics argue that tiered scrutiny produces uncertain and inconsistent results. *See, e.g.*, Sam Zuidema, Note, *Raising Heller*:

tradition to determine whether a given law violates the Amendment.<sup>131</sup>

Nevertheless, the two-part approach appears to be the law of the land in the post-*Heller* world, as the Supreme Court has declined repeated efforts to hear Second Amendment challenges.<sup>132</sup> In May 2020, the Court declined to rule on the merits of *New York State Rifle & Pistol Ass'n v. City of New York*.<sup>133</sup> A month later, the Court declined to hear ten other petitions challenging gun regulations.<sup>134</sup> However, following the death of Justice Ginsburg, the Court features a majority likely more favorable to expansion of the individual right to bear arms.<sup>135</sup> In its upcoming term, the Court will decide *New York State Rifle & Pistol Ass'n v. Bruen*, its first major Second Amendment case since *McDonald* over a decade ago.<sup>136</sup> The challenged New York law requires an individual to demonstrate an “actual and articulable” need to carry a concealed handgun in public.<sup>137</sup> If the Court were to find the law unconstitutional, the decision would signal an expanded scope for the Second Amendment right and significantly impact states with restrictions on concealed and open carry.<sup>138</sup> While change may be coming in the near future, for now the Court appears to recognize the merits of the existing Second Amendment framework, allowing lower courts to uphold gun safety laws in most challenges.<sup>139</sup>

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*Constitutional Scrutiny in a New Age of Second Amendment Rights*, 2018 U. ILL. L. REV. 813, 845-46.

131. See Darrell A. H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 895-96 (2012).

132. See Tirschwell & Frassetto, *supra* note 24.

133. *Id.*

134. *Id.*

135. See Kevin Johnson, *Ruth Bader Ginsburg's Death Injects New Urgency into Second Amendment Debate Amid Supreme Court Battle*, USA TODAY (Sept. 21, 2020, 6:14 PM), <https://www.usatoday.com/story/news/politics/2020/09/21/ruth-bader-ginsburgs-death-injects-urgency-into-2nd-amendment-debate/5851563002/> [https://perma.cc/U6ED-UUY5].

136. See Ariane de Vogue & Devan Cole, *Supreme Court Agrees to Take up Major Second Amendment Case*, CNN (Apr. 26, 2021, 11:21 AM), <https://www.cnn.com/2021/04/26/politics/supreme-court-second-amendment-case/index.html> [https://perma.cc/VL4R-2AQU].

137. *Id.*

138. See *id.*

139. See Tirschwell & Frassetto, *supra* note 24.

*C. Theories of the Second Amendment: How Private Militias Argue for the Right to be Armed in Public*

Within this post-*Heller* landscape, parties have taken up sides in the debate on gun control. On one end of the spectrum are those who believe the Second Amendment protects only use by military forces, while at the other end are those who believe there should not be any weapons regulations.<sup>140</sup> Most people fall between these poles, as some agree with only the *Heller* right to possess a handgun for self-defense in the home while others argue for a more expansive scope allowing for the possession of most firearms—including assault rifles—in or out of the home.<sup>141</sup> Depending on the group, private militias fall either into the latter category or at the extreme pole opposing any gun regulations, arguing that the Second Amendment protects their members’ rights to be armed in public.<sup>142</sup> As Second Amendment scholars Joseph Blocher and Darrell A. H. Miller note, “the Court’s decision [in *Heller*] is hard to reconcile with any particular theory of the Second Amendment.”<sup>143</sup> No one theory can fully explain the right to keep and bear arms. Nevertheless, this Section identifies some of the main justifications articulated by armed private militias.

*1. Self-Defense*

As *Heller* makes clear, “[s]elf-defense’ is the starting place for any Second Amendment theory.”<sup>144</sup> Justice Scalia’s opinion emphasized self-defense as “the core lawful purpose” of the right to bear arms.<sup>145</sup> However, uncertainty about what constitutes self-defense

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140. See Daniel J. Wright, *The Orphaned Right: How a San Diego Resident Might Have Saved Second Amendment Liberty*—*Peruta v. California*, 137 S. Ct. 1995 (2017), 32 REGENT U. L. REV. 387, 389-90 (2020).

141. See *id.* at 389.

142. The ongoing state of the gun control debate is beyond the scope of this Note, but it is important to note the positions taken by private militias and how these stances are influenced by the specific theories articulated by armed groups.

143. BLOCHER & MILLER, *supra* note 43, at 170.

144. *Id.* at 152.

145. *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008).

has troubled courts.<sup>146</sup> “[T]he traditional legal understanding of self-defense” differs significantly from the term’s definition in everyday use.<sup>147</sup> Second Amendment scholar Eric Ruben proposes that the limitations of legal self-defense—such as requirements of necessity and proportionality, as well as the role of self-defense as an affirmative defense to criminal charges—should inform any understanding of the Second Amendment doctrine.<sup>148</sup> The theory of self-defense is “deeply rooted” in Second Amendment jurisprudence, but it remains an “unstable and contested” concept.<sup>149</sup> The doctrine does not define against whom self-defense may be directed, how defense may be pursued, or how far the right extends.<sup>150</sup> Inherent within self-defense, however, are other, potentially more workable, theories articulated by private militias.

## 2. *Safety*

Personal protection and safety are natural theories of the Second Amendment motivating private militia groups. Militias often extend these theories to include public safety, thereby granting them the right to carry arms in public spaces to protect their neighborhoods and communities.<sup>151</sup> According to one popular saying, “an armed society is a polite society.”<sup>152</sup> Proponents of this theory can analogize to the First Amendment’s “marketplace of ideas” rationale in arguing that the government “does not possess a monopoly” on a “marketplace of violence.”<sup>153</sup>

However, those on the other side of the argument can point to the deaths of protestors in Kenosha or the many recent mass school shootings to show that the presence of guns in public has done more harm than good.<sup>154</sup> As the Court noted in *Heller*, laws prohibiting

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146. See Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 66 (2020).

147. See *id.*

148. *Id.* at 67.

149. BLOCHER & MILLER, *supra* note 43, at 153-54 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010)).

150. See *id.* at 152.

151. See *id.* at 155.

152. *Id.* (citing ROBERT A. HEINLEIN, *BEYOND THIS HORIZON* 228 (Baen Books 2002) (1942)).

153. *Id.*

154. See Yablon, *supra* note 20.

possession of weapons in “sensitive places such as schools and government buildings” do not violate the Second Amendment.<sup>155</sup> Courts have held parking lots, polling places, and other locations to be “sensitive places” where guns may be regulated.<sup>156</sup> Thus, it would appear that any theory of safety has not been found to authorize possession wherever and whenever armed militias seek to carry guns.

### 3. *Anti-Tyranny*

The anti-tyranny theory of the Second Amendment is rooted in the early militias of the Colonial Era.<sup>157</sup> Fears of a standing army and the monarchy drove colonists to form their own armed forces; these same fears are reflected in the modern anti-government movement among private militia groups.<sup>158</sup> This theory also invokes federalism concepts, as the Second Amendment is viewed as a “limitation on federal power,” granting the states and the people a check on the government.<sup>159</sup> Another subset of the anti-tyranny theory posits that the right to bear arms protects minorities from police brutality and exposes systemic problems while holding officers accountable.<sup>160</sup> This argument is particularly salient today as African Americans are continually subjected to systemic violence, often at the hands of the police and armed private actors.<sup>161</sup>

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155. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

156. Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223, 260 (2018). For a more thorough discussion on the “sensitive places” doctrine, see *id.*

157. See BLOCHER & MILLER, *supra* note 43, at 165.

158. See *Antigovernment Movement*, *supra* note 37.

159. Douglas Walker, Jr., *Necessary to the Security of Free States: The Second Amendment as the Auxiliary Right of Federalism*, 56 AM. J. LEGAL HIST. 365, 367 (2016).

160. See SpearIt, *Firepower to the People! Gun Rights & the Law of Self-Defense to Curb Police Misconduct*, 85 TENN. L. REV. 189, 190-91 (2017).

161. See Ebony Slaughter-Johnson, ‘Stand Your Ground’ Laws Encourage Dangerous Vigilantism, INST. FOR POL’Y STUD. (Sept. 5, 2018), <https://ips-dc.org/stand-your-ground-laws-encourage-dangerous-vigilantism/> [<https://perma.cc/9RUT-WA9J>].

#### 4. *Autonomy*

Another theory of the Second Amendment that private militia groups rely on is autonomy, or the idea of “self-rule.”<sup>162</sup> Under this theory, individuals have the right to control their own bodies, decisions, and actions without restriction.<sup>163</sup> A person’s choice to carry an assault weapon in public should trump all other considerations because he is “his own master.”<sup>164</sup> However, court decisions, including *Heller* itself, place significant limitations on the scope of the right to bear arms.<sup>165</sup> Thus, even if autonomy is accepted as a rational justification for the individual right to bear arms, courts and policymakers have not found any compelling reason to allow completely unrestricted possession.

#### 5. *Collective Defense Outside of the Home*

Militias often also draw on an extended theory of self-defense to argue not only that defense is needed outside of the home, but also that groups have a right to defend themselves and their communities collectively. Collective defense is certainly embodied in the Second Amendment in the language “[a] well-regulated Militia, being necessary to the security of a free State.”<sup>166</sup> However, courts have interpreted the “militia” to encompass the formal armed forces and official militia, as well as “all able-bodied men.”<sup>167</sup> Thus, private militia groups gathering while armed in public would appear to fall outside of this definition and Second Amendment protection. Professor Darrell A. H. Miller notes that *Heller* “did not foreclose some level of collective right *in addition to a personal right*”<sup>168</sup> and

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162. See BLOCHER & MILLER, *supra* note 43, at 160.

163. *See id.*

164. *Id.* (citing the classical theory of John Locke).

165. *See* District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008) (discussing categories not protected by the Second Amendment).

166. U.S. CONST. amend. II.

167. *Heller*, 554 U.S. at 596.

168. Darrell A. H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 937 (2011).

suggests that a corporation could argue for a collective right to arm itself.<sup>169</sup> A private militia could argue that it operates as a corporation and also has a right to provide collective defense by arming itself, via its members, in public. As the next Part will show, however, existing laws regulating the presence of armed militias in public are constitutional and non-violative of the Second Amendment's right to keep and bear arms.

### III. STATE ANTI-MILITIA LAWS: THE CATEGORIES AND THEIR CONSTITUTIONALITY

Although *Heller* established a fundamental individual right to keep and bear arms, that Second Amendment right is not absolute.<sup>170</sup> Following *Heller*, courts have upheld most constitutional challenges to gun laws, with little expansion of the right's scope beyond lawful self-defense in the home.<sup>171</sup> The government can regularly show a substantial interest in public safety to restrict possession, particularly of assault weapons, outside of the home.<sup>172</sup>

Especially in the context of private militias, the government has a variety of tools to limit the potential harms of armed gatherings in public. Prosecutors have used several federal provisions to limit militia activity. For example, in *United States v. Huff*, the defendant, who was associated with a private militia group that planned to "take back" Madisonville, Tennessee, was convicted of violating a federal law that criminalizes transporting a firearm "knowing or having reason to know ... that [it would] be used unlawfully in furtherance of a civil disorder."<sup>173</sup> In that case, the Sixth Circuit held that the law did not violate the Second Amendment, which does not "protect the right of citizens to carry arms for *any sort* of confrontation."<sup>174</sup>

169. *Id.* at 891-92.

170. See Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 626 (2019).

171. See *supra* Part II.B.

172. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 146 (4th Cir. 2017).

173. 630 F. App'x 471, 475-76 (6th Cir. 2015) (quoting 18 U.S.C. § 231(a)(2)).

174. *Id.* at 487 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008)). Other federal laws have also been used to regulate private militia activities. See *Conaway*, *supra* note 52, at 1453 (noting that federal anti-conspiracy laws could be applied to border vigilantes, who operate in a similar fashion to private militias).

The focus of this Note, and this Part in particular, is on state-level anti-militia laws. In a 2020 report, Georgetown University Law Center's Institute for Constitutional Advocacy and Protection catalogued existing provisions in all fifty states that can be used to prevent private armies from gathering at public rallies.<sup>175</sup> Section A assesses examples of the four general categories of state anti-militia laws identified in the report. Section B then analyzes these provisions under *Heller*, arguing that they are constitutional and fit within the existing framework used to assess Second Amendment challenges.

### *A. Categories of Existing State Anti-Militia Provisions*

States currently have four main avenues by which they can regulate private militia groups: (1) constitutional subordination clauses; (2) false assumption statutes; (3) anti-paramilitary activity statutes; and (4) statutes prohibiting armed gatherings.<sup>176</sup> This Note focuses on the provisions states can use to directly regulate armed militia gatherings, so the first three categories will receive less attention than the fourth. This Section briefly reviews examples of each category in turn.

#### *1. Constitutional Subordination Clauses*

Forty-eight states have constitutional clauses that place the military under civil authority.<sup>177</sup> For example, Article I, Section 13 of the Virginia Constitution reads: "in all cases the military should be under strict subordination to, and governed by, the civil power."<sup>178</sup> Important to note in this sample provision is the use of the word "military." While armed private militias may think of themselves as members of the military, they are unofficial and not state sanctioned.<sup>179</sup>

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175. See PROHIBITING PRIVATE ARMIES, *supra* note 17, at 1.

176. *Id.* at 2.

177. *Id.* at 4.

178. VA. CONST. art. I, § 13.

179. See Hansen, *supra* note 9.



## 2. *False Assumption Statutes*

Seventeen states have false assumption statutes, which restrict civilians from acting as police officers or members of the armed forces.<sup>180</sup> These statutes take two common forms. The first bars false assumption of the duties of an officer: “Any person who falsely assumes or exercises the functions ... [of a] peace officer ... is guilty of a Class 1 misdemeanor.”<sup>181</sup> The second regulates the wearing of military uniforms: “No person shall wear ... a uniform so similar as to be easily mistaken [for an officer].”<sup>182</sup> Not all militias wear misleading uniforms or act as police officers; nevertheless, several groups have sought to assume police duties at public protests, as seen in Kenosha, and some have even been welcomed by law enforcement.<sup>183</sup>

## 3. *Anti-Paramilitary Activity Laws*

A third category of anti-militia laws includes statutes that criminalize paramilitary activity, such as instructing others how to use firearms and explosives.<sup>184</sup> At least twenty-five states have such statutes.<sup>185</sup> A key to these provisions is the intent that such paramilitary training will be directed toward committing a “civil disorder.”<sup>186</sup> This “behind-the-scenes” training activity can rear its ugly head when militia members later choose to bear and use their weapons in public.<sup>187</sup>

## 4. *Statutes Prohibiting Armed Gatherings*

Twenty-nine states have statutes that prohibit private militias from gathering in public without state authorization.<sup>188</sup> Alabama’s

180. PROHIBITING PRIVATE ARMIES, *supra* note 17, at 7.

181. VA. CODE ANN. § 18.2-174 (2021).

182. ARIZ. REV. STAT. ANN. § 26-170(A) (2021).

183. *See* Shortell et al., *supra* note 7; Hvistendahl & Brown, *supra* note 72.

184. PROHIBITING PRIVATE ARMIES, *supra* note 17, at 6.

185. *Id.*

186. *See, e.g.*, COLO. REV. STAT. § 18-9-120(2) (2021).

187. *Cf.* Witsil, *supra* note 5 (discussing the training activity of militia members who plotted to kidnap Governor Whitmer).

188. PROHIBITING PRIVATE ARMIES, *supra* note 17, at 5.

statute serves as the model for this Note's proposed standard: "Any two or more persons ... who associate, assemble, or congregate together ... or otherwise take up or bear arms in any such capacity without authority of the Governor [shall face conviction]."<sup>189</sup> This statute, representative of those adopted by other states, encompasses a variety of groups, as long as two or more members gather with arms in public.<sup>190</sup> As the Institute for Constitutional Advocacy and Protection report states, "self-designated private militia organizations attend[ing] public rallies purportedly to keep the peace ... likely fit within this type of prohibition."<sup>191</sup> Part IV argues that all states should adopt laws modeled on the Alabama provision, with heightened penalties for those convicted.<sup>192</sup> But first, this Note will assess the constitutionality of the laws currently in force.

### *B. The Constitutionality of State Regulation of Private Militias*

Despite the arguments of private militia members and gun rights activists to the contrary, state laws regulating armed gatherings in public are constitutional under both the Second and First Amendments.

#### *1. Second Amendment Constitutionality of Anti-Militia Laws*

The existing state-level tools available to regulate private militia groups, particularly those laws restricting armed gatherings, do not violate the Second Amendment. In fact, in the 1886 case *Presser v. Illinois*, the Supreme Court held that a state law restricting the parading of a private militia in public was not unconstitutional and did not infringe upon the Second Amendment right to bear arms.<sup>193</sup> Justice Scalia made explicit reference to *Presser* in his *Heller* opinion, noting that the Second Amendment "does not prevent the prohibition of private paramilitary organizations."<sup>194</sup> Later, in *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, the District

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189. ALA. CODE § 31-2-125 (2021).

190. *See id.*

191. PROHIBITING PRIVATE ARMIES, *supra* note 17, at 5.

192. *See infra* Part IV.A.

193. 116 U.S. 252, 264-65 (1886).

194. *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008).

Court for the Southern District of Texas upheld a state law prohibiting private military training.<sup>195</sup> In that case, members of the KKK, who also were part of the Texas Emergency Reserve militia, argued unsuccessfully that the Second Amendment protected the right to bear arms as a group.<sup>196</sup> As Eric Tirschwell and Alla Lefkowitz have noted, the prohibitions in these cases “are exactly the type of laws that [*Heller*] reaffirmed as permissible.”<sup>197</sup>

Prior to *Heller*, states could regulate private militias based on the militia-oriented reading of the Second Amendment granting authority to regulate the possession of arms as it related to the militia.<sup>198</sup> Following *Heller*’s interpretation of the Second Amendment as granting an individual right to bear arms, the analysis of state laws regulating private militias now focuses on the two-part framework adopted by lower courts.<sup>199</sup> First, courts determine whether the law burdens conduct covered by the Second Amendment.<sup>200</sup> Assuming private militia members are not ex-felons or mentally ill—uncovered categories according to *Heller*—and the weapons are “in common use,” state militia laws likely do burden covered conduct.<sup>201</sup>

However, even if state anti-militia provisions regulate conduct covered by the Second Amendment, courts must determine the appropriate level of scrutiny to apply—strict scrutiny for core exercises of the right or intermediate scrutiny for non-core conduct.<sup>202</sup> Self-defense in the home requires the application of strict scrutiny.<sup>203</sup> In contrast, courts should apply intermediate scrutiny for armed public gatherings because such gatherings simply do not implicate the same privacy and self-defense concerns raised in protecting one’s own home. Under intermediate scrutiny, the government can easily demonstrate its substantial interest in public

195. 543 F. Supp. 198, 219-20 (S.D. Tex. 1982).

196. *Id.* at 210.

197. Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Public Demonstrations: Debunking First and Second Amendment Myths After Charlottesville*, 65 UCLA L. REV. DISCOURSE 172, 180 (2018) (footnote omitted).

198. See Polesky, *supra* note 54, at 1594-95; BLOCHER & MILLER, *supra* note 43, at 60.

199. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 146 (4th Cir. 2017).

200. See BLOCHER & MILLER, *supra* note 43, at 110.

201. See *District of Columbia v. Heller*, 554 U.S. 570, 625-27 (2008) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

202. See Zick, *supra* note 156, at 236.

203. See *Heller*, 554 U.S. at 628-29.

safety.<sup>204</sup> State provisions prohibiting armed militia gatherings are substantially related to an interest in public safety, as demonstrated by recent acts of intimidation and violence committed by armed actors at public protests.<sup>205</sup> Removing armed gatherings from the streets can help de-escalate tensions and the potential for violence.<sup>206</sup>

Furthermore, these regulations do not burden any more conduct than necessary, as militia members are still free to (1) privately gather while armed in their own homes, (2) publicly gather while unarmed, and (3) individually carry arms in states and settings where such conduct is legal.<sup>207</sup> Despite private militias' arguments to the contrary, the Constitution and case law do not support an unrestricted right to assemble with arms in public.<sup>208</sup> For example, following violence at the 2017 "Unite the Right" rally in Charlottesville, a suit successfully applied Virginia's anti-militia laws to bar twenty-three militia members from returning to the city in armed groups of two or more.<sup>209</sup> Furthermore, forty-four states have laws allowing individual open carry of long guns in public, undermining the claims that bans on armed militia gatherings are too broad and infringe on the Second Amendment right to bear arms.<sup>210</sup>

## *2. First Amendment Constitutionality of Anti-Militia Laws*

Although extensive analysis of the First Amendment is beyond the scope of this Note, it is nonetheless important to address constitutional claims that state anti-militia provisions infringe upon the freedoms of speech, association, and assembly. Some argue that restrictions on militia gatherings violate the freedom of speech because many militia groups are engaging in political speech by

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204. See BLOCHER & MILLER, *supra* note 43, at 110.

205. See Shortell et al., *supra* note 7; Hvistendahl & Brown, *supra* note 72.

206. See Shortell et al., *supra* note 7.

207. See Ellen M. Bowden & Morris S. Dees, *An Ounce of Prevention: The Constitutionality of State Anti-Militia Laws*, 32 GONZ. L. REV. 523, 530 (1996).

208. See James M. Vaché & Mark Edward DeForrest, *Truth or Consequences: The Jurisprudential Errors of the Militant Far-Right*, 32 GONZ. L. REV. 593, 620 (1996).

209. Shortell et al., *supra* note 7.

210. *Id.*

expressing their anti-government stances.<sup>211</sup> However, anti-militia laws do not prevent groups from gathering to express their unique political beliefs; rather, the provisions restrict the carrying of weapons in public while gathered in a group.<sup>212</sup> Additionally, even if armed gatherings in public are considered expressive “symbolic speech,” states can use content-neutral regulations that are tailored to serve a substantial government interest.<sup>213</sup> Governments can demonstrate a significant interest in public safety for which the law is neutrally applied to all armed groups, regardless of their political views or beliefs.<sup>214</sup>

Others argue that anti-militia provisions violate the First Amendment rights of groups to associate with like-minded individuals and to assemble in public.<sup>215</sup> However, as noted above, laws regulating armed gatherings are not categorical restrictions on the rights to assemble and associate.<sup>216</sup> Militia groups can assemble in public, as long as they are not armed.<sup>217</sup> Militia members are free to associate with one another, either unarmed in public or armed in the privacy of their homes.<sup>218</sup> Court decisions, from *Presser* in 1886 up through the recent Charlottesville suit, reflect interpretations of anti-militia provisions as non-violative of the First Amendment.<sup>219</sup>

Open carry laws that allow the public bearing of long guns are not the focus of this Note, but the overlap between private militias, open carry, and First Amendment rights merits brief discussion.<sup>220</sup> Some have argued that open carry laws chill the First Amendment right to speech of protestors, who face intimidation or violence when an

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211. See Louren Oliveros, Comment, *Sacrificing People, Protecting Hate: An Analysis of Anti-Militia Statutes and the Incitement to Violence Exception to Freedom of Speech as Legal Protections for Members of Groups Targeted by Hate-Motivated Violence*, 30 N.M. L. REV. 253, 267 (2000).

212. See *id.* at 267-68.

213. See Zick, *supra* note 156, at 231; *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

214. See Zick, *supra* note 156, at 231.

215. See Larizza, *supra* note 38, at 584.

216. See Bowden & Dees, *supra* note 207, at 530.

217. See *id.*

218. See *id.*

219. See *id.* at 530-31 (quoting *Presser v. Illinois*, 116 U.S. 252, 267 (1886)); Shortell et al., *supra* note 7.

220. For more thorough analysis of open carry laws and public protests, see Zick, *supra* note 156, and Gregory P. Magarian, *Conflicting Reports: When Gun Rights Threaten Free Speech*, 83 LAW & CONTEMP. PROBS. 169 (2020).

armed individual appears at a public protest.<sup>221</sup> Similarly, the gathering of an armed militia at a public protest can chill speech, creating a clash of First and Second Amendment rights.<sup>222</sup> As mentioned above, restrictions on armed public gatherings meet the standard of intermediate scrutiny, serving the government's substantial interest in public safety.<sup>223</sup> Thus, in a battle between a protestor's right to free speech and a militia member's right to bear arms, the protestor should win because public safety and de-escalation of the potential for violence call for reasonable restrictions on the Second Amendment.<sup>224</sup> Simply put, a protestor's life and well-being are more fundamental constitutional rights than the right to gather in public as part of an armed private militia.<sup>225</sup>

#### IV. A PROPOSAL FOR REGULATING ARMED PRIVATE MILITIAS IN PUBLIC

States can use anti-militia provisions to regulate private militia gatherings in public without violating the Constitution, and they should do so to protect the safety of their citizens. So why have states rarely utilized the tools available at their disposal?<sup>226</sup> This Part seeks to answer that question, while providing a workable and effective alternative to existing state anti-militia laws. First, Section A proposes a universal, consistent standard that all states should adopt in order to regulate armed private militia gatherings in public. Then, Section B addresses practical challenges that states will face in enforcing this proposed standard. Finally, Section C rebuts common counterarguments that private militias and gun rights activists may rely on in opposition to the proposal.

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221. See Magarian, *supra* note 220, at 173.

222. See *id.*

223. See BLOCHER & MILLER, *supra* note 43, at 110.

224. See Thomas B. McAfee, *Constitutional Limits on Regulating Private Militia Groups*, 58 MONT. L. REV. 45, 77-78 (1997).

225. See *id.*

226. See Yablon, *supra* note 20.

*A. Regulating Private Militias: Applying a Universal State Standard to Ban Armed Gatherings in Public*

Although all fifty states have at least one provision that can regulate armed private militias, these laws are rarely utilized.<sup>227</sup> States can more effectively regulate armed groups and promote public safety by adopting a universal standard that applies consistently in each state. This proposed standard adopts the language of Alabama’s law banning armed militia gatherings in public:

Any two or more persons, whether with or without uniform, who associate, assemble, or congregate together by or under any name in a military capacity for the purpose of drilling, parading, or marching at any time or place or otherwise take up or bear arms in any such capacity without authority of the Governor, must, on conviction, be fined.<sup>228</sup>

Additionally, this Note’s proposed standard calls for enhanced penalties for conviction, up to a \$5,000 fine, five years in prison, or both.<sup>229</sup> These heightened penalties will increase deterrence, providing laws with more bite when enforced.<sup>230</sup> Depending on the severity of the case and the armed group’s specific actions, a court can vary the applicable fine and jail time within the statutory range.

Enacting this proposed statute consistently across all fifty states, rather than at the federal level, will allow states to be responsive to the local needs of their communities. While some cases will inevitably receive national headlines and recognition, prosecutions can be handled locally to reinforce a state’s commitment to safety and its willingness to root out local threats to citizens.<sup>231</sup> Under the language of this proposed standard, a variety of armed actors could be considered “private militia” groups for the purposes of regulation. For example, the “with or without uniform” language allows equal

227. *See id.*

228. ALA. CODE § 31-2-125 (2021).

229. The Alabama statute from which this proposal’s language is drawn calls only for up to a \$1,000 fine, an amount commonly seen in other state statutes. *See id.*

230. *See Rathod, supra* note 28.

231. *Cf. Shortell et al., supra* note 7 (discussing Wisconsin provisions that could be used to prohibit the Kenosha Guard and other private armed actors from gathering at public protests).

application of the provision to any armed group, not just those who parade in uniform or seek to assume law enforcement duties.<sup>232</sup>

Additionally, while the standard specifically lists “drilling, parading, or marching” as prohibited conduct, it also includes “tak[ing] up or bear[ing] arms in any such capacity.”<sup>233</sup> This phrasing covers any armed appearance of a militia in public, regardless of how formal the group’s organization or activity may be. As long as two or more individuals gather “by or under any name” of a militia group in public while bearing weapons, they are subject to regulation.<sup>234</sup>

Militia groups may raise objections to the “associate, assemble, or congregate” language as violating their First Amendment rights.<sup>235</sup> However, the rights to assemble in public or associate with a group are not categorically restricted by this proposed standard; rather, groups are only limited when they gather while armed in public settings.<sup>236</sup> The law would not prohibit groups from gathering unarmed in public or armed in their homes, placing only those restrictions on the First Amendment rights necessary to protect public safety.<sup>237</sup> Furthermore, by including the phrase “without authority of the Governor,” this standard recognizes that ultimate control over any militia gathering rests with the government.<sup>238</sup> Of course, state-sanctioned militias, such as the National Guard, could be authorized to gather armed in public.<sup>239</sup> And there may be other regulated scenarios in which a governor might allow a group—such as the Knights of Columbus—to parade while armed. Thus, this proposed standard restricts only unofficial armed gatherings of groups that may threaten public safety.

Notably, this Note’s proposed law does not include a *mens rea* requirement for conviction. The standard does not require that armed militia members who gather in public *intend* to intimidate

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232. See ALA. CODE § 31-2-125.

233. *Id.*

234. *Id.*

235. See *supra* Part III.B.2.

236. See Bowden & Dees, *supra* note 207, at 530.

237. See *id.*

238. See, e.g., VA. CONST. art. I, § 13 (subordinating the military under the control of civil power).

239. See Golden, *supra* note 9, at 1023.



protestors or cause violence.<sup>240</sup> As demonstrated by the countless incidents of escalating tensions and even lethal violence at protests, merely showing up in an armed group poses a substantial threat to public safety.<sup>241</sup> States should have the flexibility to respond to threats and hold perpetrators of violence and intimidation accountable. This Note's proposed standard, built primarily on the language of preexisting provisions that pass constitutional muster, grants states such power to effectively limit the impact of private militias.

Applying this standard to one of the recent appearances of armed private militias at public protests, the Kenosha Guard could be prosecuted for its activities during the racial justice protests following Jacob Blake's shooting.<sup>242</sup> Members found to have gathered in a group of two or more while armed at the public protest, under the name of the Kenosha Guard and without authority of Wisconsin's governor, could face prosecution. While the Proud Boys group does not necessarily operate or identify as an armed private militia, if members appear together armed in public to intimidate protesters, they could also face regulation.<sup>243</sup> The same would apply to armed militia members who gathered to storm the Capitol on January 6, with the caveat that the District of Columbia is not a state and therefore would need to apply the standard under an analogous city provision.<sup>244</sup> An individual's right to keep and bear arms merits constitutional protection, but when that right conflicts with an individual's rights to life and safety, it must be subordinated. State governments have a duty to adopt and consistently apply laws that de-escalate tensions while promoting public safety.

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240. Cf. Zick, *supra* note 156, at 256 (discussing that some laws regulating paramilitary activity require "the purpose or intent of furthering civil disorder").

241. See *Are Citizen Militias Legal?*, NPR (Aug. 30, 2020, 5:20 PM), <https://www.npr.org/2020/08/30/907720068/are-citizen-militias-legal> [<https://perma.cc/K48P-W8MC>].

242. See Shortell et al., *supra* note 7. Although Kyle Rittenhouse was not a member of the militia group, he could face prosecution under a domestic terrorism statute, such as 18 U.S.C. § 2331. The Kenosha Guard's armed activity during the protests is believed to have emboldened Rittenhouse's actions. See *id.*

243. See Levy & Ailworth, *supra* note 6.

244. See Goldman et al., *supra* note 3.

*B. Practical Challenges to Regulating Private Militias*

In order to successfully implement this Note's proposed regulation of private militias, states will need to overcome several practical challenges. The primary challenge to implementation is overcoming the lack of political will that has prevented regulation of armed militias under existing state provisions.<sup>245</sup> States have "wide latitude" to regulate groups gathering with weapons in public, with state anti-militia laws chief among the tools at their disposal.<sup>246</sup> Nevertheless, these provisions are rarely utilized, with some states likely afraid "to do anything that could be perceived as an attack on gun rights."<sup>247</sup> Additionally, some provisions are ambiguous, leaving states wary of applying laws with little precedent.<sup>248</sup> Thus, due to these concerns—fears of being perceived as too restrictive of the right to bear arms, with few cases to rely on for support—many militia groups have avoided charges.<sup>249</sup>

This Note's standard seeks to provide guidance by clearly defining what qualifies as a private militia and when such a group may be regulated while armed in public.<sup>250</sup> By increasing the allowable consequence for a conviction—up to a \$5,000 fine and up to five years in jail—this proposal gives the provisions much-needed teeth that may encourage states to act more forcefully.<sup>251</sup> Of course this proposal alone cannot compel states to charge armed groups. However, a clear and consistent standard applied evenly in all fifty states may result in more charges, thereby fostering political courage in states that previously may have feared to regulate the gun rights of militias.<sup>252</sup>

Political polarization is another practical challenge facing states seeking to regulate private militia groups. One of the core tenets of the modern private militia movement, which rose to greater

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245. See Yablon, *supra* note 20.

246. See Tirschwell & Lefkowitz, *supra* note 197, at 189.

247. Yablon, *supra* note 20.

248. See *id.*

249. See Shortell et al., *supra* note 7.

250. See *supra* Part IV.A.

251. Rathod, *supra* note 28.

252. See Yablon, *supra* note 20.

notoriety in the 1990s, was a strict anti-government perspective.<sup>253</sup> Drawing on the anti-tyranny and autonomy theories of the Second Amendment, many of these initial militia groups argued that the government had no right to regulate their weapons, and some even engaged in outright insurrection.<sup>254</sup>

While the movement has always featured right-wing beliefs and talking points, today several militias have now explicitly aligned with right-wing politicians.<sup>255</sup> As many commentators have noted, the election of former President Donald Trump was a driving factor behind this shift.<sup>256</sup> As the reaction of the Proud Boys to President Trump's "stand back and stand by" comments suggested, many groups feel emboldened and called to action by political rhetoric.<sup>257</sup> Therefore, related to the challenge of political will, many states also may fear enforcing laws that could be perceived as encroaching on the free speech of militia groups. However, this Note's proposed standard regulates only armed gatherings in public that threaten civilian safety. Groups are still free to gather armed in their homes or unarmed in public to express their views.<sup>258</sup>

The tacit support provided by law enforcement officers to private militia groups raises yet another challenge for states seeking to regulate armed gatherings.<sup>259</sup> For example, at the protests in Kenosha following the shooting of Jacob Blake, some officers "were seen giving apparent militia members water and thanking them."<sup>260</sup> While these acts alone do not suggest that all police condone the actions of all private militias, they are suggestive of a troubling entwinement between official law enforcement actors and unofficial armed groups.<sup>261</sup> This alignment blurs the lines between legal and

253. See Hansen, *supra* note 9.

254. See *id.* (discussing the government standoffs at Ruby Ridge and Waco in the early 1990s).

255. See *id.*

256. *E.g., id.*

257. Levy & Ailworth, *supra* note 6.

258. See *supra* Parts III.B, IV.A.

259. See Shortell et al., *supra* note 7; Hvistendahl & Brown, *supra* note 72 ("The United States has a long history of vigilantes working with police and government officials .... One prominent group, the Oath Keepers, is made up of current and former military and law enforcement members.").

260. Shortell et al., *supra* note 7.

261. See *id.*

extralegal actions and could further complicate state responses to militia gatherings in public. This Note's proposed standard cannot unravel all of the connections between police and unofficial armed actors. Nevertheless, the standard's clear definition of a "private militia" can and should be applied in all cases, regardless of whether an individual police officer expressed support for an armed militia member during a tense protest.<sup>262</sup>

### *C. Rebutting Counterarguments to the Proposed Standard*

In addition to the practical challenges associated with implementation, this Note's proposed standard also is likely to generate several counterarguments. The main counterargument—that state anti-militia laws are unconstitutional and violate the Second Amendment's right to keep and bear arms for self-defense—is addressed in detail in Part III.B.1. In rebuttal to these claims, there have been several court orders in recent years enforcing state statutes that restrict armed gatherings in public.<sup>263</sup> Additionally, self-defense as a legal right requires the elements of necessity and proportionality, and it is a stretch to claim that these elements are met when one gathers with other armed individuals in public.<sup>264</sup> Armed private militias cannot claim necessity and a right to self-defense when they create the tensions and threats to public safety by inserting lethal weapons into a public setting.<sup>265</sup>

As addressed above, this Note's proposed standard also does not violate the First Amendment because private militia groups maintain their First Amendment rights to assembly and association.<sup>266</sup> The standard regulates only armed gatherings in public to protect the substantial government interest in safety, while allowing private gatherings or unarmed public gatherings.<sup>267</sup> Further,

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262. This Note cannot, and does not, seek to provide solutions for reforming the police system. However, structural changes are needed to address harmful law enforcement practices, including alignment with extremist, armed right-wing militia groups.

263. See PROHIBITING PRIVATE ARMIES, *supra* note 17, at 1 (discussing the successful suit barring armed groups from gathering in Charlottesville).

264. See Ruben, *supra* note 146, at 66-67.

265. See Shortell et al., *supra* note 7.

266. See *supra* Part III.B.2.

267. See Bowden & Dees, *supra* note 207, at 530.

depending on state open carry provisions, individual members may even be allowed to bear arms in public, as long as they do not gather with other armed members.<sup>268</sup>

Some critics may argue that this Note's proposed standard is too narrow, targeting gatherings of two or more but leaving individual armed actors unregulated and free to threaten public safety. Under this argument, critics can point to "lone wolf" shooters, such as Kyle Rittenhouse in Kenosha or Dylann Roof in Charleston, who would avoid prosecution under the statute.<sup>269</sup> This argument is not without merit, as the "leaderless resistance" model embodied by "lone wolf" mass shooters has become all too common in recent years.<sup>270</sup> Nevertheless, additional measures, such as domestic terrorism statutes, exist to prosecute individual armed actors.<sup>271</sup> While this Note advocates for the prosecution of these individual domestic terrorists, its standard is limited to armed group gatherings that pose the greatest threats to public safety. By focusing solely on armed groups, the proposed statute avoids potential challenges associated with proving that an individual is a member of a specific group and therefore should face prosecution.<sup>272</sup>

Another counterargument is that identifying which private militia groups conducted an armed gathering in a large public protest crowd can be a seemingly impossible task. With hundreds or thousands of individuals gathered in a protest setting, it may be incredibly difficult to isolate militia groups as separate entities.<sup>273</sup> Nevertheless, many militia groups use forms of self-identification—for example, a uniform, label, or card—that could ease this evidentiary challenge.<sup>274</sup> Some militias cluster together in groups of several members at a protest, making identification easier.<sup>275</sup> Additionally, in today's digital age, law enforcement investigations

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268. See Shortell et al., *supra* note 7.

269. See Yablon, *supra* note 20.

270. *Id.*

271. See, e.g., 18 U.S.C. § 2331; see also *Declare Rittenhouse What He Is--A Terrorist*, MUSLIM PUB. AFFS. COUNCIL (Aug. 28, 2020), <https://www.mpac.org/blog/statements-press/declare-rittenhouse-what-he-is-a-terrorist.php> [<https://perma.cc/LG2X-N4LP>].

272. See Zick, *supra* note 156, at 256.

273. See *id.*

274. See *id.*

275. See Hansen, *supra* note 9.

and online searches may also reveal details about militia membership.<sup>276</sup>

Relatedly, a rational concern about the proposed standard is that enforcement could potentially drive armed actors further underground to avoid detection.<sup>277</sup> While this concern is legitimate, states must respond to as many potential threats to public safety as possible. This Note's proposal increases states' leverage to prosecute groups who appear armed in public, and law enforcement investigations can be utilized as needed to further pursue those groups that seek to escape regulation.

A final compelling counterargument is that protestors, particularly minorities, should be able to arm themselves in light of the historical pervasiveness of police brutality.<sup>278</sup> According to this argument, armed protestors can hold officers and law enforcement systems accountable by lawfully possessing guns and preventing the state from "possess[ing] a monopoly" on weapons.<sup>279</sup> This counterargument holds merit, particularly given the numerous killings of unarmed African Americans by police officers.<sup>280</sup> However, a categorical ban on the public gathering of armed private groups, regardless of race, political affiliation, or beliefs, will de-escalate tensions and promote public safety.<sup>281</sup> In states where it is legal to bear weapons in public, individuals are allowed to lawfully carry a gun for self-defense; only armed groups gathering together in public fall under the standard's proscription.

## CONCLUSION

States have tools at their disposal to regulate armed private militias that pose threats to public safety. However, for a variety of reasons, including a lack of political will and perceptions that these

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276. See Shortell et al., *supra* note 7 (discussing the Kenosha Guard's Facebook pages).

277. See Oliveros, *supra* note 211, at 274.

278. See SpearIt, *supra* note 160, at 190-91.

279. See BLOCHER & MILLER, *supra* note 43, at 155; see also SpearIt, *supra* note 160, at 190-91.

280. Cf. Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns> [https://perma.cc/7HWH-Y55X].

281. See Shortell et al., *supra* note 7.

laws lack any meaningful bite, states have been reluctant to rein in armed militias. This Note's proposed statute would replace existing provisions by applying a clear and consistent standard that would allow all fifty states to overcome these practical challenges and effectively regulate dangerous armed gatherings in public settings.

State anti-militia provisions naturally implicate the Second Amendment by regulating the ability of private militia groups to bear arms in public.<sup>282</sup> Since the Supreme Court's landmark holding in *Heller* that the Second Amendment protects an individual right to bear arms, militia groups have been emboldened to argue that this right extends to public spaces.<sup>283</sup> However, lower courts, applying a two-step framework, have rarely chosen to expand the Amendment's scope and have upheld existing provisions that prohibit armed gatherings.<sup>284</sup> These holdings suggest that the arguments of gun lobbyists and private militias are unpersuasive.<sup>285</sup> Thus, this Note's proposed standard, which is based on Alabama's current anti-militia provision, would pass constitutional muster without infringing on the post-*Heller* Second Amendment right.<sup>286</sup>

As scholars have noted, "the core holding of *Heller* is politically and legally secure."<sup>287</sup> Claims that the Second Amendment is being treated as a "second class right" are overblown and ignore the slow historical development of other constitutional rights.<sup>288</sup> The death of Justice Ginsburg and the subsequent confirmation of Justice Barrett, which entrenched a firm conservative majority on the Supreme Court, signal the possibility of future expansion of the Second Amendment right.<sup>289</sup> In its current term, the Court will hear its first major Second Amendment case since 2010.<sup>290</sup> Regardless of if and how the Court may expand the right to bear arms, states have the

282. See *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982).

283. See Tirschwell & Lefkowitz, *supra* note 197, at 189.

284. See PROHIBITING PRIVATE ARMIES, *supra* note 17, at 1 (describing the upholding of Virginia's anti-militia statute after the violence in Charlottesville in August 2017).

285. Tirschwell & Frassetto, *supra* note 24.

286. See ALA. CODE § 31-2-125 (2021).

287. BLOCHER & MILLER, *supra* note 43, at 177.

288. *Id.* at 183; see also Zick, *supra* note 170, at 627.

289. See Johnson, *supra* note 135.

290. See de Vogue & Cole, *supra* note 136.

capacity to regulate dangerous armed private militia gatherings right now.

As the world watched in horror on January 6, 2021, several armed militia members participated in a mob that struck at one of the central seats of American democracy. Emboldened by political and social changes, private militias have become an all-too-common presence in the twenty-first century, with the capacity to do severe and lasting damage. Quite simply, states owe a duty to their citizens to minimize the threats posed by these armed actors.

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