RELOADING THE SECOND AMENDMENT: THE UNDUE BURDENS OF THE NATIONAL FIREARMS ACT AND THEIR REMEDIES

Comment*

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* [Editor's Note: This Comment was written prior to the Fifth Circuit's decision in *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016) and the Third Circuit decision in *United States v. One Palmetto State Armory PA-15 Machinegun Receiver/Frame Unknown Caliber Serial Number: LW001804*, 822 F.3d 136 (3d Cir. 2016)]

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I. A DREAM DENIED, A RIGHT DENIED

Jay Hollis had waited almost four months for this day.[1] The long, tantalizing wait for the approval of Hollis's submitted application was finally over.[2] Hollis, a resident of Texas and trustee of the Jay Aubrey Isaac Hollis Revocable Living Trust, submitted his application to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) with the hope that he would be able to realize his long-held ambition of legally manufacturing and possessing his own M16 machinegun.[3] Hollis likely had his doubts about whether the BATFE would approve the application because under the Firearm Owners' Protection Act of 1986 (FOPA), no machineguns made after May 19, 1986, may be owned by civilians.[4] Nevertheless, on May 14, 2014, he sent off his trust's completed BATFE Form 5320.1 (better known as a Form 1) along with the $200 tax required for any individual or trust to be in possession of any firearm regulated by the National Firearms Act of 1934 (NFA).[5] Despite Hollis's reservations about whether the BATFE would actually approve his application, four long months later a response was sitting in his mailbox with the Form 1's "Approved" box clearly marked with an "X" and the signature of an authorized BATFE official underneath it.[6] At the top right of the form was the tax stamp affixed by the BATFE official, signaling that the applicant had paid the $200 tax and the weapon could now be legally made.[7] With the go-ahead from the BATFE received, Hollis's work of actually manufacturing the M16 could begin.[8]

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1. *See* Complaint for Declaratory and Injunctive Relief at 10–11, Hollis v. Lynch, 121 F. Supp. 3d 617 (N.D. Tex. 2015) (No. 3:14–cv–03872–M) [hereinafter *Hollis* Complaint].
2. *See id.*
3. *See id.* at 10.
4. *See* 18 U.S.C. § 922(o) (2016).
5. *See Hollis* Complaint, *supra* note 1, at 11.
6. *See Hollis*, 121 F. Supp. 3d at 623.
7. *See id.*
8. *See* Jeremy S., *NFA for Beginners: Form 1 to Manufacture an NFA Item*, THETRUTHABOUTGUNS.COM (May 4, 2015), http://www.thetruthaboutguns.com/2015/05/jeremy-s/nfa-for-beginners-form-1-to-manufacture-an-nfa-item/.

Alas, this would not happen; a few days later, rumors began to circulate on the Internet about the BATFE approving Form 1s to make machineguns.[9] At some point, the BATFE got wind of this.[10] Although the BATFE has no statutory or regulatory authority to revoke an already approved Form 1, a BATFE agent nonetheless contacted Hollis on September 10, 2014, to tell him that his Form 1 was now disapproved because of a mistake made by the errant federal agency.[11] A few days later, another BATFE agent delivered a letter to Hollis that demanded the surrender of the M16 if it had already been made.[12] Although Hollis had not yet manufactured the M16 and did not have to surrender any property to the BATFE, his dream of legally owning a machinegun without paying a small fortune was crushed.[13]

Although Hollis had not yet manufactured his M16 before the BATFE reversed itself and he did not have any property confiscated from him, Ryan Watson was not as fortunate. The Pennsylvania resident had also sent his Form 1 and $200 tax payment on behalf of his trust in hopes of being able to manufacture his own M16.[14] Like Hollis, the BATFE approved his Form 1 a few months after he submitted it.[15] Unlike Hollis, he was able to manufacture his M16 before the BATFE disapproved his Form 1.[16] Now in possession of a machinegun made illegal by the BATFE's reversal, Watson was forced to surrender his M16 to a BATFE agent after receiving a threatening phone call similar to the letter that Hollis received.[17] After meeting with BATFE agents to surrender his M16, Watson was not compensated for his loss of property.[18]

Watson and Hollis subsequently sued various government entities in district courts in the Third Circuit and Fifth Circuit, respectively, alleging that the actions of the defendants violated their Second Amendment right to bear arms.[19] They also sought declaratory relief that the various federal and state statutes regulating the manufacture and possession of machineguns

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9. *Hollis* Complaint, *supra* note 1, at 11.

10. *See id.*

11. *Id.*

12. *Id.*

13. *See id.* at 15. The January 2016 market price of an M16 machinegun was approximately $20,000. *Machine Guns*, MACHINE GUN PRICE GUIDE, http://machinegunpriceguide.com/html/machine _guns.html (last updated July 2016).

14. Verified Complaint for Forfeiture at 3, United States v. One Palmetto State Armory PA–15 Machinegun Receiver/Frame, Unknown Caliber, Serial No. LW001804, 115 F. Supp. 3d 544 (E.D. Pa. 2015) (No. 15–2202) [hereinafter *One Palmetto* Complaint].

15. *Id.*

16. *Id.*

17. *See id.* at 4.

18. *See id.* at 4–5.

19. Hollis *vs.* Lynch, HELLER FOUND., https://hellerfoundation.org/about/hollis-vs-holder/ (last visited Nov. 20, 2016); Watson v. Holder*: Second NFA Lawsuit Filed Challenging 922(o)*, GUNLINK: BLOG (Nov. 17, 2014), http://blog.gunlink.info/2014/11/17/watson-v-holder-second-nfa-lawsuit-filed-challenging-922o/.

were unconstitutional.[20] After oral arguments, the district courts decided the cases in favor of the defendants.[21] Both Watson and Hollis appealed.[22] On May 18, 2016, the Third Circuit Court of Appeals affirmed the judgment of the district court in Watson's case, reasoning that the Second Amendment does not guarantee the right of civilians to own machineguns because they are not in common use by civilians and because they are considered too dangerous for civilians to own.[23]

While the Watson case was decided in favor of the government, the fate of *Hollis v. Lynch* remains unknown as it continues through the lengthy appeals process. In the event that the Fifth Circuit reviewing *Hollis* sides with the plaintiff, it is important to consider the legal correctness of this decision as well as the real-world consequences that may arise as a result if the court declares the relevant federal statutes unconstitutional. Further, it is critical to consider how Texas policymakers should react if such a ruling takes place.

This Comment will establish the background and the legal analysis required to fully understand the Second Amendment and whether Hollis's claims have any legal merit. It will also describe the traits of the weapons at issue and their usefulness to law-abiding citizens. Further, this Comment will examine the potential reactions that Texas citizens and lawmakers may have toward such a decision by either the Fifth Circuit or the United States Supreme Court. Finally, it will promulgate recommendations for Texas to enforce such a decision or to comply with newly passed or amended regulations.

II. "SHALL NOT BE INFRINGED": THE SECOND AMENDMENT'S PLACE IN THE CONSTITUTION

A. A Constitutional Explanation

The Bill of Rights contains the first ten amendments to the United States Constitution.[24] These amendments contain some of the most cherished historical rights guaranteed to United States citizens, such as the right to freedom of speech, press, and religion; the right to bear arms; the right to be free from unreasonable searches and seizures by government actors; and the right to be free from compelled self-incrimination when facing criminal

20. Hollis *vs.* Lynch, *supra* note 19; Watson v. Holder*: Second NFA Lawsuit Filed Challenging 922(o)*, *supra* note 19.

21. Hollis v. Lynch, 121 F. Supp. 3d 617, 646 (N.D. Tex. 2015), *aff'd*, 827 F.3d 436 (5th Cir. 2016); United States v. One Palmetto State Armory PA–15 Machinegun Receiver/Frame, Unknown Caliber, Serial No. LW001804, 115 F. Supp. 3d 544, 577 (E.D. Pa. 2015).

22. Notice of Appeal at 1, *One Palmetto*, 115 F. Supp. 3d 544, (No. 15–2202), http://media.wix.com/ugd/c601ae_b2835fb7f8c84ab6978a271a13bb4dee.pdf.

23. *One Palmetto State Armory*, 822 F.3d at 144.

24. U.S. CONST. amends. I–X.

trials.[25] These rights are so crucial to American liberty that they are called "fundamental."[26]

Fundamental rights are protected by the Due Process Clause of the Fifth Amendment, which states that no person shall "be deprived of life, liberty, or property, without due process of law."[27] In *Palko v. Connecticut*, Justice Benjamin Cardozo wrote that the Fifth Amendment's Due Process Clause protects those rights that are "of the very essence of a scheme of ordered liberty," which, if abolished, would violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[28]

In modern American jurisprudence, courts afford fundamental rights heightened levels of protection against infringement by the government.[29] To determine whether the government has properly restricted a right guaranteed to citizens, courts apply different levels of judicial review.[30]

Rational basis review is the most lenient level of scrutiny.[31] In other words, a court is most likely to uphold a challenged law as constitutional if the court applies rational basis review.[32] When applying rational basis, a court will decide whether the proposed government actions are rationally related to a legitimate government interest.[33] Generally speaking, the Supreme Court of the United States is very deferential to the government when applying rational basis review, and the Court upholds most challenged government actions as constitutional.[34]

The next level of review is intermediate scrutiny.[35] When courts apply intermediate scrutiny, they uphold a challenged government action when it is "substantially related to an important government purpose."[36] The government action does not need to be necessary, but it must merely have a substantial relationship to the end being sought.[37] The burden of proving such purpose for the government actions is "demanding" and rests entirely with the government.[38]

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25. *Id.* amends. I, II, IV, V.

26. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 812 (4th ed. 2011).

27. U.S. CONST. amend. V.

28. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)) *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

29. Reno v. Flores, 507 U.S. 292, 301–02 (1993).

30. CHEMERINSKY, *supra* note 26, at 551.

31. *Id.* at 552–53.

32. *Id.*

33. *Id.* at 553.

34. *Id.*

35. *Id.*

36. *Id.*; *see also* Craig v. Boren, 429 U.S. 190, 197 (1976).

37. CHEMERINSKY, *supra* note 26, at 553.

38. *Id.*; *see also* United States v. Virginia, 518 U.S. 515, 533 (1996) (describing the burden of proof required for challenged government actions to be upheld).

Fundamental rights receive the most stringent standard of review, known as "strict scrutiny."[39] For government actions to be upheld under strict scrutiny, the government must demonstrate that its actions reflect a compelling government interest and narrowly tailored means of achieving its desired goals.[40] Typically, this standard is a difficult hurdle for the government to overcome; once a deciding court applies strict scrutiny, it usually strikes down the challenged law.[41]

Finally, most fundamental rights have been "incorporated" under what is known as "substantive due process" guaranteed by the Fourteenth Amendment.[42] Simply put, fundamental rights incorporated under substantive due process apply to state and local governments such that these entities cannot infringe upon those rights any more than the federal government can.[43]

B. The Second Amendment: The Militia, the People, and the Rights Conferred

The Second Amendment guarantees one of the most important rights: the right to bear arms. The Second Amendment to the United States Constitution states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[44] The Second Amendment is normally divided into two parts: the prefatory clause ("[a] well regulated Militia, being necessary to the security of a free State") and the operative clause ("the right of the people to keep and bear Arms, shall not be infringed").[45] The prefatory clause does not limit the operative clause but rather announces its purpose.[46]

The Second Amendment's function is multifaceted.[47] The first, and perhaps least understood, purpose served by the Second Amendment is the prevention of tyranny by the government.[48] More specifically, the Founding Fathers' intent for the Second Amendment was for it to act as a check on the standing army raised and supported by a tyrannical national government.[49]

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39. CHEMERINSKY, *supra* note 26, at 554, 812; *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (detailing the different levels of scrutiny courts should apply to cases involving the government's infringement of rights).

40. CHEMERINSKY, *supra* note 26, at 554.

41. *Id.*

42. U.S. CONST. amend. XIV; CHEMERINSKY, *supra* note 26, at 560.

43. CHEMERINSKY, *supra* note 26, at 560–61.

44. U.S. CONST. amend. II.

45. *Id.*; District of Columbia v. Heller, 554 U.S. 570, 577 (2008).

46. *Heller*, 554 U.S. at 599.

47. AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 199 (1998).

48. Daniel J. Schultz, *The Second Amendment: The Framers' Intentions*, 'LECTRIC L. LIBR., http://www.lectlaw.com/files/gun01.htm (last visited Nov. 20, 2016).

49. *Id.*

Historical sources indicate that the Founding Fathers, especially the Anti-Federalists, were very concerned by the proposition that the federal government would disarm the civilian populace and enforce rule through a strong standing army or government-controlled militia, and thus, the Founding Fathers provided civilians a method to prevent this from occurring.[50] The second purpose of the Second Amendment is to guarantee the individual right to self-defense.[51] Although hunting and other sporting purposes are commonly cited as the central purpose of the Second Amendment, this misconception is against the weight of the evidence gleaned from historical sources and modern jurisprudence.[52]

Interpreting the meaning and scope of the Second Amendment proves to be a difficult task. The Constitution was written to be understood by ordinary citizens, with its words and phrases to be used in their normal meaning.[53] In support of this notion, Justice Antonin Scalia wrote, in *District of Columbia v. Heller*, that "[n]ormal meaning . . . excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."[54] Despite the unambiguous assignment of meaning to constitutional provisions, the interpretation of the Second Amendment has caused heated debate among scholars and American society for generations.[55] Some proponents argue that the Second Amendment guarantees the right of individuals to keep and own firearms.[56] Others believe that the Second Amendment only guarantees a right for civilians to possess firearms while in service with the militia.[57]

Societal pressures and changes in American culture have also significantly impacted the debate surrounding the Second Amendment.[58] Recent incidents involving mass shootings have fanned the flames of the debate on gun control, with tensions coming to a head after the mass shooting at Sandy Hook Elementary School in Newtown, Connecticut, on December

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50. *Heller*, 554 U.S. at 570 (citation omitted).

51. *Id.*

52. *See* Sean Davis, *Sorry, Josh Earnest, but the Second Amendment Isn't About Hunting*, FEDERALIST (June 23, 2015), http://thefederalist.com/2015/06/23/sorry-josh-earnest-but-the-second-amendment-isnt-about-hunting/.

53. *See* Martin v. Hunter's Lessee, 14 U.S. 304, 338–39 (1816) ("If the [Constitution's] text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.").

54. *Heller*, 554 U.S. at 576–77.

55. *Id.* at 678–80; United States v. Sprague, 282 U.S. 716, 731 (1931); CHEMERINSKY, *supra* note 26, at 941.

56. *See* CHEMERINSKY, *supra* note 26, at 941.

57. *Id.*

58. *See Debate: Has the Right to Bear Arms Outlived Its Usefulness?*, NPR (Nov. 21, 2013, 12:45 PM), http://www.npr.org/2013/11/18/246023431/debate-has-the-right-to-bear-arms-outlived-its-usefulness.

14, 2012.[59] At the forefront of the controversy is whether the possession of so-called "assault weapons" should be prohibited.[60] Although no major federal gun control laws were passed in the aftermath of the Sandy Hook shooting and the debate on gun control has since cooled somewhat (with one prominent weekly newspaper calling gun control "doomed"), the Second Amendment is likely to continue to be one of the most hotly contested issues dominating American politics.[61]

C. The Right to Bear Arms Finally Arrives: District of Columbia v. Heller *and Other Modern Second Amendment Cases*

Although the battle over the Second Amendment continues to rage in the American political landscape, the legal debate over the Second Amendment was only (somewhat) settled within the last ten years.[62] For over two centuries, the judiciary had not resolved the questions surrounding the meaning and scope of the Second Amendment.[63] Early Second Amendment cases, such as *United States v. Cruikshank* and *Presser v. Illinois*, merely affirmed the notion that the Second Amendment acted as a limitation on the powers of the federal government and not on state powers.[64] None of these early cases established whether the Second Amendment conferred a collective or an individual right to bear arms.[65]

This state of affairs went unchanged until the Supreme Court decided the landmark case of *District of Columbia v. Heller* in 2008.[66] In *Heller*, a District of Columbia ordinance effectively banned the possession of handguns within Washington, D.C. by making it a crime to carry an unregistered firearm while simultaneously prohibiting the registration of handguns.[67] The plaintiff, Dick Heller, was a police officer who intended to

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59. *See, e.g.*, Marko Ceperkovic, *Sandy Hook Shooting: Is It Time to Change the Second Amendment?*, POLICY.MIC (Dec. 15, 2012), http://mic.com/articles/20838/sandy-hook-shooting-is-it-time-to-change-the-second-amendment.

60. *See Debate: Has the Right to Bear Arms Outlived Its Usefulness?*, *supra* note 58. Although "assault weapon" is a misnomer, the term has come to mean a semi-automatic, shoulder-fired weapon, typically with a magazine capacity of over ten rounds. *See* Erica Goode, *Even Defining 'Assault Rifles' Is Complicated*, N.Y. TIMES (Jan. 16, 2013), http://www.nytimes.com/2013/01/17/us/even-defining-assault-weapons-is-complicated.html?_r=0.

61. Lexington, *Charleston and Public Policy: Why Gun Control Is Doomed*, ECONOMIST (June 19, 2015, 4:16 PM), http://www.economist.com/blogs/democracyinamerica/2015/06/charleston-and-public-policy.

62. *See* District of Columbia v. Heller, 554 U.S. 570, 575–76 (2008).

63. *See* Dan M. Peterson & Stephen P. Halbrook, *A Revolution in Second Amendment Law*, 29 DEL. LAW., Winter 2011–2012, at 12.

64. Presser v. Illinois, 116 U.S. 252, 265 (1886); United States v. Cruikshank, 92 U.S. 542, 553 (1875); *see also* Peterson & Halbrook, *supra* note 63 (stating that early Second Amendment cases only affirmed that the Second Amendment acted as a check on the federal government).

65. *See Heller*, 554 U.S. at 579.

66. *Id.* at 571; CHEMERINSKY, *supra* note 26, at 942–44.

67. *Heller*, 554 U.S. at 571.

possess a pistol in his home.[68] When the District of Columbia rejected his application to possess a handgun, Heller sued the District of Columbia, seeking an injunction barring the enforcement of the D.C.'s ordinance.[69] In his complaint, Heller alleged that the ordinance was an unconstitutional infringement on his Second Amendment right to bear arms.[70] After the district court dismissed his claim, the D.C. Circuit Court of Appeals reversed the district court's decision, holding that the Second Amendment guarantees an individual's right to possess firearms and that the District of Columbia's de facto ban on pistols violated that right.[71]

The Supreme Court granted certiorari and decided the case on June 26, 2008.[72] In its 5–4 decision, the Court affirmed the holding by the D.C. Circuit Court of Appeals.[73] Writing for the majority, Justice Scalia stated that the Second Amendment guarantees an individual—rather than a collective—right to bear arms; in other words, the right to bear arms is not predicated on participation in a corporate body (such as a militia) but may instead be exercised in an individual capacity.[74] In his interpretation of the Founders' intent for the Second Amendment, Justice Scalia relied heavily on 18th century sources for the definitions of terms related to the Second Amendment.[75] For example, Justice Scalia concluded that the phrase "the right to keep arms" was meant to apply to "militiamen *and everyone else*" based on a series of 18th century anthologies, treatises, and books.[76] Further, Justice Scalia opined that the phrase "security of a free State" meant the security of the people as individuals, not the individual states, and that the militia was necessary to aid in repelling invasions, suppressing insurrections, and preventing tyranny by the government.[77]

Finally, and perhaps most significantly for the purposes of this Comment, the Court addressed the District of Columbia's de facto ban on an entire class of firearms—specifically, handguns.[78] Reasoning that the "inherent right of self-defense has been central to the Second Amendment right," Justice Scalia stated that because the District of Columbia's ban on

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68. *Id.*

69. *Id.* at 575–76.

70. *Id.* at 570.

71. *Id.* at 576.

72. *See id.*

73. *See id.*

74. *Id.* at 581. Although the Second Amendment's prefatory clause suggests that the right to bear arms is predicated on service in the "militia," Justice Scalia rejected this argument, reasoning that the militia in colonial America consisted of a subset of the population and that protecting only the right to bear arms while serving in the militia does not comport with the operative clause's description of "the people." *Id.* at 580–81.

75. *See id.* at 581–85.

76. *Id.* at 583; THOMAS WOOD, A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW 282 (1730); 3 A COMPLEAT COLLECTION OF STATE–TRYALS 185 (1719); A COLLECTION OF ALL THE ACTS OF ASSEMBLY NOW IN FORCE IN THE COLONY OF VIRGINIA 596 (1733).

77. *Heller*, 554 U.S. at 598.

78. *Id.* at 628–29.

handguns deprived its citizens of the ability to use the "most preferred firearm in the nation to 'keep' and use for protection of . . . home[s] and famil[ies]," the District of Columbia's categorical ban on handguns "fail[ed] constitutional muster."[79] The majority also rejected the argument that the ban on handguns was permissible as long as the possession of other types of firearms (such as rifles or shotguns) was allowed, reasoning that "[i]t is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon."[80] The majority also stated that the Second Amendment protects all bearable arms, including arms not in existence when the Bill of Rights was adopted, and that although modern bearable firearms are useless against warplanes and tanks, this should not change the interpretation of the Second Amendment.[81]

The affirmation of Second Amendment rights did not stop with *Heller*.[82] In *Peruta v. County of San Diego*, the Ninth Circuit affirmed the individual right to carry a handgun outside the home for self-defense and that this action constitutes a "bearing of arms" within the meaning of the Second Amendment.[83] In addition, the Supreme Court's decision in *McDonald v. City of Chicago* resulted in the right to bear arms being one of the last fundamental rights to be incorporated under substantive due process.[84] The plaintiffs in *McDonald* challenged the constitutionality of a Chicago statute that amounted to a de facto ban on handguns.[85] In a 5–4 plurality decision, the majority held that Chicago's statute was unconstitutional based on the Court's decision in *Heller*.[86] Further, the Court held that the Second Amendment is applicable to the states by virtue of its incorporation into the substantive due process guarantee of the Fourteenth Amendment.[87]

Although the affirmation of the right to bear arms was a long time coming, these cases were instrumental in settling several unanswered questions regarding the Second Amendment. *Heller* established that the right to bear arms is an individual, rather than a collective, right and that the right to self-defense is fundamental.[88] *Peruta* affirmed the right of self-defense as fundamental and supported the right of self-defense outside the home.[89] Finally, *McDonald* incorporated the Second Amendment under

79. *Id.* (citing Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).
80. *Id.* at 629.
81. *Id.* at 627–28.
82. *See id.*; *see also* Peruta v. Cty. of San Diego, 742 F.3d 1144, 1178–79 (9th Cir. 2014) (expanding Second Amendment protections), *on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016).
83. *Peruta*, 742 F.3d at 1179.
84. *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).
85. *Id.* at 751.
86. *Id.* at 747.
87. *Id.* at 750.
88. *See* District of Columbia v. Heller, 554 U.S. 570, 627–36 (2008).
89. *See* Peruta v. City of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014).

substantive due process, thereby holding the right applicable to state and local governments.[90]

III. LEGAL GYRATIONS: THE NATIONAL FIREARMS ACT AND ITS OFFSPRING

Despite these decisions that expanded the rights guaranteed by the Second Amendment, there are still heavy restrictions on certain weapons that have withstood challenges for decades. Despite *Heller*'s disapproval of a categorical ban on an entire class of firearms, *Peruta*'s affirmation of the individual right to self-defense, and *McDonald*'s application of *Heller*'s principles to state and local governments, the federal government and many states still enforce a practically categorical ban on entire classes of firearms especially suited for self-defense.[91]

These restrictions have their roots in the NFA.[92] In its original and current form, the NFA places heavy restrictions on several classes of firearms: machineguns, short-barreled rifles and shotguns, and firearm silencers.[93] The Gun Control Act of 1968 (GCA) expanded on the NFA's restrictions on machineguns, declaring that they had "no sporting purpose" and were not available for purchase by civilians.[94] The GCA also ended the importation of machineguns from other countries.[95] The final major legislation pertaining to NFA weapons culminated in the FOPA, which banned civilian possession of machineguns manufactured after May 19, 1986.[96] This last piece of legislation was seen as a *coup de grâce* of civilian machinegun ownership because it greatly reduced the amount of machineguns available for legal private ownership, driving prices to astronomical heights and reducing the possibility of ownership to only those few individuals who could afford them.[97]

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90. *See McDonald*, 561 U.S. at 750.

91. *Id.*; *Heller*, 554 U.S. at 628; *Peruta*, 742 F.3d at 1179; *see infra* Section III.C.

92. National Firearms Act of 1934, 48 Stat. 1236, chs. 756–57 (codified as amended in scattered sections of 26 U.S.C.).

93. *National Firearms Act*, ATF, https://www.atf.gov/rules-and-regulations/national-firearms-act (last updated Sept. 22, 2016). Although these weapons are referred to by various names, this Comment will use their legal names.

94. Alex C., *Machine Guns Are Legal: A Practical Guide to Full Auto*, THEFIREARMBLOG.COM (May 21, 2014), http://www.thefirearmblog.com/blog/2014/05/21/machine-guns-legal-practical-guide-full-auto/.

95. *Id.*; 18 U.S.C. § 922 (2016).

96. C., *supra* note 94.

97. *Id.*

A. A Jammed Gun: The Modern Acquisition of National Firearms Act Weapons

The process of legally acquiring NFA weapons is complicated and onerous. Under current federal law, civilians may make or transfer short-barreled rifles and shotguns as well as firearm silencers only with the payment of a $200 tax to the Department of Justice.[98] Civilians may only possess machineguns manufactured prior to May 19, 1986; the transfer of these weapons is also subject to the $200 tax.[99] Additionally, individuals applying for the manufacture of a short-barreled rifle or shotgun, or firearm silencer must submit a Form 1 along with photographs, fingerprints, and the approval of the local chief law enforcement officer (CLEO) certifying that the individual may legally possess the NFA weapon.[100] Federal law does not allow the manufacture and sale of machineguns by civilians without special licenses.[101] Likewise, individuals applying for the transfer of an existing NFA weapon must file a BATFE Form 5320.4 (Form 4) along with the other requirements needed to submit a Form 1.[102] The various forms required to make or buy NFA weapons are available on the BATFE's website in PDF format.[103] An electronic submission method, known as "eForms," is also available.[104] In 2016, the wait time for Form 1 approval was approximately four months, while Form 4 submissions were typically approved within two or three months.[105] Applications are subject to disapproval for even seemingly minor errors and may result in a months-long refund process or a restarted wait time.[106]

In addition to filing applications as an individual, applicants may submit their BATFE forms on behalf of a trust.[107] Because a trust is not a "person" as defined by the GCA, until recently, applicants did not need to submit

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98. *National Firearms Act*, *supra* note 93.

99. 18 U.S.C. § 922(o); 26 U.S.C. § 5811 (2016).

100. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP'T OF JUSTICE, NATIONAL FIREARMS ACT HANDBOOK 24 (2009), https://www.atf.gov/firearms/docs/atf-national-firearms-act-handbook-atf-p-53208/download [hereinafter NATIONAL FIREARMS ACT HANDBOOK].

101. *Federal Law on Machine Guns & Automatic Firearms*, LAW CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/federal-law-on-machine-guns-automatic-firearms/ (last visited Nov. 20, 2016). A Class II license is required to manufacture machineguns, whereas a Class III license is required to sell machineguns. *Id.*

102. NATIONAL FIREARMS ACT HANDBOOK, *supra* note 100, at 25.

103. *Forms Library*, ATF, https://www.atf.gov/resource-center/forms-library (last visited Nov. 3, 2016).

104. *Applications - eForms*, ATF, https://www.atf.gov/firearms/applications-eforms (last updated Sept. 22, 2016).

105. *Transfer Tracking: Avg. Wait Times*, NFATRACKER, www.nfatracker.com/nfa-transfer-time-tracking/ (last visited Nov. 20, 2016).

106. *See generally* David M. Goldman, *What to Do If Your ATF eForm Is Rejected*, GUN TR. L. BLOG (July 6, 2014), https://www.guntrustlawyer.com/2014/07/what-to-do-if-your-atf-eform-i.html.

107. C., *supra* note 94.

fingerprints or photographs of a trust's grantor or trustee, or submit the approval of the CLEO with their Form 1 or Form 4.[108]

Recently amended regulations require that fingerprints and photographs from each member of a trust must be submitted along with the application, although the regulations eliminate the requirement of the CLEO's approval for applications filed by individuals or trusts.[109] These new regulations, collectively referred to as "41F," seem to eliminate most of the benefits of submitting applications through a trust because of the new requirement of fingerprints and photographs from not only the person filing the application on behalf of the trust but also from every other member of the trust.[110] At this point, it seems that the only remaining benefit of acquiring NFA weapons through a trust is the ability of multiple individuals acting as trustees to possess and use the weapons owned by an NFA trust as opposed to weapons registered to an individual, who is the only person who may legally possess and use his or her NFA weapons.[111] Further, due to the new requirement for fingerprints and photographs of responsible persons to be submitted with every application, eForms are not available until 41F goes into effect on July 13, 2016.[112]

Regardless of whether an applicant files as an individual or on behalf of a trust, if the application is approved, the weapon is registered with the Secretary of Treasury in a national registry maintained by the BATFE.[113] A violation of any of the NFA's provisions is a federal offense punishable by up to a $10,000 fine, up to ten years in federal prison, or both.[114] Current law enforcement and military personnel possessing NFA weapons within the scope of their duties are exempt from these restrictions.[115] While most states allow individuals or trusts to possess NFA weapons, a minority of states has criminalized the possession of NFA weapons through state-enacted statutes; there may be criminal penalties associated with the violation of these state statutes.[116] For example, a person who violates Texas Penal Code § 46.05

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108. Sean Cody, *Texas NFA Trust*, TEX. NFA GUN TR., http://www.texasnfatrust.com/texas-national-firearms-act-gun-trust.html (last visited Nov. 20, 2016).

109. *Chief Law Enforcement Officer Certification to Be Removed from National Firearms Act Transfers*, AM. SUPPRESSOR ASS'N (Jan. 5, 2016), http://americansuppressorassociation.com/chief-law-enforcement-officer-certification-to-be-removed-from-national-firearms-act-transfers/.

110. *See id.*

111. *See id.*

112. *See id.*

113. *See* C., *supra* note 94.

114. 26 U.S.C. § 5871 (2016).

115. *See* C., *supra* note 94.

116. *State NFA Restrictions*, 3G TACTICAL, https://www.3gtactical.com/nfa/nfa-state-restrictions (last visited Nov. 20, 2016). An interesting example of a conviction of an individual under a state-enacted statute is the case of Steven Ray Tickle, the star of the Discovery Channel series *Moonshiners*. *See* Chris Eger, *Tickle Guilty of Having an Illegal Short Barreled Shotgun*, GUNS.COM (Feb. 2, 2016), http://www.guns.com/2016/02/02/tickle-guilty-of-having-an-illegal-short-barreled-shotgun/. On January 28, 2016, Tickle was found guilty of possessing an unregistered short-barreled shotgun (with a barrel 14

(the Texas criminal statute concerning the possession of NFA weapons) commits a third-degree felony with a punishment range of two to ten years in prison.[117] These state statutes provide an additional set of legal implications for individuals to contend with when they are considering whether to attempt to acquire NFA weapons.[118]

B. National Firearms Act Weapon Descriptions

Before delving into a legal analysis of the NFA and its progeny, some explanation of what NFA firearms are and how they function is necessary. The first type of firearm regulated by the NFA is machineguns.[119] The law considers a machinegun to be "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single [pull] of the trigger."[120] In less complicated language, a machinegun is any weapon that fires more than one shot with each pull of the trigger, typically in rapid succession.[121] A machinegun will continue to fire as long as its trigger is held down, stopping only when its ammunition supply has been exhausted or it encounters a mechanical malfunction—known as a "jam."[122] Most machineguns fire at a high rate, which usually varies from 500–900 rounds per minute; for example, the M16 assault rifle fires at approximately 700–950 rounds per minute.[123]

Machineguns are standard issue to military personnel around the world, including American soldiers; the current-issue machinegun to military personnel in the United States Army, Air Force, Navy, and Marine Corps is the M16 assault rifle or its smaller version, the M4 Carbine.[124] The M16 and M4 are shoulder-fired personal weapons intended to be borne and used by one person.[125] The M16 and M4 are not crew-served weapons, which are typically operated by two or more individuals.[126] Both the M16 and M4 are "select fire" weapons; that is, they are capable of both semi-automatic fire,

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inches in length) in violation of a Virginia statute regulating the possession of these weapons. *Id.*; *see infra* note 133 (discussing NFA restrictions on short-barreled shotguns).

117. TEX. PENAL CODE ANN. §§ 12.34(a), 46.05(e) (West 2016).

118. *See id.* § 46.05.

119. 26 U.S.C. § 5845(b) (2016).

120. *Id.*

121. GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 53 (Gregg Lee Carter ed., 2d ed. 2012).

122. *Id.*

123. *Armalite / Colt AR-15 / M16 M16A1 M16A2 M16A3 M16A4 Assault Rifle (USA)*, WORLD GUNS, http://world.guns.ru/assault/usa/m16-m16a1-m16a2-m16a3-e.html (last visited Nov. 20, 2016) [hereinafter *Assault Rifle*].

124. *Id.*

125. *M16 Class Rifle*, SHOOTER'S LOG, http://blog.cheaperthandirt.com/military-manuals/m16-class-rifle/ (last visited Nov. 20, 2016).

126. Z, *Crew-Served Weapon Systems*, U.S. ARMY: BLOG (Aug. 27, 2006, 10:29 AM), http://found memories.blogspot.com/2006/08/crew-served-weapon-systems.html.

one pull of the trigger fires one shot, and fully automatic fire, one pull of the trigger fires multiple shots.[127] While semi-automatic fire is usually more accurate and controllable by users, fully automatic fire is useful in military engagements to provide suppressing fire, which can keep enemy soldiers' heads down while allowing friendly soldiers to move freely on the battlefield.[128] As such, the ability to provide both semi-automatic and fully automatic fire by one individually bearable firearm is an important facet of the modern soldier's ability to fight and win military engagements.[129]

The second class of firearms regulated by the NFA is short-barreled rifles and shotguns.[130] The law considers short-barreled rifles to be "rifle[s] having a barrel or barrels of less than 16 inches in length . . . [or] a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel . . . less than 16 inches in length."[131] Simply put, this means that a rifle cannot be manufactured or modified to be less than twenty-six inches in overall length or have a barrel less than sixteen inches long.[132] The NFA places similar restrictions on short-barreled shotguns, which may not be shorter than twenty-six inches in overall length or have a barrel shorter than eighteen inches.[133]

Short-barreled rifles and shotguns have the advantage of being much shorter and lighter than their full-sized counterparts.[134] This means that they are more easily wielded in confined areas, such as homes and vehicles, making them ideal for self-defense.[135] They are also more easily used by individuals of smaller stature, who may possess less upper-body strength.[136] Although the performance of the projectiles fired from these weapons may suffer somewhat as a result of shorter barrels, this disadvantage is insignificant compared to the gained portability and handiness that the shorter overall length and weight of these weapons give the user.[137]

Firearm silencers (also called "firearm mufflers" by the BATFE) are the third major category of firearms regulated by the NFA.[138] Firearm silencers are defined as "any device for silencing, muffling, or diminishing the report

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127. *See Assault Rifle*, *supra* note 123.

128. *See* Matthew Cox, *Full Auto: Battlefield Necessity or a Waste of Ammo?*, KIT UP! (Dec. 29, 2011), kitup.military.com/2011/12/full-auto-battlefield-necessity.html.

129. *See* Kyle Jahner, *Army Continues Rollout of More Durable, Full-Auto M4A1*, ARMYTIMES (July 4, 2015), http://www.armytimes.com/story/military/tech/2015/07/04/army-m4a1-rifle-carbine/28173291/.

130. 26 U.S.C. § 5845(a) (2016).

131. *Id.*

132. *Id.*

133. *Id.*

134. Steve Adelmann, *The Facts About SBRs*, SHOOTING ILLUSTRATED (Oct. 13, 2011), http://www.shootingillustrated.com/articles/2011/10/13/the-facts-about-sbrs/.

135. *Id.*

136. *Id.*

137. *Id.*

138. *See National Firearms Act*, *supra* note 93.

of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication."[139] In other words, firearm silencers reduce the sound signature of a discharged firearm and can consist of the complete device or any part whose only function is to be a component of a firearm silencer.[140] For instance, the law considers the outer tube of the firearm silencer to be a firearm silencer itself because it is a component designed to be a part of a firearm silencer.[141] Modern firearm silencers typically consist of a tube containing a series of baffles that restrict the expanding gases created by the discharge of a firearm, slowing the expansion of the gases and reducing the loudness of the report.[142]

This reduction in sound report can lead to many benefits for users, such as reduced loudness (and reduced risk of hearing loss), lower recoil from the firearm, elimination of muzzle blast, increased accuracy, and faster follow-up shots.[143] In addition, firearm silencers limit the noise that crosses property lines; this tends to reduce the chance that others will be disturbed, fostering improved relations between neighbors, and may reduce the incidence of nuisance claims.[144] Combined, these benefits of firearm silencers can make shooting a safer and more pleasurable experience for users and bystanders alike.[145]

Despite the reduction in sound granted by their use, many often overestimate the effectiveness of firearm silencers; for most modern firearm silencers, the average reduction in report usually amounts to only 14.3–43 decibels.[146] A firearm's report without a silencer attached is usually 130–150 decibels.[147] As such, almost all firearms with a silencer attached will still have a report of well over 100 decibels, which is approximately as loud as a running motorcycle or snowmobile.[148] These facts suggest that firearm silencers do not actually "silence" firearms at all; thus, "suppressor" is a more appropriate name, which has come into widespread parlance.[149] Further, the

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139. 18 U.S.C. § 921(a)(24) (2016).

140. *See id.*

141. *See id.*

142. Daven Hiskey, *Gun "Silencers" Don't Make Them Anywhere Near Silent*, TODAY I FOUND OUT (Nov. 4, 2010), http://www.todayifoundout.com/index.php/2010/11/gun-silencers-dont-make-them-anywhere-near-silent/.

143. *Our Story*, SILENCER SHOP, http://www.silencershop.com/our-story/ (last visited Nov. 20, 2016).

144. *See* Scott E. Mayer, *Suppressors Aren't Silencers*, GUNS & AMMO (July 1, 2011), http://www.gunsandammo.com/gear-accessories/suppressors/suppressors-arent-silencers/.

145. *See Our Story*, *supra* note 143.

146. Hiskey, *supra* note 142.

147. *See id.*

148. *Decibel (Loudness) Comparison Chart*, GALEN CAROL AUDIO, http://www.gcaudio.com/resources/howtos/loudness.html (last visited Nov. 20, 2016).

149. Jeremy S., *Guns for Beginners: "Silencer" or "Suppressor?"*, THETRUTHABOUTGUNS.COM (Apr. 16, 2015), http://www.thetruthaboutguns.com/2015/04/jeremy-s/guns-for-beginners-silencer-or-suppressor/. For this reason, "suppressor" will be used for the remainder of this Comment.

fact that most suppressed firearms are still louder than a motorcycle or snowmobile detracts from the popular perception of firearm suppressors as "assassin's tools" to be used for nefarious or illegal purposes.[150]

C. Benefits of National Firearms Act Weapon Ownership

While federal and state laws regulate machineguns, short-barreled rifles and shotguns, and firearm suppressors, this has not prevented the legal use of these weapons by civilians in a wide variety of settings. Irrespective of their type, collectors prize NFA weapons because of their relative rarity compared to other easier acquired firearms.[151]

Machineguns are used in special competitions across the nation.[152] In addition, although it rarely occurs, people have used machineguns in self-defense situations.[153] Despite the obvious advantages of using a machinegun for self-defense, the highly regulated nature of these weapons has resulted in legal difficulties for their users, usually because machineguns were considered an aggravating factor when determining whether the actions of the users were legally justified.[154] This supposed aggravating factor seems to be predicated on the notion that machineguns are "overkill" because of their high firepower, resulting in a disproportionate amount of force being used against an assailant.[155]

Short-barreled rifles and shotguns are considered ideal for use in the home during defensive situations, largely because of their short length and ease of handling in confined areas, such as hallways.[156] The decreased length of these weapons also allows individuals of smaller stature to wield them more effectively.[157] Short-barreled rifles are also more effective than AR-15 "pistols," which are simply short-barreled rifles without the stock attached.[158]

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150. *See* Mayer, *supra* note 144.

151. *See* John Brown, *The National Firearms Act Trade & Collectors Association (NFATCA)*, SMALL ARMS REV., http://www.smallarmsreview.com/display.article.cfm?idarticles=1854 (last visited Nov. 20, 2016) (describing a prolific national association dedicated to the collection of firearms regulated by the NFA).

152. *See Machine Gun Competition Calendar*, MINIUZI.COM, http://miniuzi.com/calendar/month.php?date=2015101 (last visited Nov. 20, 2016). As of October 15, 2015, multiple machinegun competitions across the United States are held each month. *See id.*

153. *See, e.g.*, Ridge, *"F You and Your High Powered Rifle!" The Gary Fadden Incident*, COLO. AR-15 SHOOTERS CLUB DISCUSSION F. (Jan. 11, 2010, 10:43 PM), https://www.ar-15.co/threads/19235-quot-F-you-and-your-high-powered-rifle!-quot-The-Gary-Fadden-incident.

154. *See id.*

155. *See id.*

156. *See* Robert Farago, *The Home Defense Shotgun Is Dead*, THETRUTHABOUTGUNS.COM (Nov. 10, 2014), http://www.thetruthaboutguns.com/2014/11/robert-farago/the-home-defense-shotgun-is-dead/ (suggesting that some short-barreled rifles are superior to shotguns for home defense purposes because short-barreled rifles are compact, lightweight, accurate, and have a large magazine capacity).

157. *See id.*

158. *See id.* These weapons do not have a stock and classify as pistols rather than short-barreled rifles, thus enabling them to be possessed without being subject to NFA regulations. *See id.*

However, the use of short-barreled rifles and shotguns for self-defense may result in similar legal difficulties faced by individuals using machineguns for self-defense.[159]

Finally, firearm suppressors are widely used to train new shooters because of the reduced strain put on users' hearing in a variety of situations.[160] Firearm suppressors may also reduce recoil and increase accuracy when attached to a host weapon.[161] Firearm suppressors are also useful for hunting because their use makes detection by game less likely and results in less noise transmission to neighboring properties during hunting season.[162]

D. Bootleggers, Communists, and the Taxing Clause: The National Firearms Act's Legal Background

Considering the benefits of NFA weapons, why does the NFA so highly restrict their possession by civilians? The NFA was born out of the Great Depression, when fears of armed bootleggers, gangsters, and communists wreaking havoc on the public peace drove Congress to pass the law in an attempt to keep weapons considered too powerful out of criminals' hands.[163] Events such as the Saint Valentine's Day Massacre—during which Chicago gangsters used Thompson submachineguns, which are fully automatic, short-barreled firearms—and other gangland slayings also drove the impetus for passing the NFA.[164]

In response to these fears, Congress passed the NFA in 1934 pursuant to the Taxing Power granted to it by the Constitution.[165] Congress imposed a tax on the manufacture and possession of certain kinds of firearms that fell under its authority.[166] Further, Congress found its authority to pass the NFA in the Commerce Clause by relating the interstate trafficking of NFA weapons to narcotics trafficking.[167] This authority was strengthened by *Perez v. United States*, in which the Supreme Court held that Congress could regulate wholly intrastate activities affecting interstate commerce without

159. *See generally* Ridge, *supra* note 153.

160. *See Our Story*, *supra* note 143.

161. *Education*, AM. SUPPRESSOR ASS'N, http://americansuppressorassociation.com/education/ (last visited Nov. 20, 2016).

162. *Id.* As of October 2016, forty states have legalized the use of suppressors while hunting. *Id.*

163. Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 602 (1995) (citing *Firearms: Hearing on H.R. 2569, H.R. 6606, H.R. 6607, and H.R. 11325 Before a Subcomm. of the H. Comm. on Interstate & Foreign Commerce*, 71st Cong., 2d Sess. 1–3, 7 (1930)).

164. GREGG LEE CARTER, GUN CONTROL IN THE UNITED STATES: A REFERENCE HANDBOOK 131 (2d ed. 2006).

165. *See* United States v. Miller, 307 U.S. 174, 175 n.1 (1939).

166. *See id.*

167. United States v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992) (citing H.R. REP. NO. 99-495, at 1–5, *reprinted in* 1986 U.S.C.C.A.N. 1327, 1327–31).

direct evidence that the intrastate activity had an effect on interstate commerce.[168] This holding had significant consequences for constitutional challenges to the NFA; after *Perez*, it became practically impossible to attack Congress's use of its commerce power to ban NFA weapons by claiming that the possession of NFA weapons had no effect on interstate commerce.[169]

This is not to say that the NFA went unchallenged. *United States v. Miller* was one of the first significant legal battles over the constitutionality of the NFA.[170] There, two individuals were convicted of transporting an unregistered short-barreled shotgun in interstate commerce in violation of the NFA.[171] The defendants argued that the NFA was not a revenue-raising measure—which is a proper use of Congress's taxing power—but instead an usurpation of the police powers properly delegated to the states and that the statute violated the Second and Tenth Amendments.[172]

On direct appeal from the trial court, the Supreme Court found these arguments unpersuasive and upheld the constitutionality of the NFA.[173] Writing for the majority, Justice McReynolds disagreed that the NFA was an usurpation of states' police powers, holding that Congress had the authority under the Taxing Clause to pass the NFA.[174] Justice McReynolds also reasoned that because short-barreled shotguns are not part of "ordinary military equipment" with a "reasonable relationship" to service in the militia, they are not afforded protection under the Second Amendment.[175] Further, the Court suggested that short-barreled shotguns are incapable of contributing to the "common defense" provided by the militia.[176] Finally, Justice McReynolds stated that although states have defined various levels of protection on the right to bear arms guaranteed by the Second Amendment, none of the states' protections included the right to possess or use short-barreled shotguns.[177]

Since *Miller*, a multitude of challenges to the constitutionality of the NFA have risen at both the federal and state levels, but all have ultimately failed.[178] While many of these challenges were connected to criminal charges

168. *See* Perez v. United States, 402 U.S. 146, 152–53 (1971).

169. *See id.*; *Hale*, 978 F.2d at 1018 (describing the difficulty of post-*Perez* challenges to gun restriction statutes passed pursuant to Congress's ability to regulate interstate commerce).

170. *See Miller*, 307 U.S. at 175.

171. *Id.*

172. *Id.* at 176.

173. *See id.* at 177–78.

174. *Id.* at 178–79.

175. *Id.* at 178.

176. *Id.*

177. *Id.*

178. *See, e.g.*, United States v. Rybar, 103 F.3d 273, 285–86 (3d Cir. 1996); United States v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992).

arising out of NFA violations, a few were born out of civil actions.[179] Two examples are the cases laid out in detail at the beginning of this Comment.[180]

E. Fire Support: Texas National Firearms Act Law

Similar to the Second Amendment of the United States Constitution, the Texas Constitution guarantees the right to bear arms.[181] The Texas Constitution establishes that the right to bear arms is connected to service while protecting the state, similar to the Second Amendment's "militia" language.[182] Unlike the Second Amendment, the Texas provision also provides that one of the purposes of the right to bear arms in Texas is for the "lawful defense of [oneself]," thus establishing Texans' right to bear arms as individuals.[183]

Texas also has its own statute governing the possession of NFA weapons.[184] Texas Penal Code § 46.05 criminalizes the possession, manufacture, transportation, repair, or sale of, *inter alia*, machine guns, short-barreled firearms, and firearm suppressors.[185] Until recently, registration with the BATFE under the NFA Register was merely a defense to prosecution for a person charged with possession of NFA weapons.[186] In 2015, however, Texas Penal Code § 46.05 was amended to remove the defense to prosecution subsection, instead adding a provision that decriminalizes the possession of NFA weapons if registered with the BATFE pursuant to the NFA Register.[187]

Texas Penal Code § 46.05 has been upheld in numerous state criminal convictions and has sustained attack on constitutional grounds in those cases.[188] Deciding courts typically reasoned that the weapons prohibited by Texas Penal Code § 46.05 are usually used in criminal activity and thus have

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179. *See generally Rybar*, 103 F.3d at 274; *Hale*, 978 F.2d at 1018.

180. *See supra* Part I.

181. *Compare* U.S. CONST. amend. II ("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."), *with* TEX. CONST. art. I, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.").

182. *See* U.S. CONST. amend. II; TEX. CONST. art. I, § 23.

183. TEX. CONST. art. I, § 23.

184. TEX. PENAL CODE ANN. § 46.05 (West 2016).

185. *Id.* § 46.05(a)(1)(b)–(c).

186. *Id.* § 46.05(c) ("It is a defense to prosecution under this section that the actor's possession was pursuant to registration pursuant to the National Firearms Act, as amended.") (footnote omitted).

187. *Id.* § 46.05(a)(1) ("A person commits an offense if the person intentionally or knowingly possesses . . . any of the following items, unless the item is registered in the National Firearms Registration and Transfer Record maintained by the [BATFE] . . . .").

188. *See, e.g.*, Morrison v. State, 339 S.W.2d 529, 532 (Tex. Crim. App. 1960); Lewis v. State, 759 S.W.2d 773, 774 (Tex. App.—Beaumont 1988, no writ).

no place in civilian hands.[189] Further, courts have held that the prohibition of weapons listed in this statute does not violate the Texas Constitution's guarantee of the right to bear arms.[190] While a few cases have involved only the possession of an unregistered NFA weapon by a defendant, in most cases, the defendants had other charges connected to the possession of a weapon prohibited by Texas Penal Code § 46.05 or had committed crimes while simultaneously in possession of an NFA weapon.[191]

While a panoply of Texas criminal cases have challenged the constitutionality of the NFA or Texas Penal Code § 46.05 on Second Amendment grounds, as of February 2016, only one *civil* case originating in Texas has done so.[192] It is here that our analysis begins.

IV. *HOLLIS* FIRES BACK: MODERN CHALLENGES TO THE NATIONAL FIREARMS ACT'S REGULATIONS

Hollis v. Lynch is the only Texas civil case to challenge the constitutionality of the NFA and Texas Penal Code § 46.05(a)(1)(b).[193] In that case, Jay Hollis, as trustee of the Jay Aubree Isaac Hollis Revocable Living Trust, submitted his Form 1 to the BATFE to make an M16 machinegun.[194] A few months later, the BATFE approved his Form 1, giving Hollis official authorization to manufacture an M16.[195] A few days later, however, the BATFE reversed its decision and disapproved Hollis's Form 1 despite having no statutory authority to do so.[196] Hollis sued the BATFE and various other government entities in the District Court for the Northern District of Texas, Dallas Division, alleging that his Second Amendment right to bear arms had been violated by the BATFE's actions.[197] He also sought declaratory relief, arguing that the federal and state statutes regulating NFA

189. *See, e.g.*, *Morrison*, 339 S.W.2d at 530–31 (citing TEX. PENAL CODE art. 489b, §§ 1, 2, 4 (West 1925)).

190. *See, e.g.*, *id.* at 531; TEX. CONST. art. I, § 23.

191. *See, e.g.*, Coleman v. State, 145 S.W.3d 649, 655 (Tex. Crim. App. 2004) (upholding the conviction of a defendant for the possession of a firearm silencer while in possession of controlled substances); Richardson v. State, 879 S.W.2d 874, 885 (Tex. Crim. App. 1993) (upholding the conviction of a defendant who committed murders using an unregistered Uzi submachinegun); Wynn v. State, 864 S.W.2d 539, 540 (Tex. Crim. App. 1993) (upholding the conviction of a defendant in possession of a firearm silencer and controlled substances); Bower v. State, 769 S.W.2d 887, 908 (Tex. Crim. App. 1989) (upholding the conviction of a man who committed murders with a firearm equipped with a silencer), *overruled on other grounds by* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991) (en banc); *Morrison*, 339 S.W.2d at 530 (upholding the conviction of a defendant who used a machinegun to commit a domestic assault on his wife and children).

192. *See generally* Hollis v. Lynch, 121 F. Supp. 3d 617 (N.D. Tex. 2015).

193. *See id.*

194. *Id.* at 622–23.

195. *Id.* at 623; *see supra* Part I.

196. *See supra* Part I.

197. *See supra* Part I.

weapons were unconstitutional.[198] The district court ruled in favor of the government, and Hollis appealed.[199] Ryan Watson, a resident of Pennsylvania, also sued the federal government under similar circumstances.[200] The district court hearing his case also ruled in favor of the government, and Watson also appealed the district court's decision.[201] On May 18, 2016, the Third Circuit Court of Appeals affirmed the judgment of the district court in Watson's case.[202]

In *Hollis*, the district court addressed several issues in its judgment. The first issue was Hollis's standing. The court held that Hollis suffered an injury in fact because the actions of the BATFE placed Hollis in legal jeopardy of being prosecuted if he had proceeded to manufacture his M16.[203] Nevertheless, the court stated that his injury was not traceable to the actions of the defendants because the Texas statute prohibiting the possession of machineguns would prohibit Hollis from possessing a machinegun independent of any federal statute.[204] In addition, because the State of Texas was not a party to the lawsuit, the court did not have redressability.[205] For these reasons, Hollis did not have standing, and the court struck down his Second Amendment claim for lack of traceability and redressability.[206]

Nevertheless, the court addressed Hollis's Second Amendment claims independent of any standing issues. The court relied on *National Rifle Association of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* (*NRA*) to determine whether the NFA, GCA, and Texas Penal Code § 46.05 harmonize with the Second Amendment's guarantee of the right to bear arms.[207] A court applying *NRA* to its analysis will ask whether "the challenged law burdens conduct that falls outside the Second Amendment's scope"; if it does, the law passes constitutional muster.[208] The defendants in *Hollis* relied on *Heller*'s language indicating that the Second Amendment right is not unlimited and that the Second Amendment does not guarantee the right to "keep and carry any weapon whatsoever in any manner whatsoever."[209] Further, the defendants argued that NFA weapons fell within

198. *See supra* Part I.
199. *See supra* Part I.
200. *See supra* Part I.
201. *See supra* Part I.
202. United States v. One Palmetto State Armory PA–15 Machinegun Receiver/Frame, Unknown Caliber, Serial No. LW001804, 115 F. Supp. 3d 544, 577 (E.D. Pa. 2015).
203. Hollis v. Lynch, 121 F. Supp. 3d 617, 628 (N.D. Tex. 2015).
204. *Id.* at 628–34.
205. *Id.*
206. *Id.* at 634.
207. *Id.*; Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194 (5th Cir. 2012).
208. *Nat'l Rifle Ass'n*, 700 F.3d at 195.
209. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008); Hollis v. Lynch, 121 F. Supp. 3d 617, 635 (N.D. Tex. 2015).

the prohibition of "dangerous and unusual" weapons by the *Heller* decision.[210]

Hollis countered by arguing that *Heller* stood for the proposition that the dangerous and unusual doctrine did not apply to the possession of a weapon but only to the manner in which a weapon is used.[211] Specifically, Hollis focused on the common law offense of "affray," which is the act of "arm[ing oneself] with dangerous and unusual weapons, in such a manner as will naturally diffuse a terrour [sic] among the people."[212] In other words, Hollis argued that it was the manner in which a weapon was *used*, and not any inherent characteristic of the weapon itself, that should determine whether the dangerous and unusual doctrine should apply.[213] The district court found these arguments unpersuasive and struck down Hollis's Second Amendment claim.[214]

A. Missed!: Why the District Court Got It Wrong

The district court that decided *Hollis* made several errors when it ruled in favor of the government. The following Sections examine each error and explain the reasoning behind this conclusion.

1. The District Court Misapplied the Dangerous and Unusual Doctrine

The dangerous and unusual doctrine has its roots in common law.[215] This doctrine posits that there is a historical prohibition of the carrying of dangerous and unusual weapons—such as axe-heads or other frightening weapons—that would elicit fear from the public.[216] The act of carrying dangerous or unusual weapons was a crime against the peace by causing terror to the public.[217] Justice Scalia recently stated that there was a tort known as "affrighting," which was the act of carrying a "really horrible weapon just to scare people."[218] It is likely that Justice Scalia's comments

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210. *Heller*, 554 U.S. at 626–27; *Hollis*, 121 F. Supp. 3d at 636. The *Miller* decision promulgated the "dangerous and unusual" doctrine. *See* United States v. Miller, 307 U.S. 174, 175 (1939).

211. *Heller*, 554 U.S. at 626–27; *Hollis*, 121 F. Supp. 3d at 636.

212. *Hollis*, 121 F. Supp. 3d at 636 (citation omitted); *Heller*, 554 U.S. at 626–27.

213. *See Heller*, 554 U.S. at 626–27; *Hollis*, 121 F. Supp. 3d at 636.

214. *Hollis*, 121 F. Supp. 3d at 636–39.

215. *Heller*, 554 U.S. at 627 (citing English v. State, 35 Tex. 473, 476 (1871)). The common law offense of affray was the act of "riding or going around with dangerous or unusual weapons[, which] is a crime against the public peace, by terrifying the good people of the land." *English*, 35 Tex. at 476 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49).

216. *Heller*, 554 U.S. at 627 (citing *English*, 35 Tex. at 476); *see also* Susan Jones, *Justice Scalia on 2nd Amendment Limitations: 'It Will Have to Be Decided'*, CBSNEWS.COM (July 30, 2012, 7:04 AM), http://cnsnews.com/news/article/justice-scalia-2nd-amendment-limitations-it-will-have-be-decided (providing detail on Justice Scalia's attitudes toward the Second Amendment).

217. *English*, 35 Tex. at 476.

218. *See* Jones, *supra* note 216.

stemmed from *A Treatise on the Criminal Law of the United States*, by Francis Whartson, which mentions that there was an offense of "affray" that involved no violent act but rather was committed by causing a breach of the peace through the display of dangerous and unusual weapons.[219]

As Justice Scalia noted, the act of "affrighting"—in which the dangerous and unusual doctrine has its roots—refers not to the *possession* of an "unusual" or "dangerous" weapon but rather to the illegal *use* of that weapon.[220] In a modern context, this would mean that it would be legal to possess a "scary" weapon, such as a machinegun, that may cause terror in the public, even if it would be illegal to carry that weapon (or, for that matter, any other weapon) in a manner calculated to frighten the public.[221]

Instead of relying on the historical basis for the dangerous and unusual doctrine, the district court in *Hollis* incorrectly interpreted the doctrine to apply to the bearing *and* possession of these weapons.[222] While the *Heller* Court stated that an individual may not possess "any weapon whatsoever in any manner whatsoever and for whatever purpose," the issue in *Hollis* did not concern whether Hollis had a right to *carry* a machinegun in a frightening manner but rather whether he had a right to *possess* a machinegun.[223] Further, the dangerous and unusual doctrine has little place in today's world because it is legal in many jurisdictions—including Texas—to carry semi-automatic rifles in public that have an identical appearance to their fully-automatic counterparts; it follows that fully-automatic rifles should cause no more alarm than semi-automatic rifles because it is all but impossible for most individuals to tell them apart.[224] For this reason, the dangerous and unusual doctrine should not only apply to the possession of these weapons but perhaps even apply to the carrying of these weapons in jurisdictions that allow the public carry of rifles and shotguns.

Because the dangerous and unusual doctrine is grounded in the use rather than the possession of frightening weapons capable of causing a breach of the public peace and because the doctrine's applicability to the public carrying of these weapons is questionable, the doctrine did not apply to the case in *Hollis*, and the district court erred in relying on it as a basis for its

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219. Brief for Plaintiff-Appellant at 11, Hollis v. Lynch, 121 F. Supp. 3d 617 (N.D. Tex. 2015) (No. 15–10803) [hereinafter *Hollis* Brief] (citing FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 527 (1874)).

220. *See* Jones, *supra* note 216.

221. *See, e.g.*, TEX. PENAL CODE ANN. § 42.01(8) (West 2016) (stating that a disorderly conduct offense may be committed if an individual "displays a firearm or other deadly weapon in a public place in a manner calculated to alarm"); *see also* Jones, *supra* note 216.

222. *See Hollis*, 121 F. Supp. 3d at 635–37.

223. District of Columbia v. Heller, 554 U.S. 570, 625 (2008); *see Hollis* Brief, *supra* note 219, at 8. In support of this notion, there are current statutes that regulate the manner in which weapons currently in common use—such as semi-automatic weapons—may be carried in public. *See, e.g.*, TEX. PENAL § 42.01(8).

224. *Texas Gun Law*, TEX. L. SHIELD, https://www.texaslawshield.com/portal/texas-gun-law/ (last visited Nov. 20, 2016).

decision.[225] Furthermore, it is questionable whether the dangerous and unusual doctrine is relevant today because existing laws prevent public terror by regulating the manner in which firearms and other weapons are carried.[226] For these reasons, the district court erred in its application of the dangerous and unusual doctrine, and the Fifth Circuit should decline to follow suit.

2. The District Court Erred by Not Striking Down a Categorical Ban on an Entire Class of Firearms

One of the central tenets from *Heller* is that categorical bans on entire classes of firearms—in *Heller*, handguns—are unconstitutional, regardless of the standard of review applied.[227] This holding was supported in part by the fact that handguns are especially useful in the exercise of the fundamental right of self-defense and are in widespread use for that purpose.[228] *Heller* applies directly to *Hollis* because the NFA and its progeny (especially the FOPA) effectively ban the possession of machineguns by making them prohibitively expensive to acquire for all but the most affluent individuals, thereby making it virtually impossible for the vast majority of the population to acquire them.[229] In addition, the application process amounts to a de facto categorical ban on NFA weapons because the time-consuming, difficult, and expensive process for acquiring approval to possess these weapons discourages most individuals from even attempting to acquire them.[230] Further, the usefulness of machineguns and other NFA weapons for self-defense suggests that their possession and use for that purpose might be constitutional if law-abiding individuals were allowed to possess these weapons.[231]

In *Heller*, the Court strongly suggested that the destruction of a right under the pretense of regulation is unconstitutional.[232] There is little indication that anything else is happening with regard to the regulation of NFA weapons because the restrictions (and their aftereffects) put in place an absurdly burdensome barrier to acquiring them.[233] This is especially true in

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225. *See Hollis*, 121 F. Supp. 3d at 635–39.

226. *See, e.g.*, TEX. PENAL § 42.01(8).

227. *Heller*, 554 U.S. at 628–29.

228. *Id.* ("[B]anning from the home 'the most preferred firearm in the nation to "keep" and use for [the] protection of one's home and family' would fail constitutional muster.") (internal citation and footnote omitted).

229. *See Machine Guns*, *supra* note 13 (stating that the average price of an M16 machinegun is approximately $20,000). *Contra* Rich Smith, *AR-15 Rifle Price Drops; Is This Gun a Good Investment?*, MOTLEY FOOL (Nov. 23, 2014, 8:45 AM), http://www.fool.com/investing/general/2014/11/23/ar-15-rifle-price-drops-is-this-gun-a-good-investm.aspx (stating that the average price of a semi-automatic AR-15 is approximately $600–$800).

230. *See supra* Part II.

231. *See supra* Part II.

232. *Heller*, 554 U.S. at 634–35.

233. *See supra* Part II.

the case of machineguns because of their high cost, which places their acquisition out of the realm of possibility for all but the most affluent individuals.[234]

3. The District Court Should Have Found That the Government's Actions Did Not Meet Strict Scrutiny

Because Second Amendment rights are considered fundamental, the district court in *Hollis* should have applied strict scrutiny as the standard of review for the government's actions—although it was not clear what standard the court applied.[235] Likewise, the Fifth Circuit should apply strict scrutiny to *Hollis* when considering the NFA and other regulations associated with the possession of NFA weapons.[236] Because strict scrutiny requires that the government demonstrate both a compelling government interest and narrowly tailored means of achieving its goals, the Fifth Circuit should rectify the district court's error by finding in favor of Hollis.[237] Although the Government may be able to show a compelling government interest (i.e., keeping the public safe from "dangerous" weapons), it is unlikely that it will be able to demonstrate that the current regulations are anything but onerous and calculated to be as burdensome as possible.[238] In fact, one could argue that these restrictions were designed to serve as a deterrent to those interested in acquiring NFA weapons. Because the FOPA creates an almost insurmountable economic barrier to acquiring machineguns that is hardly narrowly tailored, the Fifth Circuit should rule that the FOPA does not meet strict scrutiny and is therefore unconstitutional.[239]

B. Shooting Straight: The Bureau of Alcohol, Tobacco, Firearms, and Explosives's Consistent Failure

In addition to the aforementioned errors made by the district court in *Hollis*, there are other reasons why the restrictions on NFA weapons should be relaxed. One of these is the BATFE's incompetence and inconsistency in enforcing current NFA regulations. While the regulations associated with NFA weapon possession are seemingly immutable, the BATFE has a history

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234. *See Machine Guns*, *supra* note 13.

235. *See* Hollis v. Lynch, 121 F. Supp. 3d 617 (N.D. Tex. 2015); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 943–45 (4th ed. 2013).

236. *See Heller*, 554 U.S. at 628–29; *see also* CHEMERINSKY, *supra* note 235, at 943–45 (describing strict scrutiny).

237. CHEMERINSKY, *supra* note 235, at 945.

238. *See supra* Part II.

239. *See* 18 U.S.C. § 922(o) (2016); *Machine Guns*, *supra* note 13. Of all the regulations, the FOPA represents the most insurmountable barrier to the acquisition of machineguns because of the ludicrously high prices it commands as a result of the FOPA's ban on machineguns manufactured after 1986. *See* 18 U.S.C. § 922(o).

of unilaterally modifying or completely changing these restrictions with little to no oversight or notice given to firearm owners.[240] As a regulatory agency that is part of the executive branch, the BATFE is charged with the execution and enforcement of statutes passed by the legislative branch.[241] However, the BATFE's approval (and later disapproval) of Hollis and Watson's Form 1s is not the only instance of the BATFE changing its mind; past actions demonstrate a history of confusing reversals on policy that can have dire legal consequences for unsuspecting firearm owners.[242]

Besides the reversals in *Hollis* and *Watson*, another recent example of the BATFE's indecision is the SIG Brace debacle.[243] The SIG-Sauer SB-15 Stabilizing Pistol Brace is a stock-like attachment for AR-15 pistols that was not legally classified as a stock.[244] The use of the SIG Brace allowed users to shoulder their AR-15 pistols without being required to register their weapons as short-barreled rifles, giving users the functionality of a short-barreled rifle without having to register their weapons as short-barreled rifles.[245] SIG-Sauer, the manufacturer of the brace, even included copies of a BATFE approval letter supporting the legal use of SIG Braces.[246] Nevertheless, after many SIG Braces were sold and used without incident for years, the BATFE reversed itself and declared that the mere *shouldering* of SIG Brace-equipped pistols amounted to the conversion of an AR-15 pistol into an AR-15 short-barreled rifle.[247] This required SIG Brace-equipped weapons to be registered as short-barreled rifles and rendered the stocks virtually useless overnight.[248] In addition, the BATFE's reversal effectively made SIG Brace users potential felons if they continued to use their SIG Braces in the manner previously approved by the BATFE.[249] This change in policy is typical of the BATFE's indecisiveness, which not only creates confusion and frustration on the part of firearm owners who are only trying to follow the law but also results in possible legal consequences for firearm owners who may not have notice of the BATFE's latest whims.[250]

The circumstances in *Hollis* were little different. Hollis, in good faith, relied on the BATFE's approval of his Form 1 to make an M16 machinegun.[251] Had he actually manufactured an M16, he would have been

240. *See Hollis* Complaint, *supra* note 1, at 10.
241. *See id.* at 9–11.
242. *See id.* at 10–12; *One Palmetto* Complaint, *supra* note 14, at 9.
243. *See supra* Part I.
244. Diane DiPiero, *Sig Sauer's Controversy: How Firearms Brand Stirred Up Debate*, NEWSMAX (Apr. 7, 2015, 4:58 PM), http://www.newsmax.com/FastFeatures/guns-sig-sauer-firearms-debate/2015/04/07/id/637026/.
245. *Id.*; *see also supra* Section II.D.
246. *See* DiPiero, *supra* note 244.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *See Hollis* Complaint, *supra* note 1, at 10–12.

in violation of a series of federal and state statutes that could have ended with him being a convicted felon.[252] The BATFE's incompetence placed Hollis in legal jeopardy, which begs the question of whether the BATFE is capable of handling decisions that can have dire consequences for American citizens attempting to obey the law.[253]

V. FIRE AT WILL

A. Open Fire: Recommendations for Federal Regulation Reform

Given that the burdens on NFA firearm ownership are onerous and outdated, what should be done to rectify the situation? At a very minimum, the requirement to register firearm silencers pursuant to the NFA should be struck down entirely. As a practical matter, these devices are not deserving of their reputation as "assassin's tools" and are not effective enough at reducing sound to make them particularly useful to criminals who wish to remain undetected while committing crimes.[254] On the contrary, firearm suppressors are beneficial to new or sensitive shooters, who might be frightened or burdened by the noise of a discharged firearm.[255] The use of firearm suppressors also fosters good relations between owners of adjacent properties because of the reduction in sound transmitted across property lines, possibly reducing the number of nuisance claims made by irritated neighbors.[256] Further, the vast majority of states do not criminalize the possession of firearm suppressors by state statutes, suggesting that the national consensus is that firearm suppressors are not a threat to society worth heavily regulating.[257] Recently, a bill was introduced in the United States House of Representatives to remove firearm suppressors from the NFA, signifying a desire on the part of lawmakers to ease restrictions on these weapons.[258] As such, the current restrictions related to the possession of firearm suppressors do not serve any compelling government interest and should end entirely.

Likewise, short-barreled rifles and shotguns should not be regulated in any manner by the NFA or other associated federal statutes. The primary reason for the regulation of short-barreled rifles and shotguns is the ability to conceal and use them in criminal acts.[259] However, neither type of weapon

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252. *See id.*
253. *See id.* at 14.
254. *See supra* Part II.
255. *See supra* Part II.
256. *See supra* Part II.
257. *Education*, *supra* note 161.
258. Nick Wing, *GOP Lawmakers Want to Make Gun Silencers Cheaper, Easier to Buy*, HUFFINGTON POST (Oct. 23, 2015, 5:04 PM), http://www.huffingtonpost.com/entry/gun-silencers-bill_562a405fe4b0ec0a38941ad2.
259. *See* CARTER, *supra* note 164.

is as concealable as a handgun—a type of weapon whose possession by civilians was declared to be constitutional by the *Heller* Court because of their usefulness for self-defense.[260] Furthermore, the ban on short-barreled rifles and shotguns based on their usefulness in criminal activity is without merit because the vast majority of crimes are committed with handguns rather than larger, more powerful weapons.[261] In fact, FBI statistics from 2013 demonstrate that of all the crimes committed with firearms in the United States, 5,782 crimes were committed with handguns as opposed to 285 crimes committed with rifles and 308 crimes committed with shotguns.[262] Because of the insignificant threat posed by short-barreled rifles and shotguns, federal and state governments would be hard pressed to demonstrate a compelling interest in regulating them, and the current regulations associated with these weapons almost certainly fail strict scrutiny.[263] Given that there could be no other plausible reason to regulate these weapons and the likelihood that these regulations fail strict scrutiny, the regulation of short-barreled rifles and shotguns based on concerns that they will be used in crimes is groundless.[264] For these reasons, their possession by law-abiding citizens should not be restricted, and all associated state and federal regulation of these weapons should end.

In support of these recommendations, other countries with far heavier burdens on the possession of firearms in general nonetheless place few or no additional restrictions on the private ownership of firearm suppressors and short-barreled rifles and shotguns.[265] In fact, these countries encourage firearm suppressor use, in part, to prevent unnecessary noise from disturbing neighbors.[266] This suggests that these countries deem firearm suppressors and short-barreled rifles and shotguns to be no greater a threat than more commonly owned firearms and that the use of firearm suppressors may actually be the behavior of a responsible citizen and a polite neighbor.[267] There is no plausible reason why these policies would not be applicable in the United States.[268] Furthermore, from a constitutional perspective, it is

260. District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

261. *See* Criminal Justice Info. Servs. Div., *Expanded Homicide Data Table 8*, FBI UCR, https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls (last visited Nov. 20, 2016).

262. *Id.*

263. *See supra* Part II.

264. *See supra* Part II.

265. Bob Owens, *It's Time for the Firearms Freedom Act of 2015*, BEARING ARMS (Feb. 16, 2015, 1:45 PM), http://bearingarms.com/time-firearms-freedom-act-2015/.

266. *Id.* Finland, for example, has no guaranteed right to bear arms and requires an individual to obtain a firearm license to possess firearms but places no additional restrictions on firearm silencers or short-barreled rifles and shotguns. *See* Philip Alpers & Marcus Wilson, *Finland — Gun Facts, Figures and the Law*, GUNPOLICY.ORG, http://www.gunpolicy.org/firearms/region/finland (last visited Nov. 20, 2016).

267. Owens, *supra* note 265.

268. *Id.*

highly likely that the regulation of short-barreled rifles and shotguns as well as firearm suppressors does not meet strict scrutiny because the government is almost certainly unable to demonstrate a compelling government interest by regulating them.[269] For these reasons, either a court decision or legislation passed by Congress should remove 18 U.S.C. § 922(a)(4) and (a)(24).[270] These actions would effectively end the regulation of these weapons and bring our laws into the twenty-first century.

While all regulation of firearm silencers and short-barreled rifles and shotguns should end, the same is not true for machineguns. Assuming *arguendo* that the regulation of machineguns is overturned entirely, either by legislation or a favorable ruling in *Hollis*, this state of affairs *may* be appropriate from a *constitutional* perspective. It is possible that these weapons are clearly the modern-day counterparts to the muskets that were standard equipment at the time the Second Amendment was written, and just as the First Amendment was adapted to protect radio and television as media of free speech, the interpretation of the Second Amendment must also evolve to protect modern firearms.[271] When adopting the Second Amendment, the Founding Fathers intended the militia (and the civilians the militia is made up of) to possess standard bearable arms in order to combat threats from enemies, both foreign and domestic.[272] Further, with the M16 and M4 being the standard-issue rifles in the United States Armed Forces, it follows that civilians should be able to possess these weapons if both the prefatory and operative clauses of the Second Amendment are to be fulfilled.[273]

The more likely reality, however, is that the restrictions on machineguns will pass strict scrutiny and be upheld as constitutional.[274] Although the use of legally possessed machineguns in criminal activity is virtually nonexistent, this state of affairs may not continue if the possession of machineguns becomes more widespread.[275] The possibility that these firearms might be stolen from owners who legally possess them and then subsequently used by criminals cannot be ignored. Likewise, the possibility that their use could cause even more loss of life in mass shootings, tragically common in today's society, is not outside the realm of possibility either.[276] In addition, it can be argued that even if the possession of machineguns in service in the militia is

269. *See supra* Part II.

270. *See* 18 U.S.C. § 922(a)(22), (24) (2016).

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

272. *See supra* Parts II, III.

273. *See supra* Part II.

274. *See supra* Part II.

275. *Full Auto Weapons*, GUNCITE, http://www.guncite.com/gun_control_gcfullau.html (last updated July 25, 2010).

276. *See, e.g.*, *Analysis of Mass Shootings*, EVERYTOWN FOR GUN SAFETY (Aug. 20, 2015), http://everytownresearch.org/reports/mass-shootings-analysis/. The fact that semi-automatic assault rifles, similar to fully automatic weapons, are commonly used in these mass shootings cannot be ignored; it is not out of the realm of possibility that fully automatic weapons would be used in these heinous acts as well. *See id.*

constitutionally acceptable, the concept of a militia is outmoded in today's world because the need for it ended when organized law enforcement agencies and the National Guard came into existence.[277]

Thus, it is likely that although the restriction of short-barreled rifles and shotguns as well as and firearm suppressors may not survive strict scrutiny, the regulation of machineguns likely will.[278] Machineguns are dangerous in the wrong hands, and the protection of the people from criminals who use these weapons almost certainly serves a compelling government interest.[279] As such, most challenges seeking to overturn these regulations on constitutional grounds should fail.

For these reasons, a more careful and considerate process to acquiring machineguns should be kept in place, and the only change to the current regulation of these firearms should be the removal, either legislatively or judicially, of the "date-of-manufacture" restrictions by the FOPA. The FOPA creates an overly burdensome wall that potential owners must scale to legally possess machineguns by banning the possession of machineguns manufactured after 1986 and driving the prices of machineguns to astronomical heights that are unreachable by most individuals.[280] By allowing the public to acquire newly manufactured machineguns, the supply of machineguns on the market will almost certainly increase and the price of machineguns would drop considerably.[281] This would allow far more individuals to purchase these weapons and result in the reversal of an unreasonable restriction on bearable arms, which the *Heller* Court strongly suggested was unconstitutional.[282] Further, keeping the registration requirement for machineguns would likely prevent their possession and use by criminals, who are unlikely to follow the legal procedures to acquire them.[283]

These actions are likely to strike a favorable balance between allowing law-abiding individuals to acquire machineguns (and limiting the infringement of constitutional rights) and preventing these weapons from coming into the possession of criminals. For these reasons, 18 U.S.C. § 922(o)(2)(B)'s date-of-manufacture provision should be

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277. Jeremy Brigham, *The Second Amendment Is Outdated*, GAZETTE (Apr. 1, 2014, 3:46 AM), http://www.thegazette.com/2012/12/26/the-second-amendment-is-outdated.

278. *See supra* Section II.A.

279. *See supra* Section II.A. Although the regulation of harmful products is more properly delegated to the states under their police power, there is ample precedent for the interstate regulation of "noxious substances" using Congress's authority to regulate interstate commerce. *See, e.g.*, Gonzalez v. Raich, 545 U.S. 1, 2 (2005).

280. 18 U.S.C. § 922(o) (2016); *see Machine Guns*, *supra* note 13.

281. *See* Bob Owens, *Lawsuits Challenge Controversial Machine Gun Ban*, BEARING ARMS (Mar. 12, 2015, 11:31 AM), http://bearingarms.com/lawsuits-challenge-controversial-machine-gun-ban/.

282. District of Columbia v. Heller, 554 U.S. 570, 627–28 (2008).

283. *See supra* Section III.A.

removed or modified, either by the Supreme Court or Congress, while the rest of the regulations associated with machineguns should remain in place.[284]

B. The Guns Are Bigger in Texas, Too: Recommendations for Texas

Assuming that federal regulations on NFA weapons are overturned by legislation or court decisions, Texas lawmakers and courts should follow suit without reservation. Because of the strong history of Texas case law upholding the restriction of NFA weapons, it is unlikely that any such restrictions will be overturned in state courts, and any redress will likely have to come from federal courts or from the Texas Legislature.[285] Nevertheless, there is no reason that the use of NFA weapons is incompatible with the Texas Constitution's "in the lawful defense of himself or the State" language; if anything, the increased efficacy of these weapons makes for a more effective exercise of that right.[286] In addition, if the federal bans are struck down by the ruling in *Hollis* on the grounds that the dangerous and unusual doctrine applies to the manner of carrying (rather than possessing) of NFA weapons, this holding would still be compatible with the Texas Constitution.[287] Further, Texas has legalized the use of firearm suppressors for hunting and decriminalized their possession if registered with the BATFE.[288] This suggests a certain willingness on the part of Texas lawmakers to ease the difficulty for civilians to obtain a firearm silencer.[289]

For these reasons, Texas Penal Code § 46.05(a)(1)(C) and (D) should be removed while leaving § 46.05(a)(1)(B) in place.[290] These changes would bring Texas's laws related to NFA weapons in compliance with any previously mentioned revisions to federal regulations.[291]

Legalities aside, would Texans be ready for a removal of restrictions on NFA weapons? One indicator may be the reaction to the recently passed "open carry" law that allows Texans who possess a license to carry a handgun

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284. *See* 18 U.S.C. § 922(o)(2)(B).

285. *See supra* note 191 (examining Texas cases that have upheld restrictions on NFA weapons).

286. *See* TEX. CONST. art. I, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State . . . ."); *supra* Part II.

287. *See* TEX. CONST. art. I, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the *wearing* of arms, with a view to prevent crime.") (emphasis added).

288. TEX. PENAL CODE ANN. § 46.05(a)(1) (West 2016); *see also* Terrence Henry, *You Can Now Hunt with a Silencer in Texas*, STATEIMPACT (Mar. 30, 2012, 3:16 PM), https://stateimpact.npr.org/texas/2012/03/30/you-can-now-hunt-with-a-silencer-in-texas/ (stating that hunting with a firearm silencer is legal in Texas).

289. *See* TEX. PENAL § 46.05(a)(1); *see also* Henry, *supra* note 288 (stating that it is legal to hunt with a firearm silencer in Texas).

290. TEX. PENAL § 46.05(a)(1)(B)–(D).

291. *See supra* Section V.A.

to openly carry pistols in public places.[292] Although the open carry of rifles and shotguns (and, presumably, of registered short-barreled rifles and shotguns) has been legal for decades, the open carry law may create the most contact that Texans have with firearms in public places. Only time will tell what public opinion will be on this issue, but initial reports suggest that the open carry law is not causing the backlash and chaos that critics suggested it would.[293]

If public support for open carry continues, it may suggest a certain willingness on the part of Texans to allow for relaxed restrictions on NFA weapons, especially for the purpose of self-defense.[294] Combined with the recent amendment to the Texas Penal Code § 46.05, the open carry law may signal a change in the wind for Texas lawmakers and citizens' attitudes toward NFA weapons.[295] Without a doubt, Texas has a cultural history of firearm ownership that is unlikely to clash with the possession of NFA weapons, and such changes would make sense in one of the most gun-friendly states in the country.[296]

In summation, the restriction of short-barreled rifles and shotguns, and firearm suppressors should end entirely at both the federal and state levels. To accomplish this, court decisions or the responsible legislatures should remove 18 U.S.C. § 922(a)(4) and (a)(24) as well as Texas Penal Code § 46.05(a)(1)(C) and (D).[297] Further, 18 U.S.C. § 922(o)(2)(B) should be amended by changing the date-of-manufacture language to a provision that allows newly manufactured machineguns to be lawfully possessed if acquired pursuant to the current registration process.[298] This would allow law-abiding citizens to acquire machineguns without spending a small fortune while largely preventing their acquisition by criminals.[299] Texas Penal Code § 46.05(a)(1)(B) should also remain in place, as it allows the possession of machineguns only if they are registered under the NFA.[300]

These proposed modifications to current law would have the effect of ending all regulation of short-barreled rifles and shotguns as well as firearm

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292. *See* Chris Eger, *Texas Open Carry a Week Later: Gunfights in the Street or All Quiet on the Austin Front?*, GUNS.COM (Jan. 8, 2016), http://www.guns.com/2016/01/08/texas-open-carry-a-week-later-gunfights-in-the-street-or-all-quiet-on-the-austin-front/.

293. *See id.*

294. *See* Manny Fernandez & David Montgomery, *Gun-Friendly Texas Is Getting Even Friendlier*, N.Y. TIMES (Dec. 31, 2015), http://www.nytimes.com/2016/01/01/us/-2016-01-01-texas-open-carry-gun-law.html (stating that many Texans believe that Texas's new open-carry law does not go far enough and there should be no licensing requirements to openly carry firearms).

295. *See supra* Section III.E.

296. *See* Rick Jervis, *Texas, a Place Where Guns Are Right at Home*, USA TODAY (Feb. 18, 2013, 12:18 AM), http://www.usatoday.com/story/news/nation/2013/02/17/guns-are-a-way-of-life-in-texas/1926763/.

297. 18 U.S.C. § 922(a)(4), (24) (2016); TEX. PENAL CODE ANN. § 46.05(a)(1)(C)–(D) (West 2016).

298. *See* 18 U.S.C. § 922(o)(2)(B).

299. *See supra* notes 280–83 and accompanying text (explaining that allowing citizens to purchase newly manufactured machineguns would lower the price, making them more affordable).

300. *See* TEX. PENAL § 46.05(a)(1)(B).

suppressors while keeping reasonable restrictions on machineguns that satisfy constitutional and practical concerns.[301] Until these changes are made, gun owners in Texas and other states should continue to lobby their representatives in their states' legislature to modify current NFA regulations and should continue to obey the law as it exists today.

VI. FIGHTING 'TIL THE LAST ROUND

Although the fate of *Hollis* remains unknown and will likely be for some time, it is clear that the current restrictions on most NFA weapons are archaic and serve no compelling government purpose.[302] Hollis and Watson were denied one of their most basic and cherished rights when the BATFE reversed itself and denied their applications.[303] These actions seem to violate fundamental fairness and good faith, especially when both individuals were only trying to comply with arbitrary and confusing laws, enforced by an inept agency, in an attempt to exercise their Second Amendment rights.[304] The right to possess bearable arms of almost any kind, granted to all United States citizens eligible to own firearms, is grounded in our nation's history and jurisprudence and should not be infringed by any government entities.[305]

Although this right to bear arms is not absolute—for example, machinegun ownership should be curtailed by the registration system that, for the most part, is currently in place—the restrictions of short-barreled rifles and shotguns as well as firearm suppressors serve no compelling state interest and are not narrowly tailored to achieve government ends.[306] For these reasons, all federal- and state-level restrictions on short-barreled rifles and shotguns as well as firearm suppressors almost certainly fail strict scrutiny and should come to an end.[307] Nevertheless, it is more likely that the regulation of machineguns serves a compelling state interest, and almost all current statutes restricting them should remain in place.[308]

We live in a time where the Second Amendment is one of the most divisive issues in American politics and jurisprudence.[309] The nation's policymakers, however, cannot allow the political and emotional nature of this issue to interfere with the constitutional guarantee of the right to bear arms.[310] The critical point is that while the regulation of machineguns may survive strict scrutiny, the restrictions on other NFA weapons do not,

301. *See supra* Section V.A.
302. *See supra* Parts II–IV.
303. *See supra* Part I.
304. *See supra* Part I.
305. *See supra* Parts II–III.
306. *See supra* Parts II–III.
307. *See supra* Parts II–IV.
308. *See supra* Part V.
309. *See supra* Section II.B.
310. *See supra* Section II.B.

especially in light of *Heller* and related decisions.[311] For these reasons alone, the restrictions associated with them should end.[312] Furthermore, the BATFE has repeatedly proved itself to be an incompetent arbiter of the enforcement of firearms regulations because of its constant and confusing reversal of policy decisions that can have dire legal consequences for gun owners.[313] The American people deserve better, and it is time for the BATFE to step up to the plate and effectively carry out its assigned duties as a regulatory agency.[314] After all, these changes are necessary to the security of a free state.

311. *See supra* Parts II–IV.
312. *See supra* Parts III–IV.
313. *See supra* Parts I, III.
314. *See supra* Parts I, III.