IN COMMON USE: STABILIZING BRACE REGULATION AND SECOND AMENDMENT JURISPRUDENCE

Lucas Bernard*

INTRODUCTION

American gun rights are unique amongst the nations. From the beginning, the founders recognized "the advantage of being armed, which the Americans possess over the people of almost every other nation . . . . "[1] America was a radical shift from the tyrannies of Europe where "the governments are afraid to trust the people with arms."[2] This "advantage" is secured through the Second Amendment, "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."[3] Inspiring vigorous debate that could fill endless articles, this article focuses on an issue being disputed as it is written.

On January 31, 2023, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") final rule 2021R-08F was published in the Federal Register.[4] Its focus relates to a product the ATF calls a "stabilizing brace."[5] Originally designed to assist the disabled with shooting pistols, they have become central to the

*Lucas Bernard is a student at the Southern University Law Center. He served six years in United States Army National Guard as a Combat Medic. Additionally, he has worked in the firearms industry as an instructor, salesman, and range safety officer; training civilians, security guards, and police. He has a degree in Sociology from Louisiana State University. Due to his background, the intersection of guns and the law is of great interest to him. He would like to thank his collegues at the Southern University Law Review, Professor Ryan Stoa, and his beloved wife Savannah for their guidance and support.1.James Madison, *The Federalist Papers: No. 46*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/fed46.asp (last visited Oct. 23, 2023).

2. Madison, *supra* note 1.

3. U.S. CONST. amend. II.

4. U.S. Dep't of Just. Bureau of Alcohol, Tobacco, Firearms, & Explosives, *Factoring Criteria for Firearms with Attached "Stabilizing Braces."*, ATF, https://www.atf.gov/rules-and-regulations/factoring-criteria-firearms-attached-stabilizing-braces (last visited Oct. 23, 2023).

5. ATF, *supra* note 4.

gun control debate.[6] "Stabilizing braces" immediately opened a loophole to bypass the National Firearms Act ("NFA"). The ATF defines a "pistol" as "as a weapon originally designed, made, and intended to fire a projectile . . . when held in one hand that has . . . a short stock designed to be gripped by one hand at an angle to and extending below the line of the bore."[7] Compare this to their definition of a "short-barreled rifle" as "a rifle having one or more barrels less than sixteen inches in length . . . ."[8] Companies began to produce short-barreled rifles without stocks, making them "pistols" by regulation.[9] Attaching a "stabilizing brace" as an ersatz stock blurs the line between a braced "pistol" and a "short-barreled rifle." "Stabilizing braces" became an instant success, the ATF estimates between three to seven million are in circulation.[10] A major producer of "stabilizing braces" wrote to the ATF in search of clarification on this gray area.[11] The ATF responded that*"incidental, sporadic, or situational 'use' of an arm-brace . . . equipped firearm from a firing position at or near the shoulder . . . [is not] sufficient to constitute a 'redesign[.]'"*[12] *With the ATF's seeming approval, braced pistols became commonplace. With the*

6. Brendan Pierson, *US Pistol Brace Rule Likely Illegal, Federal Appeals Court Rules*, REUTERS (Aug. 1, 2023, 5:49 PM), https://www.reuters.com/legal/us-pistol-brace-rule-likely-illegal-federal-appeals-court-rules-2023-08-01/#:~:text=Pistol%20braces%20were%20first%20marketed,the%20stock%20on%20a%20rifle.

7. Factoring Criteria for Firearms with Attached "Stabilizing Braces", 88 Fed. Reg. 6478, 6478 (proposed Jan. 13, 2023) (to be codified at 27 C.F.R. pt. 478 and 479).

8. Factoring Criteria for Firearms With Attached "Stabilizing Braces", *supra* note 8, at 6478.

9. U.S. Dep't of Just. Bureau of Alcohol, Tobacco, Firearms, & Explosives, *supra* note 6.

10. Stephen Gutowksi, *ATF Says a Quarter Million Guns Registered Under Pistol-Brace Ban*, THE RELOAD (June 2, 2023, 4:47 PM), https://thereload.com/atf-says-a-quarter-million-guns-registered-under-pistol-brace-rule/#:~:text=In%20the%20impact%20assessment%20for,0.6%20percent%20and%20eight%20percent.

11. John Pierce, *The ATF is Effectively Reversing their Position on Stabilizing Braces Once Again*, THE LAW OFFICE OF JOHN PIERCE, ESQ. (Mar. 21, 2017), https://johnpierceesq.com/the-atf-is-effectively-reversing-their-position-on-stabilizing-braces-once-again/.

12. John Pierce, *supra* note 12.

publication of rule 2021R-08F, the ATF has reversed its position. In the new rule, the ATF claims that "the requirements of the NFA cannot be circumvented by attempting to configure a firearm with a purported "stabilizing brace" when the affixed device and configuration of the firearm includes features inherent in shoulder-fired weapons."[13] By redefining a single word, the ATF seeks to cover their oversight.

[T]o amend the regulatory definition of "rifle" to make clear to the public the objective design features and other factors that must be considered when determining whether a firearm equipped with an accessory, component, or other rearward attachment (e.g., a "stabilizing brace") is a rifle designed, made, and intended to be fired from the shoulder.[14]

If rule 2021R-08F gains validity, millions of law-abiding citizens will become felons overnight. Their "pistols" would become "short-barreled rifles" due to their attachment of a "stabilizing brace."[15] Putting such an attachment on a "pistol" would be considered "mak[ing] a firearm in violation of . . ." the National Firearms Act.[16] This violation carries a fine of not more than $250,000 or ten years in federal prison, or both.[17] Considering that millions of Americans are in siginifcant legal danger, the rule must be analyzed in light of past and recent Second Amendment jurisprudence. Given the following analysis, it is the argument of this article that the least damaging and most legally grounded resolution is to remove "short-barreled" rifles from the National Firearm Act's regulatory scheme.

I. LEGAL HISTORY

A. The National Firearms Act

Enacted in 1934, the National Firearms Act was the first federal gun regulation scheme ever passed by Congress.[18] Arising from the gang violence that terrorized American streets as a result

13. Factoring Criteria for Firearms With Attached "Stabilizing Braces", *supra* note 8, at 6479.

14. *Id.*

15. *Id.*

16. 26 U.S.C § 5861.

17. 26 U.S.C §5871; 18 U.S.C §3571.

18. National Firearms Act, ch. 757, 48 Stat. 1236 (1934).

of the illegal alcohol trade during Prohibition, its purpose was to restrict ownership of firearms popular with criminals of the era.[19] To this effect, the NFA regulated what it defined as "firearms", being machine guns, silencers, and rifles and shotguns with barrels shorter than eighteen inches in length.[20] To purchase such "firearms", a person was required submit for and pay a $200 tax. If their purchase was approved, they would receive a stamp to attach to their returned application to prove their compliance.[21] While a somewhat insignificant sum today, considering the economic landscape in the year it was enacted, it virtually barred the average American from legally owning such a "firearm." Violations were punished with $2,000 fines or five years imprisonment, or both.[22] It didn't take very long for the act's constitutionality to be considered by the country's highest court in the form of *United States v. Miller*.[23]

B. United States v. Miller

In this case, the question at issue was whether the National Firearms Act violated the Second Amendment.[24] The defendant had been caught with "a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length . . ." in violation of the National Firearms Act.[25] The court considered whether the "possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia . . . ."[26] The Court acknowledged that the United States Constitution granted Congress the ability to establish the Militia, and that the Second Amendment was adopted "to assure the continuation and render possible the effectiveness of such forces . . . ."[27] The Court then discussed the concept of the Militia as it

19. ANDREW JAY MCCLURG & BRANNON P. DENNING, GUNS AND THE LAW: CASES, PROBLEMS, AND EXPLANATION 43-44 (Carolina Academic Press, LLC, 2016).

20. National Firearms Act, *supra* note 8, at 1236.

21. *Id*. at 1237.

22. *Id*. at 1240.

23. United States v. Miller, 307 U.S. 174 (1939).

24. *Id*. at 176.

25. *Id*. at 175.

26. *Id*. at 178.

27. *Id*.

understood it, noting that in the founding era, "[t]he sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion."[28] The Court defined who comprised this force, "all males physically capable of acting in concert for the common defense . . ." who when called to serve, were "expected to appear bearing arms supplied by themselves and of the kind in common use at the time." [29] Following this definition, the Court rooted their reasoning in the Anglo-American legal tradition, referencing various legislation passed in early states like Massachusetts, New York, and Virginia, all characterizing the Militia as a body of citizens turned temporary soldiers, who furnished their own arms.[30] With this, the *Miller* court concluded that "it is not within judicial notice that [a short barreled shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense" and could not "say that the Second Amendment guarantees the right to keep and bear such an instrument."[31] With that, the constitutionality of the National Firearms Act was upheld, as none of the types of weapons within its purview consisted of "ordinary military equipment" that was "in common use at the time." In his article concerning this case, *The Peculiar Story of United States v. Miller*, author Brian L. Frye summed up the Court's holding in a particularly concise manner.[32] The Court "assumed the Second Amendment guarantee ensures those subject to conscription may possess weapons suitable for militia service[]", but the Second Amendment "does not protect NFA firearms as a matter of law, because they aren't suitable for militia service."[33] The question remains, what makes a firearm suitable for militia service?

C. District of Columbia v. Heller

Sixty-nine years would pass before the Supreme Court once again considered the meaning of the Second Amendment. In

28. *Id*. at 179.
29. *Id*.
30. *Id*. at 179-183
31. *Id*. at 178.
32. Brian L. Frye*, The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48 (2008).
33. *Id*. at 75.

District of Columbia v. Heller, in question was whether a Washington D.C. ban on the possession of handguns in one's home for the purpose of self-defense violated the Second Amendment.[34] The Court first identified two conflicting interpretations of the Amendment itself. One side "believ[ing] that it protects only the right to possess and carry a firearm in connection with militia service[]" and the other asserting "that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."[35] The Court acknowledged that "[t]he Second Amendment is naturally divided into two parts."[36] The prefatory clause "A well-regulated militia, being necessary to the security of a free state" introduces the purpose of the amendment, and the operative clause "the right of the people to keep and bear arms, shall not be infringed[]" details how the purpose is carried out.[37] The Court asserted that "[l]ogic demands that there be a link between the stated purpose and the command.[38] To hold that it is an individual right, the Court acknowledged that a "right of the people" was also enumerated in the 1st and 4th Amendments, noting that "these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body."[39] Affirming that the militia consists of the armed citizenry, the Court held that "[r]eading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people."'"[40] Once they confirmed the Second Amendment as an individual right, the Court moved on to define what it meant to "keep and bear Arms." In reference to "arms," the Court recognized that "[t]he term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a

34. District of Columbia v. Heller, 554 U.S. 570 (2008).
35. *Id*. at 577.
36. *Id*.
37. U.S. CONST. amend. II.
38. District of Columbia v. Heller, 554 U.S. at 577.
39. *Id*. at 579.
40. *Id*. at 580-81.

military capacity."[41] For what it meant to "keep" arms, the Court found that it "was simply a common way of referring to possessing arms, for militiamen *and everyone else*."[42] In its interpretation of "bear arms," the Court noted that historically it "did not refer only to carrying a weapon in an organized military unit."[43] From here, the Court backtracked to ironing out the meaning of the prefatory clause. As in *Miller*, the Court defined the militia as all males physically capable of acting in a military posture.[44] The Court distinguished the militia from a professional military force, such as the United States Army. Noting that the Constitution gives Congress the power to create such regular military forces, it also gives Congress the ability to call the militia forth to take certain actions with no reference to its creation, "connoting a body already in existence. . . ."[45] The Court dismissed any argument that "well-regulated" has anything to do with being a "regular" professional military force, pointing out that period definitions of "well-regulated" only means "the imposition of proper discipline and training."[46] With this, the court identified the purpose of the Second Amendment, "to prevent elimination of the militia."[47] How would the militia be eliminated? "[B]y taking away their arms . . . ."[48] Thus, because service in the militia requires ownership of arms, the individual right to own firearms is protected. Therefore, the Court decided that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[49] In *Heller*, the Court looked deeply into the history surrounding the Second Amendment. This presaged a methodology that would be established for all Second Amendment questions in *N.Y. State Rifle & Pistol Ass'n v. Bruen*.[50]

41. *Id*. at 581.
42. *Id*. at 583.
43. *Id*. at 585.
44. *Id*. at 595
45. *Id.* at 596.
46. *Id*. at 597.
47. *Id*. at 599.
48. *Id*.
49. *Id.* at 635.
50. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

D. N.Y. State Rifle & Pistol Ass'n v. Bruen

Bruen was brought forth by challenging a state gun regulation. As with numerous states, New York issues handgun carrying licenses.[51] However, New York was one of a few states that required the applicant to show a "special need", allowing the state government to subjectively decide on who received such a license.[52] While *Heller* was concerned whether the Second Amendment protected an individual right to keep and bear arms within the home, *Bruen* concerned the expansion of that right to spaces outside the home. In New York, if a person wished to carry a firearm outside their home, they had to "prove that "proper cause exists" to issue it . . . [i]f an applicant cannot make that showing, he can receive only a "restricted" license for public carry, which allows him to carry a firearm for a limited purpose, such as hunting, target shooting, or employment."[53] What constitutes "proper cause"? The applicant must show that they require a "special need" for self-defense distinct from the broader citizenry.[54] The Court found this standard quite difficult to meet, noting that an applicant must provide evidence of actual specific and continuous dangers that they face.[55] If the issuing authority feels that "proper cause" doesn't exist, their application is denied. The Court then compared New York's carry permit scheme to that of other states, noting that the majority of them are "shall issue" states.[56] In "shall issue" states, an applicant is granted a carry permit automatically upon meeting certain objective standards.[57] In "may issue" states like New York, an applicant must meet subjective as well as objective standards, showing a particular need for a carry permit as well as meeting standard requirements, such as not being a felon.[58] To begin their analysis, the Court took note of the test the Courts of Appeals have applied for evaluating Second Amendment questions.[59] This "two-step" test involved

51. *Id*. at 2122.
52. *Id*.
53. *Id.* at 2123.
54. *Id*.
55. *Id*.
56. *Id*.
57. *Id*.
58. *Id*. at 2124
59. *Id*. at 2125.

combining a historical review and means-end scrutiny.[60] Rejecting this "two-step" test, the Court completely changed the method by which Second Amendment questions are to be considered. Now, for any gun regulation to pass muster, it must be "consistent with this Nation's historical tradition of firearm regulation."[61] Now, all Second Amendment questions are looked at purely though the lens of "history and tradition."[62]

> The test . . . requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.[63]

The Court acknowledged this method will typically take the form of "reasoning by analogy. . . ."[64] With this approach, whether a modern regulation is analogous to a historical one "requires a determination of whether the two regulations are "relevantly similar."[65] How is this determined? The Court provides two metrics, "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[66] The Court cautioned that "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check."[67] The

60. *Id*.
61. *Id*. at 2126.
62. *Id*. at 2128.
63. *Id*. at 2131.
64. *Id*. at 2132.
65. *Id*.
66. *Id*. at 2133.
67. *Id*.

historical analogue does not have to be identical to the modern regulation, but it must be fairly well suited. As an example, the Court provides the "sensitive places" exception to the Second Amendment. There are longstanding laws prohibiting the carrying of weapons in "sensitive" places, such as schools, hospitals, government buildings, etc.[68] Although the Court acknowledges that there are "relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited . . ." they are "also aware of no disputes regarding the lawfulness of such prohibitions."[69] Applying the new test, it is consistent with the "history and tradition," of American gun regulations to prohibit the carrying of arms in "sensitive" places. However, the Court cautioned that identifying "sensitive places" too generally "would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense . . . ."[70] The Court then took a broad sweep of the historical evidence relating to the public carry of firearms, determining that:

> [A]part from a handful of late-19th-century jurisdictions, the historical record . . . does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.[71]

With that, New York's "proper cause" requirement was found unconstitutional and the way Second Amendment questions are considered was fundamentally changed.

E. Current Cases

Currently, the ATF's rule is being considered in *Mock v. Garland*.[72] The primary plaintiffs, who own "pistols" with "stabilizing braces," filed suit on the day the new rule was announced.[73] The court has since issued a preliminary injunction

68. *Id*.
69. *Id*.
70. *Id*. at 2134.
71. *Id*. at 2138.
72. Mock v. Garland, Civil Action No. 4:23-cv-00095-O, 2023 U.S. Dist. LEXIS 178809 (N.D. Tex. Oct. 2, 2023).
73. *Id*. at 10; *Id*. at 11.

against enforcement of the rule against the plaintiffs.[74] In another case, *Britto et al v. Bureau of Alcohol, Tobacco, Firearms and Explosives,* another preliminary injunction for the plaintiff was granted.[75] These temporary motions show that this issue is far from settled. In particular, *Britto* foreshadows a future issue. In their opinion, the court acknowledged that "the recent case of *Mock v. Garland* provides substantial guidance."[76] In *Mock*, the plaintiffs primarily challenged the rule under the Administrative Procedure Act ("APA"), which requires that a Federal agency's final rule "must be a logical outgrowth of its concomitant proposed rule"[77] The Fifth Circuit held that it was not.[78] In both cases, the court acknowledged the Second Amendment issue inherent in the rule, but actively chose to focus their decision around the violation of the APA. To that effect, the *Britto* court claimed "[i]t goes without saying that constitutional questions should be avoided if there are independent ground[s] upon which the case may be disposed of."[79] In *Mock*, the court similarly found that the violation of the APA was the "controlling law of this case . . . ."[80] While this reasoning is sound, the underlying issue remains if the rule is found to be invalid on those grounds. In *Mock*, the court constrained the injunction to only protect the parties in that case.[81] The substance of the ATF rule will assuredly return in a form compliant with the APA. It is for this reason this article grapples with the substantive issue relating to "pistols" with "stabilizing braces" and "short-barreled rifles," analyzing them under the aforementioned jurisprudence.

74. *Id.* at 56.

75. Britto v. BATFE, No. 2:23-CV-019-Z, 2023 U.S. Dist. LEXIS 200933 (N.D. Tex. Nov. 8, 2023).

76. *Id.* at 6.

77. *Id.* at 7.

78. *Id.* at 6.

79. *Id.* at 8 (first quoting Teltech Sys., Inc. v. Bryant, 702 F.3d 232, (5th Cir. 2012); then quoting *Ashwander v. TVA*, 297 U.S. 288 (1936)).

80. Mock, U.S. Dist. LEXIS 178809 at 52.

81. *Id.* at 55.

II. ANALYSIS

A. *The Problem with* Mock v. Garland

In *Mock*, the court partially addressed the Second Amendment issue, but it wasn't controlling their decision. It was recognized that the Second Amendment covers weapons "in common use", but not "dangerous and unusual weapons."[82] The court reiterated that if a weapon is "commonly possessed by law-abiding citizens for lawful purposes *today*[,]" it is not "dangerous and unusual."[83] What makes a weapon "commonly possessed?" The court decided "[t]he relevant inquiry under this standard is the current total number of a particular weapon that is in lawful possession, ownership, and circulation throughout the United States."[84] The court confirmed that "semiautomatic pistols are commonly used weapons for lawful self-defense purposes across the United States today."[85] It further found that "the braced pistols subject to enforcement of the Final Rule are in common use today."[86] While correct, this misses the point. These "pistols," are actually "short-barreled rifles."

The ATF itself acknowledges that the new rule is to combat the use of "stabilizing braces" to turn "pistols" into "short-barreled rifles."[87] It defends the rule on the basis of public safety, noting that "braced pistols" have been used in mass shootings, and as such are "dangerous and unusual."[88] The ATF is correct, most Americans purchase "stabilizing braces" for their "pistols" to functionally create "short-barreled rifles." Therefore, the main question is whether "short-barreled rifles" should be regulated under the NFA at all. The ATF certainly believes so, stating that "[s]hort-barreled rifles specifically are dangerous and unusual due to both their concealability and their heightened ability to cause damage. . . ."[89] The ATF considers "short-barreled rifles" to be

82. *Id.*

83. *Id.* at 26 (quoting Caetano v. Massachusetts, 577 US 411 (2016)).

84. *Id.*

85. *Id.*

86. *Id.*

87. Factoring Criteria for Firearms With Attached "Stabilizing Braces", *supra* note 8, at 6498.

88. *Id.* at 6499.

89. *Id.*

"primarily weapons of war . . . hav[ing] no appropriate sporting use or use for personal protection."[90] This isn't altogether wrong, considering the current infantry rifle of the United States Army. The M4 carbine is a 5.56mm AR-15 style rifle, similar to many popular civilian variants of the AR-15, with the addition of a fully automatic setting.[91] Of particular note is the M4's barrel length, 14.5 inches.[92] Every M4 carbine issued to American soldiers is a "short-barreled rifle" by the ATF's own definition.[93] With approximately 483,000 M4 carbines in U.S. Army service, the cultural impact of such firearms is substantial.[94] Its civilian equivalent has become the most popular firearm in America, with approximately 20 million lawfully owned across the country.[95] Three to seven million of those owned are AR "pistols" fitted with "stabilizing braces," and the number is only climbing.[96] In *Caetano v. Massachusetts*, the Court found that because a couple hundred thousand people own stun guns, they are "widely owned and accepted as a legitimate means of self-defense across the country[]" and are "commonly possessed by law abiding citizens for lawful purposes *today*."[97] Based on these findings, the Court held that "Massachusetts' categorical ban of such weapons therefore violate[d] the Second Amendment."[98] If Second Amendment protections are extended over only couple hundred thousand stun

90. *Id*.

91. U.S. Army, *M4/M4A1 Carbine*, PROGRAM EXEC. OFF. SOLDIER, https://www.peosoldier.army.mil/Equipment/Equipment-Portfolio/Project-Manager-Soldier-Lethality-Portfolio/M4-M4A1-Carbine/ (last visited Oct. 23, 2023).

92. U.S. Army, *supra* note 95.

93. Factoring Criteria for Firearms With Attached "Stabilizing Braces", *supra* note 8, at 6478.

94. Kris Osborn, *The U.S. Army Is Bringing Its Entire Inventory of M4 Rifles Into the Future*, THE NAT'L INTEREST (Oct. 28, 2019), https://nationalinterest.org/blog/buzz/us-army-bringing-its-entire-inventory-m4-rifles-future-91596.

95. Solcyre Burga, *How the AR-15 Rifle Became America's Most Dangerous Weapon*, TIME (May 10, 2023, 1:00 PM), https://time.com/6278608/ar-15-rifle-assault-weapons-uvalde/#:~:text=The%20AR%2D15%20has%20no,is%20due%20to%20its%20modularity.

96. Gutowski, *supra* note 11.

97. Caetano v. Massachusetts 577 U.S. 411, 420 (2016).

98. *Id.*

guns, it is easy to assume that three to seven million AR pistols that the ATF considers to be "short-barreled rifles" would also be protected. Nonetheless, a more stringent legal analysis must be made in light of controlling Second Amendment jurisprudence: *Miller*, *Heller*, and *Bruen.*

B. "Short-Barreled Rifles" under Miller

In *Miller*, to be protected by the Second Amendment, a weapon must have "some reasonable relationship to the preservation or efficiency of a well regulated militia[.]"[99] The Court concluded that it was "not within judicial notice that . . . [a short barreled shotgun] . . . is any part of the ordinary military equipment or that its use could contribute to the common defense."[100] As shown, the US Army's current service rifle is itself a "short-barreled rifle" per ATF definition.[101] Given the Court's reasoning in *Miller*, if it were called upon to consider AR style "short-barreled rifles" today, it would be hard to argue that they wouldn't be considered "part of the ordinary military equipment" and the millions of Americans using them to protect their families are not "contribut[ing] to the common defense."[102] The *Miller* Court held that the Second Amendment had the "obvious purpose to assure the continuation and render possible the effectiveness . . ." of the militia, and it "must be interpreted and applied with that end in view."[103] The militia is "expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[104] There would be difficulty to do so if "short-barreled rifles" are heavily regulated with punishing fines and penalties. Such weapons are currently "in common use," which is why the new ATF rule seeks to make them more troublesome to possess. "Dangerous and unusual weapons" are not owned by millions of law-abiding Americans.

99. United States v. Miller, 307 U.S. 174, 178 (1939).

100. *Id.*

101. Factoring Criteria for Firearms With Attached "Stabilizing Braces", *supra* note 8, at 6478.

102. United States v. Miller, 307 U.S. at 178.

103. *Id.*

104. *Id.* at 179.

C. "Short-Barreled Rifles" under Heller

In *Heller*, the Court chose to clarify the *Miller* decision as to what "ordinary military equipment" means. They acknowledged that under *Miller*, NFA regulations surrounding machine guns could be construed as a Second Amendment violation because they were in regular military service at the time.[105] The *Heller* Court held that "ordinary military equipment" was to be understood in light of the fact that the militia was expected to report for duty bearing their personal arms, which were "in common use at the time."[106] The *Heller* Court drew a clear line on what weapons the Second Amendment doesn't protect, "weapons not typically possessed by law-abiding citizens for lawful purposes . . . ."[107] The millions of currently possessed "pistols" with "stabilizing braces" are certainly typical.[108] The Court's reasoning in *Heller* helps to draw another line. As military issue M4's are capable of fully automatic fire, they can be regulated by the NFA without any Second Amendment concerns. However, their similarly short semi-automatic civilian counterpart, the AR "pistol" with a "stabilizing brace" or "short-barreled rifle," fits well within the protections of the Second Amendment as "ordinary military equipment" that is "in common use." Modern technology has rendered some weapons that could certainly be considered "dangerous and unusual." Tanks, artillery, and Predator drones are certainly "dangerous and unusual" for civilians to own. These weapons require a modern professional Army to possess and maintain. However, the AR-15, no matter how short the barrel, is a weapon that can be easily possessed and maintained by an individual militia member. The *Heller* court acknowledged this technological gap, but nonetheless held that the relationship between militia service and the weaponry required to fulfill it remains as relevant today as it did in the past.[109] The Second Amendment is not concerned with what the Army has in relation to everyone else, but what the citizen militia commonly possesses and uses. The new ATF rule is designed to stop "pistols" with

105. District of Columbia v. Heller, 554 U.S. 570, 624 (2008).
106. *Id.*
107. *Id.* at 625.
108. Gutowski, *supra* note 11.
109. District of Columbia v. Heller, 554 U.S. 570, 627-28 (2008).

"stabilizing braces" from being "in common use" with the militia. Considering the proliferation of these ersatz "short-barreled rifles," the ATF's attack comes too late to be constitutionally sound.

D. "Short-Barreled Rifles" under Bruen

Analyzing *Bruen* in relation to "short-barreled rifles" requires a historical overview of the concept of the militia itself. Only then can one consider whether regulations of "pistols" with "stabilizing braces" and "short-barreled rifles" are "consistent with this Nation's historical tradition of firearm regulation."[110] The Second Amendment ensures the existence of the militia by securing their right to keep and bear arms. How did this look the founding era? The Militia Act of 1792 gives excellent insight into what was expected of militia members.[111] It defines who constitutes the militia, being every white male of fighting age, and requires them to enroll with their local militia company.[112] Each militia member was expected to:

> [P]rovide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle and a quarter of a pound of powder.[113]

These weapons and their accoutrements were the "ordinary military equipment" of the era. The act does not require militia members to provide cannons or warships, but it does require them to possess the basic equipment of a soldier. The ability for the individual militia member to own such equipment was of preeminent importance, for the act further states "[E]very citizen so enrolled, and providing himself with the arms, ammunition and accoutrements required as aforesaid, shall hold the same exempted from all suits, distresses, executions or sales, for debt or

110. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

111. Militia Act, ch. 33, 1 Stat. 271, (1792).

112. *Id.*

113. *Id.*

for the payment of taxes."[114] The Congress of early America thought that militia members owning "ordinary military equipment" was so important that it was protected from any fiscal dangers that may be imposed upon them. By law, a militia member may be parted from his money, but not from his rifle. The closest thing to any regulation or restriction comes from a clause attempting to create uniformity amongst the arms provided by the militia. "[F]ive years from the passing of this act, all muskets for arming the militia as herein required, shall be of bores sufficient for balls of the eighteenth part of a pound."[115] This was not because other bore sizes were "dangerous and unusual," it was to streamline logistics by having a standardized size of bullet. The act does provide for the brigade-inspector to "inspect their arms, ammunition, and accoutrements . . ." but this was only conducted "during the time of their being under arms . . . ."[116] In his book "*The Founders' Second Amendment*," author Stephen P. Halbrook makes a critical point about this particular clause. This requirement "was not a precedent for a registration system in which authorities kept records on all arms owned by the citizens."[117] Inspections were only conducted during active service to ensure that the weapons were kept in adequate condition. Halbrook asserts that the act signifies "[a] unity of purpose and activity existed between the militia system and the keeping and bearing of arms for lawful purposes."[118] Through the act, the founders showed their belief that the maintenance and effectiveness of the militia was contingent on the personal ownership of arms suitable for military service. In essence, it was a more detailed and extensive equivalent of the Second Amendment itself.

Using the Militia Act of 1792 to consider America's "history and tradition," the past can now be analogized to the present as required by *Bruen*. In the founding era, each militia member was required to possess the infantry equipment of the time. While modern technology has long left muskets obsolete, the

114. *Id.* at 272.

115. *Id.* at 271-72.

116. *Id.* at 273.

117. STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT ORIGINS OF THE RIGHT TO BEAR ARMS 308 (Ivan R. Dee, 2008).

118. HALBROOK, *supra* note 123.

contemporary equivalent of this kit is easily analogized. As times have changed, so has "ordinary military equipment." Instead of a musket, the modern soldier carries an M4. This "short-barreled rifle" would be exactly what a modern incarnation of the Militia Act of 1792 would require a militia member to possess. Taxing and mandating registration of their legally required firearm creates a difficulty antithetical to the act's purpose. The act itself specifically provided financial protections over the militia member's weapon.[119]

III. CONCLUSION

American gun law is full of circular reasoning. Some firearms are deemed "dangerous and unusual," while others are considered "part of the ordinary military equipment" and "in common use." Widespread ownership is what turns "dangerous and unusual" firearms into "ordinary military equipment." However, when firearms are regulated, it becomes impossible for them to be "in common use." Because they are not "in common use," they are "dangerous and unusual." The perfect example of this ridiculous phenomena is the NFA itself. Previously, everything it regulates could be bought normally. Because of the NFA's significant financial and criminal restrictions, the firearms it regulates became increasingly uncommon.[120] Therefore, any firearm regulation becomes a self-fulfilling prophecy that makes its subject "dangerous and unusal." This perverse logic is the intent behind the ATF's rule to redefine the word "rifle" so that it will include the millions of "pistols" with "stabilizing braces" currently possessed. Through administrative fiat, the ATF can declare firearms "dangerous and unusual" and safely violate the constitution.

Second Amendment jurisprudence points to another murky issue, the concept of the militia itself. While being the focus of the Second Amendment, referenced constantly in controlling jurisprudence, it has little presence in modern America outside the judiciary and the historical record. While it has been eclipsed by professional military forces, the militia itself still remains.

119. Militia Act, *supra* note 120.

120. MCCLURG & DENNING, *supra* note 20, at 44.

Although seemingly antiquated as an institution, the Second Amendment cannot be interpreted independent of it. The Second Amendment "assure[s] the continuation and render[s] possible the effectiveness of such forces . . . ."[121] The Militia Act of 1792 understood this, mandating that each member provide their own firearms.[122] *Miller* held that militia members were "expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[123] With approximately three to seven million owned in private hands, whether they are called "pistols" with "stabilizing braces" or "short-barreled rifles," they are undoubtedly "in common use" at this time.[124] This number already well surpasses the standard set by the Supreme Court to determine whether a weapon is "commonly possessed by law abiding citizens for lawful purposes *today*."[125]

The loophole "stabilizing braces" created exploited a weakness in the NFA. While "short-barreled rifles" were uncommon for decades after the NFA's adoption, "stabilizing braces" have made them commonly possessed by law-abiding citizens over the last decade. The ATF acknowledges this, and it is exactly why they created rule 2021R-08F.[126] The ATF prefers firearms to be "dangerous and unusual" so they can tax and regulate them. Enforcing the new rule would compel millions of Americans to submit to the NFA or face fines and imprisonment. Reality must be acknowledged. "Short-barreled rifles" are "in common use." According to controlling jurisprudence, this leaves no choice but to remove them from NFA regulations to uphold the Second Amendment.

121. United States v. Miller, 307 U.S. 174, 178 (1939).

122. Militia Act, ch. 33, 1 Stat. 271, (1792).

123. United States v. Miller, 307 U.S. at 179.

124. Gutowksi, *supra* note 11.

125. Caetano v. Massachusetts 577 U.S. 411, 420 (2016).

126. Factoring Criteria for Firearms With Attached "Stabilizing Braces", *supra* note 8, at 6479.