



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 127 | Issue 1

Fall 12-18-2022

Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise

Oliver Krawczyk

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlr>



Part of the [Constitutional Law Commons](#), and the [Second Amendment Commons](#)

Recommended Citation

Oliver Krawczyk, *Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise*, 127 DICK. L. REV. 273 (2022).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol127/iss1/8>

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review (2017-Present) by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise

Oliver Krawczyk*

ABSTRACT

The National Firearms Act of 1934 (NFA) is the strictest federal gun control law currently in effect. It criminalizes the mere possession and transfer of specifically enumerated categories of firearms deemed to be especially dangerous and unusual, such as machine guns and silencers. Commensurate with this viewpoint, the NFA imposes on violators harsh felony penalties, from lengthy prison sentences to six-figure fines. However, the NFA permits lawful civilian ownership of these firearms under a taxation and registration scheme administered by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

In its 2008 *District of Columbia v. Heller* decision, the United States Supreme Court clarified what “arms” the Second Amendment protects—those that are “in common use” and those “typically possessed by law-abiding citizens for lawful purposes,” but not those that are “dangerous and unusual.” Under this formulation, NFA restrictions received an incidental presumption of constitutionality.

That was then, this is now. In the intervening years since *Heller*, NFA firearms have exploded in popularity, amounting to millions of lawfully registered examples in civilian hands. As the NFA registry grows year after year, the federal government enjoys ever-increasing tax revenues. Consequently, registry expansion offers a lucrative and effective means of implementing gun control measures—ATF reclassification of existing non-NFA firearms and accessories as falling under the NFA can compel registrations or preclude ownership of controversial items altogether.

* J.D. Candidate, Penn State Dickinson Law, 2023. Thank you to my parents for their unwavering attention, support, and patience throughout the years. Special thanks to Gilbert Ambler for his incredible mentorship and encouragement. All mistakes are my own.

This Comment argues that the NFA’s modern expansionary trend is on a collision course with the *Heller* mandate. After *Heller*, the only constitutional NFA registry is a small one, reserved for the truly dangerous and unusual. By focusing on modern developments in three NFA categories—short-barreled rifles, silencers, and machine guns—this Comment contends that some NFA prohibitions are already constitutionally unsound and absent judicial intervention, Congress should remove them from the NFA altogether.

TABLE OF CONTENTS

INTRODUCTION	274
I. BACKGROUND	276
A. <i>The National Firearms Act of 1934</i>	276
B. <i>The Origin of “Common Use”</i>	280
C. <i>The Gun Control Act of 1968</i>	282
D. <i>The Firearms Owners’ Protection Act of 1986</i>	283
E. <i>The Reaffirmation of “Common Use”</i>	286
F. <i>The Current Landscape of the NFA</i>	288
II. ANALYSIS	292
A. <i>Articulating a Common-Use Standard</i>	292
B. <i>Short-Barreled Rifles in Modern America</i>	295
C. <i>The Massive Popularity of Suppressors</i>	298
D. <i>How Shifting Interpretations of “Machine Gun”</i> <i>Unwittingly Contribute to Common Use</i>	301
1. <i>The Bump Stock Ban</i>	301
2. <i>Forced-Reset Triggers</i>	303
3. <i>A Warning Against Regulatory Revisionism</i> ...	304
CONCLUSION	305

INTRODUCTION

Not all American firearms are treated equally. Since 1934, the National Firearms Act has provided for the strict regulation of certain firearms that Congress deemed to be too dangerous and unusual for civilized society.¹ Today, these restricted firearm categories include short-barreled shotguns, short-barreled rifles, so-called “any other weapons,” machine guns, suppressors,² and destructive

1. See National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended in scattered sections of 26 U.S.C.); Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. 30,826, 30,827 n.5 (proposed June 10, 2021) (to be codified at 27 C.F.R. pts. 478, 479) (collecting cases).

2. Firearm suppressors are named “silencers” under federal law. 26 U.S.C. § 5845(a); 18 U.S.C.S. § 921(a)(25) (LexisNexis 2022). Although the silencer’s inventor, Hiram Percy Maxim, referred to his invention as a “silencer,” this Com-

devices.³ A clear example of *malum prohibitum* offenses,⁴ the NFA criminalizes the mere possession or transfer of its enumerated firearms absent registration and payment of a tax.⁵ Despite these restrictions, ownership of NFA firearms is becoming more and more common.⁶

As the NFA registry continues to grow, gun control proponents must come to terms with the *District of Columbia v. Heller*⁷ mandate: The Second Amendment protects arms in “common use” and those “typically possessed by law-abiding citizens for lawful purposes.”⁸ This Comment argues that the NFA’s restrictions on short-barreled rifles and suppressors violate *Heller* already. In addition, continued reclassification of innocuous firearm components as machine guns will jeopardize the constitutional integrity of the machine gun prohibition. This Comment will discuss the *Heller* standard as applied to modern NFA ownership trends and suggest that further doctrinal development should focus on the *ready availability* of arms—arguably the only viable common-use interpretation for Second Amendment protection.⁹

ment will use the term “suppressor” throughout. See *Maxim Silencer*, FORGOTTEN WEAPONS, <https://bit.ly/3HN6r2m> [<https://perma.cc/8WW8-MPJH>] (last visited Sept. 5, 2022). This semantic decision reflects the reality that most suppressors are not in fact “Hollywood-quiet.” See Brandon Maddox, *Shooting Down Seven Common Silencer Myths*, SILENCER CENT. (July 6, 2021), <https://bit.ly/3hFHtYd> [<https://perma.cc/Q9VJ-4QT2>]. Instead, suppressors often make the unbearably loud just tolerably loud. See *id.*

3. See 26 U.S.C. § 5845(a).

4. See *Malum Prohibitum*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“An act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.”).

5. 26 U.S.C. § 5871.

6. See *ATF Update 2021*, *infra* note 91, at 14.

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

8. *Id.* at 625–27.

9. The bulk of this Comment was written prior to the U.S. Supreme Court’s landmark decision in *New York State Rifle & Pistol Ass’n v. Bruen* (*NYSRPA II*), 142 S. Ct. 2111 (2022). Although *NYSRPA II* vindicated the individual right to carry arms in public for self-defense, *id.* at 2122, perhaps its most consequential holding is the express endorsement of “text, history, and tradition” as the constitutional standard of review for all Second Amendment challenges. See *id.* at 2126; Gilbert Ambler, *The Second Amendment Outside the Home, Debated Before SCOTUS*, AMBLER L. OFFS., L.L.C. (Nov. 2, 2021), <https://bit.ly/35BnveH> [<https://perma.cc/B7DC-J6NA>] (predicting that the Supreme Court would adopt the “text, history, and tradition” test that JUSTICE KAVANAUGH once articulated). This test is a categorical rejection of interest balancing and places the onus on the Government to prove that challenged firearm restrictions have a historical tradition of direct or analogous regulation from around the time of the Founding. See *NYSRPA II*, 142 S. Ct. at 2131–35; NICHOLAS J. JOHNSON ET AL., *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 638 n.40 (1st ed. 2012) (noting that “[t]he *Heller* majority [ha]d not explicitly articulate[d] a

I. BACKGROUND

A. *The National Firearms Act of 1934*

The National Firearms Act of 1934 was the first major piece of federal gun control legislation enacted in the history of the United States.¹⁰ A product of the New Deal era, the NFA criminalized civilian possession of certain types of firearms but provided an avenue for subsequent lawful ownership through the implementation of a national taxation and registration framework.¹¹

standard of review” for Second Amendment challenges and that absent guidance, some circuits had begun to “apply strict scrutiny to some laws . . . and intermediate scrutiny for others”). Under this newly endorsed test, if regulated conduct falls under the plain text of the Second Amendment, it receives a presumption of constitutional protection, at which point the Government bears the burden of “demonstrat[ing] that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’” *NYSRPA II*, 142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)). The *Heller* common-use standard applies at the plain-text protection stage of the “text, history, and tradition” inquiry. *See id.* at 2134 (citation omitted) (“It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of ‘the people’ whom the Second Amendment protects. Nor does any party dispute that handguns are weapons ‘in common use’ today for self-defense.”). If a regulated weapon is not “typically possessed by law-abiding citizens for lawful purposes” or in “common use,” it is not a protected “arm” under the Second Amendment’s plain text, and a constitutional challenge to its regulation will fail without proceeding to the governmental justification stage. *Heller*, 554 U.S. at 625–27; *NYSRPA II*, 142 S. Ct. at 2126. “Common use” remains an amorphous, undeveloped standard; recent challenges have mainly concerned handguns, which courts have accepted at face value as being in common use without any additional analysis. *See Heller*, 554 U.S. at 629 (“Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”); *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (explaining that the Second Amendment “applies to handguns because they are ‘the most preferred firearm in the nation’” (quoting *Heller*, 554 U.S. at 628)); *NYSRPA II*, 142 S. Ct. at 2134 (noting that neither party disputed that handguns are in common use). This Comment addresses the question of just *when* a weapon is typical or common enough to earn Second Amendment protection. Finally, to the extent this Comment addresses executive agency rulemaking, any *Chevron* deference analysis will be omitted for the sake of brevity. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

10. *See U.S. Gun Laws: A History*, NPR (June 26, 2008, 6:36 PM), <https://n.pr/2KqCs3M> [<https://perma.cc/KL8F-P7TC>]. Seven years prior, Congress had passed a less extensive gun control law known as the Miller Bill with the narrow aim of banning the mailing of pistols and other concealable weapons through the Postal Service. *See LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 201 (Jon L. Wakelyn ed., Contributions in Am. Hist. Ser. No. 37, paperback ed. 1976); Act of Feb. 8, 1927, Pub. L. No. 69-583, 44 Stat. 1059 (codified as amended at 18 U.S.C. § 1715).

11. *See National Firearms Act of 1934*, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended in scattered sections of 26 U.S.C.).

This vast expansion of governmental control over Americans' access to firearms resulted from the confluence of several issues of national importance. Depression-era criminal activity saw the likes of Al Capone, Bonnie and Clyde, John Dillinger, and Pretty Boy Floyd become household names, bolstered by media sensation.¹² The weapons these robbers and gangsters used in high-profile incidents garnered keen public interest.¹³ Aside from the gangland crimes of the 1920s and 1930s, the February 15, 1933 assassination attempt on then-President-elect Franklin D. Roosevelt also provided significant motivation for the enactment of national gun control measures.¹⁴ Coupled with President Roosevelt's resolve "to mobilize the full power of the national government . . . at a whole range of besetting problems," the impetus was strong for governmental expansion and sweeping reforms that would affect many aspects of life, firearm ownership included.¹⁵

12. See KENNETT & ANDERSON, *supra* note 10, at 202–04. Indeed, "[w]ith newspapers daily placarding the latest exploits of the country's major criminals, the time seemed at hand for decisive federal intervention." *Id.* at 204.

13. See *id.* at 202–04. Rich gangsters took an interest in suppressors, sawed-off shotguns, and the Auto Ordnance Thompson, or "Tommy Gun." See *id.*; see also T.REX ARMS, *Everything You're NOT Supposed to Know About Suppressors*, YOUTUBE, at 02:12 (July 13, 2019), <https://bit.ly/3bpZ6rQ> [<https://perma.cc/983R-JA2G>] (contending that the use of these weapons was actually quite rare outside of Hollywood films and a handful of highly publicized criminal acts). The Thompson, for example, was simply too expensive for ordinary Americans to acquire and the firearm did not see extensive use until World War Two. T.REX ARMS, *supra*, at 02:50.

14. *The Promise of Change: Assassination Attempt*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM VIRTUAL TOUR, <https://bit.ly/3mycoc2> [<https://perma.cc/89XL-6JVB>] (last visited Sept. 5, 2022). One should take note that several other assassination attempts on 20th-century presidents also yielded expanded gun control measures soon after. See Olivia B. Waxman, *How the Gun Control Act of 1968 Changed America's Approach to Firearms—and What People Get Wrong About That History*, TIME, <https://bit.ly/3aZp4WC> [<https://perma.cc/D9JX-BTDF>] (Oct. 30, 2018, 11:52 AM) (reporting that after the assassination of President Kennedy in 1963, Congress passed the Gun Control Act of 1968, which restricted the mode of firearm acquisition that Kennedy's assassin had used); *Assassination Attempt on Reagan*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, <https://bit.ly/3nGWviI> [<https://perma.cc/MF4Z-CFPJ>] (last visited Sept. 5, 2022) (detailing the 1981 attempt on President Reagan's life, which left him with a pierced left lung). Five years after the attempted Reagan assassination, a provision of the Firearms Owners' Protection Act of 1986—ironically enough—prohibited the civilian registration of machine guns beyond its date of enactment. See Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. §§ 921–925, 926, 926A, 929; 26 U.S.C. § 5845); see also *infra* text accompanying notes 52–56 (providing further discussion of the restrictions on civilian machine gun ownership). When viewed from a class-based perspective, the masses must contend with ever-restricted rights to self-defense while the wealthy and politically connected retain access to superior firepower.

15. KENNETT & ANDERSON, *supra* note 10, at 204.

The initial draft of the NFA—introduced to address this perceived crime wave—was ambitious and overbroad, implicating nearly all firearms owned by Americans.¹⁶ The bill defined a “firearm” as any “pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person, a muffler or silencer therefor, or a machine gun.”¹⁷ Notably, the bill defined a machine gun as “any weapon designed to shoot automatically or semiautomatically twelve or more shots without reloading,” potentially subjecting countless non-machine guns to this prospective statutory definition.¹⁸ Most importantly, the bill required the enumerated “firearms” subject to its provisions to be registered and taxed and purchasers of such firearms to submit their “name, address, fingerprints, photograph,” and other identifying personal information to the federal government.¹⁹

Proponents cited the specter of widespread mayhem caused by “roaming groups of predatory criminals” in urging for the strict regulation of most small arms.²⁰ However, such intrusion upon the

16. H.R. 9066, 73d Cong. (1934).

17. *Id.*

18. *Id.* In contrast, the current statutory definition of machine gun is “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 function of the trigger.” 26 U.S.C. § 5845(b). This definition is true to the colloquial understanding of what machine guns are; semi-automatic weapons that fire only once per function of the trigger are not machine guns. See Chris Opfer, *What's the Difference Between a Semi-Automatic Weapon and a Machine Gun?*, HOW-STUFFWORKS, <https://bit.ly/3D942N6> [<https://perma.cc/4NDM-5VZ2>] (May 14, 2021).

19. H.R. 9066 § 4(a). In its original form as H.R. 9066, the NFA imposed registration and taxation requirements only on firearms sold or otherwise transferred after its enactment; the Justice Department later substituted the bill for H.R. 9741, which also required the registration and taxation of firearms already owned. See Joshua Prince, *Violating Due Process: Convictions Based on the National Firearms Registration and Transfer Record when Its “Files Are Missing”* 5–6 (Sept. 28, 2008) (unpublished manuscript), <https://bit.ly/3Pycuwl> [<https://perma.cc/HC77-3J7Z>].

20. *National Firearms Act: Hearing on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 4 (1934) [hereinafter *Hearing on H.R. 9066*] (statement of Homer S. Cummings, Att’y Gen. of the United States). Unfortunately, the hearing transcript is rife with the paternalism of appointed and elected officials who reduced the rights of the people to mere sport. See *id.* at 5–6 (“[T]his bill does not touch . . . the ordinary shotgun or rifle. . . . The sportsman who desires to go out and shoot ducks, or the marksman who desires to go out and practice . . . would not like to be embarrassed, or troubled, or delayed by too much detail.”); *id.* at 6 (“A machine gun, of course, ought never to be in the hands of any private individual. There is not the slightest excuse for it, not the least in the world . . .”); *id.* at 7 (“It seems to me that there are very few people who are innocent wearing [bullet-proof] clothes of that kind, even for their own protection.”).

right to keep and bear arms had questionable constitutional legitimacy. On this point, U.S. Attorney General Cummings addressed the concerns of Congress as follows:

Now we proceed in this bill generally under two powers—one, the taxing power, and the other, the power to regulate interstate commerce. The advantages of using the taxing power with respect to the identification of the weapons and the sale, and so forth, are quite manifest. In the first place, there is already in existence a certain machinery for dealing with the collection of taxes of this kind, and these powers are being preserved in this particular act. In addition to that, it is revenue-producing. . . .

. . . .
 . . . We have followed, where we could, the language of existing laws as to revenue terminology²¹

After a round of revisions, Congress removed the provisions concerning pistols and revolvers from the NFA but retained the regulatory provisions for the next-smallest concealable weapons—“any other weapons,” short-barreled rifles, and short-barreled shotguns.²²

With the original, more expansive legislative intent somewhat frustrated, Congress set the tax to transfer firearms subject to the NFA at \$200, the approximate market price of a machine gun at the time.²³ This tax was prohibitively expensive; in 1934, \$200 equated to well over \$4,000 today.²⁴ However, inflation adjustment fails to

21. *Id.* at 6. To this day, the NFA, a gun control law, remains codified in the Internal Revenue Code. See National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended in scattered sections of 26 U.S.C.).

22. See Prince, *supra* note 19, at 6–7. Attorney General Cummings would continue to press for the addition of pistols and revolvers to the NFA, to no avail. See KENNETT & ANDERSON, *supra* note 10, at 211–12.

23. See *Hearing on H.R. 9066, supra* note 20, at 12. The final draft of the NFA defined a “firearm” subject to its provisions as a “shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver . . . if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm” National Firearms Act § 1(a) (codified as amended at 26 U.S.C. § 5845(a)). The category of “any other weapon” was intended to be a catchall for other concealable firearms not otherwise excluded or defined. *Id.* Interestingly, a suppressor is a statutory “firearm” under the NFA even though it is more accurately a firearm accessory. See *id.*; Education, AM. SUPPRESSOR ASS’N, <https://bit.ly/3oeQj3e> [<https://perma.cc/M53K-YHDH>] (last visited Sept. 5, 2022) (describing suppressors as “simply mufflers for firearms”). This statutory characterization is akin to a car muffler being treated as an entire car for purposes of legal definition and regulation.

24. *CPI Inflation Calculator*, U.S. BUREAU LAB. STAT., <https://bit.ly/3po4MLc> [<https://perma.cc/ARA4-ARFQ>] (last visited Sept. 5, 2022) (type “200” in the field marked “\$” and select “June” and “1934” from the dropdowns, then click “Calculate”).

convey just how onerous the NFA taxation requirement was at the time of its enactment—from 1935 to 1936, almost two-thirds of American families earned less than \$1,500 annually.²⁵ In other words, an NFA transfer tax cost most people nearly two months' wages, or more—and payment was required *per* firearm subject to the NFA.²⁶ Consequently, the NFA served to bar all but the wealthiest of Americans from the lawful ownership of the likes of short-barreled rifles, suppressors, machine guns, and more.

B. *The Origin of "Common Use"*

Not long after its enactment, the NFA faced constitutional opposition. In 1938, police officers stopped and searched Jack Miller and Frank Layton, two would-be bank robbers, and discovered an unregistered short-barreled shotgun in the duo's possession.²⁷ Initially, the trial court found the relevant NFA provision under which Miller and Layton had been indicted to be violative of the Second Amendment.²⁸ The matter was brought up on direct appeal to the U.S. Supreme Court.²⁹ The Supreme Court reversed under bizarre *ex parte* circumstances, upholding the constitutionality of the NFA

25. NAT'L RES. COMM., CONSUMER INCOMES IN THE UNITED STATES: THEIR DISTRIBUTION IN 1935–36, at 2 (1938).

26. *See id.*; National Firearms Act § 3(a) (codified as amended at 26 U.S.C. § 5811(a)).

27. *See* James A. D'Cruz, Note, *Half-Cocked: The Regulatory Framework of Short-Barrel Firearms*, 40 HARV. J.L. & PUB. POL'Y 493, 501–02 (2017). Note that the NFA did not prevent criminals from possessing or having the opportunity to use NFA-regulated firearms—it prevented only the law-abiding lower and middle classes from doing so. *See id.* In fact, Attorney General Cummings *knew* criminals would not comply with the NFA, which would only serve to create a firepower imbalance between law-abiding citizens, criminal elements, and the NFA-exempted government. *See Hearing on H.R. 9066, supra* note 20, at 22 (“I do not expect criminals to comply with this law; I do not expect the underworld to be going around giving their fingerprints and getting permits to carry these weapons, but I want to be in a position . . . to convict [them] because [they have] not complied.”).

28. *United States v. Miller*, 307 U.S. 174, 176–77 (1939). Evidence exists suggesting the trial judge was in fact a staunch gun control proponent, New Deal Democrat, and Roosevelt appointee who strategically sided with the defendants to create an appealable NFA test case for the U.S. Supreme Court. *See* Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 63–65 (2008). After the NFA passed, the subsequent “Federal Firearms Act of 1938 was stirring up popular opposition, much of it based on the Second Amendment. The government needed to silence the complaints, and Miller was the perfect vehicle.” *Id.* at 65. The trial judge, who had introduced and supported various pieces of anti-gun legislation during his time as a congressman, penned a “memorandum opinion [that] presented no facts and no argument. . . . [I]t was the government’s ideal test case.” *Id.* at 64–65.

29. *Miller*, 307 U.S. at 177.

based on the submission of only one adverse party's brief—no appearance by counsel had been made for Miller or Layton.³⁰

In finding that the Second Amendment did not protect the unregistered short-barreled shotgun at issue, the *Miller* Court framed the question as one of military use:

In the absence of any evidence tending to show that possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.³¹

Further, the Court acknowledged that the Second Amendment contemplates a militia of civilian makeup, comprised of a body of citizens capable of acting for the common defense.³² In doing so, such citizens are “expected to appear bearing arms supplied by themselves and of the kind in *common use* at the time.”³³

The Court's *Miller* language is notable for several reasons. It impliedly proposed that the Second Amendment protects military-type weapons and that the NFA's “prohibit, then tax and permit” approach would violate the right to keep and bear such weapons.³⁴ Indeed, had the *Miller* rationale been employed under the same circumstances today, the outcome might have been the opposite of what had resulted in 1938. The NFA provision concerning short-barreled shotguns likely would have been invalidated, as modern short-barreled shotguns see extensive military and police use.³⁵ While the Court had no judicial notice that short-barreled shotguns

30. See *id.* at 175; D'Cruz, *supra* note 27, at 502; Frye, *supra* note 28, at 66–67. The defendants' trial court-appointed counsel had accepted a political appointment in the interim and did not appear for oral argument, citing his inability to obtain payment from the defendants. See Frye, *supra* note 28, at 59–67. Interestingly, *Miller* was not the NFA's first constitutional challenge; earlier, “*Sonzinsky* [had] tested the NFA's tax mechanism. The key question for the Court was whether Congress could use its tax power as a roundabout way of enacting a criminal law, even though the Constitution gave Congress no general power to make criminal laws.” JOHNSON ET AL., *supra* note 9, at 357; *Sonzinsky v. United States*, 300 U.S. 506, 513–14 (1937) (answering in the affirmative and upholding the NFA's taxation scheme despite its prohibitive nature).

31. *Miller*, 307 U.S. at 178.

32. *Id.* at 179.

33. *Id.* (emphasis added).

34. See *id.* at 178.

35. See, e.g., *M4 Tactical Shotguns*, BENELLI L. ENF'T, <https://bit.ly/2ZU4kd0> [<https://perma.cc/3QZ3-CTES>] (last visited Sept. 5, 2022). The Benelli M4 “was selected for service in the U.S. Marine Corps” and “was later adopted as the U.S.

saw military use in 1938,³⁶ the *Miller* proposition presumably would have applied to the machine guns of the time, many of which the military had already adopted.³⁷ However, because machine guns were not the subject of the controversy immediately before the *Miller* Court, the presumptive unconstitutionality of the NFA with respect to machine guns was not addressed.³⁸ Ultimately, the language from *Miller* that would stand the test of time would be the reference to militia access to arms in “common use.”³⁹

C. *The Gun Control Act of 1968*

Thirty-four years after the NFA’s enactment, the Gun Control Act of 1968 (GCA) amended some of its major provisions.⁴⁰ A portion of the GCA addressed a constitutional flaw in the NFA that had become apparent that year.⁴¹ In a challenge to the NFA’s fire-arm registration requirement, the Supreme Court had held that invocation of one’s Fifth Amendment privilege against self-incrimination provided a defense against prosecutions for failure to register NFA-regulated firearms.⁴² The GCA cured this flaw simply by removing “the requirement for possessors of unregistered fire-

Joint Services combat shotgun.” *Id.* The M4 shotgun is available in short-barreled format to police and civilian purchasers for roughly \$2,000. *Id.*

36. *Miller*, 307 U.S. at 178. However, even in 1938 and earlier, short-barreled firearms would have seen military use, which would have undermined the *Miller* Court’s holding even then. *See* D’Cruz, *supra* note 27, at 503 (noting that the blunderbuss, a short-barreled flintlock shotgun, saw early naval use with subsequent variants entering service during the Civil War).

37. *See, e.g.*, Bruce N. Canfield, *Arms of the American Airborne*, AM. RIFLEMAN (Apr. 14, 2016), <https://bit.ly/3J8A0xB> [<https://perma.cc/4H4U-RP2G>] (listing some of the American machine guns used in World War Two, including the Thompson, Grease Gun, and Browning Automatic Rifle).

38. *See Miller*, 307 U.S. 174. Machine guns are mentioned only in passing as part of language quoted from the NFA. *Id.* at 175 n.1.

39. *See* District of Columbia v. Heller, 554 U.S. 570, 624–25 (2008) (discussing *Miller*, 307 U.S. at 179); *see also infra* text accompanying notes 96–102 (providing further discussion of the Court’s common-use formulation).

40. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 U.S.C. and 26 U.S.C.). In addition to amending the NFA, the GCA repealed and replaced the prior federal licensing system for firearm dealers created by the Federal Firearms Act of 1938. *See* KENNETT & ANDERSON, *supra* note 10, at 243.

41. *See National Firearms Act*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://bit.ly/3k01eLF> [<https://perma.cc/9ZRC-FN5C>] (Apr. 7, 2020).

42. *Haynes v. United States*, 390 U.S. 85, 100 (1968). *Haynes*, the defendant in a prosecution over possession of an unregistered short-barreled shotgun, could not register the weapon without incriminating himself, presumably because he was ineligible to possess firearms and doing so would have been a crime in and of itself. *See id.* at 86; *Haynes v. United States*, 372 F.2d 651, 652 (5th Cir. 1967), *rev’d*, 390 U.S. 85 (1968).

arms to register” them.⁴³ Subsequently, the Supreme Court found this alteration to be constitutionally sufficient.⁴⁴

In addition to addressing concerns over recent case law, the GCA expanded the NFA by requiring the registration and taxation of “destructive devices,” which included all manner of explosives and weapons with barrels greater than .50 caliber, excluding most shotguns.⁴⁵ Finally, the GCA amended the definition of “machinegun,” now spelled as one word, to include any weapon that “can be readily restored” to function as such, as well as the “frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.”⁴⁶ This expanded definition brought components of machine guns into the regulatory fold that the NFA had not implicated before.

D. *The Firearms Owners’ Protection Act of 1986*

The final major change to the NFA came with the passage of the Firearms Owners’ Protection Act of 1986 (FOPA).⁴⁷ A contentious revision of federal gun control laws, the FOPA “was predictably lauded as ‘necessary to restore fundamental fairness and clarity to our Nation’s firearms laws’ and damned as an ‘almost monstrous idea’ and a ‘national disgrace.’”⁴⁸

43. *National Firearms Act*, *supra* note 41. “Indeed, under the amended law, there is no mechanism for a possessor to register an unregistered NFA firearm already possessed by the person.” *Id.* Possession of an unregistered NFA firearm is a felony. 26 U.S.C. § 5871; 18 U.S.C. § 3559(a).

44. *See* *United States v. Freed*, 401 U.S. 601, 605 (1971); *National Firearms Act*, *supra* note 41.

45. Gun Control Act § 201 (codified as amended at 26 U.S.C. § 5845(f)). However, not *all* shotguns escape classification as destructive devices. The NFA provides that only those shotguns “which the Secretary finds [are] generally recognized as particularly suitable for sporting purposes” fall outside the definition of destructive devices. 26 U.S.C. § 5845(f). This neutered “sporting use” conception of firearm ownership has led to the *ex post facto* reclassification of some shotguns as destructive devices, compelling registrations under the NFA. *See* Ian McCollum, *Striker 12: Shotgun Turned “Destructive Device,”* FORGOTTEN WEAPONS (Oct. 3, 2019), <https://bit.ly/3LWXXYv> [<https://perma.cc/VA46-QXAN>].

46. Gun Control Act § 201 (codified as amended at 26 U.S.C. § 5845(b)).

47. *See* Firearms Owners’ Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. §§ 921–925, 926, 926A, 929; 26 U.S.C. § 5845).

48. David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 585 (1986).

One of the most practical FOPA provisions, colloquially known as the Safe Passage provision,⁴⁹ provided much-needed protection for firearm owners traveling through jurisdictions that restricted the firearms they possessed.⁵⁰ While the majority of the FOPA concerned such “protective” measures for firearm owners and even contained a proclamation of legislative intent to safeguard the rights of citizens to keep and bear arms,⁵¹ a nefarious last-minute amendment closed the NFA’s civilian machine gun registry permanently.⁵² This provision, known as the Hughes Amendment,⁵³ prohibited the registration of new machine guns to civilians, effective May 19, 1986.⁵⁴ The FOPA and its Hughes Amendment passed

49. See MICHAEL GIARAMITA, JR., *PENNSYLVANIA GUN LAW: ARMED AND EDUCATED* 248–49 (2d ed. 2019).

50. Firearms Owners’ Protection Act § 107 (codified as amended at 18 U.S.C. § 926A). This provision enables a person to travel with their firearm from one state to another, through a state in which the firearm is illegal, for example, provided the firearm is legal in the states of origin and destination and it is not readily accessible while traveling through the restrictive intermediate jurisdiction. See *id.*; GIARAMITA, *supra* note 49, at 249. I make use of the Safe Passage provision during regular travels from Pennsylvania to Virginia, through Maryland.

51. Firearms Owners’ Protection Act § 1.

52. See Hardy, *supra* note 48, at 625. This amendment “was raised with only minutes left in the time allotted under the [House] rule. It passed on a rather irregular voice vote.” *Id.* Because the amendment was not debated and “passed on a voice vote of questionable propriety,” the “House vote has no legislative history, aside from the frantic pleas of one Representative, moving for additional time” *Id.* at 670. Without the entire House voting on the amendment, it passed by only “the forty to fifty who sat through the debates and participated in the voice votes. The chair . . . refused to acknowledge the call for the recorded vote.” *Id.* at 671 n.465.

53. See Ben Garrett, *Gun Rights Under President Ronald Reagan*, THOUGHTCO., <https://bit.ly/3PRPqS> [<https://perma.cc/RH8H-FRZX>] (Oct. 24, 2019).

54. Firearms Owners’ Protection Act §§ 102, 110 (codified at 18 U.S.C. § 922(o)). The unprecedented nature of this restriction bears emphasis—in a 1934 exchange, even Attorney General Cummings thought an outright prohibition on machine gun acquisition would go too far:

Attorney General Cummings. Of course we deal purely with concealable weapons. Machine guns, however, are not of that class. Do you have any doubt as to the power of the Government to deal with machine guns as they are transported in interstate commerce?

Mr. Lewis. I hope the courts will find no doubt on a subject like this, General; but I was curious to know how we escaped [the Second Amendment].

Attorney General Cummings. Oh, we do not attempt to escape it. We are dealing with another power, namely, the power of taxation, and of regulation under the interstate commerce clause. You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say “[w]e will tax the machine gun” and when you say that “the absence of a

both chambers of Congress with veto-proof supermajorities.⁵⁵

The effects of the Hughes Amendment on the civilian machine gun market have been staggering. By prohibiting civilian registration of newly manufactured machine guns after the FOPA's date of enactment, the six-figure number of registered machine guns that existed at the time became the *only* machine guns available for civilian transfer.⁵⁶ This artificial scarcity has caused prices of transferable "pre-1986" machine guns to skyrocket, relegating them to the status of collectors' items for the rich—today, a transferable M16 costs nearly \$30,000 while "entry-level" machine guns cost in the ballpark of \$10,000.⁵⁷ What was once accessible, though NFA-regulated, is now hopelessly out of reach for most Americans.

license showing payment of the tax has been made indicates that a crime has been perpetrated[,] you are easily within the law.

Mr. Lewis. In other words, it does not amount to prohibition, but allows of regulation.

Attorney General Cummings. That is the idea. We have studied that very carefully.

Hearing on H.R. 9066, supra note 20, at 19. But now, the damage has been done and the Hughes Amendment has ostensibly made machine guns too rare to qualify for Second Amendment protection under current precedent. See *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008).

55. See *H.R. 4332—Firearms Owners' Protection Act*, CONG., <https://bit.ly/3k5uCjr> [<https://perma.cc/FBQ3-H4MX>] (last visited Sept. 5, 2022) (passing the House 292 to 130); *S. 49—Firearms Owners' Protection Act*, CONG., <https://bit.ly/3wkXk4P> [<https://perma.cc/N5DY-Y2AD>] (last visited Sept. 5, 2022) (passing the Senate 79 to 15); U.S. CONST. art. I, § 7 (providing the requirement of a two-thirds vote).

56. See Hardy, *supra* note 48, at 670 n.461. The number of transferable machine guns is dwindling, as accidental losses, wear and tear, and the passage of time reduce the number in circulation. See John Brown, *NFATCA Report: 182,619—Is That All There Is?*, SMALL ARMS REV. (Mar. 30, 2012), <https://bit.ly/3A5Ugx8> [<https://perma.cc/FS38-KZ79>]. At the time of the 1986 registry closure, an estimated 250,000 transferable machine guns were in circulation. *Id.* By 2007, that number had dropped to approximately 182,000. *Id.* In one alarming case from the time, a widow reportedly had "called the local ATF office and requested that her late husband's collection of transferable machine guns be picked up and destroyed. . . . [N]early 100" of them left circulation, never to be seen again. *Id.* As of 2016, transferable machine guns numbered just under 176,000, per a FOIA response obtained by the National Firearms Act Trade & Collectors Association. See Dan Zimmerman, *ATF Reveals the Number of Registered Machine Guns*, TRUTH ABOUT GUNS (Mar. 7, 2016), <https://bit.ly/3G6OcEE> [<https://perma.cc/KB2C-6VS7>].

57. See Ruben Mendiola, *All Transferable Machine Guns*, DEALERNFA, <https://bit.ly/3EEXrLB> [<https://perma.cc/THM9-U753>] (last visited Sept. 5, 2022) (listing transferable machine gun prices all over the five-figure range, with one Maremont M60 commanding just shy of \$90,000 at the time of writing). Just a decade ago, transferable machine gun prices "beg[a]n at \$3,000 for the most basic models . . . rang[ing] up to \$20,000 or more for rare or collectible guns." JOHNSON ET AL., *supra* note 9, at 369. Truly, the best time to have purchased one was yester-

E. *The Reaffirmation of “Common Use”*

In 2008, the U.S. Supreme Court broke a lengthy silence on the Second Amendment when it decided *District of Columbia v. Heller*.⁵⁸ Dick Heller, a District of Columbia police officer, challenged the District’s blanket handgun prohibition after it denied his request to keep a handgun at home.⁵⁹ Heller’s Second Amendment challenge proved successful; the Supreme Court invalidated the District’s onerous handgun ban and its requirement that domestically kept firearms be rendered inoperable, which had all but defeated the purpose of keeping arms for self-defense.⁶⁰

Writing for a five-four majority, Justice Scalia employed a lengthy “text, history, and tradition” analysis⁶¹ to conclude that the Second Amendment recognizes an individual right to keep and bear arms.⁶² This individual right exists independent of militia service, as the Second Amendment’s prefatory clause merely exemplifies an application of such a right.⁶³ On the topic of militia service, the Supreme Court clarified its holding in *Miller*, stating that it “stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.”⁶⁴ Rather than leaving an open question as to what types of weapons earn constitutional protection, the *Heller* Court observed:

Read in isolation, *Miller*’s phrase “part of ordinary military equipment” could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opin-

day. Meanwhile, the true unit cost of comparable modern machine guns available to non-civilians is around \$700. See *U.S. Army Places Order for 24,000 M4A1 Carbines with Remington*, MIL. TIMES (Apr. 20, 2012), <https://bit.ly/2Ydmk1g> [<https://perma.cc/RG5P-QFSQ>].

58. *Heller*, 554 U.S. 570.

59. *Id.* at 574–76.

60. *Id.* at 635.

61. See Stephen P. Halbrook, *Taking Heller Seriously: Where Has the Roberts Court Been, and Where Is It Headed, on the Second Amendment?*, 13 CHARLESTON L. REV. 175, 178 (2018).

62. *Heller*, 554 U.S. at 595. Two years later, the Court recognized this individual right as “fully applicable to the States.” *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

63. See *Heller*, 554 U.S. at 599. “The Amendment could be rephrased, ‘Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.’” *Id.* at 577. In the context of a militia capable of defending the polity against threats, “the adjective ‘well-regulated’ implies nothing more than the imposition of proper discipline and training.” *Id.* at 597. To be clear, “[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.” *Id.* at 599.

64. *Id.* at 623.

ion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.⁶⁵

In what must have been an allusion to the NFA, the Court found support for this common-use formulation by recognizing the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"⁶⁶

Removing the double negative, the *Heller* rule provides that the Second Amendment protects weapons in "common use" and those "typically possessed by law-abiding citizens for lawful purposes," but not those that are traditionally thought to be "dangerous and unusual."⁶⁷ What could follow from this formulation is concerning—if the legislature or an executive agency can make a certain type of firearm sufficiently rare to the point that the citizens do not typically possess it for lawful purposes, the firearm presumably loses Second Amendment protection.⁶⁸ Using this exception, the *Heller* Court carved the NFA out of its common-use formulation, granting deference to historical prohibitions and a presumption of constitutionality therefrom.⁶⁹ In short, the prevailing

65. *Id.* at 624–25 (alteration in original) (citation omitted). Ironically, "all lawful purposes" and other synonymous phrases are among the most common reasons applicants give when filing applications to make or transfer NFA items. See *ATF eForm 1 NFA Tax Stamp Walk-Through Guide*, NAT'L GUN TRS. (Nov. 3, 2018), <https://bit.ly/3OwcyLT> [<https://perma.cc/2DS9-YYYY>]; *ATF eForm 4 NFA Tax Stamp Walk-Through Guide*, NAT'L GUN TRS. (Mar. 26, 2022), <https://bit.ly/3z6mIwR> [<https://perma.cc/AX4B-BWPV>]. I happen to own a registered short-barreled shotgun whose application the ATF approved for "all lawful purposes."

66. *Heller*, 554 U.S. at 627.

67. *Id.* at 624–27. This rule accommodates the development of new firearm technology. A weapon can be "typically possessed by law-abiding citizens for lawful purposes" and not 'unusual,' even though it is not necessarily 'in common use,' and still retain Second Amendment protection, which "would allow innovative products typically used for lawful purposes which would not yet be in common use when introduced to the market." Halbrook, *supra* note 61, at 182.

68. See *Heller*, 554 U.S. at 625–27.

69. See *id.* at 627–28.

understanding of 2008 was that weapons that are “dangerous and unusual” are antithetical to being in “common use” or even “typical,” at the very least.⁷⁰ However, “dangerous and unusual” must be treated as a rebuttable presumption, as it is possible for weapons that once fell into this category to gain such popularity through legal acquisition so as to become quite typical—and indeed common.

F. *The Current Landscape of the NFA*

Today, the NFA regulates six categories of statutorily defined “firearms.”⁷¹ These categories and their common abbreviations⁷² are (1) short-barreled shotguns⁷³ (SBSs), (2) short-barreled rifles⁷⁴ (SBRs), (3) any other weapons⁷⁵ (AOWs), (4) machine guns⁷⁶ (MGs), (5) suppressors⁷⁷ (or silencers), and (6) destructive devices⁷⁸ (DDs). The Bureau of Alcohol, Tobacco, Firearms and Explosives enforces the NFA, processing all applications relating to the making, transfer, transportation, and registration of all “fire-

70. *Id.* at 625–27.

71. See 26 U.S.C. § 5845(a). For the purposes of this Comment, “NFA ‘firearms’” and “NFA items” will be used interchangeably to refer to those statutorily defined “firearms” subject to the NFA.

72. See *All Things NFA*, REDDIT, <https://bit.ly/3DqhGeS> [<https://perma.cc/ZWN5-AGAJ>] (last visited Sept. 5, 2022), an enthusiast community with well over 150,000 members who use these abbreviations regularly. Some official recognition exists; even the ATF has used “SBR” to denote “short-barreled rifle.” See *Factoring Criteria for Firearms with Attached “Stabilizing Braces,”* 86 Fed. Reg. 30,826, 30,847 (proposed June 10, 2021) (to be codified at 27 C.F.R. pts. 478, 479).

73. Defined as “a shotgun having a barrel or barrels of less than 18 inches in length” or “a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length.” 26 U.S.C. § 5845(a); 18 U.S.C. § 921(a)(6).

74. Defined as “a rifle 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 or barrels of less than 16 inches in length.” 26 U.S.C. § 5845(a); 18 U.S.C. § 921(a)(8).

75. Defined as “any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive,” among other examples, excluding “a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.” 26 U.S.C. § 5845(e).

76. Defined as “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 function of the trigger.” 26 U.S.C. § 5845(b).

77. Defined as “any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts . . . and any part intended only for use in such assembly or fabrication.” 18 U.S.C.S. § 921(a)(25) (LexisNexis 2022); 26 U.S.C. § 5845(a).

78. Defined to include “any explosive, incendiary, or poison gas” bombs, grenades, rockets, missiles, mines, or similar devices, and firearms “which have a bore of more than one-half inch in diameter,” sporting shotguns excluded. 26 U.S.C. § 5845(f); 18 U.S.C. § 921(a)(4).

arms” subject to its provisions.⁷⁹ Since the NFA’s enactment, the making and transfer tax rates have remained fixed at \$200 per “firearm,” with the exception of a \$5 transfer tax for AOWs.⁸⁰

Compliance with the NFA’s provisions and implementing regulations is much more burdensome than compliance with the laws governing typical non-NFA firearms. Prior to taking lawful possession of an NFA item, federal law requires one to file an ATF application form, pay the applicable tax, submit photographic identification and fingerprints (among other personal information), notify local authorities, and wait potentially months for approval.⁸¹ Upon approval, the ATF adds each applicant’s address and personal information to the National Firearms Registration and Transfer Record (NFRTR), the national NFA database,⁸² along with each NFA item’s serial number and date of registration.⁸³

79. See *National Firearms Act Division*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://bit.ly/3xPHbVU> [<https://perma.cc/MSR6-L9H7>] (Jan. 7, 2022).

80. 26 U.S.C. §§ 5811(a), 5821(a).

81. See 26 U.S.C. §§ 5812(a), 5822 (providing the requirements to transfer or make a “firearm” subject to the NFA); 27 C.F.R. §§ 479.62(c), 479.84(c) (2022) (requiring an applicant to notify the chief law enforcement officer (CLEO) of their locality by providing a copy of their ATF application); *Current Processing Times*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://bit.ly/3C3Lkqj> [<https://perma.cc/SA6W-YKMF>] (July 14, 2022) (estimating the current wait times for the various types of ATF applications for NFA items). At the time of writing, a paper application to make an NFA item takes on average three months for approval, while an online “eForm” application takes *just* two months. *Current Processing Times*, *supra*. Meanwhile, a paper application to transfer ownership of an existing NFA item takes about *one year* for approval. *Id.* Recently, the ATF unveiled a much-needed “modernized eForms” initiative said to reduce application processing times and provide an electronic means of submitting transfer applications, which had not been consistently available before. See *Important Notices for eForms Users*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://bit.ly/3b2ytfO> [<https://perma.cc/9UC9-NM24>] (last visited Sept. 5, 2022). The ATF claims online transfer applications should take about three to four months for approval now. *Current Processing Times*, *supra*. However, self-reported wait times are closer to double the ATF’s stated average. See generally *All Things NFA*, *supra* note 72.

82. For an alarming review of rampant inaccuracies in the NFRTR, see generally Prince, *supra* note 19.

83. See *ATF National Firearms Act Handbook*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES 23 [hereinafter *ATF NFA Handbook*], <https://bit.ly/3dgb7AX> [<https://perma.cc/W36Z-833P>] (Apr. 2009). It is worth discussing my own experience recently making and registering an SBR under the NFA, using an existing AR-pattern firearm in a short-barreled, non-NFA pistol configuration. I formed a trust in order to apply as a legal entity, which confers certain benefits for possessor flexibility and estate planning. See *NFA Gun Trust Frequently Asked Questions (FAQs)*, NAT’L GUN TRS., <https://bit.ly/34QHR2Y> [<https://perma.cc/7YLJ-ZJMF>] (last visited Sept. 5, 2022). After executing the trust through a notary, I scanned the trust documents for upload to the ATF’s eForms website. I uploaded a recent passport-style photo, completed the online application form,

Once on the registry, owners of NFA items must abide by certain requirements and restrictions that typical firearm owners do not face. For example, most NFA items cannot cross state lines without prior permission from the ATF.⁸⁴ When the owner of an NFA item changes their permanent address, the ATF also requires notification.⁸⁵ In addition, wherever an owner brings their NFA item, they must maintain documentation proving its registration,⁸⁶ which “must be made available upon request of any ATF officer.”⁸⁷ Finally, owners must contend with state laws that may impose additional restrictions on NFA items. For instance, Pennsylvania treats explosive destructive devices as prohibited offensive weapons, regardless of NFA compliance.⁸⁸

Compliance mistakes can be costly. A violation of any of the NFA’s provisions is a federal felony punishable by imprisonment for up to ten years, a fine of up to \$250,000, or both.⁸⁹ And yet, more people want NFA items than ever before—given the relative

and paid \$200 by credit card. Then, I rolled my own fingerprints and mailed duplicates to the ATF’s processing branch within the required timeframe of ten business days, thus beginning my official wait for approval. See *What Gets Mailed to the ATF / CLEO for eForm 1 Applications?*, NAT’L GUN TRS. (Nov. 21, 2019), <https://bit.ly/3sNjPhF> [<https://perma.cc/983N-KM7F>]. Soon after, I supplied a copy of my completed application, the “CLEO copy,” to my local district attorney’s office. Then, after several days, I received an odd request from my law school’s registrar to release my student status to an investigator inquiring about my ATF application—likely an unnecessary investigation by my local CLEO. After about a month’s total wait, I received an email from the ATF indicating my application had been approved. In the meantime, I had already laser-engraved my soon-to-be SBR’s receiver with my trust’s name and location, pursuant to 27 C.F.R. § 479.102. As a final step, I returned to the notary to officially assign the serial number of my SBR to my trust. All this, just to be able to put a shoulder stock on a firearm I already owned without fear of felony prosecution.

84. 18 U.S.C. § 922(a)(4); 27 C.F.R. § 478.28(a)–(b).

85. See 18 U.S.C. § 922(a)(4); 27 C.F.R. § 478.28(a)–(b).

86. 26 U.S.C. § 5841(e); 27 C.F.R. § 479.101(e).

87. *Does the Possessor of an NFA Firearm Have to Show Proof of Registration?*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://bit.ly/3dgrcGO> [<https://perma.cc/86EC-UZYU>] (Apr. 20, 2020) (“It is suggested that a photocopy of the approved application be carried by the possessor when the weapon is being transported.”).

88. See GIARAMITA, *supra* note 49, at 347. In Pennsylvania, it is a first-degree misdemeanor to possess a prohibited offensive weapon, but proof of compliance with the NFA is an affirmative defense, “with the exception of a bomb, grenade or incendiary device,” which remain prohibited. 18 PA. CONS. STAT. § 908(a)–(b) (2022).

89. 26 U.S.C. § 5871; 18 U.S.C. §§ 3559(a), 3571(b)(3); *ATF NFA Handbook*, *supra* note 83, at 87. Although the NFA “is silent concerning the *mens rea* required for a violation,” it does not impose strict liability on violators. *Staples v. United States*, 511 U.S. 600, 605 (1994). Instead, “a conviction for possession of an unregistered firearm under the [NFA] . . . requires the defendant’s knowledge of the characteristics of the firearm bringing it under the [NFA]’s registration mandate.”

affordability of the associated taxes today,⁹⁰ the ATF has seen an upwards trend in NFA applications over the years, with approximately 900,000 NFA items entering the market in 2020 alone.⁹¹ Meanwhile, the federal government enjoys ever-increasing revenue from NFA applications; annual tax revenue from applications to make or transfer NFA items jumped significantly from \$37,285,000 in 2019 to \$51,677,000 in 2020.⁹²

Consequently, the modern NFA framework can serve the dual purposes of expanding gun control measures and generating additional tax revenue, which are appealing aims for some politicians. During the most recent presidential election cycle, Joe Biden campaigned on amending the NFA to include millions of modern rifles⁹³ and so-called “high-capacity” magazines currently in circulation, suggesting only two courses of action: “[S]ell the weapons to the government, or register them under the National Firearms Act.”⁹⁴ The third option, of course, would be felony prosecution.⁹⁵

United States v. White, 863 F.3d 784, 787 (8th Cir. 2017) (citing *Staples*, 511 U.S. at 619).

90. See *CPI Inflation Calculator*, *supra* note 24 and accompanying text.

91. See *Firearms Commerce in the United States: Annual Statistical Update 2021*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES 13 [hereinafter *ATF Update 2021*], <https://bit.ly/3xU2C8f> [<https://perma.cc/V2XC-SHA6>] (last visited Sept. 5, 2022) (reporting 40,790 “Form 1” applications to make NFA items and 884,656 “Form 2” applications to manufacture or import NFA items processed in 2020). A “Form 2” is the form Federal Firearms Licensees (FFLs) use to merely “report the manufacture or importation of an NFA firearm” rather than to seek permission to do so. *Form 2—Notice of Firearms Manufactured or Imported (ATF Form 5320.2)*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://bit.ly/3GP5qbk> [<https://perma.cc/3X3P-QURH>] (last visited Sept. 5, 2022).

92. See *ATF Update 2021*, *supra* note 91, at 12. While NFA revenues pale in comparison to the annual federal total, they are not insignificant and they continue to grow substantially. See *Government Revenue*, DATA LAB, <https://bit.ly/3wVCOcu> [<https://perma.cc/9G6M-23NV>] (last visited Sept. 5, 2022) (“In 2021, the government collected \$4.05 trillion in revenue.”); *ATF Update 2021*, *supra* note 91, at 11–12.

93. A landmark decision by U.S. District Judge Roger T. Benitez recently acknowledged the massive popularity of AR-pattern rifles, for example. See *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1022 (S.D. Cal. 2021) (“Modern rifles are popular. Modern rifles are legal to build, buy, and own under federal law and the laws of 45 states. . . . In 2018, 909,330 Ford F-150s were sold. Twice as many modern rifles were sold the same year.”).

94. *The Biden Plan to End Our Gun Violence Epidemic*, BIDEN HARRIS [hereinafter *Biden Plan*], <https://bit.ly/3J12OId> [<https://perma.cc/L2QU-TGTM>] (last visited Sept. 5, 2022).

95. See 26 U.S.C. § 5871; 18 U.S.C. § 3559(a).

II. ANALYSIS

A. *Articulating a Common-Use Standard*

Eventually, the modern trend of NFA registry expansion must become constitutionally untenable under *Heller*. In recognizing the individual right to keep and bear arms, *Heller* contemplated a constitutional protection against the criminalization of firearms based on common usage and typical possession for lawful purposes.⁹⁶ When the general public has easier access than ever to NFA items numbering in the millions,⁹⁷ these are precisely “the sorts of lawful weapons . . . possessed at home” to which the armed polity has access and that the Second Amendment must protect.⁹⁸

At what point does a class of firearm become common enough, or at least typical enough, to earn Second Amendment protection?⁹⁹ Are 500,000 such firearms enough, or 1,000,000? Does a certain percentage of firearm owners have to own the type of firearm in question? These are the wrong questions to ask. Identifying a specific numerical value would be an exercise in arbitrariness and futility, requiring insights of questionable accuracy into ever-shifting ownership trends and market availabilities.¹⁰⁰ Further, sug-

96. *District of Columbia v. Heller*, 554 U.S. 570, 625–27 (2008).

97. See *ATF Update 2021*, *supra* note 91, at 16. As of 2021, 7,512,175 NFA items are registered across the United States. *Id.*

98. *Heller*, 554 U.S. at 627.

99. This question presupposes a classification breakdown of firearms into nine broad, discrete categories for purposes of determining Second Amendment protection for each. Rifles, shotguns (both being examples of “long guns”), pistols (or handguns), and the six NFA categories seem to capture the legal scope of modern firearm types quite well. See Halbrook, *supra* note 61, at 184 (“*Heller* held as a categorical matter that handguns are typically or commonly possessed by law-abiding persons for lawful purposes and may not be prohibited. . . . While the subject was handguns, the same approach would be equally applicable to long guns.”). As a result, specific makes and models may come and go but the protection for rifles—in the general sense—remains the same, for example. Finally, one should not construe analysis of “firearm” protection under this framework as precluding protection of other “arms” or accessories; items like ammunition feeding devices and body armor deserve Second Amendment protection in their own right.

100. Absent a searchable central registry of all firearms, researchers must poll subsets of the population and rely on their responses to extrapolate ownership trends. See Kim Parker et al., *America’s Complex Relationship with Guns*, PEW RSCH. CTR. (June 22, 2017), <https://pewrsr.ch/330TQds> [<https://perma.cc/3QSK-D476>] (estimating that 72 percent of firearm owners own a handgun or pistol, 62 percent own a rifle, and 54 percent own a shotgun). Indeed, a provision of the FOIA expressly prohibited any future creation of a general firearm registry: “No such rule or regulation . . . may require that records . . . be recorded at or transferred to a facility owned, managed, or controlled by the United States . . . nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.” Firearm Owners’ Protection Act of 1986, Pub. L. No. 99-308, § 106, 100 Stat. 449, 459 (codified as amended at 18 U.S.C. § 926(a)(3)).

gesting or assigning explicit numerical guidelines and focusing on models—rather than categories—could lead to absurd results in the future, when certain currently protected firearms might lose their Second Amendment protection simply for falling out of favor, rather than for belonging to a truly dangerous and unusual category.¹⁰¹

Instead, the guiding common-use principle must follow the spirit of *Miller's* language, as interpreted by *Heller*, which speaks to *ready availability* rather than some hard-and-fast benchmark for constitutional protection.¹⁰² Firearms that are readily available for lawful purchase are exactly the type of arms that the public may then bear. Despite their strict regulation and added paperwork, most lawful NFA items are readily available¹⁰³ on a *de facto* shall-issue basis, in that the ATF does not have the discretion to deny otherwise eligible applicants.¹⁰⁴ Provided an applicant is not prohibited from ownership by law, the proper completion of an appli-

101. For example, consider the absurdity of claiming that the M1 Garand, the famed American service rifle used during World War Two, would no longer earn Second Amendment protection because it is no longer common or typical in 2022. See *M1 Garand*, CIVILIAN MARKSMANSHIP PROGRAM, <https://bit.ly/3rzcyT0> [<https://perma.cc/4KS4-ZEP4>] (last visited Sept. 5, 2022) (“In the past several years, the M1 Garand, regardless of condition, has become a very hot collectors’ item and sound financial investment.”). Instead, the Garand retains its protection despite its relative rarity because it is an example of a *rifle*, and rifles are in common use. See Parker et al., *supra* note 100; Halbrook, *supra* note 61, at 184.

102. See *Heller*, 554 U.S. at 624 (alteration in original) (“We think that *Miller's* ‘ordinary military equipment’ language must be read in tandem with what comes after: ‘[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.’” (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939))).

103. Except civilian-registered machine guns, of course, given their artificial scarcity. See *supra* note 56 and accompanying text. Notably, some portion of the NFA registry contains firearms registered to non-federal entities like businesses and local governments. See 26 U.S.C. § 5841(a) (emphasis added) (“The Secretary shall maintain a central registry of all [NFA] firearms in the United States *which are not in the possession or under the control of* the United States.”); § 5801(a) (“[E]very importer, manufacturer, and dealer in [NFA] firearms shall pay a special (occupational) tax for each place of business . . .”). These provisions explain why the machine gun registry grew from 726,951 to 741,146 between 2020 and 2021, despite the 1986 civilian registry closure. See *Firearms Commerce in the United States: Annual Statistical Update 2020*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES 15 [hereinafter *ATF Update 2020*], <https://bit.ly/3uInTSG> [<https://perma.cc/J92H-ARSC>] (last visited Sept. 5, 2022); *ATF Update 2021*, *supra* note 91, at 16; *supra* note 52 and accompanying text.

104. See 26 U.S.C. § 5822 (“Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.”); § 5812 (“Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.”).

cation *will* yield an approval,¹⁰⁵ and today, prospective buyers enjoy a vibrant NFA marketplace with a wide variety of manufacturers and retailers.¹⁰⁶

The ease with which non-NFA items may be converted into strictly regulated configurations—whether by mistake or on purpose—buttresses the concept of widespread, general NFA item availability even further. With incredibly basic tools, one may convert a standard AR-pattern rifle into a machine gun, for example.¹⁰⁷ Merely attaching a plastic shoulder stock to a pistol with a short barrel creates an SBR.¹⁰⁸ So, too, does the act of destroying a rifle when one begins by cutting the barrel.¹⁰⁹ Even the innocuous act of attaching a plastic foregrip to a handgun results in the creation of an AOW—and the commission of a victimless felony—without having paid the appropriate tax.¹¹⁰ The following discussions of recent NFA developments will highlight the increasingly blurred lines between the lawful and felonious. This Comment’s response to these developments is simple—*Heller* precludes the continued restriction of several NFA categories and the relevant statutory provisions are vulnerable to constitutional attack.

105. See 26 U.S.C. §§ 5822, 5812. Logically, the ATF is incentivized to approve all eligible applicants, given the tax revenue involved. See *ATF Update 2021*, *supra* note 91, at 12. Applicants who are denied receive a refund of their tax payment and a reason for their denial. See 27 C.F.R. §§ 479.64, 479.86 (2022).

106. See, e.g., *How to Buy a Silencer*, SILENCER SHOP, <https://bit.ly/3suMOqb> [<https://perma.cc/8CGY-KJ2R>] (last visited Sept. 5, 2022) (providing customers with a streamlined purchasing process for a large selection of suppressors); *Silence Delivered*, SILENCER CENT., <https://bit.ly/3sLmMna> [<https://perma.cc/ZJ2C-VCXC>] (last visited Sept. 5, 2022) (same); *AR-15 Uppers, Kits, Rifles, Pistols & Parts*, PALMETTO ST. ARMORY, <https://bit.ly/364yddB> [<https://perma.cc/5AY9-G78F>] (last visited Sept. 5, 2022) (offering for sale various components with which customers may build affordable SBRs).

107. See Mrgunsgear Channel, *How an Automatic AR-15 M16 Rifle Works: Part 2 Assembly & Function*, YOUTUBE, at 01:00 (Feb. 12, 2020), <https://bit.ly/34yvIzD> [<https://perma.cc/6NZ5-JD6A>]. As a disclaimer, only licensed manufacturers may perform such conversions legally, subject to certain restrictions. See 18 U.S.C. § 922(o); 27 C.F.R. § 479.105; *ATF NFA Handbook*, *supra* note 83, at 46–47.

108. See 26 U.S.C. § 5845(a); 18 U.S.C. § 921(a)(8).

109. See *ATF Investigating After Democrat Seen on Video Sawing AR-15 Rifle Apart*, FOX NEWS (Mar. 11, 2018, 2:57 PM), <https://fxn.ws/364k1Bh> [<https://perma.cc/6YFB-RJJQ>] (reporting that the ATF opened an investigation against a Virginia congressional candidate for making an unregistered SBR when she sawed her AR-15 apart on video, in apparent support of increased gun control measures).

110. See *ATF NFA Handbook*, *supra* note 83, at 9 (“[C]ertain alterations to a pistol or revolver, such as the addition of a second vertical handgrip, create a weapon that no longer meets the definition of pistol or revolver. A pistol or revolver modified as described is an ‘any other weapon’ subject to the NFA”); 26 U.S.C. § 5871; 18 U.S.C. § 3559(a).

B. Short-Barreled Rifles in Modern America

The popularity of SBRs is a relatively recent development.¹¹¹ Over a decade ago, Americans owned 74,729 registered SBRs.¹¹² Today, that number has multiplied to 532,725.¹¹³ And, should a recently proposed ATF rule affecting accessories known as “stabilizing braces” go into effect, that number may explode into the tens of millions.¹¹⁴

The prospect of an exponential expansion of the SBR registry stems from a quirk in the law—nowhere in the federal definition of “handgun” or “pistol” is there any reference to barrel length.¹¹⁵ Theoretically, a pistol’s barrel may be as short or as long as one may desire.¹¹⁶ Because the operative definition focuses on design and intent to be held and fired with one hand, large pistols built on traditional rifle platforms avoid the NFA’s barrel-length require-

111. Pinpointing a single cause for SBRs’ newfound popularity is difficult. Police departments enjoy the maneuverability of compact firearms. See Brandon Maddox, *Class 3 Weapons—What Defines a Short Barrel Rifle?*, SILENCER CENT. (Aug. 6, 2013), <https://bit.ly/3Kjig22> [<https://perma.cc/D4BD-RMBA>]. The general public may find police endorsement of SBRs compelling, thereby creating demand for compact weapons for use in home-defense situations. In addition, countless online retailers and manufacturers offer SBR components for sale—a development tied to the advent of the internet itself. See, e.g., *Barrels*, AERO PRECISION, <https://bit.ly/3hDEteV> [<https://perma.cc/975W-RFB7>] (last visited Sept. 5, 2022); *AR-15 Barrels*, BRAVO CO. USA, <https://bit.ly/3IOarkz> [<https://perma.cc/95AY-CK4L>] (last visited Sept. 5, 2022); *AR-15 Uppers, Kits, Rifles, Pistols & Parts*, *supra* note 106. Finally, so-called “influencers” and internet celebrities may drive consumer trends when showcasing products. See, e.g., *Garand Thumb*, YOUTUBE, <https://bit.ly/35To7Mh> [<https://perma.cc/YGD2-UE9G>] (last visited Sept. 5, 2022) (providing an example of a popular firearm video creator with over 2,000,000 subscribers). Online sales and promotion are likely to have played a significant role in the SBR’s recent rise.

112. *Firearms Commerce in the United States: 2011*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES 24 [hereinafter *ATF Update 2011*], <https://bit.ly/3gzPnSb> [<https://perma.cc/Q53F-MKZX>] (last visited Sept. 5, 2022). This report appears to be the earliest annual commerce report the ATF makes available to the public. See *Data & Statistics*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://bit.ly/3AY2yUN> [<https://perma.cc/Y9FY-CDWZ>] (May 16, 2022). However, “[i]n late 2006, the ATF reported that 33,518 [SBRs] were registered in the NFRTR.” JOHNSON ET AL., *supra* note 9, at 369.

113. *ATF Update 2021*, *supra* note 91, at 16.

114. See Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. 30,826 (proposed June 10, 2021) (to be codified at 27 C.F.R. pts. 478, 479); William J. Krouse, *Handguns, Stabilizing Braces, and Related Components*, CONG. RSCH. SERV., <https://bit.ly/33fLeQw> [<https://perma.cc/P4S6-UDZ7>] (Apr. 19, 2021) (estimating “that there are between 10 and 40 million stabilizing braces and similar components already in civilian hands, either purchased as accessories or already attached to firearms”).

115. See 18 U.S.C.S. § 921(a)(30) (LexisNexis 2022); 27 C.F.R. § 478.11 (2022).

116. See 18 U.S.C.S. § 921(a)(30) (LexisNexis); 27 C.F.R. § 478.11.

ments entirely.¹¹⁷ In contrast, a “rifle” requires design and intent to be fired from the shoulder.¹¹⁸ When a typical firearm with a rifled bore is affixed with a shoulder stock, it becomes a rifle, and provided it has a barrel shorter than 16 inches or an overall length shorter than 26 inches, it becomes a regulated SBR.¹¹⁹

Enter the pistol stabilizing brace. Used in place of a shoulder stock, a stabilizing brace attaches to the forearm, allowing for the one-handed manipulation of a firearm that would be too cumbersome to operate otherwise.¹²⁰ Because such a firearm is legally a pistol, rather than a rifle, it may have a “short” barrel without implicating the NFA’s restrictions.¹²¹ Of course, a stabilizing brace may still be shouldered, and therein lies the problem—when does a braced pistol become an SBR?

In the summer of 2021, the ATF published a notice of proposed rulemaking (the “Biden rule”) purporting to clarify just when a stabilizing brace betrays an intent to shoulder such that the firearm to which it is attached functionally becomes a rifle.¹²² This newly proposed Biden rule followed just six months after an unsuccessful attempt to address the same issue during the final days of the Trump administration (the “Trump rule”).¹²³ Notably, the

117. See 18 U.S.C.S. § 921(a)(30) (LexisNexis); 27 C.F.R. § 478.11; Krouse, *supra* note 114; 26 U.S.C. § 5845(a).

118. 26 U.S.C. § 5845(c); 18 U.S.C. § 921(a)(7). Legally, a rifle is “a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder” using “the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger.” 18 U.S.C. § 921(a)(7). Consequently, all “rifles” are at most semi-automatic, by definition. See *id.*; Opfer, *supra* note 18. Under a humorous technicality, a firearm with a shoulder stock can avoid classification as a rifle by lacking a rifled bore, but any discussion of such outliers is beyond the scope of this Comment. See, e.g., *Reformation*, FRANKLIN ARMORY, <https://bit.ly/3hJEIKE> [<https://perma.cc/9KAE-ZK44>] (last visited Sept. 5, 2022).

119. See Krouse, *supra* note 114; 26 U.S.C. § 5845(a); 18 U.S.C. § 921(a)(8).

120. See Krouse, *supra* note 114; Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. 30,826, 30,827 (proposed June 10, 2021) (to be codified at 27 C.F.R. pts. 478, 479) (reporting that the original “intent of the brace was to facilitate one-handed firing of the AR-15 pistol for those with limited strength or mobility due to a disability . . . inspired by the needs of combat veterans with disabilities who still enjoy recreational shooting”).

121. See 18 U.S.C.S. § 921(a)(30) (LexisNexis); 27 C.F.R. § 478.11; 26 U.S.C. § 5845(a).

122. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. at 30,826. Admittedly, there is no current statutory definition of “shoulder stock” or “stabilizing brace” and the ATF’s history with classifications has been inconsistent, guided by the general principle of intent to shoulder. See Gilbert Ambler, *ATF SHAKE-UP*, AMBLER L. OFFS., L.L.C. (Dec. 19, 2020), <https://bit.ly/3hFArT1> [<https://perma.cc/6W4B-DJF5>].

123. See Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. at 30,826; Objective Factors for Classifying Weapons with “Stabilizing Braces,” 85 Fed. Reg. 82,516 (proposed Dec. 18, 2020).

Biden rule implicates potentially millions of existing braced pistols—anywhere from 3,000,000 to 7,000,000, per the ATF,¹²⁴ or 10,000,000 to 40,000,000, per the Congressional Research Service.¹²⁵ Unsurprisingly, perhaps, the Biden rule expressly rejects the prospect of a waiver of the \$200 tax for compelled registrations.¹²⁶

The popularity of braced pistols is clear,¹²⁷ as is the motivation to expand the NFA registry.¹²⁸ However, if millions of currently lawful firearms stand to be reclassified as unregistered SBRs solely by regulatory fiat, it is time to rethink whether SBRs are as “dangerous and unusual” as initially thought.¹²⁹ Indeed, the mere possibility of such a mass reclassification necessarily admits that SBRs must be quite typical in modern American life—after all, the ATF posits that these SBRs have been in circulation all along.¹³⁰

124. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. at 30,845. The expansive nature of the Biden rule derives from its specificity. *Compare* Objective Factors for Classifying Weapons with “Stabilizing Braces,” 85 Fed. Reg. at 82,520 (asserting that “[t]his document is not an administrative determination that any particular weapon equipped with a stabilizing arm brace is a ‘firearm’ under the NFA”), *with* Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. at 30,834–43 (reclassifying specific models of stabilizing braces as shoulder stocks, such as the popular SB Tactical SBA3).

125. Krouse, *supra* note 114.

126. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. at 30,847 (rejecting the notion of “[f]orgiveness of the NFA [t]ax”); *Biden Plan*, *supra* note 94. In contrast, the Trump rule offered a tax waiver for any compelled registrations that would have resulted. Objective Factors for Classifying Weapons with “Stabilizing Braces,” 85 Fed. Reg. at 82,519 (“[T]he Attorney General plans retroactively to exempt such [newly reclassified SBRs] from the collection of NFA taxes if they were made or acquired, prior to the publication of this notice, in good faith.”). However, a purported budget document discovered in September 2022 indicates that the ATF is considering an amnesty registration period for braced pistols affected by the final Biden rule after all. John Crump, *ATF Requests Funding for Pistol Brace Amnesty Registration Program*, AMMOLAND (Sept. 2, 2022), <https://bit.ly/3QiFk3w> [<https://perma.cc/8MMC-7UYA>]. While current non-NFA owners may be loath to participate in compelled registrations even with the \$200 tax waived, one can easily imagine that the amnesty period will incentivize hordes of existing NFA owners and collectors to register multiple SBRs each in order to capitalize on free registrations. An amnesty period will only cause SBR numbers to balloon even further.

127. *See* Krouse, *supra* note 114.

128. *See ATF Update 2021*, *supra* note 91, at 12; *Biden Plan*, *supra* note 94.

129. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008); Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. at 30,826–27 (“In 1934, Congress passed the NFA in order to regulate certain ‘gangster’ type weapons. These weapons were viewed as especially dangerous and unusual, and, as a result, are subject to taxes and are required to be registered with ATF.”).

130. Factoring Criteria for Firearms with Attached “Stabilizing Braces,” 86 Fed. Reg. at 30,848 (emphasis added) (“This proposed rule would prevent persons from circumventing the NFA by using arm braces as stocks on [SBRs]. If persons can circumvent the NFA by effectively making unregistered [SBRs] by using an

Are SBRs especially dangerous? Not so.¹³¹ Generally speaking, wounding potential and accuracy correlate with barrel length; the longer the barrel, the greater a bullet's velocity and the longer its effective range.¹³² By sacrificing barrel length, SBRs trade the increased lethality of rifles for greater maneuverability—and handguns already outperform SBRs in the latter department.¹³³ Given that the NFA's original, more expansive legislative intent was to regulate pistols and revolvers as well,¹³⁴ the continued regulation of SBRs makes little sense today when handguns proliferate.¹³⁵

After *Heller*, the NFA's SBR provisions are at risk of constitutional attack. Given SBRs' recent increase in popularity¹³⁶ and the potential for mass reclassification of braced pistols,¹³⁷ SBRs are neither especially dangerous nor especially unusual, but rather readily available for lawful use. If the ATF does not reverse course or Congress does not enact a targeted repeal, courts should strike the NFA's SBR provisions down.

C. *The Massive Popularity of Suppressors*

Unlike the registry growth rate of SBRs, suppressor popularity has followed an astronomical trajectory in the years since *Heller*.¹³⁸ In 2011, Americans owned a meager 285,087 suppressors.¹³⁹ By

accessory such as a “stabilizing brace,” *these weapons can continue to proliferate . . .*”).

131. See D’Cruz, *supra* note 27, at 518 (reporting that non-NFA handguns are much more common in criminal activity than rifles, whether short- or long-barreled).

132. See *id.*; Richard Mann, *Dispelling Myths: Barrel Length v. Velocity*, SHOOTING ILLUSTRATED (July 24, 2018), <https://bit.ly/34iNHdt> [<https://perma.cc/6T56-P3Q2>]; Brad Miller, *Pistol Barrel Length and Velocity*, SHOOTING SPORTS USA (Aug. 16, 2021), <https://bit.ly/3HQJlb4> [<https://perma.cc/6F5J-AFY5>].

133. See D’Cruz, *supra* note 27, at 518; Mann, *supra* note 132; Miller, *supra* note 132; Maddox, *supra* note 111; *supra* note 22 and accompanying text.

134. See *supra* notes 22–23 and accompanying text.

135. See Parker et al., *supra* note 100; *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (“Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).

136. See *supra* notes 111–13 and accompanying text.

137. See Krouse, *supra* note 114.

138. In all likelihood, the reasons for this recent trend are similar to those behind SBRs' rise. See *supra* note 111 and accompanying text. A function of modern e-commerce, retailers dedicated to suppressor sales have increased Americans' access to NFA items. See *supra* note 106 and accompanying text.

139. *ATF Update 2011*, *supra* note 112, at 24. Similar to SBRs, the number of registered suppressors essentially doubled from 2006 to 2011. See *supra* note 112 and accompanying text; JOHNSON ET AL., *supra* note 9, at 370 (“In late 2006, ATF reported that 150,364 silencers were registered in the NFRTR.”).

2020, that number had risen sevenfold to 2,042,719.¹⁴⁰ Then, in just *one* year's time, that number rocketed to 2,664,774 in 2021—an increase of over 600,000 suppressors or 30 percent.¹⁴¹ With millions of suppressors already registered¹⁴² and a vibrant, streamlined marketplace in existence,¹⁴³ suppressors are becoming ubiquitous in modern firearm ownership.¹⁴⁴

Recent attempts to deregulate suppressors underscore the ready availability of these NFA items. Talk of a Hearing Protection Act has garnered some mainstream political support.¹⁴⁵ At present, a renewed push to legalize unregistered suppressors is up for congressional consideration.¹⁴⁶ At the state level, Texas has repudiated federal law by legalizing Texas-made suppressors—an attempt to circumvent the NFA's constitutional basis in interstate com-

140. *ATF Update 2020*, *supra* note 103, at 15.

141. *ATF Update 2021*, *supra* note 91, at 16. Of course, government-owned NFA items comprise some portion of totals registered. *See supra* note 103 and accompanying text. However, suppressors owned by individuals, trusts, other legal entities, and FFL holders—those under fundamentally civilian control—vastly outnumber the suppressors owned by local governmental entities, which accounted for only about 6.5 percent of total registered suppressors in early 2021. *See SHOT Show 2021*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://bit.ly/3x3Hn3F> [<https://perma.cc/3MNZ-P6AK>] (last visited Sept. 5, 2022) (reporting only 131,021 suppressors registered to “GOV/LE/MIL” versus a cumulative 1,883,306 suppressors registered to “Individual,” “Trust/Legal Entity,” and “FFL/SOT” categories). In other words, non-civilian-owned suppressors are not inflating the data to any appreciable extent; any conclusions as to the commonality or typicality of suppressors are properly attributable to civilian ownership. *See id.*

142. *See ATF Update 2021*, *supra* note 91, at 16.

143. *See supra* note 106 and accompanying text.

144. *See* Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 CUMB. L. REV. 33, 35 (2016) (noting that the recent proliferation of civilian suppressor ownership “indicates a broad recognition of legitimate uses of suppressors not only to protect one’s hearing, but also for such purposes as reduction of loud noise that may disturb others or spook game”).

145. *See* Brandon Maddox, *Hearing Protection Act: 2022 Status*, SILENCER CENT. (Mar. 11, 2020), <https://bit.ly/3CjnXKu> [<https://perma.cc/A79H-MNGP>] (“The Hearing Protection Act was a bill first introduced in Congress in 2017 that sought to remove silencers from the purview of the [NFA]. . . . Sadly, this bill has never advanced through Congress, and in the present political climate will not.”). The 2017 bill would have decriminalized the possession of unregistered suppressors, refunded any suppressor transfer taxes paid in the prior two years, and preempted any state laws imposing taxation and registration requirements on suppressors. Hearing Protection Act, H.R. 367, 115th Cong. (2017).

146. *See* Hearing Protection Act, H.R. 95, 117th Cong. (2021). Although this bill would not provide refunds for recent registrations, it would mandate the destruction of all suppressor registration records in the NFRTR and any outstanding applications to make or transfer suppressors. *Id.*

merce.¹⁴⁷ These efforts recognize suppressors' utility in modern life as effective means of reducing noise pollution¹⁴⁸ and attempt to rectify suppressors' illogical inclusion in the NFA altogether.¹⁴⁹

Suppressors are statutory "firearms" only because they have been legislated as such.¹⁵⁰ As firearm accessories,¹⁵¹ suppressors are antithetical to the NFA's original legislative intent of restriction of concealable "gangster" weapons.¹⁵² Attachment of a suppressor necessarily increases the overall length of a firearm, undermining concealability and rendering suppressed firearms too unwieldy to carry on the person.¹⁵³ Today, rather than seeing "gangsters" carrying suppressed firearms for criminal activity, one is much more likely to see neighbors and hunters extending some common courtesy.¹⁵⁴

Given suppressors' ready availability,¹⁵⁵ overwhelming popularity,¹⁵⁶ and unclear public "danger,"¹⁵⁷ the NFA provisions re-

147. See Brandon Maddox, *New Texas Suppressor Law Explained*, SILENCER CENT. (July 13, 2021), <https://bit.ly/35Tg4zc> [<https://perma.cc/WRU5-MY2Q>]; *Hearing on H.R. 9066, supra* note 20, at 6.

148. See Halbrook, *supra* note 144, at 35.

149. The NFA's legislative history is practically devoid of any reference to suppressors or the apparent necessity of their inclusion in the NFA. See *id.* at 49 ("In further discussion, Rep. Fuller suggested that a man who carried 'a sawed-off shotgun or machine gun, or a silencer' would do so 'for an unlawful purpose.' That was the only vague reference in the entire hearings to a silencer being possessed for an unlawful purpose."). Concealable firearms—pistols, revolvers, short-barreled weapons, and the like—served as the hearings' primary focus. See *id.*

150. See 26 U.S.C. § 5845(a); *Education, supra* note 23.

151. See *Education, supra* note 23.

152. See Halbrook, *supra* note 144, at 47–48.

153. See Brandon Maddox, *Pistol Suppressors: The Best Options in 2022*, SILENCER CENT. (Sept. 16, 2020), <https://bit.ly/3CgNIQW> [<https://perma.cc/6LZD-HE5D>] ("[T]he extended length with a suppressor attached makes a pistol harder to carry concealed.").

154. See Halbrook, *supra* note 144, at 35.

155. See *supra* notes 138–44 and accompanying text.

156. See *ATF Update 2021, supra* note 91, at 16.

157. See Halbrook, *supra* note 144, at 68 (noting that the historical prohibition of dangerous and unusual weapons "referred to the carrying of certain arms in a manner that terrified the people, such as by creating an affray"). How can suppressors terrify the populace when so many partake for common, lawful purposes? See *id.* at 35. Ronald Turk, the former Associate Deputy Director of the ATF, seemed to agree in a leaked white paper:

In the past several years, opinions about silencers have changed across the United States. Their use to reduce noise at shooting ranges and applications within the sporting and hunting industry are now well recognized. . . . While DOJ and ATF have historically not supported removal of items from the NFA, the change in public acceptance of silencers arguably indicates that the reason for their inclusion in the NFA is archaic and historical reluctance to removing them from the NFA should be reevaluated. ATF's experience with the criminal use of silencers also sup-

stricting suppressor ownership violate *Heller* and deserve to be struck down as unconstitutional, should Congress fail to enact a Hearing Protection Act soon.

D. How Shifting Interpretations of “Machine Gun” Unwittingly Contribute to Common Use

1. The Bump Stock Ban

In the years since 1986, controversies over machine guns have been largely interpretive in nature.¹⁵⁸ In 2019, a high-profile ATF rule reimagined bump stocks, accessories that increased firearm rates of fire, as prohibited machine guns.¹⁵⁹ Once in effect, the rule did away with over half a million bump stocks that had been in lawful circulation previously.¹⁶⁰

The Trump administration ATF proposed the bump stock rule in response to the October 1, 2017 Las Vegas-Mandalay Bay mass shooting tragedy that had left nearly 60 people dead.¹⁶¹ The perpetrator had used “several AR-type rifles with attached bump-stock-type devices . . . to fire several hundred rounds of ammunition in a short period of time.”¹⁶² In response, “President Trump issued a memorandum instructing the Attorney General ‘to dedicate all available resources to . . . propose for notice and comment a rule banning all devices that turn legal weapons into machineguns.’”¹⁶³

In proposing a rule to reclassify bump stock accessories as machine guns themselves, the ATF acknowledged that bump stocks

ports reassessing their inclusion in the NFA. On average in the past 10 years, ATF has only recommended 44 defendants a year for prosecution on silencer-related violations; of those, only approximately 6 of the defendants had prior felony convictions. Moreover, consistent with this low number of prosecution referrals, silencers are very rarely used in criminal shootings.

Read the White Paper on Firearms Regulations, WASH. POST, <https://wapo.st/3b0yh0G> [<https://perma.cc/V9K3-W2JC>] (last visited Sept. 5, 2022).

158. *See, e.g.*, Chuck Neubauer, *Gun Makers Baffled by ATF Criteria*, WASH. TIMES (Jan. 2, 2012), <https://bit.ly/3BcC7g3> [<https://perma.cc/S9AR-TFC9>] (reporting that in one “letter ruling,” the ATF had determined that even a shoestring could be a machine gun).

159. *See Bump Stocks*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://bit.ly/3so8SCE> [<https://perma.cc/DY6A-SCDE>] (Feb. 21, 2019).

160. *See Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,538 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479) (estimating that up to 520,000 bump stocks were in circulation before the proposed rule).

161. *See id.* at 66,516; Associated Press, *Vegas Gunman Stephen Paddock Inspired by Criminal Father’s Reputation*, NBC NEWS, <https://nbcnews.to/3M0FoTa> [<https://perma.cc/AT2U-BHVH>] (Jan. 29, 2019, 2:13 PM).

162. *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,516.

163. *Bump Stocks*, *supra* note 159 (alteration in original).

merely “harnesse[d] the recoil energy of . . . semiautomatic fire-arm[s] in a manner that allow[ed]” them to sustain high rates of fire.¹⁶⁴ However, notably absent from the statutory definition of machine gun is any reference to rate of fire.¹⁶⁵ Technically, a fire-arm could fire a sluggish one round per minute and fall under the definition of machine gun, so long as it shoots “automatically more than one shot, without manual reloading, by a single function of the trigger.”¹⁶⁶ How, then, could an admittedly semi-automatic firearm constitute a machine gun when used with an accessory to increase its rate of fire?

Faced with a seemingly dispositive statutory definition, the ATF amended interpretive regulations to force a square peg into a round hole.¹⁶⁷ Of course, the statutory definition of machine gun remained unchanged and the provision maintains its silence as to semi-automatic rate-of-fire increases to this day.¹⁶⁸

The bump stock rule saw several legal challenges with mixed results. In early 2021, the Sixth Circuit Court of Appeals invalidated this redefinition of “machine gun” after a lengthy statutory analysis, but a subsequent *en banc* review effectively reinstated the bump stock rule months later.¹⁶⁹ Another jurisdiction decided differently—in *United States v. Alkazahg*,¹⁷⁰ the U.S. Navy-Marine Corps Court of Criminal Appeals vindicated a Marine who had been convicted of machine gun offenses stemming from bump stock possession.¹⁷¹ In noting the ambiguity of the statutory definition of machine gun, the *Alkazahg* court recognized the parties’ conflicting interpretations: The ATF had adopted a broad “shooter-focused” approach to statutory interpretation as opposed to a textualist “mechanical reading” that “speaks only to the internal mechanical workings of [a] rifle.”¹⁷² The court then highlighted the ATF’s inconsistent posture:

164. Bump-Stock-Type Devices, 83 Fed. Reg. at 66,518.

165. See 26 U.S.C. § 5845(b).

166. *Id.*

167. The proposed rule amended what is now 27 C.F.R. § 479.11 (2022) to reinterpret “single function of the trigger” as “single pull of the trigger,” “automatically” as “as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger,” and “machinegun” as inclusive of “a device that allows a semiautomatic firearm to shoot more than one shot with a single pull of the trigger by harnessing . . . recoil energy.” Bump-Stock-Type Devices, 83 Fed. Reg. at 66,518–19.

168. See 26 U.S.C. § 5845(b).

169. See *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446 (6th Cir.), *rev’d en banc*, 19 F.4th 890 (6th Cir. 2021).

170. *United States v. Alkazahg*, 81 M.J. 764 (N-M. Ct. Crim. App. 2021).

171. See *id.*

172. *Id.* at 779.

Bump stocks have been around for almost twenty years. During that period, the ATF has issued multiple opinions on whether the devices constitute machine guns under the statute. First, in considering the Akins Accelerator—the bump stock with the internal spring—the ATF considered it *not* to be a machine gun. Then it changed its mind, deciding that it *was*. For over a decade, the ATF consistently interpreted the statute to mean that bump stocks like the one Appellant possessed were *not* machine guns. Then it changed its mind after the Las Vegas shooting and the President’s direction to do so.¹⁷³

Ultimately, the *Alkazahg* court concluded that “a single function of the trigger” under the NFA “speaks to the mechanical actions, makeup, design, and attributes of the firearm itself Here, the ‘function’ of the trigger in a semi-automatic rifle, even with a bump stock attached, is to fire only a single round with each single pull of the trigger.”¹⁷⁴ Any other interpretation that takes into account external recoil energy or rate of fire is doomed to produce disparate, contradictory results.

2. *Forced-Reset Triggers*

While a final, nationwide disposition on the bump stock issue remains to be seen, a new controversy has developed—one surrounding so-called “forced-reset triggers.”¹⁷⁵ These trigger products operate by forcibly extending the trigger forward once the firearm has completed its cycle of operation.¹⁷⁶ By assisting the trigger “reset” inherent to all semi-automatic firearms,¹⁷⁷ these products enable a shooter to fire successive shots quickly by maintaining rearward finger pressure.¹⁷⁸ Similar to bump stocks, forced-reset triggers increase rates of fire and have a history of ATF approval.¹⁷⁹

173. *Id.* (emphasis added).

174. *Id.* at 781.

175. See John Crump, *Rare Breed FRT-15 Criminal Examination Released*, AMMOLAND (Aug. 17, 2021), <https://bit.ly/3pGRBEs> [<https://perma.cc/N72S-VTFB>].

176. See RARE BREED TRIGGERS, *Rare Breed Triggers FRT—Animation*, VIMEO, at 01:33 (Dec. 2, 2020, 12:43 PM), <https://bit.ly/3IUXVjm> [<https://perma.cc/7NH7-GGEM>] (explaining forced-reset triggers’ cycle of operation).

177. See George Harris, *The Semi-Automatic Disconnect: How Does It Work?*, SHOOTING ILLUSTRATED (July 9, 2018), <https://bit.ly/3INuqzD> [<https://perma.cc/P4KG-PMZD>].

178. See RARE BREED TRIGGERS, *supra* note 176, at 01:33.

179. See Crump, *supra* note 175; Christian Lowe, *New Trigger Makes AR-15s Nearly Full Auto*, GRAND VIEW OUTDOORS (Dec. 11, 2013), <https://bit.ly/35TPR3o> [<https://perma.cc/Y8NR-DG8F>] (reporting that the Tactical Fire Control 3MR forced-reset trigger has an ATF compliance letter “certifying [it] as a non-NFA semi-auto trigger”); *Tac-Con—3MR*, FIREARM SYS., <https://bit.ly/379rJuv> [[https://](https://bit.ly/379rJuv)

Predictably, this history of ATF approval has changed in recent months.¹⁸⁰ Beginning with Rare Breed Triggers, the maker of the “FRT-15” model of forced-reset trigger, the ATF has started reclassifying forced-reset triggers as machine guns—this time without notice-and-comment rulemaking.¹⁸¹ Such reclassification implicates competing models on the market as well, such as a copycat product from Wide Open Enterprises.¹⁸² With untold thousands of forced-reset triggers already in circulation,¹⁸³ the ATF has begun seizing inventory—and potentially customer lists—from retailers and individuals in recent months.¹⁸⁴ All the while, Rare Breed continues to sell its FRT-15 online.¹⁸⁵

3. *A Warning Against Regulatory Revisionism*

With nearly half a million bump stocks and growing numbers of forced-reset triggers implicated, the ATF has been turning the once lawful into the strictly prohibited without the backing of any recent congressional action—or even notice-and-comment rulemaking, in the case of forced-reset triggers.¹⁸⁶ While the

perma.cc/QSM9-L8QJ] (last visited Sept. 5, 2022) (linking a copy of said compliance letter).

180. See *Rare Breed Triggers, L.L.C. v. Garland*, No. 6:21-cv-1245-CEM-GJK, 2021 U.S. Dist. LEXIS 195992, at *1–2 (M.D. Fla. Oct. 12, 2021) (denying Rare Breed’s motion for preliminary injunction against ATF enforcement action).

181. See *id.*

182. See *Rare Breed Triggers, L.L.C. v. Big Daddy Enters.*, No. 1:21cv149-RH-GRJ, 2021 U.S. Dist. LEXIS 247899, at *2 (N.D. Fla. Dec. 30, 2021) (granting Rare Breed’s motion for preliminary injunction against Wide Open for patent infringement).

183. See *id.* at *9–10 (“This is a new product—the FRT-15 was launched in December 2020—in a hot, niche market. . . . [T]he FRT-15 and Wide Open trigger are high-end devices marketed to firearm enthusiasts.”); Crump, *supra* note 175 (“[Rare Breed] has been selling the trigger by the thousands for months.”).

184. See *Official Notification*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://bit.ly/3on6B9s> [<https://perma.cc/NSX8-BERP>] (last visited Sept. 5, 2022) (offering records of the ATF’s latest property seizures with several Rare Breed FRT-15 and Wide Open Trigger “machine guns” seized from individuals nationwide at the time of writing); *FPC Statement on Possible ATF Actions Regarding “Forced-Reset Triggers” (FRTs)*, FIREARMS POL’Y COAL. (Jan. 27, 2022), <https://bit.ly/3pDAUcU> [<https://perma.cc/A3YZ-WE2K>] (reporting on a leaked ATF internal correspondence detailing plans to confiscate forced-reset triggers).

185. See *FRT-15*, RARE BREED FIREARMS, <https://bit.ly/3z33k5H> [<https://perma.cc/5S5E-UKXE>] (last visited Sept. 5, 2022) (listing the forced-reset trigger for \$380 at the time of writing).

186. See *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,538 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479) (estimating that up to 520,000 bump stocks were in circulation before the proposed rule); Crump, *supra* note 175 (reporting on forced-reset trigger sales volume and the ATF’s recent reclassification of such triggers’ NFA status).

Hughes Amendment continues to impose an artificial cap on the civilian machine gun registry,¹⁸⁷ recent reclassifications of lawful, non-machine gun products as prohibited machine guns risk admitting that machine guns are much more readily available than one might expect. After *Heller*, the NFA can only be constitutional if its prohibited weapons are truly “dangerous and unusual”—meaning they are sufficiently rare.¹⁸⁸ The growing trend of reclassifying parts and accessories as machine guns is an issue of having cake and eating it, too. Implicate too many and one day, some may be surprised when a court finds even machine guns to be quite typical.

CONCLUSION

Much has changed since 2008. NFA items have exploded in popularity, so much so that millions of Americans now possess firearms and accessories that their Great Depression-era ancestors could never have dreamed of affording.¹⁸⁹ Despite this proliferation of ownership, the NFA continues to impose harsh felony penalties and burdensome restrictions, even on those who wish to comply in good faith.¹⁹⁰ However, the NFA registry cannot continue to grow unchecked; *Heller* provides a common-use ceiling that is likely to take form in the coming years.¹⁹¹

Short-barreled rifles and suppressors are undoubtedly popular.¹⁹² To reflect their newfound place in millions of Americans’ homes, the NFA provisions restricting their ownership must be struck down as violative of the Second Amendment. “Dangerous and unusual” must be taken seriously; the NFA should regulate only those categories that maintain their rarity under current precedent.¹⁹³ And, while machine guns face additional, artificial restrictions,¹⁹⁴ *Heller* should serve as a warning—overzealous reclassifications may achieve unintended results.

After *New York State Rifle & Pistol Ass’n v. Bruen*,¹⁹⁵ NFA challenges are likely to succeed if they can survive the plain-text

187. See *supra* note 56 and accompanying text.

188. See *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

189. See *ATF Update 2021*, *supra* note 91, at 16; *supra* notes 24–25 and accompanying text.

190. See 26 U.S.C. § 5871; 18 U.S.C. § 3559(a).

191. *Heller*, 554 U.S. at 624–25.

192. See *ATF Update 2021*, *supra* note 91, at 16.

193. See *Heller*, 554 U.S. at 627; *ATF Update 2021*, *supra* note 91, at 16.

194. See *supra* note 56 and accompanying text.

195. *N.Y. State Rifle & Pistol Ass’n v. Bruen (NYSRPA II)*, 142 S. Ct. 2111 (2022).

protection stage of the “text, history, and tradition” test.¹⁹⁶ However, so long as NFA items remain unrecognized as protected “arms” under *Heller*, the Government will not bear the heavy burden of justifying their regulation.¹⁹⁷ Judicial recognition of certain NFA items as increasingly common, lawfully possessed weapons turns on a common-use interpretation that acknowledges the shortcomings of a strictly numerical approach.¹⁹⁸ Instead, a weapon’s ready availability for lawful acquisition should guide common-use analysis under *Heller* and *NYSRPA II*.

In response to the Supreme Court’s relative hesitance to review Second Amendment issues, JUSTICE THOMAS eloquently observed:

For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.¹⁹⁹

Indeed, very few of us enjoy the luxury of armed security. If we are to ever restore the Second Amendment as a right worthy of equal application among those in government and the governed, reviewing the undue burdens of the NFA is a good place to start.

196. *See id.* at 2134. After all, the Government will have great difficulty pointing to a Founding-era tradition of restricting short-barreled firearms, accessories, and even military-type arms, which remained unregulated until 1934. *See* National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended in scattered sections of 26 U.S.C.).

197. *See Heller*, 554 U.S. at 625; *NYSRPA II*, 142 S. Ct. at 2126.

198. *See supra* note 100 and accompanying text.

199. *Peruta v. California*, 137 S. Ct. 1995, 1999–2000 (2017) (THOMAS, J., dissenting from denial of certiorari).