

## THE SECOND AMENDMENT: AN ANALYSIS OF INTERPRETATIONS

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### I. INTRODUCTION

There is a recent prevalence of gun violence in American society seen through shootings in Columbine, Sandy Hook, San Bernardino, Charleston, Fort Hood, Aurora, and Blacksburg. Each incident, known to most across the United States, possesses familiar yet eerie similarities that one may not quite be able to figure out. There are more instances of recent gun violence within the United States — averaging more than one per day in 2015.<sup>1</sup> The places, victims, and weapons are all real — firearms firing bullets not blanks.<sup>2</sup> For people living in Southwest Virginia, an example closer to home occurred in 2002, with the mass shooting at the Appalachian School of Law, in the rural town of Grundy.<sup>3</sup> A student shot and killed three people and injured three others.<sup>4</sup>

To Americans who witnessed and heard about these tragedies through television or other media, the fear was real.<sup>5</sup> In each of these tragic incidents, a person using a firearm executed a mass shooting, terrorizing these communities and the nation with the senseless murder of

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<sup>1</sup> Greg Myre, *A Tally of Mass Shootings in the U.S.*, NPR.org, <http://www.npr.org/sections/thetwo-way/2015/12/03/458321777/a-tally-of-mass-shootings-in-the-u-s>. (last updated Dec. 4, 2015).

<sup>2</sup> *See id.*

<sup>3</sup> Francis X. Clines, *3 Slain at Law School; Student is Held*, NEW YORK TIMES (Jan. 17, 2002), <http://www.nytimes.com/2002/01/17/us/3-slain-at-law-school-student-is-held.html>. The shooting at the Appalachian School of Law was one of the deadliest college shootings until the shooting in Blacksburg.

<sup>4</sup> *Id.*

<sup>5</sup> Eric Bradner & Gregory Krieg, *Obama Executive Action: New Gun Control*, CNN, <http://www.cnn.com/2016/01/05/politics/obama-executive-action-gun-control> (last visited Feb. 26, 2016).

innocent people.<sup>6</sup> In each case, the political response was immediate and outspoken.<sup>7</sup> Gun control arguments abounded, and the political landscape suddenly was rife with disdain on both sides of the issue.<sup>8</sup> Proponents of gun rights rushed to direct public focus squarely on allegations of the individual rights of citizens to bear arms pointing to the Second Amendment.<sup>9</sup> Supporters of gun control emphasized the number of guns in the country, shooting statistics, and arguments of the Second Amendment's misinterpretation.<sup>10</sup>

Although mass shootings bring the issue of firearms to the forefront of the political agenda, this article will not examine the nexus between firearms and mass shootings. This article will evaluate the current state of affairs with regard to the Second Amendment, its application to the states, and current interpretations under the law.

## II. SECOND AMENDMENT ORIGINS AND EARLY APPLICATION

Few issues raise the ire of opposing factions in American politics more than the Second Amendment of the Bill of Rights of the U.S. Constitution.<sup>11</sup> Firearms are a part of the fabric of the nation. They are a consistent focus of pop culture, including movies, video games, and more. Since the inception of the United States, American society ingrained guns into its culture and tradition.<sup>12</sup> Many would argue that the reason for this dynamic arose from the formation of the

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<sup>6</sup> *Id.*

<sup>7</sup> Robert Farley, *Sorting Out Obama's Gun Proposal*, FACTCHECK.ORG, <http://timelines.latimes.com/deadliest-shooting-rampages/> (last visited Feb. 26, 2016).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> BEARING ARMS 1361(U.S. Gov't Printing Office n.d.), available at <https://www.congress.gov/content/conan/pdf/GPO-CONAN-REV-2014-10-3.pdf>.

<sup>12</sup> *United States v. Miller*, 307 U.S. 174, 179 (1939).

United States: the American Revolution.<sup>13</sup> The revolution was not one of negotiation but one of significant hardship and bloodshed that allowed firearms to flourish.<sup>14</sup> Further, these individuals would argue that the colonial states would not have come together to form the United States had it not been for armed rebellion against Great Britain.<sup>15</sup>

#### A. *The Second Amendment*

The Second Amendment consists of 27 words, none of which are complex.<sup>16</sup> Despite the reasonably simple task of reading the Second Amendment, its precise meaning is elusive and disputed. No express language in the Constitution generates more rhetoric or vitriol among proponents and opponents.<sup>17</sup>

Adopted on December 15, 1791, as a component of the Bill of Rights, the Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>18</sup> The express language of the Second Amendment has led to an abundance of opinions about the actual intent of the drafters. As with all writings of significance, there are multiple drafts of the Second Amendment from which scholars often attempt to parse the drafters’ language and intent.<sup>19</sup> Unfortunately, as one may expect, these scholars’ attempts are not conclusive.

The question that arises is whether the Second Amendment provides the general populace with a constitutional right to individually bear arms that is not connected to a militia or not

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<sup>13</sup> Patrick J. Charles, “Arms for Their Defence”? *An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351, 357 (2009).

<sup>14</sup> *Id.* at 362.

<sup>15</sup> *Id.* at 353.

<sup>16</sup> U.S. CONST. amend. II.

<sup>17</sup> See Farley, *supra* note 7.

<sup>18</sup> U.S. CONST. amend. II.

<sup>19</sup> *District of Columbia v. Heller*, 554 U.S. 570, 602 (2008).

connected to serving in an organized military.<sup>20</sup> Prevalent in the twenty-first century, scholars and practitioners have a renewed judicial interest or academic inquiry in the study and analysis of the Second Amendment.

The history of the Second Amendment is quite interesting. Academics believe the Second Amendment stemmed from English common law, which provided for the right to keep and bear arms.<sup>21</sup> The English Bill of Rights of 1689 also heavily influenced the drafting of the Second Amendment.<sup>22</sup> Famed English legal scholar Sir William Blackstone described this right as an auxiliary right — supporting the natural rights of self-defense, resistance to oppression, self-preservation, and the civic duty to act in concert in defense of the state.<sup>23</sup>

The Second Amendment's primary intent provided a right to bear arms to citizens of the United States. Although the express language of the Second Amendment seems to connect this right to a militia, many view this right as both an individual right and as a right connected to military service.<sup>24</sup> The drafting of the Second Amendment was in deliberate response to requests from several states during the Constitutional debates based on prior British efforts to seize colonists' firearms.<sup>25</sup>

### B. *The Right to Bear Arms in Virginia*

The right to bear arms is so important that individual states included language securing this right in their constitutions. Specifically, the Commonwealth of Virginia's constitution is a

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<sup>20</sup> See *id.* at 578-79.

<sup>21</sup> Lillian Goldman L. Library, *English Bill of Rights of 1689*, YALE L. SCH., [http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp) (last visited Feb. 27, 2016).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> BEARING ARMS, *supra* note 11.

<sup>25</sup> *Id.*

clear, precise, and directive document.<sup>26</sup> The Virginia Constitution sought to bring into focus the rights of the people to bear arms.<sup>27</sup> Upon closer analysis of the language of the Virginia Bill of Rights, Article I, another question regarding the actual purpose of this right comes to mind:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.<sup>28</sup>

The Virginia Constitution also references the concept of a “well regulated militia,” similar to our U.S. Constitution, giving rise to the same arguments posed by those who are not in favor of individual rights to own, keep, and bear arms.<sup>29</sup> It does appear that Virginia attempted to clarify the issue of individual firearm ownership with the language, “the right of the people to keep and bear arms shall not be infringed.”<sup>30</sup> The remainder of the language gives rise to arguments that the drafters intended the inextricable attachment of this right to the concept of a militia or military experience.<sup>31</sup> Many other states included the same or similar language in their individual state constitutions.<sup>32</sup>

### *C. Barron v. Baltimore*

A nexus exists between the Second Amendment and the rights of the individual states. In the early years of the Union, courts interpreted that neither the Second Amendment nor *any other*

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<sup>26</sup> VA. CONST. art. I, § 13.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Heller*, 554 U.S. at 601.

Constitutional Amendment applied to the states.<sup>33</sup> Case law interpretations of the time minimally considered the concept of constitutional provisions applying to the states based on each state having its own constitution.<sup>34</sup>

A key case demonstrating this type of analysis is *Barron v. Baltimore*. In this case, the Supreme Court held that the Bill of Rights was not applicable to the states but applied only to the federal government as a limitation of the federal government's power.<sup>35</sup> The case arose from circumstances that the plaintiff claimed were tantamount to a taking of private property without just compensation that was subject to the protections of the Fifth Amendment.<sup>36</sup> Unsuccessful in state court, the plaintiff appealed.<sup>37</sup> The Supreme Court stated that the Fifth Amendment acted as a limitation on the exercise of power on the federal government but not the states.<sup>38</sup>

The Supreme Court dismissed the case on the basis that the constitutional drafters did not intend for the Bill of Rights to apply to the states.<sup>39</sup> The ultimate decision rendered resulted from a jurisdictional defect in the Supreme Court's ability to hear the case.<sup>40</sup> However, the Supreme Court stated that the constitutional provisions of the Fifth Amendment were merely limitations on the powers of the federal government and nothing more.<sup>41</sup> This holding included the entirety of the U.S. Constitution and Bill of Rights.<sup>42</sup> The Supreme Court's holding supported the concept that the federal government protected states' rights from intrusion.<sup>43</sup> Until the Civil War, the Supreme Court continued to follow *Barron* holding that the Bill of Rights did not apply

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<sup>33</sup> See, e.g., *Barron v. Baltimore*, 32 U.S. 243 (1833).

<sup>34</sup> See *id.* at 250.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 247.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 250-51.

<sup>39</sup> *Id.* at 251.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 250-51.

<sup>42</sup> *Id.* at 250.

<sup>43</sup> *Id.* at 250-51.

to the States.

#### D. *The Fourteenth Amendment*

Any analysis of the Second Amendment also includes an analysis of the Fourteenth Amendment, and the courts have instinctively done so in each of the instructive cases interpreting the Second Amendment.<sup>44</sup> The Constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered the federal system and changed the dynamics of application of the Bill of Rights to the states.<sup>45</sup> Most importantly, the Fourteenth Amendment ushered in a new era of federal power. The United States adopted the Fourteenth Amendment on July 9, 1868.<sup>46</sup> The Fourteenth Amendment, Section I, reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>47</sup>

The Fourteenth Amendment's "Privileges and Immunities Clause", which protects fundamental rights of individual citizens and restrains state efforts to discriminate against out-of-state citizens, is critical in its application to individual rights.<sup>48</sup> The Privileges and Immunities Clause extends only to fundamental rights and does not apply to commercial activity.<sup>49</sup> The Fourteenth Amendment became the catalyst that resulted in incorporation of the Second Amendment and other amendments to the individual states.

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<sup>44</sup> See, e.g., *Slaughter-House Cases*, 83 U.S. 36, 93 (1873).

<sup>45</sup> *Id.*

<sup>46</sup> Library of Cong., *Primary Documents of American History: 14th Amendment to the U.S. Constitution*, LIBRARY OF CONG. (Nov. 25, 2015), <https://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html>.

<sup>47</sup> U.S. CONST. amend. XIV, § I.

<sup>48</sup> See *Slaughter-House Cases*, 83 U.S. at 74-82.

<sup>49</sup> *Id.* at 99.

## 1. The Slaughter-House Cases

Four years after the adoption of the Fourteenth Amendment, the Supreme Court examined the Privileges and Immunities Clause in the *Slaughter-House Cases*.<sup>50</sup> The *Slaughter-House Cases* were a series of cases brought before the Supreme Court in 1872.<sup>51</sup> The cases involved challenges to a Louisiana law that permitted the creation of a state-sanctioned monopoly on the butchering of animals within the city of New Orleans.<sup>52</sup> Justice Samuel Miller wrote the opinion for the Court and concluded that the Privileges and Immunities Clause protects only those rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws.”<sup>53</sup> The Supreme Court interpreted this clause as protecting the rights of individuals as federal citizens and not state citizens.<sup>54</sup> The Court further defined the rights of U.S. citizens narrowly — excluding civil rights.<sup>55</sup> This was the first time the Supreme Court incorporated federal involvement in state affairs. The *Slaughter-House Cases* played an integral role in the Doctrine of Incorporation as known today.

## 2. Doctrine of Incorporation

The Supreme Court enumerated the Doctrine of Incorporation through several holdings.<sup>56</sup> The Doctrine of Incorporation uses the Due Process Clause of the Fourteenth Amendment to apply selected provisions of the Bill of Rights to the states.<sup>57</sup> One of the first cases in which the Doctrine of Incorporation appeared was one in which the Supreme Court required the payment of

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<sup>50</sup> *See id.* at 57.

<sup>51</sup> *Id.* at 58.

<sup>52</sup> *Id.* at 58-60.

<sup>53</sup> *Id.* at 79.

<sup>54</sup> *Id.* at 79-80.

<sup>55</sup> *Id.* at 80-81.

<sup>56</sup> *See infra* text accompanying notes 57-66.

<sup>57</sup> Legal Info. Inst., *Incorporation Doctrine*, CORNELL U. LAW SCHOOL, [https://www.law.cornell.edu/wex/incorporation\\_doctrine](https://www.law.cornell.edu/wex/incorporation_doctrine) (last visited Mar. 17, 2016).

just compensation for property appropriated by state or local authorities.<sup>58</sup> State statutes also provided the same guarantee.<sup>59</sup> In a later case, the Court expressly held that states must protect individual's First Amendment rights.<sup>60</sup> Since that time, the Supreme Court has steadily incorporated most of the significant provisions of the Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment.<sup>61</sup>

Typically, the Fourteenth Amendment's Due Process Clause occurs in two separate categories: procedural due process and substantive due process.<sup>62</sup>

Procedural due process [is] based on principles of "fundamental fairness," [and] addresses which legal procedures are required to be followed in state proceedings. Relevant issues . . . include notice, opportunity for hearing, confrontation and cross-examination, discovery, basis of decision, and availability of counsel. Substantive due process, although also based on principles of "fundamental fairness," [analyzes] whether a law can be applied by the states . . . regardless of the procedure followed. Substantive due process has generally dealt with specific subject areas, such as liberty of contract or privacy, and over time has alternately emphasized the importance of economic and noneconomic matters.<sup>63</sup>

The Doctrine of Incorporation applies both procedurally and substantively to the guarantees of the states.<sup>64</sup> For example, procedurally, only a jury can convict a defendant of a serious crime, since the Supreme Court has incorporated the Sixth Amendment jury-trial right against the states.<sup>65</sup> Similarly, substantively, all states must recognize the First Amendment prohibition against a state established religion, regardless of whether state laws and constitutions offer such a

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<sup>58</sup> See *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 257-58 (1897).

<sup>59</sup> *Id.* at 228.

<sup>60</sup> *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>61</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 763 (2010).

<sup>62</sup> FOURTEENTH AMENDMENT: RIGHTS GUARANTEED 1820 (U.S. Gov't Printing Office n.d.), available at <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-15.pdf>.

<sup>63</sup> *Id.* at 1820-21.

<sup>64</sup> Justia, *Generally Due Process of Law*, LAW.JUSTIA.COM, <http://law.justia.com/constitution/us/amendment-14/05-due-process-of-law.html> (last visited Apr. 8, 2016).

<sup>65</sup> *McDonald*, 561 U.S. at 761.

prohibition.<sup>66</sup> The Supreme Court has not yet found reason to incorporate the Fifth Amendment right to an indictment by a grand jury or the Seventh Amendment right to a jury trial in civil lawsuits.<sup>67</sup> Ultimately, the Doctrine of Incorporation was instrumental in applying the Bill of Rights to the states and making its provisions universal.

The Fourteenth Amendment, the Doctrine of Incorporation, and several cases set the stage for future cases involving Second Amendment rights. The Supreme Court has interpreted the Second Amendment, its application to the states, and its meaning through only four primary Second Amendment cases.

#### E. *United States v. Cruikshank*

Despite the adoption of the Fourteenth Amendment, and other post-Civil War Amendments, *United States v. Cruikshank* was one of the first cases the Supreme Court heard specifically involving the interpretation of the Second Amendment.<sup>68</sup> The Court heard the case in 1875, just after the conclusion of the Civil War.<sup>69</sup> During this time, Americans inextricably integrated weapons, particularly firearms, into American culture by virtue of western expansion. Under *Cruikshank* (similar to the holding in *Barron*), the Supreme Court limited the applicability of the Second Amendment to the federal government.<sup>70</sup> The context of the case depicts federalism ideals of the time.

It appears that the Supreme Court may have struggled with the adoption of the Fourteenth Amendment and the inception of the Doctrine of Incorporation, since the Court held that while

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<sup>66</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

<sup>67</sup> *Incorporation Doctrine*, *supra* note 57.

<sup>68</sup> *See* 92 U.S. 542, 553 (1876).

<sup>69</sup> *Id.* at 542.

<sup>70</sup> *Id.* at 553.

the federal government is supreme to state governments, the federal government has no power to protect the rights or privileges of citizens in cases that fall outside federal jurisdiction.<sup>71</sup>

*Cruikshank* further held that the Constitution only limited Congress or the national government, from infringing on constitutional rights.<sup>72</sup>

Even years after the ratification of the Fourteenth Amendment, the Supreme Court in *Cruikshank* still held that the First and Second Amendments did not apply to state governments.<sup>73</sup> Beginning in the 1920s, a series of Supreme Court decisions interpreted the Fourteenth Amendment to “incorporate” most portions of the Bill of Rights, making these portions enforceable against state governments.<sup>74</sup> The Fourteenth Amendment was particularly important in Second Amendment matters.

#### F. *United States v. Miller*

Following *Cruikshank* in 1875, the Supreme Court did not hear any other cases involving interpretation of the Second Amendment until *United States v. Miller* in 1939.<sup>75</sup> In this case, the defendant was indicted for violating the National Firearms Act.<sup>76</sup> The defendant carried a double barreled twelve-gauge shotgun without proper registration, which was required under Title 26 of the U.S. Code.<sup>77</sup> The district court held that the National Firearms Act violated the Tenth Amendment by usurping the states’ police power and dismissed the indictment against the defendant.<sup>78</sup> The government appealed the case.<sup>79</sup>

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<sup>71</sup> *Id.* at 549.

<sup>72</sup> *Id.* at 553 (quoting *New York v. Miln*, 36 U.S. 102, 139 (1837)).

<sup>73</sup> *Id.* at 552-53.

<sup>74</sup> See *Incorporation Doctrine*, *supra* note 57.

<sup>75</sup> *Miller*, 307 U.S. at 175.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 176.

The Court reviewed the statutory construct of the National Firearms Act (“the Act”).<sup>80</sup> The Act’s provisions precluded any individual from possessing any enumerated firearm unless the government properly taxed the weapon.<sup>81</sup> The Act further prohibited the possession or transport of any firearms.<sup>82</sup>

The Court focused its entire ruling on the relationship between the Second Amendment and military service.<sup>83</sup> The militia and people in the military are required to bear arms to “execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>84</sup> The Court ultimately upheld the National Firearms act and ruled that both the federal and state governments held the authority to limit firearms that do not have a “reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>85</sup> *Miller* was instrumental in providing authority for both the federal and state governments to regulate the sale, possession, and transport of firearms in public hands.

### III. SECOND AMENDMENT INTERPRETATION AND APPLICATION IN THE MODERN ERA

#### A. *District of Columbia v. Heller*

Two contemporary cases heard by the Supreme Court cleared the air concerning an individual’s right to bear arms. On June 26, 2008, the Supreme Court issued its first decision since 1939 that interpreted the Second Amendment.<sup>86</sup> In *United States v. Heller*, the Court ruled

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 178.

<sup>81</sup> *Id.* at n.1.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 179-82.

<sup>84</sup> *Id.* at 178.

<sup>85</sup> *Id.* at 179.

<sup>86</sup> *Heller*, 554 U.S. at 570.

that the Second Amendment conferred an individual right to possess a firearm for traditionally lawful purposes such as self-defense.<sup>87</sup> The Court also ruled that two District of Columbia provisions, one that banned handguns and one that required lawful firearms in the home to be disassembled or trigger-locked, violated this right.<sup>88</sup>

*Heller* is a landmark decision in favor of gun rights. It is the most comprehensive and instructive of all of the Supreme Court's rulings regarding the Second Amendment. Dick Heller's job authorized him to carry a handgun while on duty as a police officer at the Thurgood Marshall Judiciary Building.<sup>89</sup> "He applied for a registration certificate for a handgun that he wished to keep at home [for self-defense purposes], but the District refused."<sup>90</sup> D.C. law precluded the possession of handguns, the carrying of unlicensed firearms, the licensure of firearms, and gave the chief of police authority to issue licenses for one-year periods only.<sup>91</sup> Residents of D.C. were required to keep their lawfully owned firearms "unloaded and dissembled or bound by a trigger lock or similar device" unless the gun owner kept the gun in a place of business or the gun owner used the gun for lawful recreational activities.<sup>92</sup>

The Supreme Court in *Heller* held the Second Amendment protects an individual's right to possess and carry firearms.<sup>93</sup> More specifically, the Supreme Court decided that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia and to use that arm for traditionally lawful purposes, such as self-defense within the home.<sup>94</sup> The Supreme Court noted that the Second Amendment does not apply to felons or the

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<sup>87</sup> *Id.* at 635.

<sup>88</sup> *Id.* at 628-29.

<sup>89</sup> *Id.* at 574-75.

<sup>90</sup> *Id.* at 575.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 635.

<sup>94</sup> *Id.*

mentally ill, to schools or government buildings, and places with “conditions or qualifications on commercial sale of arms.”<sup>95</sup>

*Heller* is a seminal case in the interpretation of the Second Amendment as it grants a right for individuals to keep and bear arms absent any requirement of use of the weapon in or relative to a militia.<sup>96</sup> The Supreme Court provided a thorough analysis of prior case law; the facts of the case; the Doctrine of Incorporation; the Second Amendment; the Fourteenth Amendment; current cultural views; and, focused squarely on the issue of whether an individual right to bear arms existed in the absence of military service.<sup>97</sup> *Heller* clearly sets out the Supreme Court’s opinion that individuals may possess firearms and that this individual right is absolute as granted by the Second Amendment.<sup>98</sup>

The Court in *Heller* restricted the individual right to bear arms.<sup>99</sup> The Court stated, “Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the nineteenth century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>100</sup> This observation alludes to the prior holding in *Miller* where the Court put limitations on the types of firearms individuals can possess. The Court’s focus appears not to attempt to exclude firearms that have evolved over time but to preclude and properly regulate weapons that are not reasonable.<sup>101</sup> For example, the Court excludes fully automatic firearms,

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<sup>95</sup> *Id.* at 626.

<sup>96</sup> *See generally id.*

<sup>97</sup> *Id. passim.*

<sup>98</sup> *Heller*, 554 U.S. at 622 (Second Amendment proponents point to this element of the ruling as a staunch win. The holdings in *Heller* do not reverse or specifically modify any of the previous Supreme Court rulings. The *Heller* case simply adds to these cases and provides clarification.).

<sup>99</sup> *Id.* at 626.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

military grade weapons, similar weapons, and explosives.<sup>102</sup> When deciding *Heller*, the Court attempted to bring some level of finality to the interpretation of the Second Amendment.

However, it was only a short time until another case came before the Court.

### B. *McDonald v. Chicago*

*McDonald v. Chicago* is the most recent case heard by the Supreme Court concerning the Second Amendment. In *McDonald*, the petitioners filed three suits against respondent municipalities, the City of Chicago and the Village of Oak Park, alleging that municipal ordinances banning handgun possession violated both the Second and Fourteenth Amendments.<sup>103</sup>

In *McDonald*, petitioners Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson were Chicago residents who desired to own handguns in their homes for purposes of self-defense.<sup>104</sup> Chicago's city ordinance provided that "No person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm."<sup>105</sup> The Court noted, "The code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in Chicago."<sup>106</sup>

The *McDonald* ruling clarified earlier decisions holding that through the Fourteenth Amendment, the Second Amendment applied to state and local governments.<sup>107</sup> The Court reached into the historical record and reviewed many key cases in the Court's analysis, including

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<sup>102</sup> *Id.* at 713.

<sup>103</sup> *McDonald*, 561 U.S. at 752.

<sup>104</sup> *Id.* at 750.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 758-59.

*Cruikshank* and *Miller*.<sup>108</sup> The Court opined that under the Due Process Clause, the Court has never examined the Second Amendment’s application to the states.<sup>109</sup>

Looking to *Heller*, the *McDonald* Court stated that self-defense was the main objective of the Second Amendment.<sup>110</sup> Self-defense also includes use of firearms to protect one’s family and home.<sup>111</sup> The Court summarized, “It is clear that the Framers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”<sup>112</sup>

The Court ultimately held that the Due Process Clause of the Fourteenth Amendment included the Second Amendment.<sup>113</sup> The Supreme Court interpreted the right to bear arms as a fundamental right.<sup>114</sup> This right exists by virtue of the Second and Fourteenth Amendments.<sup>115</sup> All branches of government have added reasonable restrictions to this right. Congress restricted this right when they passed the Violent Crime Control and Law Enforcement Act of 1994, and recent executive action by President Barack Obama in January 2016 also restricted Second Amendment rights in the United States.<sup>116</sup>

### C. *Executive Action and Government Acts*

Congress passed the Violent Crime Control and Law Enforcement Act of 1994, which included a provision entitled, “The Public Safety and Recreational Firearms Use Protection

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<sup>108</sup> *Id.* at 758.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 767.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 778.

<sup>113</sup> *Id.* at 791.

<sup>114</sup> *Id.* at 767.

<sup>115</sup> *Id.* at 791.

<sup>116</sup> Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong. (1994); *see* Farley, *supra* note 7.

Act.”<sup>117</sup> Congressional representatives commonly refer to this section as the federal assault weapons ban.<sup>118</sup>

The ban restricted the “manufacture, transfer, and possession” of semi-automatic assault weapons except for those already in lawful possession at the time of the law’s enactment.<sup>119</sup> The ban also barred the manufacture and sale of 19 specific semi-automatic firearms classified as “assault weapons” and any semiautomatic rifle, pistol, or shotgun capable of accepting a detachable magazine and that possessed two or more banned features.<sup>120</sup> The list of such features included telescoping or folding stocks, pistol grips, flash suppressors, grenade launchers, bayonet lugs, and magazines holding ten rounds or more.<sup>121</sup> The restricted firearms were weapons regulated by the National Firearms Act of 1934.<sup>122</sup> Surprisingly, the outright ban of these weapons passed.<sup>123</sup> The law had a sunset provision that resulted in its expiration in 2004.<sup>124</sup> Despite multiple attempts, legislators have failed to revive the ban.<sup>125</sup> However, there were numerous challenges to the law on several grounds, none of which were successful, and many viewed the ban as constitutional.<sup>126</sup>

President Barack Obama implemented executive action regarding gun control in January 2016.<sup>127</sup> This executive order expands background checks for buyers and introduces a number of

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<sup>117</sup> H.R. 3355 at § 110101.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at § 110102(a)(B)(30).

<sup>122</sup> H.R. 3355 at § 110102(a)(B)(30); I.R.C. § 5845(a).

<sup>123</sup> Lynn Murtha & Suzanne L. Smith, Note: “*An Ounce of Prevention . . .*”: *Restrictions Versus Proaction in American Gun Violence Policies*, 10 ST. JOHN’S J. LEGAL COMMENT. 205, 217-18 (1994).

<sup>124</sup> H.R. 3355 at § 110105.

<sup>125</sup> *See, e.g.*, GovTrack, *H.R. 5099 (108th): Assault Weapons Ban Reauthorization Bill*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/108/hr5099> (last visited Apr. 9, 2016).

<sup>126</sup> *See, e.g.*, San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1133 (9th Cir. 1996).

<sup>127</sup> Farley, *supra* note 7.

additional gun control measures.<sup>128</sup> The Order “clarifies that individuals ‘in the business of selling firearms’ [must] register as licensed gun dealers, effectively narrowing the so-called ‘gun show loophole,’ which exempts most small sellers from keeping formal sales records.”<sup>129</sup>

President Obama’s executive action addresses gun violence in a number of ways that result in raising the ire of those in favor of gun rights while receiving negative assessments by those in favor of gun control.<sup>130</sup> However, the executive action does provide for a number of changes that restrict gun sales and ownership.<sup>131</sup> This executive action calls for increased background checks; increased interjurisdictional reporting between the states; increased enforcement power for the Bureau of Alcohol Tobacco and Firearms (“ATF”); redefines the term “gun dealer”; and provides funding for 200 additional ATF enforcement officers.<sup>132</sup> The measure proposes additional scrutiny on mental health issues and proposes a new \$500 million investment to increase access to mental health care.<sup>133</sup> A provision has also been included to focus on improved gun safety.<sup>134</sup>

#### IV. CONCLUSION

The status of interpretation of the Second Amendment’s application to the states is absolute. The individual right to bear arms is a guaranteed right in the United States that is applicable to the individual based on the Doctrine of Incorporation, the Fourteenth Amendment, and *stare decisis*. Both *Heller* and *McDonald* clearly established that the individual right to bear

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<sup>128</sup> *Id.*

<sup>129</sup> Bradner & Krieg, *supra* note 5.

<sup>130</sup> *Id.*

<sup>131</sup> See White H. Office of the Press Sec’y, *Fact Sheet: New Executive Actions Reduce Gun Violence and Make Our Communities Safer*, WHITEHOUSE.GOV (Jan. 4, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

arms exists separately and distinctly from military service.<sup>135</sup> The rules set forth in *Heller*, *McDonald*, *Miller*, and *Cruikshank* are still good law in their entirety, and the Court continues to recognize that reasonable restrictions can be placed on the individual's right to own, possess, and bear arms.

Arguments abound concerning the constitutional right to bear arms, the constitutional status of any such right, the viability of gun control, its place in American society, and the efficacy of any such effort. Due to the increase in mass shootings over the last ten years, public debate and congressional involvement continue despite the decisions in *Heller* and *McDonald*.<sup>136</sup> Mass murders utilizing firearms have become commonplace and give rise to calls for gun control and arguments about individual gun rights.<sup>137</sup> Gun violence has become so prevalent that the common definition of "mass shooting" is "four or more killings in a single incident" in the wake of the tragedy in Newtown, Connecticut.<sup>138</sup> Statistically, gun violence has declined during the past twenty years.<sup>139</sup> Despite this fact, the instances of mass shootings have increased.<sup>140</sup>

In 2002, I lost a dear friend to gun violence during the shooting at my *alma mater*, the Appalachian School of Law. A number of my friends and family were possible victims on that day, but fortunately, they survived. My brother was there. Others — good people — lost their lives. I recall being frozen with fear and overwhelmed with the news. However, I do not think stricter gun laws would have prevented this shooting. I do not blame the gun for it was merely an instrument utilized to commit a crime. Another gun stopped the shooter in that instance. The gun was neither good nor bad. It was the intent of the individual in possession of the weapon

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<sup>135</sup> *Heller*, 554 U.S. at 590; *McDonald*, 561 U.S. at 784.

<sup>136</sup> See Bradner & Krieg, *supra* note 5.

<sup>137</sup> Myre, *supra* note 1.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

that drew the line between good and evil.

Having experienced the effects of gun violence first-hand, I understand the wave of emotions that drives the political landscape and numerous arguments underlying gun control. As a pragmatist, I believe it is inappropriate for any group or individual to attempt to encroach the Second Amendment rights of the individual to bear arms. The Supreme Court's decisions have provided clear guidance that the Constitution provides this individual right. Both the federal and state governments are at liberty to implement appropriate controls on the sale, transfer, transport, and possession of firearms.<sup>141</sup>

Therefore, regardless of the politics surrounding the issue, the Second Amendment is validly applicable to the states. Citizens of the United States have the individual right to bear arms, albeit with reasonable restrictions. It does not appear that the battle between proponents of gun rights and opponents of the same will ever be settled. Yet, the Supreme Court decisions in recent years provides more clarity to the issue than ever before.

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<sup>141</sup> *Heller*, 554 U.S. at 627.