The Second Amendment: An Overview of *District of Columbia v. Heller* and *McDonald v. City of Chicago*

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Summary

In *District of Columbia v. Heller*, the Supreme Court of the United States ruled in a 5-4 decision that the Second Amendment to the Constitution of the United States protects an individual right to possess a firearm, unconnected with service in a militia, and the use of that firearm for traditionally lawful purposes, such as self-defense within the home. The decision in *Heller* affirmed the decision of the Court of Appeals for the District of Columbia, which declared three provisions of the District of Columbia's Firearms Control Regulation Act unconstitutional. The provisions specifically ruled on were: DC Code § 7-.....02, which generally barred the registration of handguns; DC Code § 22-4504, which prohibited carrying a pistol without a license, insofar as the provision would prevent a registrant from moving a gun from one room to another within his or her home; and DC Code § 7-.....02, which required that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device. In noting that the District's approach "totally bans handgun possession in the home," the Supreme Court declared that the inherent right of self-defense is central to the Second Amendment right, and that the District's handgun ban amounted to a prohibition of an entire class of arms that has been overwhelmingly utilized by American society for that purpose.

The Court in *Heller* conducted an extensive analysis of the Second Amendment to interpret its meaning, but the decision left unanswered other significant constitutional questions, including the standard of scrutiny that should be applied to laws regulating the possession and use of firearms, and whether the Second Amendment is incorporated, or applies to, the states.

After *Heller*, three federal Courts of Appeals addressed the question of incorporation. Two of these decisions, from the U.S. Courts of Appeals for the Second Circuit and the Seventh Circuit, held that the Second Amendment did not apply to the states, whereas the Court of Appeals for the Ninth Circuit held that the Second Amendment is incorporated under the Due Process Clause of the Fourteenth Amendment, although this decision has since been vacated. In *McDonald v. City of Chicago*, the Court reversed the decision of the Court of Appeals for the Seventh Circuit, and held that the Second Amendment applies to the states.

With respect to the *Heller* decision, this report provides an overview of judicial treatment of the Second Amendment over the past 70 years in both the Supreme Court and federal appellate courts. With respect to the *McDonald* decision, this report presents an overview of the principles of incorporation, early cases that addressed the application of the Second Amendment to state governments, and the federal appellate cases that addressed incorporation of the Second Amendment since the *Heller* decision. Lastly, this report provides an analysis of the Court's opinions in *Heller* and *McDonald* and the potential implications of these decisions for firearms legislation at the federal, state, and local levels.

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Introduction

In June 2008, the Supreme Court issued its decision in *District of Columbia v. Heller*, holding by a 5-4 vote that the Second Amendment to the Constitution of the United States protects an individual right to possess a firearm, unconnected with service in a militia, and to use that firearm for traditionally lawful purposes such as self-defense within the home.[1] In *Heller*, the Court affirmed the lower court's holding that declared three provisions of the District of Columbia's Firearms Control Regulation Act to be unconstitutional. The decision in *Heller* marked the first time in almost 70 years that the Supreme Court addressed the nature of the right conferred by the Second Amendment. Although the Court conducted an extensive analysis of the Second Amendment to interpret its meaning, the decision left unanswered other significant constitutional questions, including the standard of scrutiny that should be applied to laws regulating the possession and use of firearms, and whether the Second Amendment applies to the states. This latter issue was subsequently addressed by the Supreme Court in *McDonald v. City of Chicago*.[2]

Accordingly, this report first provides a historical overview of judicial treatment of the Second Amendment and a discussion of the Court's decision in *Heller*. It then examines the issue of incorporation, which was the focus of the *McDonald* decision. Lastly, this report concludes with an analysis that focuses on the potential impact of the Court's decisions in *Heller* and *McDonald* on such legislation pertaining to the use and possession of firearms at the federal, state, and local levels.

The Second Amendment—An Individual or Collective Right?

The Second Amendment to the Constitution states that "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." Despite its brevity, the nature of the right conferred by the language of the Second Amendment has been the subject of great debate in the political, academic, and legal spheres for decades. Generally, it can be said that there are two opposing models that govern Second Amendment interpretation. On one side of the debate, there is the "individual right model," which maintains that the text and underlying history of the Second Amendment clearly establishes that the right to keep and bear arms is committed to the people, that is, an individual, as opposed to the states or the federal government. On the other end of the spectrum is the "collective right model," which interprets the Second Amendment as protecting the authority of the states to maintain a formal organized militia. A related interpretation, commonly called the "sophisticated collective right model," posits that individuals have a right under the Second Amendment to own and possess firearms, but only to the extent that such ownership and possession is connected to service in a state militia.

The text of the amendment is often raised to both support and contravene the argument that there is an individual right to keep and bear arms. The individual right model places great weight on the operative clause of the amendment that states "the right of the people to keep and bear arms shall

[1] District of Columbia v. Heller, 554 U.S. 570 (2008).

[2] McDonald v. City of Chicago, 561 U.S. __ (2010); 130 S. Ct. 3020 (2010).

not be infringed." Accordingly, it is argued that this command language clearly affords a right to the people, and not simply to states. To support this notion, it is argued that the text of the Tenth Amendment, which clearly distinguishes between "the states" and "the people," makes it evident that the two terms are, in fact, different, and that the Founders knew to say "state" when they meant it.[3] Under this reading, it may be argued that if the Second Amendment did not confer an individual right, it simply would have read that the right of the states to organize the militia shall not be infringed. Supporters of the collective right model, by contrast, often counter with the argument that the dependent clause, which refers to "a well regulated militia," qualifies the rest of the amendment, thereby limiting the right of the people to keep and bear arms and investing the states with the authority to control the manner in which weapons are kept, and to require that any person who possesses a weapon be a member of the militia.[4]

An outgrowth of the rationale used by the collective right proponents has been the argument that the militia, in modern times, is embodied by the National Guard, and that the realities of modern warfare have negated the need for the citizenry to be armed.[5] Individual right theorists have countered these arguments by noting that the militia of the Founders' era consisted of every able-bodied male, who was required to supply his own weapon. These theorists also point to 10 U.S.C. § 311, which as part of its express definition of the different classes of militia states that in addition to the National Guard, there is an "unorganized militia" that is composed of all able-bodied males between the ages of 17 and 45 who are not members of the National Guard or naval militia.[6] Moreover, proponents of the individual right model deride the notion that an individual right to keep and bear arms can be read out of the Constitution as a result of technological advancements or shifting societal mores.[7] As illustrated below, various federal appellate courts gave effect to each of these interpretive models, contributing to the uncertainty that characterized the debate over the meaning of the Second Amendment prior to the Court's decision in *Heller*.

The Second Amendment in the Supreme Court: *United States v. Miller*

Despite the heated debate regarding the meaning of the Second Amendment, the Supreme Court had decided only one case touching upon its scope prior to the decision in *Heller*. That case, *United States v. Miller*, considered the validity of a provision of the National Firearms Act in relation to the Second Amendment.[8] An interesting aspect of the decision in *Miller*, as illustrated below, is that it was commonly cited in subsequent lower court decisions as supportive of the proposition that the Second Amendment confers a collective right to keep and bear arms. However, the Court's discussion and actual holding, while giving effect to the dependent clause,

[3] *See, e.g.*, Randy Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual Historical Theory of the Ninth Amendment*, 60 Stan. L. Rev. 937, 948 (2008).

[4] *See* David C. Williams, *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic* 15 (2003).

[5] *See, e.g.*, H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi. Kent. L. Rev. 403 (2000).

[6] *See* Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment*, 77 U. Det. Mercy L. Rev. 1, 32 (1999).

[7] *Id.* at 50.

[8] United States v. Miller, 307 U.S. 174 (1939).

could nonetheless be taken to indicate that the Second Amendment confers an individual right limited to the context of the maintenance of the militia.

In *Miller*, the Court upheld a provision of the National Firearms Act that required the registration of sawed-off shotguns. In discussing the Second Amendment, the Court noted that the term "militia" was traditionally understood to refer to "all males physically capable of acting in concert for the common defense," and that members of the militia were primarily civilians and, on occasion, soldiers too, who when called upon "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[9] This kind of language throughout the *Miller* Court's brief discussion of the meaning and expectations of those in a militia during the Founding-era, though subsequently cited as supporting a collective right interpretation, also lent itself to the possible interpretation that the Second Amendment confers an individual right to keep and bear arms limited to the context of the maintenance of a militia. Despite this language, the Court in *Miller* held:

> In absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than 18 inches in length" 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.[10]

The *Miller* holding focuses on and appears to suggest that the applicability of the Second Amendment depends upon the type of weapon possessed by an individual and that the weapon, in order to be protected under the amendment, must have some reasonable relationship to the preservation or efficiency of a well-regulated militia. Yet, the decision in *Miller* is perplexing because while it indicated a connection between the right to keep and bear arms and the militia, the Court did not explore the logical conclusions of its holding; thus the question remained as to what point the regulation or prohibition of firearms would violate the strictures of the amendment. After *Miller*, the cases decided in the following decades departed from this rather undefined test, with each succeeding decision arguably becoming more attenuated such that judicial treatment of the Second Amendment for the remainder of the 20th century almost summarily concluded that the amendment conferred only a collective right to keep and bear arms.

The Second Amendment in Federal Court: Appellate Decisions Since *Miller*

The process of departure from, and the attenuation of, *Miller* began with the 1942 decision in *Cases v. United States*.[11] The U.S. Court of Appeals for the First Circuit (First Circuit) stated its view on the holding in *Miller* and found it to suggest that "the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia."[12] The First Circuit pointed out that a

[9] *Id.* at 179.

[10] *Id.* at 178. Notably, the defendant in *Miller* did not present any evidence in support of his argument.

[11] Cases v. United States, 131 F.2d 916 (1st Cir. 1942).

[12] *Id.* at 922.

general application of the test in *Miller* could, as a consequence, prevent the government from regulating the possession or use by private persons, not connected with a militia, of machine guns and similar weapons, which clearly serve military purposes. Beginning its departure from *Miller*, the court in *Cases* simply stated that it doubted the Founders intended for citizens to be able to possess weapons like machine guns, and further declared that *Miller* did not formulate any sort of general test to determine the limits of the Second Amendment.[13] The court then applied a new test of its own formulation, focusing on whether the individual in question could be said to have possessed the prohibited weapon in his capacity as a militiaman.[14] Applying that rationale to the case at hand, the First Circuit declared that the defendant possessed the firearm "purely and simply on a frolic of his own and without any thought or intention of contributing to the efficiency of [a] well regulated militia."[15] While *Cases* acknowledged that the Federal Firearms Act "undoubtedly curtails to some extent the right of individuals to keep and bear arms," the court upheld its constitutionality, stating that the act "does not conflict with the Second Amendment" because as suggested by the court's new test, the government can regulate individuals from possessing a weapon (that could be viewed as a weapon of common militia use) if such an individual is not in fact using that weapon in his capacity as a militiaman or for the purpose of common militia use.

The court in *Cases* further cited the Supreme Court's decision in *United States v. Cruikshank*[16] and *Presser v. Illinois*,[17] (both of which were decided prior to the advent of modern incorporation doctrine principles) as support for the proposition that the Second Amendment does not confer an individual right: "The right of the people to keep and bear arms is not a right conferred upon the people by the federal constitution. Whatever rights the people may have depend upon local legislation; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right."[18]

The concept of the Second Amendment as a collective protective mechanism rather than a conferral of an individual right was reinforced by the U.S. Court of Appeals for the Third Circuit's (Third Circuit) decision that same year in *United States v. Tot*.[19] In that case, the Third Circuit declared that it was "abundantly clear" that the right to keep and bear arms was not adopted with individual rights in mind.[20] The court's support for this statement was brief and conclusory, and did not address any of the relevant, competing arguments.[21] It was this type of holding that became the norm for the remainder of the century in cases addressing the Second Amendment, with courts increasingly referring to others' holdings to support the determination

[13] *Id.* The court also stated its view that it "d[id] not feel that the Supreme Court in [*Miller*] was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go." *Id.*

[14] *Id.* at 922-23.

[15] *Id.* at 923.

[16] United States v. Cruikshank, 92 U.S. 542 (1875).

[17] Presser v. Illinois, 116 U.S. 252 (1886).

[18] Cases, 131 F.2d at 921. The court also noted that past case law indicated that the limitation imposed upon the federal government by the Second Amendment to not infringe on the right conferred by the amendment was not absolute. *Id.* at 922.

[19] United States v. Tot, 131 F.2d 261 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

[20] *Id.* at 266.

[21] *Id.*

that there is no individual right conferred under the Second Amendment, without engaging in any appreciable substantive legal analysis of the issue.[22]

United States v. Emerson

The traditional, albeit highly undefined, balance among the federal appellate courts with regard to judicial treatment of the Second Amendment changed with the 2001 decision in *United States v. Emerson*.[23] In *Emerson*, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) became the first federal appellate court to hold that the Second Amendment confers an individual right to keep and bear arms. The court in *Emerson* specifically addressed the constitutionality of 18 U.S.C. § 922(g)(8), which prevents those under a domestic violence restraining order from possessing a firearm. The district court had ruled this provision to be unconstitutional on grounds that it allows the existence of a restraining order, even if issued "without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights."[24] The Fifth Circuit agreed with the district court's conclusion that the Second Amendment confers an individual right after it engaged in an extensive analysis of the text and history of the amendment.[25] It further stated that "the history of the Amendment reinforces its plain text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training."[26] In making this determination, the Fifth Circuit explicitly acknowledged that it was repudiating the position of every other circuit court that had previously addressed the meaning of the Second Amendment, stating: "[W]e are mindful that almost all of our sister circuits have rejected any individual rights view of the Second Amendment. However, it respectfully appears to us that all or almost all of these opinions seem to have done so either on the erroneous assumption that *Miller* resolved that issue or without sufficient articulated examination of the history and text of the Second Amendment."[27]

The court in *Emerson* stated: "We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with *Miller*, that it protects the rights of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearm ... that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*."[28] Although the *Emerson* court adopted the individual right model, it nonetheless reversed the district court decision, determining that rights protected by the Second Amendment are subject to reasonable restrictions:

> Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored

[22] *See, e.g.*, Love v. Peppersack, 47 F.3d 120, 123 (4th Cir. 1995) ("The lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual right."); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) ("It is clear that the Second Amendment guarantees a collective rather than an individual right.").

[23] United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), *rehearing and rehearing en banc denied*, 281 F.3d 1281 (5th Cir. 2001), *cert denied*, Emerson v. United States, 536 U.S. 907 (2002).

[24] United States v. Emerson, 46 F.Supp.2d 598, 610 (N.D. Tex. 1999).

[25] Emerson, 270 F.3d at 218-259.

[26] *Id.* at 260.

[27] *Id.* at 227.

[28] *Id.* at 260.

> specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country. Indeed, Emerson does not contend, and the district court did not hold, otherwise. As we have previously noted, it is clear that felons, infants and those of unsound mind may be prohibited from possessing firearms.[29]

Applying this standard to the challenged provision, the *Emerson* court noted that while the evidence before it did not establish that an express finding of a credible threat had been made by the local state court, the nexus between firearm possession by an enjoined party and the threat of violence was sufficient to establish the constitutionality of 18 U.S.C. § 922(g)(8).[30] The decision in *Emerson* was accompanied by a special concurrence arguing that "[t]he determination whether the rights bestowed by the Second Amendment are collective or individual [was] entirely unnecessary to resolve this case and has no bearing on the judgment we dictate by this opinion."[31]

Although the decision in *Emerson* did not result in the invalidation of any laws, the decision was quite significant as it marked the first time a circuit court adopted an individual rights interpretation of the Second Amendment, which in turn led to the most substantive exposition of the collective rights model by a sister circuit.

Silveira v. Lockyer

In *Silveira v. Lockyer*,[32] the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) rejected a Second Amendment challenge to California's Assault Weapons Ban, specifically repudiating the analysis in *Emerson* and adopting the collective right model interpretation of the Second Amendment. It stated, "Our court, like every other federal court of appeals to reach the issue except for the Fifth Circuit, has interpreted *Miller* as rejecting the traditional individual rights view."[33] The *Silveira* decision was particularly significant because the Ninth Circuit essentially picked up the gauntlet thrown down in *Emerson*. The court engaged in its own substantive analysis of the text of the amendment, but reached the opposite conclusion than that of the Fifth Circuit, which is important because the opinion in *Silveira* acknowledged and purported to rectify the deficiencies in prior cases that have summarily interpreted *Miller* as precluding an individual rights interpretation.

In particular, the Ninth Circuit began its analysis by expressly acknowledging that "the entire subject of the meaning of the Second Amendment deserves more consideration than we, or the Supreme Court, have thus far been able (or willing) to give it."[34] After engaging in an extensive consideration of the same historical and textual arguments that were addressed in *Emerson*, the court in *Silveira* stated, "The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other

[29] *Id.* at 261.

[30] *Id.* at 264-65.

[31] *Id.* at 272 (Parker, J., special concurrence).

[32] Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2003), *rehearing en banc denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, Silveira v. Lockyer, 540 U.S. 1046 (2003).

[33] Silveira, 312 F.3d at 1063.

[34] *Id.* at 1064.

use. This conclusion is reinforced in part by *Miller*'s implicit rejection of the traditional individual rights position."[35] The court later reemphasized this position, declaring:

> In sum, our review of the historical record regarding the enactment of the Second Amendment reveals that the amendment was adopted to ensure that effective state militias would be maintained, thus preserving the people's right to bear arms. The militias, in turn, were viewed as critical to preserving the integrity of the states within the newly structured national government as well as to ensuring the freedom of the people from federal tyranny. Properly read, the historical record relating to the Second Amendment leaves little doubt as to its intended scope and effect.[36]

Upon determining that the collective right model controls Second Amendment analysis, the Ninth Circuit held that the amendment "poses no limitation on California's ability to enact legislation regulating or prohibiting the possession or use of firearms, including dangerous weapons such as assault weapons."[37] Like the *Emerson* decision, the opinion in *Silveira* was accompanied by a special concurrence that argued that the court's "long analysis involving the merits of the Second Amendment claims," and its adoption of the "collective rights theory" was "unnecessary and improper" in light of existing precedent mandating the dismissal of such claims for a lack of standing.[38] A request for rehearing *en banc* was denied by the full court, resulting in the dissent of six judges.[39]

The holdings in *Emerson* and *Silveira*, for the first time, presented the Supreme Court with two contemporaneous circuit court decisions that reached fundamentally different conclusions with regard to the protections afforded by the Second Amendment. While this dynamic led to a great deal of speculation as to whether the Court would grant a petition for *certiorari* in *Silveira* to resolve this split, the Court ultimately denied the application. This was presumably due to the fact that even though the decisions constituted a concrete split between the two circuit courts on this issue for the first time, no firearms laws were actually invalidated.

The *District of Columbia v. Heller* Decision

In light of the split interpretations of the meaning of the Second Amendment in the circuit court decisions *Emerson* and *Silveira*, both of which were denied *certiorari* by the Supreme Court, the stage for just such a conflict was set in 2007 in *Parker v. District of Columbia*.[40] The decision in *Parker*, which eventually made its way to the Supreme Court, marked the first time that a federal appellate court struck down a law regulating firearms on the basis of the Second Amendment.

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[35] *Id.* at 1066.

[36] *Id.* at 1086.

[37] *Id.* at 1087.

[38] *Id.* at 1093-94 (Magill, J., special concurrence).

[39] Silveira, 328 F.3d 567 (9th Cir. 2003). (Judge Pregerson, dissenting, "[T]he panel misses the mark by interpreting the Second Amendment right to keep and bear arms as a collective right, rather than as an individual right. Because the panel's decision abrogates a constitutional right, this case should have been reheard en banc." *Id.* at 568. Judge Kozinski, dissenting, "The sheer ponderousness of the panel's opinion—the mountain of verbiage it must deploy to explain away these fourteen words of constitutional text—refutes its thesis far more convincingly than anything I might say. The panel's labored effort to smother the Second Amendment by sheer body weight has all the grace of a sumo wrestler trying to kill a rattlesnake by sitting on it—and is just as likely to succeed." *Id.* at 570.).

[40] Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007).

Parker v. District of Columbia

In *Parker*, six residents of the District of Columbia challenged three provisions of the District's 1975 Firearms Control Regulation Act: DC Code § 7-.....02(a)(4), which generally barred the registration of handguns, thus effectively prohibiting of possession of handguns in the District; § 22-4504(a), which prohibited carrying a pistol without a license (to the extent the provision would prevent a registrant from moving a gun from one room to another within his or her home); and § 7-.....02, which required all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device.[41]

The *Parker* court first dismissed the claims of five of the six plaintiffs upon determining that the District's general threat to prosecute violations of its gun control laws did not constitute an injury sufficient to confer standing on citizens who had only expressed an intention to violate the District's gun control laws but had not suffered any injury in fact.[42] The remaining plaintiff, Dick Heller, was found to have standing due to the fact that he had applied for, and had been denied, a license to possess a handgun. Based on this, the court determined that the denial of a license "constitutes an injury independent of the District's prospective enforcement of its gun laws."[43] The court also allowed Heller's claims challenging § 22-4504(a) (prohibiting the carriage of a pistol without a license) and § 7-.....02 (requiring firearms be kept unloaded and disassembled or bound by a trigger lock) to stand, as they "would amount to further conditions on the [right] Heller desires."[44]

The court then turned to its substantive consideration of the Second Amendment, engaging in a textual and historical analysis that largely mirrored the approach of the Fifth Circuit in *Emerson*. The court placed particular importance on the "word[s] ... the drafters chose to describe the holders of the right—'the people.'"[45] Stating that the phrase "the people" is "found in the First, Fourth, Ninth, and Tenth Amendments," and that "[i]t has never been doubted that these provisions were designed to protect the rights of *individuals*," the court stated that it necessarily follows that the Second Amendment likewise confers an individual right.[46] The court also rejected the contention that the prefatory clause of the amendment ("A well regulated Militia, being necessary to the security of a free State") qualified the effect of its operative clause ("the right of the people to keep and bear Arms, shall not be infringed"), based on its characterization of the historical factors at play. According to the court, early Congresses recognized that the militia existed as all "able-bodied men of a certain age," independent of any governmental creation, but also that a militia nevertheless required governmental organization to be effective.[47] This

[41] *Id.* at 373.

[42] In making this finding, the court relied upon its prior holdings in *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997) and *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005). Based on those cases, the *Parker* court determined that the "plaintiffs were required to show that the District had singled them out for prosecution," as opposed to making a showing of general threat of prosecution stemming from a potential future violation of the District's gun control laws. Parker, 478 F.3d at 374. While noting that Supreme Court precedent generally allows for more relaxed standing requirements when faced with a "pre-enforcement challenge to a criminal statute that allegedly threatened constitutional rights," the *Parker* court stated that it was nonetheless bound by its decisions in *Navegar* and *Seegars* in the absence of an *en banc* decision overruling those cases. *Id.*

[43] *Id.* at 376.

[44] *Id.*

[45] *Id.* at 381.

[46] *Id.*

[47] *Id.* at 387-88.

interpretation enabled the court to dispose of the District's argument that "a militia did not exist unless it was subject to state discipline and leadership."[48] By specifically rejecting the notion that there is a state organization requirement for the creation of a militia, the court was able to interpret the prefatory clause as encompassing a broad swath of the populace, irrespective of a state's right to raise a collective protective force.[49] The court concluded its analysis by stating: "The important point, of course, is that the popular nature of the militia is consistent with an individual right to keep and bear arms: Preserving an individual right was the best way to ensure that the militia could serve when called."[50]

The *Parker* court also addressed the District's argument that it was not subject to the restraints of the Second Amendment because it is a purely federal entity. This argument was predicated on the supposition that since the District is not a state, no federalism concerns are posed within the context of the Second Amendment as there is no possibility that the exercise of legislative power would unconstitutionally encumber the organization of a state militia, that is, "interfere with the 'security of a free State.'"[51] The court, in rejecting the District's argument, referred to it as an "appendage of the collective right position" and made note that "the Supreme Court has unambiguously held that the Constitution and Bill of Rights are in effect in the District."[52]

The final argument addressed by the court in *Parker* was the District's contention that "even if the Second Amendment protects an individual right and applies to the District, it does not bar the District's regulation, indeed, its virtual prohibition, of handgun ownership."[53] Engaging in a historical analysis, the court determined that long guns (such as muskets and rifles) and pistols were in "common use" during the era when the Second Amendment was adopted.[54] While noting that modern handguns, rifles, and shotguns are "undoubtedly quite improved over [their] colonial-era predecessors," the court held that the "modern handgun ... is, after all, a lineal descendant" of the pistols used in the Founding-era and that they "certainly bear 'some reasonable relationship to the preservation or efficiency of a well regulated militia,'" thereby meeting the standard delineated in *Miller*.[55] The court further rejected the argument that the Second Amendment applies only to colonial era weapons, stating that "just as the First Amendment free speech clause covers modern communication devices unknown to the Founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a 'search,' the

[48] *Id.* at 386.

[49] *Id.* at 389.

[50] *Id.*

[51] *Id.* at 395.

[52] *Id.* Judge Henderson, in her dissent, argued that the District was not a "state" within the meaning of the Second Amendment because courts have held that a determination as to whether the District qualifies as a state under a certain constitutional provision is dependent on the "character and aim of the specific provision involved." *Id.* at 406 (Henderson, dissenting). In this case, Judge Henderson maintained that the "Second Amendment's 'character and aim' does not require [treatment of] the District as a State," because it "had—and has—no need to protect itself from the federal government," which was the primary reason the Second Amendment was drafted. *Id*. at 406-07 (Henderson, dissenting).

[53] *Id.* at 397.

[54] *Id.* at 398.

[55] *Id.* The *Parker* court refers Supreme Court's decision in *Miller* that set forth the rationale that the applicability of the Second Amendment depends upon the type of weapon possessed by an individual and that the weapon, to be protected under the amendment, must have some reasonable relationship to the preservation of a well-regulated militia, see *supra* footnotes 8-10 and accompanying text.

Second Amendment protects the possession of the modern-day equivalents of the colonial pistol."[56]

The court stressed that its conclusion should not be taken to suggest that "the government is absolutely barred from regulating the use and ownership of pistols," stating that "the protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment."[57] The court stated that its holding did not conflict with earlier Supreme Court determinations that existing laws prohibiting the concealed carriage of weapons or depriving convicted felons of the right to keep and bear arms "[do] not offend the Second Amendment."[58] According to the court, regulations of this type "promote the government's interest in public safety consistent with our common law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised."[59] It went on to state other "[r]easonable regulations also might be thought consistent with a 'well regulated Militia,'" including but not necessarily limited to, the registration of firearms (on the basis that it would give the government an idea of how many would be armed for militia service if called upon), or reasonable firearm proficiency testing (as this would promote public safety and produce better candidates for service).[60]

Applying these standards to the provisions of the DC Code at issue, the court ruled that each challenged restriction violated the protections afforded by the Second Amendment. With regard to § 7-.....02(a)(4) (prohibiting the registration of a pistol), the court stated: "Once it is determined—as we have done—that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them."[61] Turning to § 22-4504(a) (prohibiting the carriage of a pistol without a license, inside or outside the home), the court stated: "[J]ust as the District may not flatly ban the keeping of a handgun in the home, obviously it may not prevent it from being moved throughout one's house. Such a restriction would negate the lawful use upon which the right was premised—i.e., self defense."[62] Finally, with respect to § 7-.....02 (requiring that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device), the court stated: "[L]ike the bar on carrying a pistol within the home, [this provision] amounts to a complete prohibition on the lawful use of handguns for self-defense. As such, we hold it unconstitutional."[63]

District of Columbia v. Heller

On November 20, 2007, the Supreme Court granted the District of Columbia's petition for *certiorari*, though limiting it to the question of "[w]hether the following provisions, DC Code §§ 7-.....02(a)(4), 22-4504(a), and 7-.....02, violated the Second Amendment rights of

[56] *Id.*

[57] *Id.* at 399.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 400.

[62] *Id.*

[63] *Id.* at 401.

individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?"[64]

Oral Argument

On March 18, 2008, the Supreme Court heard oral argument for *Heller*, considering in detail many of the issues raised by the decision in *Parker*. Based on the questions and comments of the Justices, it was widely assumed that the Court would hold that the Second Amendment does in fact confer an individual right to keep and bear arms.[65] In particular, Chief Justice Roberts and Justices Alito and Scalia all made statements indicating that they support an individual right interpretation. For instance, responding to the Petitioner's assertion that the prefatory clause of the amendment confirms that the right is militia related, Chief Justice Roberts stated: "[I]t's certainly an odd way in the Second Amendment to phrase the operative provision. If it is limited to State militias, why would they say 'the right of the people'? In other words, why wouldn't they say 'State militias have the right to keep arms'?"[66] Likewise, Justice Scalia declared:

> I don't see how there's any, any, any contradiction between reading the second clause as a—as a personal guarantee and reading the first one as assuring the existence of a militia, not necessarily a State-managed militia because the militia that resisted the British was not State-managed. But why isn't it perfectly plausible, indeed reasonable, to assume that since the framers knew that the way militias were destroyed by tyrants in the past was not by passing a law against militias, but by taking away the people's weapons—that was the way militias were destroyed. The two clauses go together beautifully: Since we need a militia, the right of the people to keep and bear arms shall not be infringed.[67]

Additionally, Justice Kennedy indicated that he would support an individual right interpretation, suggesting that the purpose of the prefatory clause was to "reaffirm the right to have a militia," with the operative clause establishing that "there is a right to bear arms."[68] Justice Kennedy's questioning further indicated that he might view a right to self-defense as being of a constitutional magnitude, suggesting that the Framers may have also been attempting to ensure the ability of "the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies."[69] While Justice Thomas remained silent during the oral argument, he had made statements in the past indicating support for an individual right interpretation of the Second Amendment.

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[64] District of Columbia v. Heller, 128 S. Ct. 645 (November 20, 2007). The District of Columbia's petition for *certiorari* asked the Court to consider the question of "[w]hether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns." Petition for Writ of Certiorari, District of Columbia v. Heller, 128 S. ct. 2783 (2008) (No. 07-2390), 2007 WL 2571686. The respondents, Heller, asked the Court to consider "[w]hether the Second Amendment guarantees law-abiding, adult individuals a right to keep ordinary, functional firearms, including handguns, in their homes." Brief in Response to Petition for a Writ of Certiorari, Heller, 128 S. Ct. 2783 (No. 07-290), 2007 WL 2962912.

[65] *See*, Linda Greenhouse, *Court Weights Right to Guns, And Its Limits*, N.Y. Times, March 19, 2008, at A-1 ("A majority of the Supreme Court appeared ready ... to embrace, for the first time in the country's history, and interpretation of the Second Amendment that protects the right to own a gun for personal use.")

[66] Transcript of Oral Argument at 4, *Heller*, 128 S. Ct. 2783 (No. 07-290) *available at*, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf.

[67] *Id.* at 7.

[68] *Id.* at 5-6.

[69] *Id.* at 8.

The Decision in *Heller*

On June 26, 2008, the Supreme Court issued its decision, holding by a vote of 5-4 that the Second Amendment protects an individual right to possess a firearm, unconnected to service in a militia, and protects the right to use that arm for traditionally lawful purposes such as self-defense within the home.[70] The opinion engaged in an extensive analysis of the text of the amendment. It first focused on the operative clause of the amendment ("the right of the people to keep and bear Arms, shall not be infringed"), finding that the textual elements of this clause and the historical background of the amendment "guarantee the individual right to possess and carry weapons in case of confrontation."[71] With regard to the prefatory clause ("A well regulated Militia, being necessary to the security of a free State,") the Court held that the term "militia" refers to all able-bodied men, as opposed to state and congressionally regulated military forces described in the Militia Clauses of the Constitution. The Court further held that "the adjective 'well-regulated' implied nothing more than imposition of proper discipline and training," and that the phrase "security of a free State" refers to the security of a free polity as opposed to the security of each of the several states.[72]

After analyzing the operative and prefatory clause, the Court then addressed the issue of whether the prefatory clause "fits" with the operative clause that "creates an individual right to keep and bear arms." The Court declared that the two clauses "fit[] perfectly" when viewed in light of the historical backdrop that motivated adoption of the Second Amendment.[73] In particular, the Court pointed to the concern, raised by Justice Scalia in oral argument, of the Founding generation's knowledge that the federal government would disarm the people in order to disable the citizens' militia rather than banning the militia itself, which would then enable a politicized standing army or a select militia to rule. According to the Court, the amendment was thus designed to prevent Congress from abridging the "ancient right of individuals to keep and bear arms, so that the ideal of a citizens' militia would be preserved."[74]

After reaching this conclusion, the Court examined its prior decisions relating to the Second Amendment in order to ascertain "whether any of [its] prior precedents foreclose[] the conclusions [it] reached about the meaning of the Second Amendment." The Court first considered its ruling in *United States v. Cruikshank*, which held that the Second Amendment does not by its own force apply to anyone other than the federal government. There, the *Cruikshank* Court vacated the convictions of a white mob for depriving blacks of their right to keep and bear arms. Whereas past lower courts interpreted *Cruikshank* to support the proposition that the Second Amendment does not confer an individual right, the *Heller* Court stated that the decision in *Cruikshank* "supports, if anything, the individual-rights interpretation."[75] The Court stressed that their decision in *Cruikshank* described the right protected by the Second Amendment as the "bearing [of] arms for a lawful purpose," and that "the people must look for their protection

[70] District of Columbia v. Heller, 554 U.S. 570 (2008). The majority opinion was authored by Justice Scalia, and was joined by Roberts, C.J., and Kennedy, Thomas, and Alito, JJ. Justice Stevens filed a dissenting opinion, in which Souter, Ginsburg, and Breyer, JJ., joined. Justice Breyer filed another dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined.

[71] *Id.* at 591.

[72] *Id.* at 595-596.

[73] *Id.* at 598.

[74] *Id.* at 599.

[75] *Id.* at 620.

against any violation by their fellow-citizens of the rights it recognizes to the States' police power." This discussion in *Cruikshank*, according to the Court in *Heller*, "makes little sense if it is only a right to bear arms in a state militia."[76]

The Court then turned to its prior ruling in *Presser v. Illinois*, which held that the right to keep and bear arms was not violated by a law that prohibited groups of men "to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law."[77] The *Heller* Court stated that this holding in *Presser* "[did] not refute the individual-rights interpretation of the Amendment," and has no bearing on the Second Amendment's "meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations."[78]

Regarding the holding in *United States v. Miller*, the *Heller* Court rejected the assertion that the decision in *Miller* established that the "Second Amendment 'protects the right to keep and bear arms for certain military purposes, but ... does not curtail the legislature's power to regulate the nonmilitary use and ownership of weapons.'"[79] The Court declared that "*Miller* did not hold that and cannot be possibly read to have held that," given that the decision in *Miller* was predicated on the determination that the "*type of weapon* was not eligible for Second Amendment Protection."[80] According to the *Heller* Court, the holding in *Miller* "is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia')."[81] The Court went on to note, "[h]ad the [*Miller*] Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen."[82] The Court concluded its consideration of this issue by stating, "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons."[83]

Having determined that the Second Amendment confers an individual right and that precedent supports such an interpretation, the Court stressed, "like most rights, the right secured by the Second Amendment is not unlimited."[84] The Court noted that the right at issue had never been construed as allowing individuals "to keep and carry any weapons whatsoever in any manner whatsoever and for whatever purpose," and that "the majority of the 19th century courts to

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[76] *Id.* (citing United States v. Cruikshank, 92 U.S. 532, 553 (1875); Justice Stevens, in dissent, disagreed with "the majority's assertion that the Court in *Cruikshank* 'described the right protected by the Second Amendment as "bearing arms for a lawful purpose,"' (quoting Cruikshank, 92 U.S. at 553).… The *Cruikshank* Court explained that the defective *indictment* contained such language, but the Court did not itself describe the right or endorse the indictment's description of the right." (emphasis in original). *See* Heller, 128 S. Ct. at 673. The majority countered Justice Stevens's point by stating "in explicit reference to the right described in the indictment, the Court stated that 'The second amendment declares that it [*i.e.*, the right of bearing arms for a lawful purpose] shall not be infringed.'" *See id*. at 620, n 22.

[77] Heller, 128 S. Ct. at 620 (citing Presser v. Illinois, 116 U.S. 252, 264-5 (1886)).

[78] *Id.* at 621.

[79] *Id.* (quoting Stevens, J., dissenting).

[80] *Id.* at 622 (emphasis in original).

[81] *Id.*

[82] *Id.*

[83] *Id.* at 623.

[84] *Id.* at 626.

consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."[85] Moreover, the Court's opinion appears to indicate that current federal firearm laws are constitutionally tenable:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [fn 26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.][86]

The Court further stressed:

> We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." [citation omitted] We think that limitation is fairly supported by the historical tradition of prohibiting the carrying "dangerous and unusual weapons." [citations omitted][87]

The Court in *Heller* ultimately affirmed the holding in *Parker v. District of Columbia*,[88] ruling unconstitutional the three relevant provisions of the DC Code.[89] The Court then declared that the inherent right of self-defense is central to the Second Amendment right, and that the District's handgun ban amounted to a prohibition of an entire class of arms that has been overwhelmingly utilized by American society for that purpose.[90] It did not specify a governing standard of review for Second Amendment issues, but stated that the District's handgun ban violates "any of the standards of scrutiny that we have applied to enumerated constitutional rights."[91] The Court also struck down as unconstitutional the District's requirement that any lawful firearm in the home be disassembled or bound by a trigger lock, as such requirement "makes it impossible for citizens to use arms for the core lawful purpose of self-defense."[92] However, the Court's opinion did not address the District's licensing requirement (§ 22-4504), making note of Heller's concession that

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[85] *Id.*

[86] *Id.* at 626-627.

[87] *Id.* at 627. The language of the Court seems to indicate that current federal restrictions on the ownership of fully automatic weapons are constitutionally valid. Although the Court further noted that "[i]t may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause ... [T]he fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right," (*id.*), it is interesting to note that the Court's analysis on this point does not give any consideration to the constitutional implications of the role that longstanding, legislatively imposed restrictions may play in preventing certain types of weapons from being "typically possessed by law-abiding citizens" or from coming into "common use."

[88] Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007).

[89] *See*, footnotes 61-63 and accompanying text, *supra*.

[90] *Id.* at 628-629. Earlier in its opinion, the Court stated: "Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communication, [citation omitted] and the Fourth Amendment applies to modern forms of search, [citation omitted] the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582.

[91] *Id.* at 628.

[92] *Id.* at 630.

such a requirement would be permissible if enforced in a manner that is not arbitrary and capricious.[93]

Subsequent to the Supreme Court decision, the District of Columbia amended its firearms laws to be in compliance with the ruling. However, there has been much legislative movement with respect to the District's firearms laws. For more information on DC gun laws, see CRS Report R40474, *DC Gun Laws and Proposed Amendments*, by (name redacted).

The Second Amendment Post-*Heller*

Although the decision in *Heller* marked the first time in almost 70 years that the Supreme Court addressed the nature of the right conferred by the Second Amendment, the Court itself noted that its decision did not constitute "an exhaustive historical analysis ... of the full scope of the Second Amendment."[94] Consequently, while the Court's opinion is extremely important simply by virtue of its determination that the Second Amendment protects an individual right to possess a firearm, it left unanswered many questions of significant constitutional magnitude.

The Court acknowledged the criticism that its ruling leaves "so many applications of the right in doubt," and that "it does not provid[e] extensive historical justification for those regulations of the right," which the Court described as constitutionally permissible.[95] In response to such criticism, the Court explained:

> [S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.... And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.[96]

A significant question left open by the Court centers on the standard of scrutiny that should be applied to laws regulating the possession and use of firearms.[97] In *Heller*, the Court refused to establish or identify any such standard, declaring instead that the challenged provisions were unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[98] Yet, the Court did reject a test grounded in rational basis scrutiny, stating that "if all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[99] And, the Court explicitly rejected Justice Breyer's argument, raised in his dissent, that an "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects

[93] *Id.* at 630-631.

[94] *Id.* at 626.

[95] *Id.* at 635 (quoting Breyer, J., dissenting).

[96] *Id.*

[97] Generally there are three levels of judicial scrutiny. First, strict scrutiny, the most rigorous, requires a statute to be narrowly tailored to serve a compelling state interest. Second, intermediate scrutiny, requires a statute to further a government interest in a way that is substantially related to that interest. Third, the rational basis standard merely requires the statute to be rationally related to a legitimate government function. *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies §§ 6.5, 10.1.2 (3d ed. 2006).

[98] Heller, 554 U.S. at 628.

[99] *Id.* at n.27.

upon other important governmental interests" should be applied.[100] Responding to Justice Breyer's suggesting, the Court stated:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.[101]

Another issue that was unresolved by the Court is whether the Second Amendment applies to the states. However, this issue was soon settled in the 2009 term of the Supreme Court when it decided *McDonald v. City of Chicago*, subsequently discussed.

The Second Amendment—Does It Apply to the States?

On June 28, 2010, the Supreme Court issued its decision in *McDonald v. City of Chicago*.[102] The issue before the Court in *McDonald* was whether the Second Amendment applies to, or is incorporated against, the states. An incorporation analysis generally asks whether the protections provided for in the first eight amendments of the Bill of Rights apply to state governments in the same manner that they directly apply to the federal government. Judicial treatment of incorporation has evolved over time, with the Court inquiring: (1) if the first eight amendments apply directly to the states; (2) if the Privileges or Immunities Clause of the Fourteenth Amendment guarantees these rights; and (3) if the Due Process Clause of the Fourteenth Amendment incorporates the protections provided for in the first eight amendments. These three inquiries are explained below.

Direct Application

Initially, in the early 19th century, the Supreme Court had ruled in *Barron v. Mayor & City Council of Baltimore* that the protection of individual liberties in the Bill of Rights applied only to the federal government, not to state or local governments.[103] Chief Justice John Marshall, writing for the Court, stated: "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[104] He further stated that had the framers intended the Bill of Rights to apply to the states, "they would have declared this purpose in plain and intelligible language."[105] Although application of the Bill of Rights solely to the federal government would mean that state and local governments could then be free to infringe upon these individual protections, Chief Justice

[100] *Id.* at 634-635 (quoting Breyer, J., dissenting).

[101] *Id.*

[102] McDonald v. City of Chicago, 561 U.S. ___; 130 S. Ct. 3020 (2010).

[103] Barron v. Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[104] *Id.* at 247.

[105] *Id.* at 250.

Marshall observed that "[e]ach state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the power of its particular government, as its judgment dictated."[106] Although the argument continued to be made that the Bill of Rights applied directly to the states, the Court rejected this contention time and time again.[107]

Privileges or Immunities Clause of the Fourteenth Amendment

It was not until after the Civil War when the Fourteenth Amendment was ratified that claimants resorted to the Privileges or Immunities Clause of Section 1 of the amendment for judicial protection. The Privileges or Immunities Clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[108]

Five years after the Fourteenth Amendment was ratified, the Supreme Court, in *Slaughter-House Cases*, rejected the plaintiffs' assertions that a state law, which granted a monopoly to the City of New Orleans, was in violation of the U.S. Constitution because it created involuntary servitude, denied them equal protection of the laws, and abridged their privileges or immunities as citizens under the Thirteenth and Fourteenth Amendments.[109] In rejecting the plaintiffs' challenge, the Court narrowly construed all of these provisions. With respect to the Privileges or Immunities Clause, the Court held that this Clause was not meant to protect individuals from state government actions and was not meant to be a basis for federal courts to invalidate state laws.[110] In doing so, the Court first acknowledged: "It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."[111] After making this distinction, the Court specifically stated that "it is only the [privileges and immunities of the citizens of the United States] which are placed by this clause under the protection of the Federal Constitution, and that the [privileges and immunities of the citizen of the State] whatever they may be, are not intended to have any additional protection by the paragraph of this amendment."[112] Furthermore, the Court stated that "privileges and immunities relied on in the argument are those which belong to the citizens of the States as such, and that they are left to State governments for security and protection, and not by this article [the Fourteenth Amendment] placed under the special care of the Federal government."[113] While this ruling has never been expressly overturned, and therefore

[106] *Id.* at 247.

[107] *See* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469 (1833); Permoli v. First Municipality, 44 U.S. (3 How.) 589 (1845); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Withers v. Buckley, 61 U.S. (20 How.) 84 (1858); Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1867); Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321 (1869).

[108] U.S. Const. amend. XIV, § 1. *See also* Constitution Annotated, 1001 (2004).

[109] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 85 (1873).

[110] *Id.* at 77-78.

[111] *Id.* at 74.

[112] *Id.*

[113] *Id.* at 78. While the Court in *Slaughter-House* declined to "defin[e] the privileges and immunities of citizens of the United States which no State can abridge," it had suggested that some of these privileges and immunities under the Fourteenth Amendment are "those which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. These include the right to come to the seat of government, to access the seaports, to "demand the care and protection of the federal government over one's life, liberty, and property when on the high seas or within the jurisdiction of a foreign government." *Id.* See also *infra* footnote 224 for discussion on privileges and immunities of citizens of the several States.

generally continues to preclude use of the Privileges or Immunities Clause to apply the Bill of Rights,[114] Justice Thomas addressed the Clause as it applies to the Second Amendment at length in his concurring opinion in *McDonald* (see *infra*).

Due Process Clause of the Fourteenth Amendment

In the early 20th century, the Supreme Court in *Twining v. New Jersey*[115] recognized the possibility that the Due Process Clause of the Fourteenth Amendment incorporates provisions of the Bill of Rights, thereby making them applicable to state and local governments. The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."[116] In *Twining*, the Court observed that

> [I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law ... not because those rights are enumerated in the first eight Amendments, but because they are of such nature that they are included in the conception of due process of law.[117]

Although the Court acknowledged that the Due Process Clause included "principles of justice so rooted in the tradition and conscience of our people as to be ranked fundamental,"[118] and therefore "implicit in the concept of ordered liberty,"[119] the Court, despite debate,[120] has never endorsed total incorporation of all of the Bill of Rights. Rather, the Court embraced what has become known as the doctrine of "selective incorporation," which holds that the Due Process Clause incorporates the text of certain provisions of the Bill of Rights.[121] It was in *Gitlow v. New York* that the Supreme Court for the first time said that the First Amendment's protection of freedom of speech applies to the states through its incorporation into the Due Process Clause of the Fourteenth Amendment.[122] Although the Court held that New York's criminal anarchy statute did not violate the Fourteenth Amendment because the state was properly exercising its police power, the Court, in finding incorporation, stated, "[F]reedom of speech and of the press ... are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[123]

Prior to *McDonald*, the Supreme Court had found the following provisions of the Bill of Rights to be incorporated:

[114] The Court, however, revived the Privileges or Immunities Clause in *Saenz v. Roe*, 526 U.S. 489 (1999), by using it to protect the right to travel.

[115] Twining v. New Jersey, 211 U.S. 78 (1908).

[116] U.S. Const. amend. XIV, § 1.

[117] Twining, 211 U.S. at 99.

[118] Palko v. Connecticut, 302 U.S. 319, 325 (1937) (citations omitted).

[119] *Id.*

[120] *See* Adamson v. California, 332 U.S. 46, 69 (1947) (Black, J. dissent).

[121] *See also* Constitution Annotated, 999-1008 (2004).

[122] Gitlow v. New York, 268 U.S. 652 (1925).

[123] *Id.* at 666.

- The First Amendment's establishment clause,[124] free exercise clause,[125] and protection of speech,[126] press,[127] assembly,[128] and petition.[129]
- The Fourth Amendment's protection against unreasonable searches and seizures and the requirement for a warrant based on probable cause; also the exclusionary rule, which prevents the government from using evidence obtained in violation of the Fourth Amendment.[130]
- The Fifth Amendment's prohibition of double jeopardy,[131] protection against self-incrimination,[132] and requirement that the government pay just compensation when it takes private property for public use.[133]
- The Sixth Amendment's requirements for speedy[134] and public trial,[135] by an impartial jury,[136] with notice of the charges,[137] and for the chance to confront adverse witnesses,[138] to have compulsory process to obtain favorable witnesses,[139] and to have assistance of counsel if the sentence involves possible imprisonment.[140]
- The Eight Amendment's prohibition against excessive bail[141] and cruel and unusual punishment.[142]

Over time, the Court has articulated various tests for deciding whether a provision of the Bill of Rights is incorporated through the Due Process Clause of the Fourteenth Amendment. The Supreme Court in *Duncan v. Louisiana*[143] summarized these formulations, stating, "the question has been asked whether a right is among those 'fundamental principles of liberty and justice

[124] Everson v. Board of Ed., 330 U.S. 1 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948); Wallace v. Jaffree, 472 U.S. 38 (1985).

[125] Hamilton v. Regents, 293 U.S. 245, 262 (1934); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[126] Gitlow v. New York, 268 U.S. 652 (1925); Fiske v. Kansas, 274 U.S. 380 (1927); Stromberg v. California, 283 U.S. 359 (1931).

[127] Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931).

[128] DeJonge v. Oregon, 299 U.S. 353 (1937).

[129] DeJonge v. Oregon, 299 U.S. 353 (1937); Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); Bridges v. California, 314 U.S 252 (1941).

[130] Wolf v. Colorado, 338 U.S. 784 (1949); Mapp v. Ohio, 367 U.S. 643 (1961).

[131] Benton v. Maryland, 395 U.S. 784 (1969).

[132] Malloy v. Hogan, 378 U.S. 1 (1964); Griffin v. California, 380 U.S. 609 (1965).

[133] Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

[134] Klopfer v. North Carolina, 386 U.S. 213 (1967).

[135] *In re* Oliver, 333 U.S. 257 (1948).

[136] Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. Louisiana, 379 U.S. 466 (1965). *See also* Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that the Sixth Amendment is incorporated to the states and guarantees a jury trial for serious criminal offenses).

[137] *In re* Oliver, 333 U.S. 257 (1948).

[138] Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

[139] Washington v. Texas, 388 U.S. 14 (1967).

[140] Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

[141] Schilb v. Kuebel, 404 U.S. 357 (1971).

[142] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Robinson v. California, 370 U.S. 660 (1962).

[143] Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

which lie at the base of all our civil and political institutions ...'[144] whether it is 'basic in our system of jurisprudence ...'[145] and whether it 'is a fundamental right, essential to a fair trial.'[146]„ The Court also noted, in discussing state criminal processes, that "the question ... is ... whether given this kind of [common-law] system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."[147]

Has the Supreme Court Addressed Incorporation of the Second Amendment via the Due Process Clause?

Over 100 years ago, the Supreme Court held in *United States v. Cruikshank* that the Second Amendment does not act as a constraint upon state law.[148] In its brief treatment of the Second Amendment, the Court in *Cruikshank* stated that "this is one of the amendments that has no other effect than to restrict the powers of the national government."[149] This holding was reaffirmed in *Presser v. Illinois*, where the Court further commented that because "all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States," the "States cannot, even laying the constitutional provision [aside], prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government."[150] In other words, the Court seemed to be of the opinion that there was no need to rely upon the Second Amendment to act as a constraint upon state law, because states could not go so far as to prohibit the people from owning firearms as doing so would interfere with the United States' ability to rely on its reserved military force—defined as "citizens capable of bearing arms"—to maintain the public security. Both of these decisions were decided shortly after the *Slaughter-House Cases* decision, and prior to the advent of modern incorporation principles (discussed above).

In *Heller*, the Court commented upon the issue of incorporation, stating:

> With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our decisions in *Presser v. Illinois* (citation omitted) and *Miller v. Texas*, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.[151]

At the time, this statement seemed to leave open the possibility that were the issue of incorporation to come before the Supreme Court, the Court would either support the application of modern incorporation doctrine principles to the Second Amendment or continue with the

[144] Powell, 287 U.S. at 67.

[145] *In re* Oliver, 333 U.S. at 272.

[146] Gideon, 372 U.S. at 343-44.

[147] Duncan, 391 U.S. at 149-50 n. 14.

[148] United States v. Cruikshank, 92 U.S. 542, 553 (1875).

[149] *Id.*

[150] Presser v. Illinois, 116 U.S. 252, 265 (1886).

[151] Heller, 554 U.S. at 620, n.23.

precedents found in *Cruikshank* and *Presser* that the Second Amendment does not apply to the states.

Post-*Heller* Appellate Decisions and Incorporation of the Second Amendment

After the *Heller* decision, three courts of appeals addressed whether the Second Amendment applies to the states, that is, via direct application or via incorporation through the Due Process Clause of the Fourteenth Amendment. The U.S. Courts of Appeals for the Second Circuit and Seventh Circuit both held that the Second Amendment does not apply to the states, whereas the Court of Appeals for the Ninth Circuit in *Nordyke v. King* held that the Second Amendment is applicable to the states, though it later vacated its decision in light of *McDonald*.[152]

The Second and Seventh Circuit Decisions

The U.S. Court of Appeals for the Second Circuit (Second Circuit) was the first to address this issue in *Maloney v. Rice*.[153] In *Maloney*, the plaintiff sought a declaration that a New York penal law that punishes the possession of nunchukas[154] was unconstitutional. On appeal, the plaintiff argued that the state statutory ban violates the Second Amendment because it infringes on his right to keep and bear arms.[155] The court, citing *Presser*, held that the state law did not violate the Second Amendment because "it is settled law ... that the Second Amendment applies only to limitations the federal government seeks to impose on this right."[156] The court noted that, although *Heller* might have questioned the continuing validity of this principle, Supreme Court precedent directed them to follow *Presser* because "[w]here, as here, a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.'"[157]

Similarly, in *National Rifle Association v. City of Chicago*,[158] the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) held that the Second Amendment does not apply to the states. Here, the National Rifle Association (NRA) appealed the decision of the lower court to dismiss its

[152] Nordyke v. King, No. 07-15763 (9th Cir. July 12, 2010) (order to vacate panel opinion in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009) and to remand case for further consideration in light of *McDonald v. City of Chicago*).

[153] Maloney v. Rice, 554 F.3d 56 (2d Cir. 2009).

[154] A "chuka stick" (or "nunchuka") is defined as "any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain ... capable of being rotated in such a manner as to inflict serious injury upon a person." *Id.* at 58 (citing N.Y. Penal Law § 265.01(1)).

[155] Of note, while *Maloney* was dismissed on grounds that the Second Amendment is not incorporated, the presence of nunchukas as the weapon of issue begs the question of whether the Second Amendment would protect such "arms." See *infra* note 208 and accompanying text.

[156] Maloney, 554 F.3d at 58.

[157] *Id.* at 59 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (affirming a Fifth Circuit Court of Appeals decision but stating "We do not suggest the Court of Appeals on its own authority should have taken the step of renouncing *Wilko* [v. Swann]. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.")).

[158] Nat'l Rifle Ass'n v. City of Chicago, 567 F.3d 856 (7th Cir. 2009) [hereinafter NRA v. City of Chicago], *rev'd* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

suits against two municipalities on the ground that *Heller* dealt with law enacted under the authority of the national government, while the City of Chicago and Village of Oak Park are subordinate bodies of a state.[159] Although the *NRA* case was decided after the Ninth Circuit's decision in *Nordyke v. King*, which held the opposite, the Seventh Circuit stated that the Supreme Court's decisions in *Cruikshank*, *Presser*, and *Miller* still control, as they have direct application in the case. The court noted that, although *Heller* questioned *Cruikshank*, this "[did] not license inferior courts to go their own ways.... If a court of appeals may strike off on its own, this not only undermines the uniformity of national law but also may compel the Justices to grant *certiorari* before they think the question ripe for decision."[160]

The Ninth Circuit Decision

On April 20, 2009, the U.S. Court of Appeals for the Ninth Circuit in *Nordyke v. King* held that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment and applied it against the states and local governments.[161] However, the Chief Judge issued an order on July 29, 2009, stating that the Ninth Circuit would rehear the case *en banc* and that the three-judge panel decision issued in April 2009 was not to be cited as precedent by or to any court of the Ninth Circuit.[162] Following the *McDonald* decision, the Ninth Circuit vacated the panel decision and remanded the case for further consideration.[163] Despite these developments, this report examines the April 2009 opinion, as the Court in *McDonald* followed a similar analysis when it examined the Second Amendment through the Due Process Clause of the Fourteenth Amendment.

Nordyke stated that there are three doctrinal ways the Second Amendment could apply to the states: (1) direct application, (2) guaranteed as a right by the Privileges or Immunities Clause of the Fourteenth Amendment, or (3) incorporation by the Due Process Clause of the Fourteenth Amendment. Citing precedent, the court held that it was precluded from finding incorporation through the first two options.[164] The court then embarked on an analysis under the Due Process Clause of the Fourteenth Amendment.[165] It began by noting that "[s]elective incorporation is a species of substantive due process, in which the rights the Due Process Clause protects include some of the substantive rights enumerated in the first eight amendments of the Constitution."[166] The court stated that addressing either selective incorporation, which addresses enumerated

[159] *Id.* at 857.

[160] *Id.* at 858.

[161] Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).

[162] Nordyke v. King, No. 07-15763, (9th Cir. 2009 July 29, 2009) (order to rehear case *en banc* and that the three-judge panel opinion shall not be cited).

[163] Nordyke v. King, No. 07-15763 (9th Cir. July 12, 2010) (order to vacate panel opinion in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009) and to remand case for further consideration in light of *McDonald v. City of Chicago*).

[164] The court acknowledged that Supreme Court precedent foreclosed a finding through direct application. Nordyke, 563 F.3d at 446 (citing Barron, 32 U.S. at 247-51). It also acknowledged that the *Slaughter-House Cases* preclude analysis through the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* (citing Slaughter-House Cases, 83 U.S. at 74-5).

[165] The court addressed an earlier Ninth Circuit case, *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992) which held that the Second Amendment applies only to the federal government. The court found that *Fresno Rifle* only decided that the Second Amendment was not incorporated via direct application of the Privileges or Immunities Clause of the Fourteenth Amendment, and that the decision did not reach the question of whether the Second Amendment could be incorporated via the Due Process Clause of the Fourteenth Amendment.

[166] Nordyke, 563 F.3d. at 449.

rights, or substantive due process, which addresses unenumerated rights, requires the court to answer if "a right is so fundamental that the Due Process Clause guarantees it."[167]

To answer this, the Ninth Circuit, although acknowledging other standards used in selective incorporation analyses, applied another standard the Supreme Court used "outside the context of incorporation" to determine whether an individual right unconnected to criminal or trial procedures is a fundamental right protected by substantive due process.[168] Specifically, the Ninth Circuit inquired "whether the right to keep and bear arms ranks as fundamental, meaning 'necessary to an *Anglo-American* regime of ordered liberty' ... [which compelled them] to determine whether the right is 'deeply rooted in this Nation's history and tradition' (emphasis added)."[169] The inquiry "deeply rooted in this Nation's history and tradition" stems from *Moore v. City of East Cleveland*,[170] where the Supreme Court recognized a fundamental right to keep family together that includes an extended family. Noting that "incorporation is logically a part of substantive due process,"[171] the court in *Nordyke* applied the standard from *Moore* because that case noted "the similarity between ... general substantive due process and the incorporation inquiry stated in *Duncan* [*v. Louisiana*]."[172] As will be seen *infra*, the Supreme Court in *McDonald* generally abstained from addressing that its past decisions had linked the Due Process Clause with a substantive due process analysis even though it also utilized the "deeply rooted in our Nation's history" standard. However, Justice Stevens, dissenting, conducted his own substantive due process analysis and concluded that the right is not incorporated.[173]

After engaging in a historical analysis of the right during the Founding era, the post-Revolutionary years, and the post-Civil War era,[174] and drawing from some of the Supreme Court's findings in *Heller*, the Ninth Circuit concluded that the Second Amendment is incorporated and applies against state and local governments because "the crucial role [of this] deeply rooted right ... compels us to recognize that it is indeed fundamental [and] necessary to the Anglo-American conception of the ordered liberty that we have inherited."[175]

Typically, when a right is deemed fundamental, the court must use the strict scrutiny test as the standard of review, meaning that "a law will be upheld if it is necessary to achieve a compelling government purpose."[176] Although the Ninth Circuit concluded that the Second Amendment was a fundamental right, it did not apply the strict scrutiny test to the challenged county ordinance.[177]

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[167] *Id.*

[168] *Id.* at 451.

[169] *Id.*

[170] 431 U.S. 494, 503 (1977).

[171] Nordyke, 563 F.3d at 450.

[172] Moore, 431 U.S. at 503 n. 10.

[173] See *infra* "Justice Stevens's Dissenting Opinion: No Incorporation Under a Substantive Due Process Analysis."

[174] Nordyke, 563 F.3d at 451-57.

[175] *Id.* at 457.

[176] Generally there are three levels of judicial scrutiny. First, strict scrutiny, the most rigorous, requires a statute to be narrowly tailored to serve a compelling state interest. Second, intermediate scrutiny, requires a statute to further an government interest in a way that is substantially related to that interest. Third, the rational basis standard merely requires the statute to be rationally related to a legitimate government function. *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies §§ 6.5, 10.1.2 (3d ed. 2006).

[177] The Alameda County ordinance that was challenged was one that "makes it a misdemeanor to bring onto or to possess a firearm or ammunition on County property." Nordyke, 563 F.3d at 442.

Rather, it noted that the Supreme Court in *Heller* did not announce a standard of review and held that the challenged ordinance, which prohibited the possession of firearms or ammunition on county property, "fits within the exception from the Second Amendment for 'sensitive places' that *Heller* recognized."[178]

The *McDonald v. City of Chicago* Decision

On June 28, 2010, the Supreme Court issued its decision in *McDonald v. City of Chicago*. The petitioners, Otis McDonald and other residents of Chicago and the Village of Oak Park, Illinois, asserted that certain municipal ordinances prevented them from keeping handguns in their homes for self-defense. The Chicago ordinance provided: "No person ... shall ... possess ... any firearm unless such person is the holder of a valid registration certificate of such firearm."[179] The Chicago Code, however, prohibited the registration of most handguns, which "effectively ban[s] handgun possession by almost all private citizens who reside in the City."[180] Similarly, Oak Park made it "unlawful for any person to possess ... any firearm," a term that included "pistols, revolvers, guns and small arms ... commonly known as handguns."[181]

Petitioners advocated for incorporation of the Second Amendment against the states either under the Fourteenth Amendment's Privileges or Immunities Clause or under the Fourteenth Amendment's Due Process Clause.[182] It is worth noting that the petitioners devoted much of their brief and oral argument for application of the Second Amendment via the Privileges or Immunities Clause of the Fourteenth Amendment. On the other hand, the NRA, who was recognized by the Court as a "respondent" in support of the petitioners' (McDonald) group, primarily argued for incorporation of the Second Amendment via the Due Process Clause of the Fourteenth Amendment.[183]

Although five Justices agreed that the Second Amendment applies to the states, these Justices came to different conclusions as to how the amendment is incorporated, resulting in a fractured opinion. Justice Alito delivered the opinion of the Court and concluded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment. This opinion was joined by Chief Justice Roberts, and Justices Scalia and Kennedy. Justice Thomas, however, filed a concurring opinion in which he concluded that the Privileges or Immunities Clause of the

[178] Nordyke, 563 F.3d at 460 (quoting Heller, 554 U.S. at 626-627, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.").

[179] McDonald, 130 S. Ct. at 3026 (citing Chicago, Ill., Municipal Code § 8-20-040(a) (2009)).

[180] *Id.* (citing Chicago, Ill., Municipal Code § 8-20-050(c)).

[181] *Id.* (citing Oak Park, Ill., Municipal Code §§ 27-2-1 (2007), 27-1-1 (2009)).

[182] Brief for Petitioners at i, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521). As a technical note, the term "incorporated" is not generally utilized when asking if a right applies to the states via the Privileges and Immunities Clause of the Fourteenth Amendment. In such cases, the question typically analyzed by the Court is whether the Privileges and Immunities Clause guarantees the right. *See, e.g.*, Saenz v. Roe, 526 U.S. 489 (1999).

[183] The NRA case from the Seventh Circuit had consolidated both the petitioners and respondents in support of petitioners' cases. After the Seventh Circuit issued its decision, each party applied separately to the Supreme Court for *writ of certiorari*—(McDonald v. City of Chicago, docket 08-1521) and (NRA v. Chicago, docket 08-1497). However, the Supreme Court granted *certiorari* only for petitioners (McDonald) but later recognized the NRA as a respondent in support of the petitioners.

Fourteenth Amendment guarantees the right to keep and bear arms. Two dissenting opinions were filed. Justice Stevens opined that whether the Second Amendment applies should be analyzed under a substantive due process analysis, and that "the analysis should depend on whether there is a constitutionally protected liberty to keep handguns in the home ... which he [consequently] did not believe existed due to the 'fundamentally ambivalent relationship' of firearms to liberty."[184] The second dissenting opinion was authored by Justice Breyer, joined by Justices Ginsburg and Sotomayor, who opined that the history of the right is so uncertain that it does not support incorporation; that determining the constitutionality of a particular state gun law is outside the Court's scope and expertise; and that incorporation would intrude significantly upon state police power.

Justice Alito's Majority and Plurality Opinion: Incorporation of the Second Amendment via the Due Process Clause of the Fourteenth Amendment

Justice Alito, writing for the Court, revisited the precedents in *Barron* and *Slaughter-House Cases*, which precluded application of the Bill of Rights either by direct application or the Privileges or Immunities Clause of the Fourteenth Amendment, respectively. Although Justice Alito, writing for the plurality, declined to disturb these holdings, and further acknowledged that the Court's decisions in *Cruikshank*, *Presser*, and *Miller* held that the Second Amendment applies only to the federal government,[185] he stated that those decisions "do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States."[186]

Before analyzing how the Fourteenth Amendment incorporates the Second Amendment, the Court first examined the evolution of its Due Process Clause analysis.[187] It noted five features of its earlier approach to a Due Process Clause analysis, which included

- viewing "the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship";[188]
- the use of "different formulations in describing the boundaries of due process,"[189] which included looking to "immutable principles of justice which no member of the Union may disregard,"[190] or protecting rights that are "so rooted in the traditions and conscience of our people as to be ranked fundamental,"[191] and that are "the very essence of a scheme of ordered liberty ... and essential to 'a fair and enlightened system of justice'";[192]

[184] McDonald, 130 S. Ct. at 3107 (Stevens, J., dissenting).

[185] *Id.* at 3030 (Alito, J., plurality).

[186] *Id.* at 3031.

[187] Justice Thomas joined in section, part III-A and III-B, with the other four Justices, but did not agree to their concluding that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment.

[188] *Id.* (majority) (citing Twining, 211 U.S. at 99).

[189] *Id.*

[190] *Id.* at 3032 (citing Twining, 211 U.S. at 102 (internal quotation marks omitted).

[191] *Id.* (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[192] *Id.* (citing Palko, 302 U.S. at 325).

- asking whether any other "civilized system could be imagined"[193] as not affording a particular procedural safeguard before compelling a state to recognize a particular right;
- recognizing that some rights set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause; and
- holding that even if a right was protected against state infringement that "the protection or remedies afforded against [the state] sometimes differed from the protection or remedies provided against abridgment by the Federal Government."[194]

Out of these five features, the Court pointed out that later cases, which selectively incorporated certain rights, abandoned three of the previously noted characteristics. The Court, instead of examining "*any* civilized system," now asks "whether a particular guarantee is fundamental to *our* scheme of ordered liberty and system of justice."[195] The second feature the Court has shed was any prior "reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause," stating that the Court has incorporated almost all of its provisions, as discussed above. Lastly, the Court has "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,' stating that it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'"[196] With some exceptions,[197] the Court has held that incorporated Bill of Rights protections "'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"[198]

With this modern framework for analyzing if a right comes under the protection of the Due Process Clause, the Court turned to the issue of whether the Second Amendment was just such a right that was incorporated in the concept of due process. The Court, similar to the Ninth Circuit, analyzed whether "the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, (citation omitted) or as [it has] said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition' *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)."[199]

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[193] *Id.* (citing Duncan, 391 U.S. at 149, n. 14).

[194] *Id.* at 3032.

[195] Respondents made the argument that the Court should look at whether a procedural right is fundamental "given this kind of system," referring to the United States, but that for a substantive right, the Court is not limited as to "the context of a particular procedural system, but whether [the substantive right] is more generally implicit in the concept of ordered liberty," thus allowing the Court to examine other civilized systems. Brief for Respondents at 10, n.3, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521). See also *infra* footnote 257.

[196] *Id.* at 3035 (citing Malloy v. Hogan, 378 U.S. 1, 10-11 (1964) (internal quotation marks omitted)).

[197] For example, the Court has held that the Sixth Amendment right to trial by jury does not require unanimous jury verdict in state trials although they are required in federal trials. *See* McDonald, 130 S. Ct. at 3036, n. 14.

[198] *Id.* (citing Malloy, 378 U.S. at 10).

[199] *Id.* at 3036. The Court notably utilized the "deeply rooted in this Nation's history and tradition" inquiry, the same as the Ninth Circuit, to examine the Second Amendment under the Fourteenth Amendment. However, while the Ninth Circuit acknowledged that this test's origins lay outside the "context of selective incorporation " and from *Moore v. City of East Cleveland*, where the Court engaged in a substantive due process analysis of an unenumerated right, the Court in *McDonald* seems to omit the discussion of this connection. See *supra* footnotes 168-173 and accompanying text.

Turning back to its decision in *Heller*, the Court emphasized self-defense as a basic right that is the "central component" of the Second Amendment right. It reiterated that it had found "the need for defense of self, family, and property [as] most acute" in the home and that the right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family."[200] Thus, the Court's decision appeared to concentrate on whether the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment as it was defined in *Heller*, that is, the right to keep and bear arms for a lawful purpose such as self-defense[201] and that it protects those weapons typically possessed by law-abiding citizens for lawful purposes.[202] In the Court's review of historical evidence from both the Framing-era of the Bill of Rights and the ratifying era of the Fourteenth Amendment, it believed it to be "clear that the Framers and ratifiers ... counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[203]

According to the Court, both Federalists and Antifederalists of the Framing-era considered the right to keep and bear arms as fundamental to the newly formed system of government, but differed as to whether the right was sufficiently protected. Federalists believed that the right was adequately protected due to the limited powers assigned to the federal government, while Antifederalists, who feared that the new federal government would infringe on traditional rights, insisted on the adoption of the Bill of Rights as a condition of ratification.[204] By the mid-19th century, the Court found that the Second Amendment "was still highly valued for the purposes of self-defense" even though the perceived threat of the federal government's intrusion had faded.[205]

According to the Court, in the aftermath of the Civil War, southern states and militia members made "systematic efforts" to disarm African Americans, to which the 39th Congress decided that legislative action was necessary. The legislative actions included the Freedmen's Bureau Act and the Civil Rights Act of 1866, both of which the Court found demonstrated that the right to keep and bear arms was still recognized as fundamental.[206] Specifically, Section 14 of the Freedmen's Bureau Act provided that "the right ... to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all citizens ... without respect to race or color, or previous condition of slavery (emphasis added)."[207] Section 1 of the Civil Rights Act, similarly, guaranteed the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[208] Although the Civil Rights Act does not explicitly define the meaning of "all laws and

[200] *Id.* (citing Heller, 128 S. Ct. at 628-629).

[201] Respondents noted that "contentions about the need for firearms for self-defense have long dominated the controversies about the extent to which governments at various levels should regulate or limit firearms. This case, however, does not present any question about the constitutional status ... of an unenumerated right to self-defense, and the presumed existence of such a right would not support incorporating the Second Amendment in any event." Brief for Respondents, *supra* footnote 195, at 37-8.

[202] Heller, 554 U.S. at 625128 S. Ct. at 2786, 2815-16 ("We therefore read [*United States v.*]*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.").

[203] McDonald, 130 S. Ct. at 3042 (majority).

[204] *Id.* at 3037.

[205] *Id.* at 3038.

[206] *Id.* at 3040.

[207] *Id.* (citing 14 Stat. 176-77 (1866)).

[208] *Id.* (citing 14 Stat. 27 (1866)).

proceedings," the Court stated that Representative Bingham, one of the drafters of the Fourteenth Amendment, believed the act "protected the same rights as enumerated in the Freedmen's Bureau bill."[209] Based on this evidence, the Court concluded that "the Civil Rights Act, like the Freedmen's Bureau Act, aimed to protect 'the constitutional right to bear arms' and not simply to prohibit discrimination"[210] and that "[t]oday, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act."[211] In addition, the Court presented excerpts of the congressional debates on the Fourteenth Amendment,[212] and from the period immediately following ratification of the amendment, as well as emphasized the number of state constitutions that recognized the right, as evidence that the right to keep and bear arms was considered fundamental.[213]

Although the Court found incorporation under the Due Process Clause, the plurality chose to address an argument made by respondents concerning the Privileges or Immunities Clause, specifically that the historical record provides no basis for imposing the Second Amendment on the states, and that Section 1, presumably in its entirety,[214] was "overwhelmingly" viewed by Members of the U.S. House of Representatives as an antidiscrimination rule. The respondents' end point seemed to be that mixed understanding and divided views among 19th century legislators and legal scholars alike demonstrate that the public could not have understood the reach of the Privileges or Immunities Clause or understood that the Clause incorporated the Bill of Rights.[215] The Court, however, focused on the assertion that Section 1 would only outlaw discriminatory measures and stated five reasons as to why such a construction would be "implausible." These reasons included (1) that if Section 1 did no more than prohibit discrimination, it would be plausible that "the Fourth Amendment, as applied to the states, would not prohibit all unreasonable searches and seizures, but only discriminatory searches and seizure";[216] (2) that the Freedmen's Bureau Act must be read as more than a simple prohibition of racial discrimination because it would have been nonsensical for Congress to guarantee "the full and equal benefit" of "the constitutional right to bear arms," if it did not exist;[217] and (3) that if the 39th Congress and the ratifying public had simply prohibited racial discrimination with respect to the bearing of arms, opponents of the Black Codes, laws that deprived blacks of their rights, would have been left without the means of self-defense.[218]

[209] *Id.* (citing 39th Cong. Globe 1292).

[210] Respondents argued that these Acts "did not grant any substantive rights or purport to define the privileges or immunities of national citizenship; [they] required only nondiscriminatory treatment." Brief for Respondents, *supra* footnote 195, at 62-3.

[211] *Id.* at 3041 (citing General Building Contractors Ass'n., Inc. v. Pennsylvania, 458 U.S. 375, 389 (1982)).

[212] *Id.* at 3041-42. The Court highlighted the speech of Representative Stevens from 1868 where he addressed the disarmament of freedmen and emphasized the necessity of the right. *Id.*

[213] *Id.* at 3041-42.

[214] U.S. Const. amend, XIV, § 1 ("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.").

[215] Brief for Respondents, *supra* footnote 195, at 75.

[216] McDonald, 130 S. Ct. at 3043 (majority).

[217] See *supra* footnote 210.

[218] McDonald, 130 S. Ct. at 3043-44 (Alito, J., plurality).

Justice Thomas's Concurring Opinion: Application of the Second Amendment via the Privileges or Immunities Clause

Although the plurality declined to find incorporation under the Privileges or Immunities Clause, Justice Thomas in his concurring opinion proceeded with his own analysis of the Second Amendment's application through the Clause, because he could "not agree that it is enforceable against the States through a clause that speaks only to 'process.'"[219] Justice Thomas took to task the Court's precedent where it has determined that the Due Process Clause applies to unenumerated rights against the states, believing that "neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does."[220] In acknowledging the numerous cases founded upon the substantive due process framework and the importance of *stare decisis*, Justice Thomas stated that his only task at hand is to decide "to what extent, [a] particular clause in the Constitution protects the particular right at issue" and that the objective of his inquiry is to "discern what 'ordinary citizens' at the time of ratification would have understood the Privileges or Immunities Clause to mean."[221]

First, Justice Thomas found that "the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.'"[222] Second, in tracing the English roots, he concluded that the "[F]ounding generation generally did not consider many of the rights identified in [the] amendments as new entitlements, but as inalienable rights of all men," and that "both the States and Federal Government had long recognized the inalienable rights of state citizenship."[223] Third, he concluded that Article IV, § 2, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," protected traveling citizens against state discrimination with respect to the fundamental rights of state citizenship.[224] Noting textual similarity between Article IV, § 2 and that of the Privileges or Immunities Clause (§ 1) of the Fourteenth Amendment, Justice Thomas stated that "it can be assumed that the public's understanding of the latter was informed by its understanding of the former."[225] Therefore, to determine whether the Second Amendment was one of the rights guaranteed in the Fourteenth Amendment's Privileges or Immunities Clause, he explored two remaining questions.

First, he asked if "the privileges or immunities of 'citizens of the United States' recognized by § 1 [are] the same as the privileges and immunities of 'citizens in the several States' to which Article IV, § 2 refers?"[226] To a certain extent, Justice Thomas implicitly answered this question by

[219] *Id.* at 3059 (Thomas, J., concurring).

[220] *Id.* at 3062.

[221] *Id.* at 3063.

[222] *Id.* at 3063-64.

[223] *Id.* at 3067-68.

[224] *Id.* at 3067-68. Justice Thomas noted that Justice Washington in *Corfield v. Coryell*, 6 F. Case. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) had defined the "Privileges and Immunities of the several States" as those rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." In *Corfield*, 6. F. Cas. at 551-52, the court did not define "fundamental rights" but indicated that they could "'be all comprehended under' a broad list of 'general heads,' such as '[p]rotection by the government,' 'the enjoyment of life and liberty, with the right to acquire and possess property of every kind,' 'the benefit of the writ of habeas corpus,' and the right of access to 'the courts of the state,' among others (footnote omitted)." See also *supra* "Privileges or Immunities Clause of the Fourteenth Amendment."

[225] *Id.* at 3066.

[226] *Id.* at 3068.

referring to some instances where politicians debating the Fourteenth Amendment and legal commentators equated the privileges and immunities of § 1 to those referred to in Article IV, § 2.[227] However, much of Justice Thomas's analysis focused on presenting evidence, such as treaties,[228] congressional speeches,[229] and legislation of the era.[230] From these various sources, Justice Thomas concluded that the "evidence overwhelmingly demonstrates" that "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms."[231]

The second question asked is if "§ 1 [of the Fourteenth Amendment], like Article IV, § 2 prohibits only discrimination with respect to certain rights if the State chooses to recognize them, or does it require States to recognize those rights?"[232] Or, more specifically applied to the right at issue, "whether the Privileges or Immunities Clause merely prohibits States from discriminating among citizens if they recognize the Second Amendment's right to keep and bear arms, or whether the Clause requires States to recognize the right."[233] In his analysis, Justice Thomas seemed to answer this question by stating "it was understood that liberty would be assured little protection if §1 left each State to decide which privileges or immunities of United States citizenship it would protect."[234] However, a greater part of his discussion to this second question was devoted to why the Privileges or Immunities Clause protects against more than just state discrimination and establishes a "minimum baseline of rights for all American citizens."[235]

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[227] *Id.* at 3074 and 3076. The first example is the floor speech given by Senator Jacob Howard in introducing the new, and ultimately adopted, draft of the Fourteenth Amendment. He stated that Section 1 imposed "a general prohibition upon all the States ... from abridging the privileges and immunities of the citizens of the United States." *Id.* at 3074 (citing 39th Cong. Globe 2765). Senator Howard explained that the rights included "'the privileges and immunities spoken of' in Article IV, § 2." *Id.* (*But see* Brief of Respondents, *supra* note 203, at 66 arguing that apart from Senator Howard, "no one else expressly agreed with, or clearly articulate, that idea."). A second reference is to the remarks of Representative Mills, who opposed the initial draft of the Fourteenth Amendment. He stated, "[t]hese first amendments [of the Bill of Rights] and some provisions of the Constitution of like import embrace the 'privileges and immunities' of citizenship as set forth in article 4, section 2 of the Constitution *and in the fourteenth amendment* (emphasis added)." McDonald, 130 S. Ct. at 3076 (Thomas, J., concurring) (citing 2 Cong. Rec. 384-85 (1874)). A third reference is from legal commentators of the time who explained "that the rights listed in § 1 had 'already been guaranteed' by Article IV and the Bill of Rights, but that these rights, 'which had been construed to apply only to the national government, are thus imposed upon the States.'" *Id.* (citing G. Paschal, The Constitution of the United States 290 (1868)).

[228] For example, 19th century treaties in which the United States acquired territory from other sovereigns, like the Louisiana Cessation Act of 1803, often provided that inhabitants would enjoy all the "rights, advantages and immunities of citizens of the United States." McDonald, 130 S. Ct. at 3069 (Thomas, J., concurring) (citing Treaty Between the United States of American and the French Republic, Art III, Apr. 30, 1803, 8 Stat. 202, T. S. No. 86).

[229] For example, Representative John Bingham, the principal draftsman of § 1, in presenting the first draft of the Fourteenth Amendment, emphasized that the aim of Section 1 was to "arm the Congress of the United States ... with the power to enforce the bill of rights as it stands in the Constitution today." McDonald, 130 S. Ct. at 3072 (Thomas, J., concurring) (citing 39th Cong. Globe 1088 (1866)).

[230] Like the plurality, Justice Thomas highlighted the Freedmen's Bureau Act and Civil Rights Act of 1866 as examples that reflected an understanding that the "privileges" of citizenship provided to freedmen in these acts included constitutional rights, such as the right to keep and bear arms. McDonald, 130 S. Ct. at 3074-75 (Thomas, J., concurring).

[231] *Id.* at 3068, 3077.

[232] *Id.* at 3077.

[233] *Id.* at 3077.

[234] *Id.* at 3083.

[235] *Id.*

First, Justice Thomas pointed out that the Privileges or Immunities Clause uses the verb "abridge" rather than "discriminate," to describe the limit it imposes on state authority ("[n]o State shall"). He referred to the dictionary which defines the word "abridge" to mean "[t]o deprive; to cut off ... as, to *abridge* one of his rights."[236] Thus, a plain reading of the Clause indicates that it is meant to impose a limitation on state power to infringe upon pre-existing substantive rights and does not indicate that the Framers of the Clause used "abridge" to prohibit only discrimination. Second, Justice Thomas presented several reasons as to the lack of discussion on this Clause and Section 1 to rebut the "typical" argument that because there was no extensive public discussion on the Clause, that it must "not have been understood to accomplish such a significant task of subjecting States to federal enforcement of minimum baseline of rights."[237] He, instead, looked to historical events that "underscored the need for, and wide agreement upon, federal enforcement of constitutionally enumerated rights against the States, including the right to keep and bear arms."[238] Chronicling the many instances prior to, and after, the Civil War where pro-slavery forces and southern legislatures enacted laws that "repressed virtually every right recognized in the Constitution" including prohibiting blacks from carrying or possessing firearms, Justice Thomas, reiterating the Court, stated that "if the Fourteenth Amendment 'had outlawed only those laws that discriminate on the basis of race or previous condition of servitude, African-Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers.'"[239] In other words, because evidence demonstrates that the intent was to protect blacks from such abuses,[240] the Clause, contrary to respondents' claim, cannot simply be about protection from discriminatory state laws, as a nondiscriminatory law banning firearm possession outright would have still "left firearms in the hands of militia and local peace officers."[241] Building upon his Privileges or Immunities Clause analysis, Justice Thomas concluded that "history confirms what the text of the ... Clause most naturally suggests: ... that '[n]o State shall ... abridge' the rights of United States citizens, the Clause establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them."[242]

Justice Stevens's Dissenting Opinion: No Incorporation Under a Substantive Due Process Analysis

Justice Stevens began his dissent by rephrasing the question presented. Rather than asking if the Fourteenth Amendment incorporates the Second Amendment, a question he believed to be settled by the *Cruickshank*, *Presser*, and *Miller* decisions, the question he posed was "whether the Constitution 'guarantees individuals to a fundamental right,' enforceable against the States, 'to possess a functional, personal firearm, including a handgun, within the home.'"[243]

[236] *Id.* at 3078 (citing Webster, An American Dictionary of the English Language, at 6).

[237] *Id.*

[238] *Id.*

[239] *Id.* at 3082 (citing McDonald, 130 S. Ct. at 3043).

[240] *Id.* ("[S]tatements by citizens indicate that they looked to the [Joint]Committee [on Reconstruction] to provide a federal solution to this problem.").

[241] *Id.*

[242] *Id.* at 3083.

[243] *Id.* at 3089 (Stevens, J., dissenting).

He stated that the Court's decisions that render procedural guarantees in the Bill of Rights enforceable against the states have little impact on the meaning of the word "liberty" in the Clause or about the scope of its protection of nonprocedural rights, such as the Second Amendment. Asserting that a substantive due process analysis must be used to determine if the Second Amendment should be applied to the states, his dissent provided a "fresh survey of this old terrain."[244] Justice Stevens presented three general principles elicited from the Court's substantive due process case law. First, he stated "that the rights protected by the Due Process Clause are not merely procedural in nature."[245] A second principle made clear by case law is that substantive due process is fundamentally a matter of personal liberty, in which it must be asked if the interest asserted is "compromised within the term liberty."[246] The third principle derived from case law is that "the rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights."[247] He also forewarned that "the costs of federal courts' imposing a uniform national standard may be especially high when the relevant regulatory interests vary significantly across localities, and when the ruling implicates the States' core police powers."[248]

Justice Stevens disagreed with the plurality that the historical pedigree of a right is dispositive of its status under the Due Process Clause, and its suggestion "that only interests that have proved 'fundamental from an American perspective,' ... or 'deeply rooted in this Nation's history and tradition,' to the Court's satisfaction, may qualify for incorporation into the Fourteenth Amendment."[249] He stated that although the tests have varied, the Court "has been largely consistent in its liberty-based approach to substantive interests outside of the adjudicatory system," and that the focus has been "not so much on the historical conceptions of the guarantee as on its functional significance within the States' regimes."[250]

With this framework,[251] Justice Stevens believed it necessary to examine the "nature of the right that petitioners have asserted," and "whether [the right asserted] is an aspect of Fourteenth

[244] *Id.* at 3090.

[245] *Id.* ("It has been 'settled' for well over a century that the Due Process Clause 'applies to matters of substantive law as well as matters of procedure' (citation omitted) ... The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' *Troxel v. Granville*, 530 U.S. 57, 65 (2000).").

[246] *Id.* at 3092. ("Inclusion in the Bill of Rights is neither necessary nor sufficient for an interest to be judicially enforceable under the Fourteenth Amendment. This Court's 'selective incorporation' doctrine, (citation omitted) is not simply 'related' to substantive due process, (citation omitted); it is a subset thereof." *Id*. at 3093.).

[247] *Id.* at 3093. Justice Stevens acknowledged that the Court's decisions from the 1960s show "jot-for-jot" incorporation of a number of procedural rights, a norm during this era; yet, "at least one subsequent opinion suggests that these precedents require perfect state/federal congruence only on matters '"at the core"' of the relevant constitutional guarantee *Crist v. Bretz*, 437 U.S. 28, 37 (1978)." In Justice Stevens's opinion, it is necessary that some procedures be the same in state and federal courts to ensure certainty, uniformity, and fairness. However, this bears "little relevance to the question of whether a *non*procedural rule set forth in the Bill of Rights qualifies as an aspect of the liberty protected by the Fourteenth Amendment." McDonald, 130 S. Ct. 3094 (Stevens, J., dissenting).

[248] *Id.* at 3095.

[249] *Id.* at 3097. Justice Stevens found that the Court's decisions in *Palko* (302 U.S. 319 (1937)) and *Duncan* (391 U.S. 145 (1968)) are not so draconian such that the Court is limited to examining only "one mode of intellectual history." Rather, these cases suggest that the Court must look to other factors when deciding if a right is implicit of ordered liberty. *Id.* at 3096-97.

[250] *Id.* at 3098.

[251] Noting that the Framers did not clearly define the meaning of liberty and aware that a "liberty" analysis is open to (continued...)

Amendment 'liberty.'"[252] Finding the gravamen behind petitioners' complaint plainly to be "an appeal to keep a handgun or other firearm of one's choosing in the home," Justice Stevens stated that the petitioners' argument "has real force"[253] but felt that a number of factors supported the respondents.

First, Justice Stevens stated that "firearms have a fundamentally ambivalent relationship to liberty."[254] On the one hand, "[g]uns may be useful for self-defense, as well as hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty."[255] Second, "the right to possess a firearm of one's choosing is different in kind from the liberty interests [the Court] has recognized under the Due Process Clause" and that is "not the kind of substantive interest ... on which a uniform, judicially enforced national standard is presumptively appropriate."[256] Third, the experience of other advanced democracies undermines "the notion that an expansive right to keep and bear arms is intrinsic to ordered liberty."[257] Fourth, Justice Stevens reasoned that the Second Amendment differs from the other Amendments in that it is a federalism provision and that "it is directed at preserving the autonomy of the sovereign States, and its logic therefore 'resists' incorporation by a federal court *against* the States."[258] In other words, because the Second Amendment, like the Tenth Amendment, exists for the vitality of the states, one cannot argue that it applies to the states. Furthermore, Justice Stevens stated the reasons that motivated the Framers or Reconstruction Congress to act "have only a limited bearing on the question that confronts the homeowner in a crime-infested metropolis today."[259] Fifth, he emphasized that the "idea that States may place substantial restrictions on the right to keep and bear arms short of complete disarmament, is in fact, far more entrenched than the notion that the Federal Constitution protects any such right."[260] Agreeing with the Seventh Circuit that "[f]ederalism is a far 'older and more deeply rooted tradition than is a

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excessive subjectivity by the Court, Justice Stevens stated that precedent provides a number of constraints on the decision process and that "significant guideposts" do exist. *Id.* at 3100. These include respect for the democratic process, "sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society," and the deeper principle that judges must approach their work with "humility and caution." *Id.* at 3101.

[252] *Id.* at 3103.

[253] Justice Stevens wrote: "Bolstering petitioners' claim, our law has long recognized that the home provides a special kind of sanctuary in modern life. ... [W]e have long accorded special deference to the privacy of the home." *Id.* at 3105.

[254] *Id.* at 3107.

[255] *Id.* at 3108.

[256] *Id.* at 3109. ("[I]t does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality: The marketplace offers many tools for self-defense, even if they are imperfect substitutes...."*Id.*).

[257] *Id.* at 3110. The plurality critiqued respondents and Justice Stevens for its argument that it can rely on the experience of any civilized society. *Id.* at 3045 (Alito, J., plurality). Addressing this, Justice Stevens wrote: "While the 'American perspective' must always be our focus, (citation omitted), it is silly—indeed, arrogant—to think we have nothing to learn about liberty from the billions of people beyond our borders." *Id.* at 3111 (Stevens, J., dissenting).

[258] *Id.* at 3111 (citing Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 45 (2004)).

[259] *Id.* at 3112. Justice Stevens also noted that the episodes of violence against African Americans in the nation's history, as chronicled by Justice Thomas and the plurality, "do not suggest that every American must be allowed to own whatever type of firearm he or she desires—just that no group of Americans should be systematically and discriminatorily disarmed and left to the mercy of racial terrorists." *Id.* In addition, he noted that although "some Americans," presumably referring to Representative Bingham and Senator Howard, may have thought or hoped that the Fourteenth Amendment incorporated the Second Amendment does not "justify the conclusion that it did." *Id.*

[260] *Id.* at 3112.

right to carry,' or to own, 'any particular kind of weapon,'"[261] Justice Stevens noted that the Court's ruling in particular will take a "heavy toll in terms of state sovereignty."[262] Lastly, due to the varying patterns of gun violence and traditions and cultures of lawful gun use across the states and localities, among other things, Justice Stevens asserted that even if the Court could assert a plausible constitutional basis for intervening, that it should not necessarily do so.[263]

Justice Scalia also wrote a concurring opinion, which takes issue with the substantive due process, or "liberty clause" analysis espoused by Justice Stevens. Justice Scalia primarily critiqued the subjective nature of the standard proposed by the dissent, stating that any of the guideposts or constraints listed by Justice Stevens still leaves too much power in the hands of judges, ultimately depriving people of power.[264]

Justice Breyer's Dissenting Opinion: No Incorporation Under Due Process Clause

Justice Breyer issued a separate dissenting opinion, in which Justices Ginsburg and Sotomayor joined. Noting Justice Stevens's conclusion that the Fourteenth Amendment's guarantee of substantive due process does not include a general right to keep and bear firearms for purposes of self-defense, Justice Breyer chose to consider separately the question of "incorporation" as the Court had done so when it asked "if the Second Amendment right to private self-defense is 'fundamental' so that it applies to the States through the Fourteenth Amendment."[265] In short, Justice Breyer concluded that he could "find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private-self-defense purposes."[266]

First, Justice Breyer revisited the *Heller* decision by stating that the Court had based its conclusion "almost exclusively upon its reading of history."[267] Yet, he cited numerous articles by historians, scholars, and judges[268] that the history underlying the *Heller* decision is far from clear. Given the Court's emphasis on the historical pedigree of the right, he thus posited "where *Heller*'s historical foundations are so uncertain, why extend its applicability?"[269] However, Justice Breyer expressed that the Court "has never stated that the historical status of a right is the only relevant consideration,"[270] but rather it has asked if the "right in question has remained fundamental over time."[271] Furthermore, he opined that the Court should look to other factors where history does

[261] *Id.* (quoting NRA, 567 F.3d 856, 860).

[262] *Id.* at 3113.

[263] *Id.* at 3114-16.

[264] *Id.* at 3058 (Scalia, J., concurring) ("Justice Stevens' approach ... deprives people of ... power, since whatever the Constitution and laws may say, the list of protected rights will be whatever the courts wish it to be. ... Justice Stevens abhors a system in which 'majorities or powerful interest groups always get their way,' ... but replaces it with a system in which unelected and life tenured judges always get their way." *Id.*).

[265] *Id.* at 3120 (Breyer, J., dissenting).

[266] *Id.*

[267] *Id.* at 3121.

[268] According to Justice Breyer, these articles express the view that the Court's historical account was flawed. *Id.*

[269] *Id.* at 3122.

[270] See also *supra* footnotes 249-250 and accompanying text.

[271] *Id.* at 3123 (referring to *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972) (plurality opinion) (stating that the (continued...)

not provide a clear answer. These factors include "the nature of the right; any contemporary disagreement about whether the right is fundamental; the extent to which incorporation will further other ... constitutional aims; and the extent to which incorporation will advance or hinder the Constitution's structural aims, including its division of powers among different governmental institutions."[272]

Justice Breyer applied these factors to the "private right of self-defense" as it is considered "the central component" of the Second Amendment by the Court in *Heller*.[273] With respect to these factors, he found (1) that there is disagreement, or no consensus, that the private right of self-defense is fundamental;[274] (2) that there is no reason to believe that incorporation will further any broader constitutional objectives;[275] and (3) that incorporation of the right will disrupt the constitutional allocation of decision-making authority. Justice Breyer gave several reasons in support of this last factor, including that incorporation of the right recognized in *Heller* "would amount to an incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government."[276] Additionally, because "determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions," he made the case that the courts are not suited with either the expertise or the tools to weigh the constitutional right to bear arms "against the 'primary concern of every government—a concern for the safety and indeed the lives of its citizens'" (citation omitted).[277] In light of these factors, he suggested that the Court could proceed in examining state gun regulation by "adopting a jurisprudential approach similar to the many state courts that administer a state constitutional right to bear arms."[278] However, he noted that the Court has not only not done so, but also rejected an "interest-balancing approach" similar to that utilized by the states.[279]

Second, Justice Breyer returned to examine history after determining that none of the factors supported incorporation. Because the Court examined whether the interests the Second Amendment protects are "deeply rooted in this Nation's history and tradition," Justice Breyer declared that the question, thus, is not whether there are references to the right to bear arms for self-defense throughout the Nation's history as there naturally would be, but rather "whether there is a consensus that *so substantial* a private self-defense right as the one described in *Heller* applies to the States."[280] Although the Court in *Heller* collected much evidence, Justice Breyer

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incorporation "inquiry must focus upon the function served" by the right in question in "*contemporary society*" (emphasis in the original)).

[272] *Id.* at 3123.

[273] *Id.* at 3124.

[274] *Id.* at 3124 ("Much of this disagreement rests upon empirical considerations. One side believes the right essential to protect the lives of those attacked in the home; the other side believes it essential to regulate the right in order to protect the lives of others attacked with guns. It seems unlikely that definitive evidence will develop one way or another." *Id.* at 3125.).

[275] *Id.* at 3125 ("Unlike the First Amendment's rights of free speech, free press, assembly, and petition, the private self-defense right does not comprise a necessary part of the democratic process that the Constitution seeks to establish." *Id.*).

[276] *Id.* ("Private gun regulation is the quintessential exercise of a State's 'police power'...." *Id.*).

[277] *Id.* at 3127 (citation omitted).

[278] *Id.*

[279] *Id.* The "interest-balancing approach" was suggested by Justice Breyer in *Heller* but rejected by the Court.

[280] *Id.* at 3130 (noting that "general historical references to the 'right to keep and bear arms' are not always helpful" (continued...)

stated that he found "no more than ambiguity and uncertainty" when he supplemented the findings in *Heller* with additional historical facts from the 18th, 19th, 20th, and 21st centuries.[281] He declared that "a historical record that is so ambiguous cannot itself provide an adequate basis for incorporating a private right of self-defense and applying it against the States."[282]

The plurality opinion criticized Justice Breyer's dissent on four grounds. First, it did not approve of his assertion that "there is no popular consensus" that the right is fundamental, stating that the Court has never used "popular consensus" as a rule for finding incorporation.[283] Second, the plurality did not agree with his argument that "the right does not protect minorities or persons holding political power" when he argued that incorporation should not be found because the right at issue does not further any broader constitutional objective.[284] The plurality countered by citing petitioners' and other supporting briefs' claims that the right is especially important for women and members of groups vulnerable to crime as evidence that the Second Amendment right protects "the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials."[285] Third, the plurality agreed with Justice Breyer that incorporation will limit the legislative freedom of the states, but it was not convinced that this argument was persuasive in finding a lack of incorporation, given that a limitation on the states always exists when a provision is incorporated.[286] Last, the plurality disagreed with Justice Breyer's argument that "incorporation will require judges to assess the costs and benefits of firearms restrictions," because "[t]he very enumeration of the right takes out of the hands of government ... the power to decide on a case-by-case basis whether the right is *really worth* insisting upon"(emphasis in the original).[287]

The Second Amendment Post-*McDonald*

Although holding that the Second Amendment as recognized in *Heller* applies to the states, the Court did not decide whether the challenged municipal ordinances were in violation of the amendment, leaving the question for the lower court to examine. Because the *McDonald* decision was thus limited, a number of questions unanswered by the Court in *Heller* still remain, most of which are concerned with the scope of the Second Amendment.

First, what standard of judicial scrutiny[288] will be used to decide if a firearms law is in violation of the Second Amendment? As discussed above, the Court in *Heller* did not specify a particular level of scrutiny, instead stating that the three challenged District of Columbia firearms provisions were unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[289] The Court in *Heller* rejected a rational basis standard as well

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when "evaluating a more particular right—namely, the right to bear arms for the purposes of private self-defense." *Id.*).

[281] *Id.* at 3131.

[282] *Id.*

[283] *Id.* at 3049 (Alito, J., plurality).

[284] *Id.*

[285] *Id.*

[286] *Id.* at 3050.

[287] *Id.* (quoting Heller, 554 U.S. at 634).

[288] See *supra* footnotes 97 and 176 for description of three levels of judicial scrutiny.

[289] Heller, 554 U.S. at 628.

as Justice Breyer's proposed "interest-balancing" inquiry, which would have examined "whether the statute burdens a protected interest in a way that is out of proportion to the statute's salutary effects upon other important governmental interests."[290] (For more of the Court's discussion of the standard of scrutiny in *Heller*, see "The Second Amendment Post-*Heller*").

Since *McDonald*, the U.S. Court of Appeals for the Third Circuit (Third Circuit), in *United States v. Marzzarella*,[291] attempted to draw a framework for how to approach such cases when it held that a federal ban on possession of unmarked firearms was constitutional.[292] The Third Circuit noted that *Heller* suggested a two-pronged approach:

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee (citations omitted). If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under the standard, it is constitutional. If it fails, it is invalid.[293]

With respect to the challenged federal statute, the defendant argued that because firearms in common use in 1791 did not have serial numbers, the Second Amendment must protect firearms without serial numbers. The court was not convinced by this argument because it found that "it would make little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility. ... The mere fact that some firearms possess a nonfunctional characteristic should not create a categorically protected class of firearms on the basis of that characteristic."[294] The court was further skeptical of the defendant's argument that "possession in the home is conclusive proof that § 922(k) regulates protected conduct."[295] Nonetheless, the court assumed that 18 U.S.C. § 922(k) burdened the defendant's Second Amendment right. Looking to First Amendment jurisprudence for guidance, the court noted that even an enumerated, fundamental right may be subjected to varying levels of scrutiny depending on the circumstances.[296] The court noted that § 922(k) "does not severely limit the possession of firearms," and still pass muster because the statute is narrowly tailored to achieve the government's compelling interest in preserving serial numbers for tracing purposes.[297]

Second, does the Second Amendment right for purposes of lawful self-defense extend only to the home? In both *Heller* and *McDonald*, the provisions challenged were those that prevented handgun possession in the home, and in each case the Supreme Court stressed the right of self-defense within the home as being central component of the right to keep and bear arms. However, the Court did not make clear if this similar protective right extend to a vehicle, a temporary living

[290] *Id.* at 689 (Breyer, J., dissenting).

[291] United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010), *cert. denied* Marzzarella v. United States, 131 S. Ct. 958 (2011).

[292] *Id.* at 87 (referring to 18 U.S.C. § 922(k)).

[293] *Id.* at 89. The Third Circuit found *Heller*'s list of "presumptively lawful" firearm regulations susceptible to two meanings. "On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny." *Id.* at 91.

[294] *Id.* at 94.

[295] *Id.* at 94

[296] *Id.* at 97-100.

[297] *Id.* at 97.

space, a place of business, or in public places? *Heller* mentioned the possibility that the self-defense right has the potential to extend further upon "future evaluation."[298]

Third, what types of regulations would be burdensome enough to infringe on the Second Amendment right? Both *Heller* and *McDonald* emphasized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[299] The Court further repeated assurances that its holding "does not imperil every law regulating firearms," and "[does] not cast doubt on [] longstanding regulatory measures [such] as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arm.'"[300] *Heller* indicated that mere regulation of a right would not sufficiently infringe upon, or burden, the Second Amendment right, when it pointed out that certain colonial-era ordinances did not "remotely burden the right of self-defense as much as an absolute ban on handguns."[301] In other words, it appears that to be burdensome, a regulation must also substantially burden the self-defensive right.[302]

Fourth, what types of weapons will fall within the protection of the Second Amendment? *Heller* determined that the Second Amendment protection extends to weapons that are "in common use at the time," and not those that are "dangerous and unusual."[303] The Court in *Heller* made clear that the Second Amendment protects handguns, as it found them to be a common weapon "overwhelmingly chosen by American society" for purposes of self-defense, but not other weapons such as machine guns, short-barreled rifles and shotguns, or grenade launchers. However, it is unclear if other types of so-called "assault" weapons, martial arts weapons,[304] and clubs will be protected under the Second Amendment. There have been recent challenges to state and local "assault weapons" bans, which have been upheld. In 2009, the California Court of Appeals in *People v. James* considered *Heller*'s impact on California's Roberti-Roos Assault Weapons Control Act of 1989, which several localities like the District of Columbia and Cook County, Illinois have mirrored.[305] In *James*, the court declared that the prohibited weapons on the state's list "are not the types of weapons that are typically possessed by law-abiding citizens for

[298] After *McDonald*, the Chicago City Council approved new handgun ordinances, which include banning gun shops in Chicago and prohibiting gun owners from stepping outside their homes, even onto their porches or in their garages, with handguns. Don Babwin, *Chicago Approves New Handgun Restrictions*, Associated Press, July 6, 2010, *available at* http://www.msnbc.msn.com/id/38061266/.

[299] McDonald, 130 S. Ct. at 3047 (Alito, J., plurality) (citing Heller, 554 U.S. at 626).

[300] *Id.* at 3047 (citing Heller, 554 U.S. at 626-627).

[301] Heller, 554 U.S. at 632.

[302] For example, it remains to be seen how the courts will decide if Maryland's requirements to obtain a permit to carry a firearm are too burdensome. Maria Glod, *Gun Rights Advocates Challenge Maryland's Restrictions on Handgun Carry Permits*, Washington Post, July 30, 2010, at B06.

[303] Heller, 554 U.S. at 627. *See* footnote 202.

[304] See *supra* footnote 155.

[305] People v. James, 94 Cal. Rptr. 3d 576 (Cal. Ct. App.2009). *See also* Heller v. District of Columbia, 698 F.Supp.2d 179 (D.D.C. 2010) (holding that the District of Columbia's regulations on firearm registration procedures, a prohibition on assault weapons, and a prohibition on large capacity ammunition feeding devices withstand intermediate scrutiny); Wilson v. Cook County, Ill., No. 1-08-1202, 2011 Ill. App. LEXIS 77 (Ill. App. Ct. Feb. 9, 2011) (upholding a trial court order that the Cook County ordinance banning certain categories of assault weapons: (1) was not unconstitutionally vague or overbroad; (2) did not violate the Second Amendment or article I, § 22 of the Illinois Constitution; and (3) that the plaintiffs did not state a cause of action for violation of the due process and equal protection clauses under the United States Constitution).

lawful purposes such as sport hunting or self-defense; rather these are weapons of war."[306] It concluded that the relevant portion of the act did not prohibit conduct protected by the Second Amendment as defined in Heller and therefore the state was within its ability to prohibit the types of dangerous and unusual weapons an individual can use.[307]

It is highly likely that these last three questions, which center on the scope of the Second Amendment, will result in future litigation. As courts begin to tackle these questions, they may draw from the Third Circuit's framework or develop their own standards. For example, since the *Marzzarella* decision, the U.S. Court of Appeals for the Seventh Circuit in *United States v. Skoien* rejected a Second Amendment challenge to 18 U.S.C. § 922(g)(9)—prohibiting persons convicted of misdemeanor crimes of domestic violence from possessing firearms—on the basis that "logic and data" demonstrate "a substantial relation between § 922(g)(9) and [an important governmental] objective."[308]

Faced with evaluating the same federal provision as in *Skoien*, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) in *United States v. Chester* issued a decision to provide district courts in its circuit guidance on the framework for deciding Second Amendment challenges.[309] The Fourth Circuit followed the two-pronged approach delineated in *Marzzarella*, that is, the first, a historical inquiry "seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification," and second, if the regulation burdens the conduct that was within the scope of the Second Amendment as historically understood, "then we move up to the second step of applying the appropriate form of means-end scrutiny."[310]

Although the Fourth Circuit remanded the case to the district court, it noted that § 922(g)(9), like § 922(g)(1)—prohibiting convicted felons from possession—requires the court to evaluate whether a person, rather than a person's conduct, is unprotected by the Second Amendment, and that "the historical data is not conclusive on the question of whether the Founding era understanding was that the Second Amendment did not apply to felons."[311] Thus, as in *Marzzarella*, the Fourth Circuit assumed, due to lack of historical evidence, that the defendant was entitled to some Second Amendment protection to keep and possess firearms in his home for self-defense. For this defendant and other similarly situated persons, the court declared that the government, upon remand, must meet the intermediate scrutiny standard and not strict scrutiny, because the defendant's claim "was not within the 'core right' identified in *Heller*—the right of a *law-abiding*, responsible citizen to possess and carry a weapon for self-defense—by virtue of [the defendant's] criminal history as a domestic violence misdemeanant."[312] (emphasis in the original).

[306] James, 94 Cal. Rptr. 3d at 585-86 (quoting Cal. Penal Code § 122275.5(a) (West 2006)).

[307] James, 94 Cal. Rptr. 3d at 586 (citing the Cal. Penal Code §§ 12280(b)-(c) which are penalties for possession of assault weapon or .50 BMG rifle).

[308] United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010) (vacating a panel decision by the Seventh Circuit, 587 F.3d 803 (7th Cir. 2009), that had determined that the "core right of self defense identified in *Heller* [was] not implicated" and had voted to remand the case to give the government the opportunity to carry its burden imposed by the intermediate constitutional framework as that was the appropriate level of scrutiny for the challenged provision).

[309] United States v. Chester, 628 F.3d 673, 2010 U.S. App. LEXIS 26508 *1 (4th Cir. 2010).

[310] *Id.* at *18.

[311] *Id.* at *20.

[312] *Id.* at *26.

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