Ardently Advocating the Palladium of Liberty?:

***Heller,* the High Court, and Handguns**

an Honors Project submitted by

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Approval Sheet

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INTRODUCTION

Most social scientists agree that the average American citizen possesses very low levels of knowledge about governmental operations and current events.[1] The ignorance of the typical American with regard to the U.S. Constitution and the judicial branch is often particularly spectacular. For instance, a 2006 survey conducted by the Zogby International polling firm revealed that, while 77% of U.S. residents are able to name two of Snow White's Seven Dwarfs, only 24% can correctly name two Supreme Court justices.[2] Furthermore, a multiple-choice survey issued to Carson-Newman College students showed that 53% of participants had no knowledge about the three amendments addressing or guaranteeing voting rights and 67% could not identify when the U.S. Constitution was written.[3] Although court rulings involving highly politicized issues such as abortion, affirmative action, and gay rights will occasionally capture citizens' attention, the fact remains that the typical American is seldom interested in or knowledgeable about the activities of the federal courts. In 2008, however, the U.S. Supreme Court's interpretation of the U.S. Constitution's Second Amendment[4] in *District of Columbia v. Heller* evoked hysteria, hyperbole, and interest group action on a level seldom seen. For instance, the debate over the Court's ruling actually led to states threatening to secede,[5] guns and

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[1] Ronald D. Lambert, James E. Curtis, Barry J. Kay, and Steven D. Brown, "The Social Sources of Political Knowledge," *Canadian Journal of Political Science* 21, no. 2 (1988): 360, http://www.jstor.org (accessed November 5, 2009); Jeffrey J. Mondak and Belinda Creel Davis, "Asked and Answered: Knowledge Levels When We Will Not Take 'Don't Know' for an Answer," *Political Behavior* 23, no. 3 (2001): 199, http://www.jstor.org (accessed November 5, 2009).

[2] Zogby International, "New National Poll Finds: More Americans Know Snow White's Dwarfs Than Supreme Court Judges, Homer Simpson Than Homer's Odyssey, and Harry Potter Than Tony Blair," Zogby International, http://www.zogby.com/soundbites/ReadClips.cfm?ID=13498 (accessed February 1, 2010).

[3] Survey entitled "How Illiterate Are Your Peers" conducted by Lara McDonald and Heidi Brady on November 15, 2009.

[4] The Second Amendment provides: "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." See U.S. Constitution. amend. 2.

[5] Prior to the Supreme Court hearing *District of Columbia v. Heller,* forty-four members of the 60th Montana Legislature and the Montana Secretary of State signed an extra-session resolution stating that "any form of 'collective rights' holding by the Court in Heller will offend the Compact" between Montana and the United States. Consequently, Montana "reserves all usual rights and remedies under historic contract law if its Compact should be

ammunition being bought by irate citizens at unprecedented rates,[6] and powerful interest groups warning that mobs armed with assault rifles and assassins equipped with .50-caliber sniper rifles possessing armor-piercing ability would soon be roaming the streets of the nation's capital.[7] Due to the strong public sentiment on both sides of the gun control debate and the scant case law dealing with the Second Amendment, *Heller* was commonly expected to become a landmark Supreme Court ruling.[8] It is perhaps for these reasons that when the one hundred fifty seven-page decision was handed down on June 26, 2008, commentators often did not limit themselves to what the opinion actually said, as they interpreted the ruling in light of their own biases. This project, therefore, will provide an assessment of the *District of Columbia v. Heller* by looking at the relevant history of the Second Amendment and reviewing the case. The immediate impact of the decision on the District of Columbia will then be examined because *Heller* only addressed the District's firearms code; the remarkable recalcitrance of the District to alter its laws after the decision was handed down has made it a focal point for significant Second Amendment legal battles; and, if the Second Amendment is incorporated against the states, the District's actions are an excellent example of how state and local governments who wish to retain strict gun

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violated." See "An Extra-Session Resolution of Individual Legislatures of the 60th Montana Legislature," Pro Gun Leaders, http://www.progunleaders.org/Heller/resolution.html (accessed January 18, 2009).

[6] Editorial, "Democrats Hang Fire on Guns; The Party In Power Is Split On Gun Control," *Washington Times*, May 22, 2009, http://www.lexisnexis.com (accessed November 18, 2009); Peter Applebome, "When Fear and Fury Drive Gun Sales," *New York Times*, June 22, 2009, http://www.lexisnexis.com (accessed November 18, 2009); David A. Fahrenthold and Frederick Kunkle, "Bullets Are Speeding Faster Out Of Gun Shops In U.S.; A SHORTAGE OF AMMUNITION Demand Is Up Despite Drop in Crime Rate," *Washington Post*, November 3, 2009, http://www.lexisnexis.com (accessed November 18, 2009).

[7] When House Resolution 6691 (a bill changing the District of Columbia's gun laws as required by *Heller*) was in front of the 110th Congress, the Brady Campaign To Prevent Gun Violence circulated information claiming that the legislation "would create serious new threats to public safety and national security, **even allowing the carrying of loaded semi-automatic assault rifles in downtown Washington and legalizing .50 caliber sniper rifles that can pierce armor**" [emphasis is original]. See "Sweeping Bill to Repeal D.C. Gun Laws Would Endanger Public Safety and Threaten Homeland Security," Brady Campaign to Prevent Gun Violence, http://www.dcvote.org/pdfs/brady_campaign_summary_HR_6691 (accessed January 12, 2009).

[8] Sandy Froman and Ken Blackwell, "The Roe v. Wade of Gun Rights," Worldnetdaily.com, http://www.worldnetdaily.com (accessed September 2, 2008).

control laws could do so. Finally, this paper will review *Heller*'s broad legal implications with an emphasis being placed on incorporation.

CHAPTER ONE:

THE HISTORY OF THE SECOND AMENDMENT

Prior to its decision in *District of Columbia v. Heller*, the Supreme Court had never undertaken an in-depth analysis of the Second Amendment. While the Court had previously mentioned the amendment in a handful of cases, none of these rulings contained a substantive discussion of the history of the amendment or of the precise nature of the right that it guarantees. *Heller*, however, required such an analysis. In the virtual absence of legal precedence, it was the history of the Second Amendment that the Court mainly had to rely upon in deciding the proper scope and meaning of the amendment. Therefore, in order to adequately understand and analyze the case, it is necessary to briefly review the Second Amendment's history.

A. Origin of the Right to Keep and Bear Arms

The Second Amendment traces its roots to seventeenth-century England. After Charles I's royalist forces were defeated in the English Civil War, the English government was controlled by Parliament.[9] While parliamentary forces had worked together to defeat the king, they swiftly broke up into numerous factions after the royalists' defeat, which made effective operation of the government all but impossible.[10] Oliver Cromwell therefore used the New Model Army to disband the Rump Parliament and the Parliament of Puritan Saints.[11] Due to Parliament's continuing ineptitude, Cromwell instituted what was essentially a harsh, Puritan military dictatorship in the 1650s.[12] Englishmen did not quickly forget Cromwell's use of the military to control the House of Commons and institute a dictatorship and they sought to prevent it from reoccurring. Therefore, members of Parliament, such as William Pulteney, supported

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[9] Brittania.com, "Monarchs: Oliver Cromwell (1649-1658 AD)," http://www.britannia.com/history/monarchs/mon48.html (accessed March 20, 2006).
[10] Ibid.
[11] Ibid.
[12] Ibid.

efforts to reduce the British army's size, declaring that "a standing army of any kin[d] . . . is a terrible thin[g]" and is "in the highest degree dangerous to the . . . happiness of the community" because it is "impossible that the liberties of the people in any country can be preserved where a numerous standing army is kept up."[13]

When the Stuart kings were restored to the English throne in 1660, their actions expanded Englishmen's strong distrust of standing armies and led to them becoming extremely protective of their ability to retain arms.[14] The English particularly resented Kings Charles II and James II employing militias loyal to themselves to stifle political dissent, partially by taking away the arms of those who opposed them.[15] Therefore, prior to giving the crown to William and Mary in the Glorious Revolution of 1688, the English people demanded that their future sovereigns endorse the English Bill of Rights, which listed what the people "claim[ed], demand[ed] and insist[ed] upon . . . as their undoubted rights and liberties."[16] Duly signed into law by William and Mary, the English Bill of Rights provides the basis for the English common law right to have and bear arms, namely that "the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law."[17]

This common law right influenced the American belief in the right of the people to possess and bear firearms.[18] As English settlers poured into America, they brought with them an extreme wariness of "standing armies and professional police forces" based on the perception

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[13] Earl F. Martin, "America's Anti-Standing Army Tradition and the Separate Community Doctrine," *Mississippi Law Journal* 76 (2006): 184, http://www.lexisnexis.com (accessed October 3, 2008).
[14] Robert J. Cottrol, "Second Amendment," in *The Oxford Guide to the Supreme Court,* ed. Kermit L. Hall (New York: Oxford UP, 2005), 891.
[15] District of Columbia v. Heller, 2008 U.S. LEXIS 5268, ***37-8, http://www.lexisnexis.com (accessed January 12, 2009).
[16] "English Bill of Rights 1689, c.2, §7," The Avalon Project, Lillian Goldman Law Library, Yale Law School, http://www.avalon.law.yale.edu/17th_century/england.asp (accessed August 22, 2009).
[17] "Bill of Rights, sec. 7, 1 W. & M., 2d sess., c.2, 16 Dec. 1689," in *The Founders' Constitution*, ed. Philip B. Kurland and Ralph Lerner (Indianapolis, IN: Liberty Fund, 1987), 210.
[18] Eugene Volokh, "Necessary to the Security of a Free State," *Notre Dame Law Review* 83 (2007): 1, http://www.lexisnexis.com (accessed October 3, 2008).

that both presented a threat to the liberty of the individual.[19] The beliefs of the colonial Americans, therefore, led to the strengthening in the colonies of the British tradition of utilizing armed yeomanry both to defend against external attacks and to enforce colonial law.[20] In particular, the necessity of defending settlements from the attacks of Native Americans and later the armies of the French resulted in arms becoming as crucial to the colonists as their agricultural tools.[21] The colonists were armed on all occasions, be it at church or working the fields, since they were surrounded by the constant threat of danger.[22] Over time, laws led to both the de facto deputization of every white male and subsequent colonial statutes making possession of arms obligatory on virtually all able-bodied, white males and imposing upon them the duty of bearing them in local militia formations.[23]

B. Blackstone's and Locke's Influence in Colonial and Early America

By the late eighteenth century, the right to keep and bear arms had become essential to England's American subjects.[24] And in this area, the beliefs of the American colonists were particularly molded by the thoughts of Sir William Blackstone and John Locke.[25]

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[19] Cottrol, 891.
[20] Ibid.
[21] John Ordronaux, *Constitutional Legislation in the United States* (Philadelphia: T. & J.W. Johnson & Co., 1891), 241-243, http://www.books.google.com (accessed September 7, 2009).
[22] Ibid. That such a practice was necessary was reflected by the Plymouth Colony law mandating that each man must "have piece, powder, and shot—viz., a sufficient musket or other serviceable piece for war, with bandeleroes, swords, and other appurtenances for himself, and each man-servant he kept able to bear arms." See Ibid.
[23] Cottrol, 891-92. Multiple articles and books discuss early colonial arms-bearing requirements. (Due to the book's extensive usage of primary documents, David E. Young's *The Founders' View of the Right to Bear Arms* is a particularly valuable resource for these provisions.) An example of such requirements is Georgia's "Act for Better Ordering the Militia of This Province." It required that "every person liable to appear and bear arms at any muster . . . shall constantly keep and bring with him to such muster . . . one gun or musket fit for service." A further act passed by the Georgia Assembly compelled "every white male inhabitant . . . who is or shall be liable to bear arms in the militia . . . to carry firearms" in places of public worship. See Nathan Kozuskanich, "Originalism in a Digital Age: An Inquiry into the Right to Bear Arms," http://www.newsbank.com/readex/newsletter.cfm?newsletter=210 (accessed September 7, 2009).
[24] District of Columbia v. Heller, ***39.
[25] Alden v. Maine, 527 U.S. 706 (1999), http://www.findlaw.com (accessed September 7, 2009).

William Blackstone was an eighteenth-century, English judge, author, and professor "whose works constituted the preeminent authority on English law for the founding Generation."[26] He divided the rights of individuals into two categories: relative and absolute rights.[27] Absolute or natural rights consist of the "enjoyment of personal security, of personal liberty, and of private property."[28] It is "the principal aim of society . . . to protect individuals in the enjoyment of [these] absolute rights,"[29] since, as "long as these remain inviolate, the subject is perfectly free."[30] In order that laws do not vainly "declar[e], ascertai[n], and protec[t]" these rights, it is necessary that "auxiliary subordinate rights" exist as "barriers to protect and maintain inviolate the three great and primary rights."[31] Amongst these secondary rights, the right to bear arms enjoys a place of ascendency.[32] Therefore, the privilege of having "arms for . . . defence, suitable to [a subject's] condition and degree, and such as are allowed by law" exists as "a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[33] Not only is the individual possession of arms valuable in preventing tyranny; but also the existence of civilian-soldiers is necessary to a free state, since:

> In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear: but in free states . . . no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters

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[26] Ibid.
[27] William Blackstone, *Commentaries on the Laws of England* (Philadelphia: Bell Publishing Co., 1772), 123-124, http://www.library.acaweb.org (accessed August 22, 2009).
[28] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769), 140. http://www.avalon.law.yale.edu/18th_century/blackstone (accessed September 7, 2009).
[29] Nordyke v. King, 563 F.3d 449, http://www.findlaw.com (accessed September 7, 2009).
[30] Blackstone (Oxford), 140.
[31] Ibid., 136.
[32] Nordyke v. King, 449.
[33] William Blackstone, "Commentaries, 1:139, 1765," *The Founders' Constitution*, ed. Philip B. Kurland and Ralph Lerner (Indianapolis, IN: Liberty Fund, 1987), 210.

> the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier.[34]

As a right vital to protecting all other rights, therefore, the right to have arms is an Englishman's "birthright to enjoy entire" except where the law places it under "necessary restraints" that are both "gentle and moderate."[35]

While Blackstone was a jurist, John Locke was a late seventeenth-century, English philosopher to whom the Founding Fathers also often looked for guidance.[36] Locke agreed with Blackstone that there is a natural law right to have firearms for self-defense and to preserve liberty.[37] However, it is Locke's extensively developed justification for revolution that is perhaps the most notable aspect of his philosophy with regard to the right to keep and bear arms. In particular, Locke argued that:

> Whensoever . . . the [government] shall . . . either by Ambition, Fear, Folly or corruption, *endeavour to grasp* themselves, or put *into the hands of any other an Absolute Power* over the Lives, Liberties, and Estates of the People; by this breach of Trust they *forfeit the Power*, the People had put into their hands, . . . and it devolves to the People, who have a Right to resume their original Liberty, . . . by the Establishment of a new [government] (such as they shall think fit) [to] provide for their own Safety and Security.[38]

Clearly, the existence of an armed citizenry that can organize itself into a militia that will

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[34] Blackstone (Philadelphia), 408.
[35] Blackstone (Oxford), 140.
[36] George A. Mocsary, "Explaining Away the Obvious: the Infeasibility of Characterizing the Second Amendment as a Non-individual Right," *Fordham Law Review* 76 (2008): 2132, http://www.lexisnexis.com (accessed October 3, 2008).
[37] Locke clearly believed that there was a natural law right to have readily usable firearms for self-defense. He noted: "it being reasonable and just I should have a right to destroy that which threatens me with destruction: for *by the Fundamental Law of Nature, Man being to be preserved*, as much as possible, when all cannot be preserv'd, the safety of the Innocent is to be preferred: And one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a *Wolf* or a *Lyon*." See John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 2009), 278-279. Furthermore, Locke held that the right to self-defense still existed in a society of laws. This is: "because the Law, which was made for my Preservation, where it cannot interpose to secure my Life from present force, which if lost, is capable of no reparation, permits me my own Defence, and the Right of War, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common Judge, nor the decision of the Law, for remedy in a Case, where the mischief may be irreparable." See Ibid., 280-281.
[38] Ibid., 412-413.

oppose governmental tyranny is necessary in order to be able to carry out the duty of throwing off an abusive government and creating a new one that will protect the peoples' fundamental rights.

By the 1760s and 1770s, the American colonists evinced a widespread adherence to Blackstone's and Locke's belief that the right to keep and bear arms was an individual right necessary to guard against private and public violence and preserve liberty.[39] However, this period was one of unrest and rebellion in the colonies. King George III, therefore, began making efforts to disarm the colonists in areas most mutinous against England's rule.[40] The colonists, ever vigilant regarding their means of self-defense, would often cite Blackstone's ideas regarding the right to keep and bear arms in their strong objections to efforts by the crown to deprive them of what they considered to be one of their elemental rights.[41]

Not only did the common masses embrace Blackstone's and Locke's view that the right to keep and bear arms was essential to liberty, but also Revolutionary philosophers and the United States' Founding Fathers championed this conviction.[42] Samuel Adams, in a 1772 report of one of the Committees of Correspondence, declared that:

> [a]mong the Natural Rights of the Colonists are these[:] First, a right to Life; Secondly, to Liberty; thirdly, to property; *together with the Right to support and*

[39] District of Columbia v. Heller, ***39-41.
[40] Ibid.
[41] For instance, a Boston pamphleteer in 1769 who recording the stressful relations between the wary colonists and the British troops resulting from British efforts to disarm the Bostonians wrote: "Instances of the licentious and outrageous behavior of the military conservators of the peace still multiply upon us, some of which are of such a nature . . . as must serve fully to evince that a late vote of this town, calling upon the inhabitants to provide themselves with arms for their defense, was a measure as prudent as it was legal: such violences are always to be apprehended from military troops, when quartered in the body of a populous city. . . . It is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression." See Nordyke v. King, 449.
[42] Ibid.

> *defend them in the best manner they can*—Those are evident Branches of, rather than deductions from, the Duty of Self-Preservation, commonly called the first Law of Nature.[43]

Thomas Jefferson emphasized the value of arms in preventing despotism, declaring that free men should never "be debarred the use of arms," because possession of arms by the people "protect[s] . . . against tyranny in government."[44] James Madison and Alexander Hamilton elucidated on Jefferson's point by noting the value of armed citizenry in combating different forms of tyranny. Madison doubted that "a militia amounting to near half a million of citizens with arms in their hands" could be vanquished by an oppressive standing army.[45] Furthermore, he believed that the significant American "advantage of being armed" could not be easily overcome by threatening governments "afraid to trust the people with arms."[46] Hamilton, however, emphasized the preventative quality of armed citizens when it came to tyranny at home. Since "standing armies are dangerous to liberty," if the central government is able to "command the aid of the militia . . . in support of the civil magistrate, it can the better dispense with the employment" of a standing army.[47]

While grievances such as interference with the colonies' systems of government and economies were more egregious instances of British tyranny than efforts to remove arms from rebellious colonial areas, the British efforts at disarmament constituted a severe offense to colonial sensibilities. This was particularly true since the ability to call up armed

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[43] Samuel Adams, "The Rights of the Colonists," Hanover Historical Texts Project, http://www.history.hanover.edu/texts/adamss.html (accessed August 22, 2009).
[44] Thomas Jefferson, "Draft Constitution for Virginia 1776," The Avalon Project, Lillian Goldman Law Library, Yale Law School, http://www.avalon.law.yale.edu/18th_century/jeffcons.asp (accessed March 31, 2009).
[45] James Madison, "No. 46," in *The Federalist Papers* (New York: The New American Library of World Literature, 1961), 299.
[46] Ibid.
[47] Alexander Hamilton, "No. 29," in *The Federalist Papers* (New York: The New American Library of World Literature, 1961), 183.

militias was considered the "essential means of colonial resistance."[48] Indeed, it was to be the efforts of the British to demolish American stores of ammunition that resulted in the skirmishes at Lexington and Concord that sparked the American Revolution.[49] For the colonists, clearly, the right to keep and bear arms was no mere academic theory; rather, it was a God-given right necessary for self-preservation, the perpetuation of liberty, and the abolition of tyranny.

C. Colonial Arms Regulations

However, the fact that the colonists viewed their possession of arms as fundamental to their liberty did not preclude them from instituting firearm restrictions. Multiple colonial cities, including Boston, Philadelphia, and New York (the three most populous American cities in the Founding Era), restricted the discharge of firearms within city limits.[50] In addition to the regulation of firearms in urban areas, multiple cities also restricted areas in which gunpowder, "a necessary component of an operational firearm," could be stored "for fire-safety reasons."[51]

While some firearms and gunpowder restrictions clearly did exist, they were essentially limited to densely populated urban areas and were mainly public safety measures that imposed penalties for infractions comparable to receiving a jaywalking ticket.[52] In any event, while

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[48] Nordyke v. King, 450.
[49] Ibid.
[50] For instance, Philadelphia imposed a fine of five shillings or two days in jail for either "firing a gun or setting off fireworks . . . without a 'governor's special license.'" See District of Columbia v. Heller, ***197. Boston enacted an ordinance in 1746 that banned the "discharge . . . [of] any Gun or Pistol charged with Shot or Ball in the Town," imposing a forty shilling fine on such an action. See Ibid., ***196. New York City placed a twenty shilling fine on the discharge of firearms in a three day period around New Year's Day, and Pennsylvania enacted a similar law that was applicable in every "inhabited par[t]" of its territory. See Ibid., ***197. Furthermore, Rhode Island punished "the firing of 'any Gun or Pistol . . . in the Streets of any of the Towns of [its] Government, or in any Tavern of the same, after dark, on any Night whatsoever" with a fine of five shillings for the first offense, the fine to be increased for multiple offenses. See Ibid., ***197.
[51] Ibid., ***198. In particular, Massachusetts in 1783 instituted a law prohibiting Bostonians from "tak[ing] into . . . [or] receiv[ing] into . . . any Dwelling, House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building within the Town of Boston, any . . . Firearm, loaded with, or having Gun-Powder" and punishing violations with the seizure of the offending weapon and a fine. See Ibid., ***103, 198. Moreover, New York City statutorily required that, if gunpowder were to be kept in individual homes, certain specified containers must be utilized for storage; and Pennsylvania towns such as Reading and Carlisle prohibited gunpowder from being stored anywhere in the home except the highest level of the home. See Ibid., ***201.
[52] Ibid., ***107.

particularly the gunpowder storage laws would have made it more difficult to use a firearm for self-defense, none of the laws in question could conceivably be construed as imposing a severe burden on the right to keep and bear arms. And, as Justice Scalia notes, even if the laws did not explicitly contain self-defense exceptions, such exceptions could reasonably be inferred. After all, it is simply "inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a 'Do Not Walk' sign in order to flee an attacker, or that the Government would enforce those laws under such circumstances."[53]

D. The Second Amendment

Due to the continued importance placed upon the right to keep and bear arms in early America, eight states adopted provisions in their state declarations of rights in the period from June 1776 to October 1783 that were analogous to what would become the federal Second Amendment.[54] The North Carolina Constitution of 1776 perhaps best embodies the spirit of these constitutional provisions, declaring 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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.[55]

Clearly, the American public possessed the view that armed citizens fighting in militias were the optimal way to preserve freedom and safety. Together with this belief was a pervading fear that the strong central government being created by the U.S. Constitution might deprive Americans of the rights that they had traditionally possessed as Englishmen and under the

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[53] Ibid.
[54] David E. Young, *The Founders' View of the Right to Bear Arms* (Ontonagon, Michigan: Golden Oak Books, 2007), 3.
[55] North Carolina Legislature. *North Carolina Constitution of 1776, Declaration of Rights, art. XXX*, http://www.ncleg.net/Legislation/constitution/article1.html (Accessed August 23, 2009).

Articles of Confederation.[56] Consequently, there was broad insistence upon an addendum to the Constitution that would protect a citizen's right to bear arms. Thomas Jefferson therefore urged James Madison to push for the addition of a bill of rights, since he foresaw danger in the "omission of a bill of rights providing clearly and without the aid of sophisms for" freedoms such as "protection against standing armies."[57] As Justice Scalia noted, the Federalists and Anti-Federalists hotly disputed the topic, although the debate:

> as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Anti-federalist rhetoric. . . . John Smilie, for example, worried not only that Congress's "command of the militia" could be used to create a "select militia," or to have "no militia at all," but also . . . that "[w]hen a select militia is formed; the people in general may be disarmed." . . . Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people.[58]

Ultimately, the Anti-Federalists overcame their opposition, and the right to keep and bear arms was enshrined in the U.S. Constitution's Bill of Rights. When James Madison penned the Second Amendment, however, he did so in a manner that would allow for controversy over its true meaning for two hundred seventeen years.

The wording of an amendment is obviously important in understanding its meaning, and the unusual grammatical construction of the Second Amendment has presented scholars with multiple problems. The Second Amendment, as passed by both houses of Congress, consists of both a prefatory clause ("A well regulated Militia, being necessary to the security of a free State,") and an operational clause ("the right of the people to keep and bear Arms, shall not be

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[56] Cottrol, 892.
[57] Paul Finkelman, "Thomas Jefferson, Original Intent, and the Shaping of American Law: Learning Constitutional Law From the Writings of Jefferson," *New York University Annual Survey of American Law* 62 (2006): 45, 84, http://www.lexisnexis.com (accessed October 3, 2008).
[58] District of Columbia v. Heller, ***47.

infringed") divided by three commas.[59] Unfortunately, prominent grammarians in the eighteenth century believed that it was acceptable to insert a comma to indicate a pause, while also maintaining that commas could delineate absolute clauses.[60] Madison's spasmodic usage of commas thus instigated a prolonged debate over just what he intended the amendment to mean. Adding to the confusion is the fact that when the amendment was copied and sent to state legislatures to be ratified, the third comma was sometimes omitted.[61] The ensuing difficulty is that it is technically unclear which version is the "authentic" Second Amendment.[62] Furthermore, assuming that the omission of the third comma is enough to make a substantial difference between the two versions, there possibly is no *true* Second Amendment.[63]

E. Post-Ratification Commentary

Notwithstanding the Second Amendment's grammatical deficiencies, three of the most significant legal scholars of the Founding Era interpreted the amendment as being one of the U.S. government's most important provisions. St. George Tucker, the editor of "the most important early American edition of Blackstone's Commentaries,"[64] declared that the Second Amendment:

> may be considered as the true palladium of liberty. . . . The right to self-defence is the first law of nature. . . . Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.[65]

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[59] U.S. Constitution, amend. 2.
[60] William W. Van Alstyne, "A Constitutional Conundrum of Second Amendment Commas: A Short Epistolary Report," *The Green Bag an Entertaining Journal of Law* 10 (2007): 472, http://www.lexisnexis.com (accessed October 3, 2008).
[61] Ibid., 474-475.
[62] Ibid., 475.
[63] Ibid.
[64] District of Columbia v. Heller, ***41.
[65] St. George Tucker, "Blackstone's Commentaries 1:App. 300, 1803," *The Founders' Constitution*, eds. Philip B. Kurland and Ralph Lerner (Indianapolis, IN: Liberty Fund, 1987), 212.

Furthermore, U.S. Supreme Court Justice Joseph Story stated that militias form the "natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers."[66] The Second Amendment is thus justly considered "the palladium of the liberties of a republic," since it provides not only "a strong moral check against the usurpations and arbitrary power of rulers" but also, if initially a tyrannical ruler assumes power, it "enable[s] the people to resist and [ultimately] triumph."[67] Therefore, "friends of a free government" cannot be overly vigilant to surmount the "dangerous tendency of the public mind" to relinquish the right of citizens to keep and bear arms.[68]

Finally, William Rawle, a well-known attorney and member of the Pennsylvania Assembly that ratified the Bill of Rights,[69] noted that the militia, in their role of "repel[ling] invasion, . . . suppress[ing] insurrection, and preserv[ing] the good order and peace of government," form "the palladium of the country."[70] It is therefore incumbent upon state governments "to adopt such regulations as will tend to make good soldiers with the least interruptions of the . . . occupations of civil life."[71] The federal government clearly "has a strong and visible interest" in all of this; thus, the Second Amendment guarantees that "*the right of the people to keep and bear arms shall not be infringed.*"[72] Due to this prohibition, there is no manner in which Congress can construe any part of the Constitution in order to confer upon itself the power to disarm citizens.[73] Such a "flagitious attempt," at best, could only be undertaken by a

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[66] Joseph Story, *A Familiar Exposition of the Constitution of the United States* (New York: Harper & Brothers, 1840), § 450-451, http://www.books.google.com (accessed August 29, 2009).
[67] Ibid.
[68] Ibid.
[69] District of Columbia v. Heller, ***61.
[70] William Rawle, "A View of the Constitution of the United States, 125-126, 1829 (2d ed.)," *The Founders' Constitution*, ed. Philip B. Kurland and Ralph Lerner (Indianapolis, IN: Liberty Fund, 1987), 213-214.
[71] Ibid., 213.
[72] Ibid., 214.
[73] Ibid.

state legislature.[74] However, the Second Amendment operates as a restraint on both the federal and state governments if either should attempt to disarm citizens "in any blind pursuit of inordinate power."[75] The Second Amendment, nevertheless, must not "be abused to the disturbance of the public peace."[76] For instance, it "is an indictable offence" for armed citizens to assemble for an illegal purpose.[77] And, if an individual goes about armed under circumstances "giving just reason to fear that he purposes to make an unlawful use" of his weapons, he can be required "to give surety of the peace"—failure to do so subsequently subjecting him to incarceration.[78]

F. Pre-Civil War Supreme Court Case Law

One result of the virtual unanimity of scholarly opinion regarding the importance of a robust Second Amendment was that few firearms restrictions were implemented prior to the Civil War.[79] Thus, there were virtually no federal court cases contesting the right of a citizen to keep and bear arms prior to the Civil War and Reconstruction. Moreover, while the states did implement firearms regulations over time, there remained essentially no federal firearms regulations up until the beginning of the twentieth century.[80] And, even though there was some activity at the state court level dealing with the right to bear arms, state cases almost unanimously interpreted the Second Amendment as protecting a citizen's right to bear arms regardless of connection with a state militia.[81] Furthermore, the federal courts were not likely to subject the state courts' decisions to scrutiny on the basis of the Court's holdings in *Barron v. Baltimore* (1833) and *The Slaughterhouse Cases* (1873) that the Bill of Rights was only binding

[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Cottrol, 892.
[80] Ibid.
[81] District of Columbia v. Heller, ***67.

on the federal government.[82] Ultimately, the U.S. Supreme Court only referenced the Second Amendment in two nineteenth-century cases; and, even though the Court did believe that the amendment merited mention, discussion of the Second Amendment was peripheral to the majority's main analysis.[83]

G. Post-Civil War Legislation

The Reconstruction Era, however, revived scholastic and congressional interest in the Second Amendment, particularly when the South tried to disarm former slaves. Debates soon arose over whether such actions infringed upon the "blacks' constitutional right to keep and bear arms."[84] Consequently, Congress, in the Freedmen's Bureau Act of 1866, felt compelled to specifically protect the right.[85]

In passing this legislation, the subsequent Civil Rights Act of 1871, and the Fourteenth Amendment, Congress believed that it was encoding a right guaranteed by the Second Amendment. As Justice Antonin Scalia notes, such an understanding was evinced by congressional discussions of all three pieces of legislation:

> even an opponent of [the Freemen's Bureau Act] sa[id] that the founding generation "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense." . . . Similar discussion attended the passage of the Civil Rights Act of 1871 and the Fourteenth Amendment. . . . Representative Butler said of the Act: "Section eight is intended to enforce the well-known constitutional provision guaranteeing the right of the citizen to 'keep

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[82] Cottrol, 892.

[83] First, Chief Justice Roger Taney listed the "liberty . . . to keep and carry arms" amongst citizens' rights in *Dred Scott v. Sanford*. See Dred Scott v. Sandford, 60 U.S. 393 (1856), http://www.lexisnexis.com (accessed August 27, 2009). Secondly, in *Houston v. Moore*, Justice Joseph Story in agreeing with the Court's decision that the states, where not pre-empted by Congress, had concurrent power over the militia with the federal government, noted that the Second Amendment (which he misquoted as the Fifth Amendment) "may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." See District of Columbia v. Heller, ***67; Houston v. Moore, 18 U.S. 52-53 (1820), http://www.lexisnexis.com (accessed August 27, 2009).

[84] District of Columbia v. Heller, ***75.

[85] The Act stated 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 . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery. See Ibid., ***76.

> and bear arms,' and provides that whoever shall take away . . . the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same." . . . With respect to the proposed Amendment, Senator Pomeroy described as one of the three "indispensable" "safeguards of liberty . . . under the Constitution" a man's "right to bear arms for the defense of himself and family and his homestead."[86]

Plainly, Restoration Era Congresses believed that the Second Amendment guaranteed an individual right to keep and bear arms.[87] Congress was, however, exhibiting an important shift in what it emphasized in the amendment, as it moved from almost solely stressing the value of a militia in preventing tyranny by and abuses from a standing army to finding more of a self-defense purpose in the Amendment. Such transference of emphasis was likely due to the fact that a refusal to maintain a standing army was no longer practical by the late nineteenth century.

H. Post-Civil War Commentary

Virtually every legal scholar of the post-Civil War period agreed with Congress' interpretation of the Second Amendment as an "individual right unconnected with militia service."[88] The most famous of these scholars, Thomas Cooley, wrote that any conclusion drawn from the wording of the Second Amendment "that the right to keep and bear arms was only guaranteed to the militia" would be unjustified by the purpose of the provision.[89] Rather, the amendment's intent is that those individuals "from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose."[90] It is in this manner that the government can be provided with a militia that can be said to be well-regulated; for "to bear arms" suggests not only "the mere keeping" but also "the

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[86] Ibid., ***76-77.
[87] Ibid., ***77-8.
[88] Ibid., ***78.
[89] Thomas Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown, and Co., 1898), 271, http://www.constitution.org/cmt/tmc/pcl.htm (accessed August 29, 2009).
[90] Ibid.

learning to handle and use" arms in a manner that will allow citizens to efficiently use them.[91] As for what arms the amendment is intended to protect, the Constitution refers to what weapons "are suitable for the general defence of the community against invasion or oppression."[92] Consequently, the concealed carry of arms designed merely for "deadly individual encounters may be prohibited."[93]

Other nineteenth-century scholars concurred with Cooley's interpretation. John Ordronaux noted that:

> The right to bear arms has always been the distinctive privilege of freemen. Aside from any necessity of self-protection to the person, it represents among all nations power coupled with the exercise of a certain jurisdiction. . . . Therefore it was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed. It is not in consequence dependent upon that instrument, and is only mentioned therein as a restriction upon the power of the national government against any attempt to infringe it. . . . But this prohibition is not upon the States. . . . [Thus,] the provision does not prevent a state from enacting laws regulating the manner in which arms may be carried.[94]

Furthermore, Benjamin Vaughan Abbott declared that "public welfare" depends on a state's populace possessing "[s]ome general knowledge of firearms."[95] This is because, if there were a war, it would not be possible to quickly form "an efficient force of volunteers unless the people had some familiarity with weapons of war."[96] Hence, the Second Amendment "secures the right of the people to keep and bear arms."[97] It therefore follows that "a citizen who keeps a gun or pistol under judicious precautions, practices in safe places the use of it, and in due time teaches

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[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] John Ordronaux, *Constitutional Legislation in the United States* (Philadelphia: T. & J.W. Johnson & Co., 1891), 241-243, http://www.books.google.com (accessed September 7, 2009).
[95] District of Columbia v. Heller, ***81-82.
[96] Ibid.
[97] Ibid.

his sons to do the same, exercises his individual right."[98] And, undoubtedly, an individual "whose residence or duties involve peculiar peril may keep a pistol for prudent self-defence."[99]

Finally, John Norton Pomeroy stated that the purpose of the Second Amendment was "to secure a well-armed militia" because standing armies "have always been associated with despotism."[100] However, a militia would be worthless if citizens were not allowed to "exercise themselves in the use of warlike weapons."[101] The government is therefore "forbidden by any law or proceeding to invade or destroy the right to keep and bear arms" in order to maintain this right "and to secure to the people the ability to oppose themselves in military force against the usurpations of government" or outside foes.[102] This right, however, is not unlimited. The Second Amendment is thus "not violated by laws forbidding persons to carry dangerous or concealed weapons, or laws forbidding the accumulation of quantities of arms with the design to use them in a riotous or seditious manner."[103] In short, the provision grants "[f]reedom, not license," and guards "fair use, not . . . libelous abuse."[104]

I. Post-Civil War Supreme Court Case Law

The ultimate result of the passage of the Freedmen's Bureau Act of 1866, the Fourteenth Amendment, and the Civil Rights Act of 1871 was that the Supreme Court for the first time found itself hearing cases that substantially dealt with the Second Amendment. With the passage of the Fourteenth Amendment, in particular, it appeared that a new day for Second Amendment jurisprudence might be dawning, since several of the framers of the new amendment intended it

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[98] Ibid.
[99] Ibid.
[100] John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* (Cambridge, MASS: The Riverside Press, 1888), 157, http://www.books.google.com (accessed August 29, 2007).
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid.

to incorporate the Bill of Rights to the states.[105] Even though the Court for the first time decided to hear a case that directly dealt with the Second Amendment in 1875, such hopes were soon shattered.

In *United States v. Cruikshank* (1876), the first case substantially dealing with the Second Amendment to reach the U.S. Supreme Court, the Court heard an appeal regarding members of the Ku Klux Klan interfering with the fundamental rights of black victims. In particular, they were being deprived of their lives and liberty of person without due process of law, prevented from exercising freedom of assembly, and prohibited from bearing arms.[106] In the 8-1 decision, the Court gave notice that the Fourteenth Amendment would incorporate neither the First Amendment nor the Second Amendment to the states. Chief Justice Waite, speaking for the Court, stated that the Second Amendment "has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation . . . of the rights it recognizes" in state police powers.[107]

After *Cruikshank*, it would be sixty-four years before the Court would once again hear a true Second Amendment case. The Court would nevertheless reference the amendment in several opinions. In *Presser v. Illinois* (1886) the Court reaffirmed *Cruikshank's* holding. However, Justice William Woods noted in dicta that:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force . . . of the United States as well as of the States; and, in view of this prerogative the States cannot . . . 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.[108]

In 1897, the Court again referenced the Second Amendment in *Robertson v. Baldwin*. Delivering

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[105] Cottrol, 892.
[106] United States v. Cruikshank, 92 U.S. 545 (1875), http://www.findlaw.com (accessed August 29, 2007).
[107] Ibid., 542.
[108] Presser v. Illinois, 116 U.S. 252 (1886), http://www.findlaw.com (accessed August 29, 2007).

the opinion of the Court, Justice Brown stated that:

> The law is perfectly well settled that the first ten amendments to the Constitution . . . were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, . . . the right of the people to keep and bear arms (Art. II) is not infringed by laws prohibiting the carrying of concealed weapons.[109]

In the first and only twentieth-century Second Amendment case, *United States v. Miller* (1939), the Court for the first time heard a case that was solely a Second Amendment challenge. The passage of the Eighteenth Amendment in 1919 brought about Prohibition and led to a meteoric rise in organized crime in the 1920s and 1930s. Consequently, Congress for the first time enacted a significant firearms regulation—the National Firearms Act of 1934, which required the "taxation and registration of automatic weapons and sawed-off shotguns."[110] The Court unanimously voted to uphold this regulation. Speaking for the Court, Justice James McReynolds stated that the Second Amendment "did not protect the right of citizens to own firearms that were not ordinary militia weapons."[111] Furthermore, he noted that:

> In the absence of any evidence tending to show that possession or use of [a sawed-off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[112]

Finally, the Second Amendment's "obvious purpose" was "to assure the continuation and render possible the effectiveness" of the militia.[113] Despite increasing numbers of federal firearms

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[109] Robertson v. Baldwin, 165 U.S. 281-282 (1875), http://www.findlaw.com (accessed August 29, 2007).
[110] Cottrol, 892.
[111] Ibid.
[112] United States v. Miller, 307 U.S. 174 (1939), http://www.findlaw.com (accessed August 29, 2007).
[113] Ibid., 178.

regulations, it would be sixty-nine years before the Court would hear another significant Second Amendment case. This time, however, the Court would for the first time provide an in-depth analysis of the Second Amendment.

J. Conclusion

Upon reviewing the history of the American right to keep and bear arms, it becomes abundantly clear that legal scholars, judges, politicians, and ordinary citizens have consistently viewed this right as being vital to liberty. Not only has it been seen as a protection against governmental tyranny, but also it has been viewed as necessary for the defense of one's person, family, possessions, and country. It should also be noted that, because arms have not historically been viewed as solely serving militia-related purposes, it is exceedingly difficult to view the Second Amendment as protecting a collective, as opposed to an individual, right.

It must not be forgotten, however, that the right to keep and bear arms has never been considered to be an unrestricted right. For instance, the English Bill of Rights only gave the right to have arms to a limited group of individuals (Protestants) and only protected certain arms (those that were suited to a subject's rank and were not prohibited by law). Blackstone recognized that the "public allowance" of "arms for . . . defence" was permissibly subjected to "due restrictions."[114] Colonial laws regulated firearms usage and gunpowder storage. Early state declarations of right, which strongly influenced the Second Amendment's phraseology,[115] recognized that legislatures were entitled to regulate the exercise of the right to keep and bear arms. Legal scholars, such as William Rawle, Thomas Cooley, John Norton Pomeroy, and John Ordroneaux, acknowledged that the Second Amendment can be subjected to restrictions, particularly regarding the classes of permissible weapons, situations in which citizens may go

[114] Blackstone, "Commentaries, 1:139, 1765," 210.
[115] Young, 4.

armed, and the manner of carrying arms. Also, the Court in *Robertson v. Baldwin* and *United States v. Miller* recognized that regulations on the right to keep and bear arms, such as prohibitions on the concealed carry of weapons and the possession of unusual and dangerous firearms, are constitutional. Ultimately, it appears that the Second Amendment was intended to grant an individual right to keep and bear arms that, while definitely designed to further militia-related purposes, is not contingent on participation in a militia and that can be subjected to reasonable regulations.

CHAPTER TWO:

DISTRICT OF COLUMBIA v. HELLER

Due to the flexibility provided by the grammatical construction of the Second Amendment, the Supreme Court's refusal to closely scrutinize the amendment and render a decisive opinion on its meaning, and an increasing desire for gun regulations in modern times, three views of the nature and scope of the amendment have developed. In 2008, the Court dispelled this ambiguity surrounding the Second Amendment by essentially adopting one of these views (the Standard Model) as authoritative in *District of Columbia v. Heller*. This decision, however, was by no means unanimous. The dissenting justices clearly believed that the majority had erroneously interpreted the history of the Second Amendment and thereby chosen the wrong model. Therefore, in order to fully comprehend the case, it is necessary to understand the main scholarly interpretations of the Second Amendment prior to reviewing *Heller*'s procedural history, discussing the majority and dissenting opinions in the case, and analyzing the decision.

A. Three Understandings of the Second Amendment

Over time, scholars have developed three major views of the history and meaning of the Second Amendment. The Standard or Individual Right Model, which is the "mainstream scholarly interpretation,"[116] asserts that the Second Amendment guarantees to private citizens the right to "obtain, possess, and maintain access to readily usable firearms for lawful purposes." [117] The purpose of this amendment is both to "allow individuals to protect themselves and their families" and to "ensure a body of armed citizenry from which a militia could be drawn whether

[116] Glenn Harlan Reynolds, "A Critical Guide to the Second Amendment," *Tennessee Law Review* 62 (1995): 477, http://www.ssrn.com (accessed October 4, 2008).
[117] Kenneth A. Klukowski, "Armed by Right: The Emerging Jurisprudence of the Second Amendment," *George Mason University Civil Rights Law Journal* 18 (2008): 175, http://www.lexisnexis.com (accessed October 3, 2008).

that militia's role was to protect the nation, or to protect the people from a tyrannical government."[118] Also, it can be seen as an extra division of power devised by the Framers in order to protect liberty, as it ensured that U.S. citizens would be able to own sufficient "military power to offset that of the Federal government."[119] While proponents of this model believe that the right to bear arms extends beyond citizens involved in state militias to private citizens, they also believe that essential limitations exist both on what individuals may keep and bear arms and on what type of arms are protected by the amendment.[120]

In support of this theory, Standard Model advocates often state that their interpretation of the Second Amendment is based both on history and the Second Amendment's text. They claim that the American right to keep and bear arms is derived from the natural law right to life and liberty and is the result of both provisions of the English Bill of Rights of 1689 and English common law.[121] Consequently, those in the Founding Era believed that the right to have and carry arms was one of the traditional "Rights of Englishmen," the abrogation of which by King George III provided a rallying point for the American revolutionaries.[122] Since the Second Amendment, like the rest of the Bill of Rights, is part of natural law, the government did not create, but simply preserved, this right.[123]

Regarding the Second Amendment's text, the right to bear arms is distinctly referred to as a "right of the people," a designation that in other portions of the Bill of Rights is "universally interpreted as protecting individual rights."[124] Therefore, if one does not interpret the amendment as preserving an individual right, one must believe that:

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[118] Reynolds, 475.
[119] Ibid., 469.
[120] Ibid., 488.
[121] Klukowski, 175.
[122] Reynolds, 467.
[123] Klukowski, 175.
[124] Reynolds, 466.

> (1) when the first Congress drafted the Bill of Rights it used "right of the people" in the first amendment to denote a right of individuals (assembly); (2) then, some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to the states; (3) but then, forty-six words later, the fourth amendment's "right of the people" had reverted to its normal individual right meaning; (4) "right of the people" was again used in the natural sense in the ninth amendment; and (5) finally, in the tenth amendment the first Congress specifically distinguished "the states" from "the people," although it had failed to do so in the second amendment.[125]

Consequently, to claim that the words "right of the people" as applied to the Second Amendment do not protect an individual right threatens an individual rights interpretation of any other part of the Bill of Rights.[126] Not to mention the fact that the right that the amendment is speaking of is plainly "the right of the people, to keep and bear arms," which means that the mention of a "well regulated militia" does nothing to alter the right guarded by the Second Amendment.[127]

In contrast to the Standard Model, the States' Right Model holds that the Second Amendment simply protects the right of a state to possess a well-regulated militia. Under this view, "militias" are defined as "organized military units," and the addendum of "well regulated" to "militia" necessitates control of the militias by the state.[128] On the other hand, the Sophisticated Collective Right Model, a derivative of the second model, propagates the view that the possession and ownership of arms by individuals is protected by the Second Amendment; however, possession and ownership must be connected with state militia service.[129] Adherents to these two models argue that the Second Amendment was a reaction to the possibility that the powerful central government created by the U.S. Constitution might attempt to disarm state

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[125] Ibid.
[126] Ibid.
[127] Ibid., 466-467.
[128] Klukowski, 175.
[129] Ibid., 175-176.

militias—units considered essential both for local defense and as a counterpoise to the federal government's standing army.[130]

Proponents of either collective right model, however, are faced with multiple difficulties. First, they must show that "no individual right was intended" despite the fact that the "most natural reading of the amendment's phraseology" indicates a desire to protect individuals as well as the states.[131] The Framers, moreover, definitely possessed the ability to make the amendment clearly state that its purpose was "to simply preserve the states' power to arm militias" if they had the desire to do so.[132]

Thirdly, the ultimate conclusion of those who believe in the State's Rights Model must be that, if the whole object of the Second Amendment is to protect the existence of state militias so that they can function as counterbalances to federal forces, the range of what rights the states have under the amendment is "determined by the goal of preserving an independent military force not under direct federal control."[133] Such a constitutional right is highly problematic in that the Second Amendment would therefore effectively remove many of the restrictions that Article I, Section 10[134] of the Constitution imposes on the military power of the states.[135] Furthermore, if states possess the right to maintain their own militias outside of the control of the federal government, states must have the right to outfit their militias in any way they please, since allowing the central government to restrict or regulate their weaponry would render the states' right pointless and obviate the effectiveness of the check on the federal

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[130] Ibid., 176; Reynolds, 488.
[131] Klukowski, 176.
[132] Ibid.
[133] Reynolds, 489-490.
[134] In particular, "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a Foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." See U.S. Constitution, art. I, sec. 10, cl. 3.
[135] Reynolds, 490.

government's power.[136] Since it is unlikely that the states would care to utilize their own resources to arm their citizens, many states might simply follow the example that Congress set in 1792 and require / permit their citizens to possess military-grade weaponry.[137] Such a requirement must, in order to make the states' right meaningful, preempt congressional gun-control laws.[138] It would, furthermore, modify the Constitution's assignment to the federal government of the right "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."[139]

Fourthly, advocates of the States' Right Model have very little historical evidence to back their claim.[140] As a matter of fact, in the words of Stephen Halbrook:

> [i]f anyone entertained this notion [that the Second Amendment protects the right of states to maintain militias instead of the right of the people to keep and bear arms] in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for *no known writing surviving from the period between 1787 and 1791 states such a thesis*.[141]

The theory did not even exist until the twentieth century, when it became "necessary to uphold gun control laws—primarily intended to disarm blacks and immigrants—against Second Amendment challenge."[142] Finally, either States' Right Model is based on the "discredited (and always unsound)" belief that the state governments, not the people, are the "primary constituents" of the U.S. Constitution.[143] Power is thus delegated to the tenuously trusted federal government by the states, who retain to themselves the necessary power to protect themselves and their citizens by checking the central government's acts when necessary.[144] Within this

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[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid; U.S. Constitution, art. I, sec. 8, cl. 16.
[140] Reynolds, 493.
[141] Quoted in Reynolds, 494.
[142] Reynolds, 494.
[143] Ibid., 491-492.
[144] Ibid., 491.

conception, states can use their militias to offset the federal government's armies and state legislators have the power to void what federal firearm regulations might interfere with a state's prerogatives.[145] Such a notion of the relationships existing in the federal system has a decidedly bleak history, being the view adhered to by the losing side spanning from *McCulloch v. Maryland* (1819) to the Civil War and *Brown v. Board of Education* (1954).[146] Furthermore, upon accepting this stance on federalism, there are no grounds for believing that the Framers intended for authority to stem from the people and be divided between state governments and the federal government anywhere in the Constitution, which would require that constitutional history be reconsidered all the way back to 1819—a decidedly unlikely proposition.[147] Ultimately, given the considerable difficulties with either collective right model, it is not difficult to understand why the majority of scholars adhere to an individual right interpretation of the Second Amendment.

B. Parker v. District of Columbia

Even though many scholars agreed that the Standard Model was the proper interpretation of the Second Amendment, it was unclear whether such a standard would be adopted by the federal courts. The case that resulted in the courts authoritatively ruling on this question was *Parker v. District of Columbia. Parker* was initiated when the CATO Institute filed a lawsuit on behalf of six D.C. residents who alleged that the District of Columbia's handgun laws were so restrictive that they violated the Second Amendment.[148] In particular, they challenged the sections of the D.C. Code making it a crime to carry unregistered firearms, prohibiting the registration of handguns, forbidding handgun carry without a license, giving the D.C. Chief of

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[145] Ibid.
[146] Ibid., 492.
[147] Ibid.
[148] "Parker v. District of Columbia," Brady Center to Prevent Gun Violence, Legal Action Project, http://www.gunlawsuits.org/docket/casestatus.php?RecordNo=87 (accessed September 12, 2009).

Police the ability to issue one-year licenses, and requiring that firearms must remain either unloaded and disassembled or bound by a trigger lock unless they were located in a business or were being used for lawful recreational activities.[149] Four people sought to own handguns in their homes for self-defense purposes.[150] Gillian St. Lawrence possessed a registered shotgun, but he wished to keep it both assembled and unbound by a trigger lock.[151] Finally, Dick Anthony Heller, a D.C. special policeman allowed to carry a handgun when on guard duty at the Federal Judicial Center, desired to have a handgun in his home.[152] The District, however, denied him a registration certificate.[153] The district court upheld the challenged laws, holding that the Second Amendment did not grant individuals any rights unless they "serve[d] with an organized militia such as today's National Guard."[154]

This decision was reversed on appeal three years later.[155] The D.C. Circuit held that the Second Amendment protects an individual right to keep and bear arms, noting that this right was:

> premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad).[156]

Furthermore, the Second Amendment protects activities that "are not limited to militia service, nor is an individual's enjoyment of the right [to bear arms] contingent upon his or her . . . enrollment in the militia."[157] Handguns constitute "arms" within the meaning of the Second Amendment; therefore, D.C. cannot ban them.[158] While rights under the Second Amendment

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[149] D. C. Code §§7–2501.01(12), 7–2502.01(a), 7–2502.02(a) (4), 22–4504(a), 22–4506, and 7–2507.02. See Parker v. District of Columbia, 478 F.3d 374 (D.C. Cir. 2007), http://www.findlaw.com (accessed January 17, 2009); District of Columbia v. Heller, ***6.
[150] Parker v. District of Columbia, 374.
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] "Parker v. District of Columbia," 2; Parker v. District of Columbia, 374.
[155] "Parker v. District of Columbia," 3.
[156] Parker v. District of Columbia, 416.
[157] Ibid.
[158] District of Columbia v. Heller, ***7.

must be subject to reasonable restrictions, D.C.'s requirement that firearms kept at home remain in a nonfunctional state regardless of the times when they might be necessary for self-defense violates the Second Amendment.[159] Finally, only Heller had standing.[160]

C. District of Columbia v. Heller

After a request for a rehearing was denied,[161] the District filed a petition for certiorari with the United States Supreme Court. The Court granted certiorari to *Parker*, which was now entitled *District of Columbia v. Heller*; however, it was only to decide the narrow question of:

> Whether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of 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.[162]

D. Antonin Scalia's Majority Opinion

In a 5-4 decision the Court affirmed the decision of the D.C. Circuit. Writing for the majority, Justice Antonin Scalia noted that the Second Amendment's prefatory clause ("A well regulated Militia, being necessary to the security of a free State") neither limits nor expands the scope of the operative clause ("the right of the people to keep and bear Arms, shall not be infringed"); rather, it simply announces the amendment's purpose.[163] The "militia" mentioned in the prefatory clause is "comprised [of] all males physically capable of acting in concert for the common defense."[164] The addendum of "well-regulated" simply connotes that such a militia should be subjected to necessary military training.[165] The militia was considered to be essential to the "security of a free State" because of its value in "repelling invasions and suppressing

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[159] Ibid.
[160] Parker v. District of Columbia, 374.
[161] "Parker v. District of Columbia," 4.
[162] Paul D. Clement, "District of Columbia, et al., Petitioners v. Dick Anthony Heller, on Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit: Brief for the United States as Amicus Curiae," I, http://www.lexisnexis.com (accessed January 17, 2009).
[163] District of Columbia v. Heller, ***42-51; Ibid., ***2.
[164] Ibid., ***42.
[165] Ibid., ***44-45.

insurrections, . . . render[ing] large standing armies unnecessary," and "train[ing]" and "organiz[ing]" the "able-bodied men of [the] nation" so that "they [were] better able to resist tyranny."[166] Consequently, the Second Amendment was created to quell the fears of the Anti-Federalists that the powerful federal government would attempt to disarm the citizens comprising the militia.[167] As for the "State" referred to by the amendment, it the United States, not the several states.[168]

Regarding the operative clause, Scalia stated that both its history and text reveal that it implies an individual, as opposed to a collective, right.[169] The phrase "right of the people" is the identical or very similar phraseology to that employed in the First, Fourth, and Ninth Amendments to refer to rights that are clearly those of the individual.[170] As for the meaning of "to keep and bear Arms," weapons "not specifically designed for military use and . . . not employed in a military capacity" constitute "arms," "to keep arms" simply means to possess weapons, and "to bear arms" denotes carrying weapons "for the purpose of offensive or defensive action."[171] Both the history and the text of the operative and prefatory clauses comport with the Court's holding that the "Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."[172] Furthermore, neither *Cruikshank* nor *Presser* in any way prevent an individual right interpretation of the amendment; and *Miller* does not limit the right to bear arms only to militia service—it simply limits the types of weapons to which the amendment applies.[173]

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[166] Ibid., ***46.
[167] Ibid., ***2.
[168] Ibid., ***45.
[169] Ibid., ***12-42.
[170] Ibid., ***12.
[171] Ibid., ***16-22.
[172] Ibid., ***2.
[173] Ibid., ***3, ***82-94.

Scalia noted, however, that the Second Amendment is not without limits. It certainly does not provide a right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[174] Rather:

> [n]othing in [this] 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.[175]

A second restriction on the right to keep and bear arms is that the only weapons protected by the Second Amendment are those that are "in common use at the time"—that is, the carrying of "dangerous and unusual weapons" can be prohibited.[176]

As for the D.C. laws in question, the ban on handguns, trigger-lock requirement, and requirement that firearms in the home be either disassembled or bound by a trigger lock violate the Second Amendment under any standard of scrutiny.[177] Based on the assumption that Heller is not disqualified from exercising his rights under the Second Amendment, D.C. must allow Heller to register his handgun and must issue him a license to keep it at home.[178]

Justice Scalia's interpretation of the Second Amendment was contested by the dissenting justices, who preferred to look to the intention of the Framers in interpreting the amendment instead of mainly relying upon the public meaning of the amendment when it was adopted.

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[174] Ibid., ***94.
[175] Ibid., ***95.
[176] Ibid. The objection to this restriction on the grounds that, if arms that are "most useful in military service" (i.e. assault rifles and similar weapons) may be prohibited, the Second Amendment is entirely separated from the prefatory clause is unpersuasive. See Ibid., ***96. The comprehension of the amendment when it was ratified was that the militia was the "body of all citizens capable of military service, who would bring the . . . lawful weapons that they possessed at home to militia duty." See Ibid. Consequently, it matters not that for modern militias to be as effective of those in the Founding Era it would necessitate citizens possessing arms that are "sophisticated" and "highly unusual in society at large" or even that no number of military-grade small weapons possessed by citizens would be effective against modern "bombers and tanks." See Ibid., ***96-97. The Court's interpretation of the right to keep and bear arms cannot be altered just because "modern developments have limited the degree of fit between the prefatory clause and the protected right." See Ibid., ***97.
[177] Ibid., ***4.
[178] Ibid., ***111.

Under either method of interpretation, however, the justices examined and used as support much of the same historical evidence and textual material—mainly because there are limited quantities of both.

E. John Paul Stevens' Dissent

Justice John Paul Stevens, joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer, penned the primary dissent.[179] Stevens began his dissent by criticizing Scalia's interpretation of the actual question of the case, pointing out that whether the Second Amendment's protected right is either collective or individual in nature is irrelevant since determining that the protected right is an individual one does nothing to clarify the "scope of that right."[180] Clearly, the amendment grants individuals a right to own and use weapons for "certain military purposes;" however, the real question of this case is whether it also protects a similar right for purposes unrelated to the military, such as self-defense or hunting.[181]

According to Stevens, in this area, the Court's decision in *United States v. Miller* supplies clear guidance.[182] The Framers intended for the Second Amendment to protect the right of states' citizens only to "maintain a well-regulated militia."[183] The amendment was the result of concerns voiced during the ratification of the Constitution that the federal government would be able to both create a standing army, which would be "an intolerable threat to the sovereignty of the

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[179] Justice Stephen Breyer also penned a dissent in *Heller*. His opinion basically agrees with Stevens that the Second Amendment secures the right to keep and bear arms only insofar as it is related to militia-related, not self-defense-related, interests and that the majority's failure to provide substantial guidance for the lower courts in deciding Second Amendment cases (a class of cases with which they are likely to be inundated) is highly problematic. Breyer's opinion is most distinguishable in that he expends a great deal of effort in demonstrating that the District's gun laws could be upheld even if one views the Second Amendment as protecting non-militia-related interests. He is able to do so because the Court failed to establish a standard of review for Second Amendment challenges. Recognizing this, he proposes his own standard of review. To read Breyer's opinion see Opinion of Breyer, S., District of Columbia v. Heller, ***112-261.
[180] Ibid., ***112.
[181] Ibid.
[182] Ibid.
[183] Ibid.

several States," and disarm the states' militias.[184] However, the Framers never indicated that the amendment was intended to "limi[t] any legislature's authority to regulate private civilian use of firearms," in particular, there is no evidence showing the Founding Fathers had any intention of "enshrin[ing] the common-law right of self-defense in the Constitution."[185] The view of the Second Amendment espoused in *Miller* –namely that the amendment "protects the right to keep and bear arms for certain military purposes"—is thus not only the "most natural reading of the Amendment's text" but it is also the construction most true to the historical evidence.[186] Not only has this interpretation of the amendment been relied upon by "hundreds of judges," but also the Court itself affirmed it in *Lewis v. United States* (1980).[187] Since that time, there has been no new evidence presented that would substantiate the majority's claim "that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons."[188] As a matter of fact, the early history of the amendment shows that the Framers actually "*rejected* proposals that would have broadened its coverage to include such uses."[189]

Stevens further noted that the only reason that the Court is able to reach the opposite conclusion is due to a "strained and unpersuasive reading" of the text of the Second Amendment, provisions of the English Bill of Rights of 1689 that are substantially different from the amendment, several nineteenth-century state constitutions, post-enactment commentary, and a "feeble attempt to distinguish *Miller*" by placing "more emphasis on the Court's decisional process than on the reasoning in the opinion itself."[190] Even if both sides of the argument could present equal evidence, most jurists, out of "respect for the well-settled views" of previous

[184] Ibid., ***112-113.
[185] Ibid., ***113.
[186] Ibid., ***113-114.
[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] Ibid., ***116-117. For more on Stevens' critique of Scalia's history see Opinion of Stevens, J., Heller v. District of Columbia, ***157-175.

members of the Court and "the rule of law itself," would refrain from approving "such a dramatic upheaval in the law."[191]

As for the text of the Second Amendment, Stevens states that the preamble makes three notable points:

> [i]t identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be "well regulated."[192]

In all three areas, the preamble is similar to clauses in multiple State Declarations of Right ratified roughly in 1776 that emphasize the significance the Founding Fathers placed on the preservation of state militias and the "profound fear . . . of the dangers posed by standing armies."[193] Thus, the preamble both "sets forth the object of the Amendment and informs the meaning of the remainder of its text."[194] Consequently, the Court is wrong to deal with the preamble "as mere surplusage" by analyzing the operative clause then only returning to it in order to ascertain that the Court's interpretation of the operative clause is not inconsistent with the purpose announced in the prefatory clause.[195] The Court thus arrives at a "preferred reading in what is at best an ambiguous text" without bothering to "identif[y] any language in the text that even mentions civilian uses of firearms" and proceeds to announce that its interpretation is "not foreclosed by the preamble"—an approach that, while being "acceptable advocacy," is quite the "unusual approach for judges to follow."[196]

Stevens also pointed out that, in a manner consistent with its erroneous analysis of the preamble, the Court managed to incorrectly interpret the operative clause. Scalia centers his

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[191] Ibid., ***117.
[192] Ibid., ***119.
[193] Ibid., ***119-120.
[194] Ibid., ***125.
[195] Ibid., ***126-127.
[196] Ibid., ***127.

textual analysis on the assertion that the words "the people" in the operative clause have the same meaning as those in the First and Fourth Amendments; thus, "the term unambiguously refers to all members of the political community, not an unspecified subset."[197] However, the Court then proceeds to limit the class receiving the protection of the amendment to "law-abiding, responsible citizens"—a "subset significantly narrower than the class of persons protected by the First and Fourth Amendments."[198] The Court's interpretation of the phrase "to keep and bear arms" is also erroneous. The proper meaning of "bear arms" in the absence of additional modifying words is "to serve as a soldier, do military service, fight."[199] Since the amendment never mentions the employment of weapons by civilians, the text must be adapted to the purpose stated in the preamble.[200] The Court's reliance on irrelevancies continues as the majority points out that the right to keep and bear arms was a "*pre-existing* right"—a fact of no consequence since "the right to keep and bear arms for service in a state militia" was, likewise, a pre-existing right.[201] In short, not a single word in the text can be said to "even arguably suppor[t] the Court's overwrought and novel" interpretation of the Second Amendment as "elevating above all other interests the right of law-abiding, responsible citizens to use arms in defense of both hearth and home."[202]

Moreover, Stevens believes that the majority's discussion of case law is errant. First, the Court is incorrect in stating that the *Cruikshank* Court explained the right contained in the Second Amendment as "'bearing arms for a lawful purpose,'" since the Court in *Cruikshank* was simply saying "that the defective *indictment* contained such language."[203] *Cruikshank* neither

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[197] Ibid.
[198] Ibid.
[199] Ibid., ***130.
[200] Ibid., ***131-132.
[201] Ibid., ***141.
[202] Ibid., ***141-142.
[203] Ibid., ***178.

described the right contained in the Second Amendment nor "endorse[d] the indictment's description of the right."[204] As for *Presser*, it not only confirmed the holding in *Cruikshank* "that the Second Amendment posed no obstacle to regulation by state governments," but it also "suggested that . . . nothing in the Constitution protected the use of arms outside the context of a militia 'authorized by law' and organized by the State or Federal Government."[205] Thirdly, in *Miller* the Court looked at many of the sources that the Court reviews in depth in *Heller* and arrived at the unanimous decision that "the Second Amendment did not apply to the possession of a firearm that did not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[206] The *Miller* Court's decision hinged not on a differential "between muskets and sawed-off shotguns" but on the "basic difference between the military and nonmilitary use and possession of guns."[207] As for the majority's assertion that *Miller* should be "discounted" because the appellee neither "file[d] a brief [n]or made an appearance," the lack of an "adversarial presentation" is an insufficient "basis for refusing to accord *stare decisis* effect to a decision" of the Court, as particularly evidenced by the fact that in *Marbury v. Madison* only one side appeared and proffered arguments.[208] In short, the Court dismisses *Miller* simply because it dislikes the decision the *Miller* Court arrived at on the basis of all relevant evidence—hardly a satisfactory reason to ignore a "unanimous opinion . . . upon which substantial reliance has been placed by legislators and citizens for nearly 70 years."[209]

The majority's unfortunate decision is, furthermore, likely to bring about dire consequences. The Court's finding of "a new constitutional right to own and use firearms for

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[204] Ibid.
[205] Ibid., ***180-181.
[206] Ibid., ***183.
[207] Ibid., ***185.
[208] Ibid., ***185-186.
[209] Ibid., ***188.

private purposes" unsettles the longstanding understanding that it is within the power of legislatures to "regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia."[210] In the process, the Court does not even outline "the scope of permissible regulations," which, in light of the fact "that most citizens are law-abiding and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home," may leave very few regulations standing.[211] The supervening effect is that judges' case loads are likely to be enlarged to the "breaking point."[212] Even absent such a drastic result, undoubtedly the majority's decision will result in judges playing a far larger role "in making vitally important national policy decisions than was envisioned at any time in the late 18th, 19th, or 20th centuries."[213] Without "compelling evidence" that the Framers chose to limit the ability of "elected officials wishing to regulate civilian use of weapons, and to authorize" the Court's employment of "the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy," it is hard to accept that the Framers intended such a result.[214]

F. Analysis of the Case

Upon reading the two primary *Heller* opinions, it becomes evident that the justices arrive at different conclusions mainly due to differences in their analyses of historical texts and case law. In their respective discussions of the historical aspects of the case, Justices Scalia and Stevens to a large extent reference the history discussed in chapter one. The justices, however, differ in what they emphasize. Justice Scalia particularly highlights the Second Amendment's English origins and anything that conceivably supports a finding of a self-defense purpose and an

[210] Ibid., ***188-189.
[211] Ibid., ***189.
[212] Ibid., ***190.
[213] Ibid.
[214] Ibid., ***191.

individualistic right in the amendment. However, he often fails to note, or at least attach much significance to, the restrictions that have been historically placed on the right to keep and bear arms. On the other hand, Justice Stevens goes to great lengths to emphasize that the use and even storage of firearms and their components has always been regulated. He also extensively expounds upon how the prefatory clause of the Second Amendment, in conjunction with historical evidence emphasizing militia-related purposes for the right to keep and bear arms, precludes interpreting the amendment as protecting more than militia-related interests. Like Scalia, Stevens is prone to dismissing evidence that does not support his view. Consequently, to him, the English origins of the right to keep and bear arms as well as the writings of legal scholars addressing it are all but irrelevant when it comes to interpreting the U.S. Constitution's Second Amendment. Moreover, he handily ignores the opinions of other legal scholars that the majority references on the grounds that they are not particularly cogent and that, in some instances, they are not even pertinent.

As for the weight that should have been accorded to case law in reaching a decision in this case, the justices' views radically differ. Scalia sees *Miller, Cruikshank,* and *Presser* as neither illustrative of how the Court should rule in *Heller* nor as impeding his decision to construe the Second Amendment as protecting the right of an individual not affiliated with a militia to own and carry arms, particularly for a self-defense purpose. Stevens, however, strongly believes that *Presser* and *Miller* require the Court to hold that the Second Amendment only protects a right to keep and bear arms for military purposes.

In the end, Scalia's historical analysis is overall more convincing than Stevens'. The majority of the evidence does seem to indicate that the arms provision of the English Bill of Rights and Blackstone's references to it did indeed strongly influence the American conception

of the right to keep and bear arms. Furthermore, in the absence of substantial Supreme Court case law construing the Second Amendment, it appears reasonable to give weight to legal scholars' interpretations of the amendment throughout history. To be sure, that is not to say that Scalia's handling of history is always optimal. He should have more duly noted the restrictions that have existed on the right to keep and bear arms. Furthermore, Stevens' point that post-Civil War commentary can only with difficulty be said to be authoritative on what the Second Amendment was supposed to mean was well made. Nonetheless, Scalia's analysis appears to best capture the intent of the Framers in creating the Second Amendment and the public understanding of what the amendment guarantees.

The majority's handling of what Supreme Court case law does exist was much more problematic than its interpretation of history. It is difficult to view *Presser* as not implying that the Second Amendment was only intended to protect arms reasonably related to militia purposes. As for *Miller*, not only did it review much of the same historical evidence that the Court looked at in *Heller*, but also it once again articulated the view that the amendment protects weapons owned and used for military purposes. These cases are obviously relevant to the main question in *Heller*—whether the Second Amendment protects the right of an individual not affiliated with a state militia to keep and bear arms. And, even though the Court chose not to abide by *stare decisis*, it should have at least acknowledged that fact and more substantially explained why the decisions were in essence being overturned.

While the dissenters' criticism of the majority's usage of history and case law is mainly only of academic interest, the dissenters also note crucial practical problems with the Court's decision that are highly relevant to any discussion of the case's impact. First, the case unsettled *Miller*—a decision upon which judges and legislators had long relied. As a result, *Heller* threw

the constitutionality of many laws and court decisions into question and virtually guaranteed that the courts would be flooded with Second Amendment challenges. More importantly, the majority did not clearly provide the lower courts with substantial guidance on how to resolve these cases.

Regarding these criticisms, it must be said that it is inconceivable that the Court was unaware of the likely repercussions of its decision given that both the dissenters devoted a great deal of energy to highlighting the decision's shortcomings in this area. And, even though it would be unrealistic to expect the Court to completely clarify the field of Second Amendment jurisprudence in its first decision substantively interpreting the amendment, it nonetheless appears to be an almost irresponsible action on the part of the majority to not establish, at a minimum, a standard of review. Indeed, it is the failure to do so that allowed Justice Breyer to demonstrate that the Court could have reached the conclusion that they did regarding the Second Amendment's meaning and still have upheld the District's firearms regulations as reasonable restrictions on the right to keep and bear arms. Ultimately, however, while the Court's omission of guidelines for implementation of the decision by lower courts is hardly laudatory, as discussion of the case's impact will show, it has actually not proven to be as much of a stumbling block to the courts as the dissenters imagined.

G. Conclusion

Heller is clearly the most important Second Amendment decision that the Supreme Court has handed down. After all, it is the first comprehensive U.S. Supreme Court ruling on the Second Amendment. Furthermore, it prevents the government from totally banning firearms, protects an individual right to possess and carry weapons independent of militia service, and finds a self-defense purpose in the Second Amendment. It also prevents the government from denying gun licenses on arbitrary and capricious grounds; and it voids D.C.'s gun ban laws,

which were some of the most draconian in the nation. *Heller* has, moreover, been the catalyst for many lawsuits challenging firearm regulations.

Nevertheless, *Heller* is significantly limited. The restricted nature of the case is far from surprising, however, because it would be difficult to establish a complete framework for Second Amendment jurisprudence in the first substantial Second Amendment case the Court has heard—not to mention the fact that the Court often exhibits a prudential reluctance to expanding its holdings beyond the specific questions presented in a case.[215] In any event, *Heller* certainly did not "clarify the entire field" of Second Amendment jurisprudence.[216] First, the patently narrow decision did not incorporate the Second Amendment to the states through the Fourteenth Amendment's Due Process Clause, leaving the Second Amendment as binding only on the *federal* government. *Heller* did not even sweepingly revise federal firearm laws, since the challenge was only made to and the decision only was concerned with three specific D.C. gun laws. Furthermore, *Heller* only involved handguns, which is perhaps why the majority failed to establish a full-scale test for determining what arms the people have a right to bear. Regardless, the outer limits of the right to bear arms were hardly established, especially in light of Scalia's statement that only firearms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia" are protected by the Second Amendment.[217] This highly subjective standard was hardly helped by the equally vague admonition that the Second Amendment protects weapons "typically possessed by law-abiding citizens for lawful purposes."[218] Finally, the majority did not provide guidance to the lower courts regarding the level of judicial review to be applied to challenged gun laws. Despite the failure of the Court to

[215] Ibid., ***110.
[216] Ibid.
[217] Ibid., ***88.
[218] Ibid., ***92.

address many important issues regarding future Second Amendment legislation and litigation in *Heller*, both the fact that *Heller* is essentially the first case in a developing area of high-profile constitutional law and the extensive impact that the ruling has already had in the courts indicate that it is likely to join cases such as *Griswold v. Connecticut* as a landmark of modern Supreme Court jurisprudence.

CHAPTER THREE:

THE IMPACT OF *HELLER* ON THE DISTRICT OF COLUMBIA

The most immediate impact of *Heller* was that it clearly required the District of Columbia to expeditiously change its handgun laws. However, the District, being generally unhappy about having to alter its firearm regulations from being the "nation's toughest restrictions on firearms ownership," decided to do its utmost to test the limits of the Court's allowance of "reasonable restrictions."[219] At a post-*Heller* news conference, the District's mayor, police chief, attorney general, and various council members expressed their disappointment with the Court's ruling, stating their belief that it would only lead to increased handgun violence.[220] Consequently, the D.C. Council chairman declared that "[w]e're going to have the strictest handgun laws the Constitution allows."[221] The firearms laws the District has subsequently promulgated reflect this intention.

Even if the firearms laws the District has passed cannot strictly be said to contravene the Court's ruling, they most certainly have not been in compliance with the spirit of the decision. Due to this fact, D.C. has been forced to continually promulgate legislation to amend its firearms regulations as existing laws have consistently been challenged by lawsuits and have met with congressional disapproval. Both because these lawsuits deal with some of the most controversial Second Amendment issues (particularly the Right-to-Carry and bans on classes of firearms) and because the District's response to *Heller* is a model for other governments who wish to use their police powers to restrict Second Amendment rights in the face of court decisions protecting the rights of gun owners, the District's response to *Heller* merits substantial review.

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[219] "D.C. Government Faces a New Reality," *Washington Post*, June 27, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/26/AR2008062603988.html (accessed November 27, 2009).
[220] Ibid.
[221] Ibid.

A. The Court's Requirements, Firearms Control Emergency Amendment Act of 2008, and Heller II

In *Heller*, the Court specifically held that three sections of D.C.'s Firearms Control Regulation Act were unconstitutional:

> (1) § 7-2502.02, which generally barred the registration of handguns; (2) § 22-4504, which prohibited carrying a pistol without a license, insofar as that provision would prevent a registrant from moving a gun from one room to another within his or her home; and (3) § 7-2507.02, which required that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device.[222]

However, the Court did not address the constitutionality of D.C.'s firearms licensing requirement, although the majority did note that such a requirement, if not enforced arbitrarily and capriciously, probably would not contravene the Second Amendment.[223]

The D.C. Council's first effort to comply with this June decision was the Firearms Control Emergency Amendment Act of 2008.[224] The act amended the Firearms Control Regulations Act of 1975 that had previously constituted the District's firearms laws:

> to repeal the prohibition on the registration of pistols, to require a ballistics record for each registered pistol, to require a waiting period when registering a firearm, and to establish a self-defense exception to the requirement for safe storage of firearms in the home."[225]

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[222] Ibid.
[223] Ibid.
[224] Because the District of Columbia is a federal enclave, its procedure for enacting laws is unique. When the D.C. Council passes a permanent or a temporary bill (which is effective for only two hundred fifty-five days), the legislation must receive the D.C. mayor's approval or it must be passed over the mayor's veto. The legislation must then be presented to Congress, and Congress has a specified time period in which to approve or disapprove of the bill. If Congress fails to take any action on a bill within the allotted time period, the bill becomes effective D.C. law. In the period between the bill receiving the mayor's signature and being ruled on by Congress, the bill is operative District law. The D.C. Council, however, has the additional option of enacting emergency legislation, which requires the approval of the D.C. mayor but need not be submitted to Congress. Such legislation expires after ninety days, but the council may vote to extend the bill's effective life another ninety days. Due to the convenience of the emergency legislation option, when the D.C. Council promulgates laws, it generally will enact emergency legislation and then hold hearings to determine the form of permanent legislation that will be submitted to Congress. See Vivian S. Chu, "D.C. Gun Laws and Proposed Amendments: A Comparative Analysis of S.Amdt. 575 and the District's Gun Proposals," CRS Report for Congress, http://www.crs.gov (accessed November 30, 2009), 2-3.
[225] "Firearms Control Amendment Act of 2008," Council of the District of Columbia, § 1, http://www.dcwatch.com/council17/17-886.htm (accessed November 27, 2009).

The act specifically did not repeal the ban on handgun possession in most places in the District—it simply created an exception for self-defense in one's home.[226] However, those D.C. residents with handguns that were legally registered no longer needed to have a carry license to carry them within their homes.[227]

The act, while making some concessions to the Court's ruling, could hardly be said to be a good faith effort to implement the decision because it retained most of the District's objectionable handgun regulations.[228] Of particular importance was the fact that the act failed to alter the District's extraordinarily broad definition of machine guns from all "semi-automatic weapons that can shoot, or be converted to shoot, more than 12 rounds without reloading," yet it categorically prohibited such weapons.[229] In so doing, D.C. effectively banned the majority of clip-fed, semi-automatic handguns.[230]

Not surprisingly, this enactment met with strong criticism for failing to adequately comply with the *Heller* decision.[231] To challenge the new D.C. firearm laws in court, Dick Anthony Heller (the plaintiff in *D.C. v. Heller)* tried to register a Model 1911 .45-caliber handgun and Absalom F. Jordan, Jr. tried to register a semi-automatic .22-caliber target pistol.[232] The D.C. Metropolitan Police Department turned down both applications because, even though the pistols only had magazines with capacities for ten or fewer rounds, both could potentially hold a twelve-round detachable magazine.[233] Subsequently, two premier Second Amendment attorneys, Stephen Halbrook and Richard Gardiner, filed suit in the U.S. District Court for the

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[226] District of Columbia's Mayor's Office, "Mayor Fenty, Council Unveil Firearms Legislation and Regulations," http://www.dc.gov/mayor/news/release.asp?id=1333 (accessed November 27, 2009).
[227] Ibid.
[228] For more detailed descriptions of this act see Appendix I.
[229] "D.C. Government Faces a New Reality."
[230] Ibid.
[231] Chu, 2.
[232] Chris W. Cox, "City Officials Defy Supreme Court's Second Amendment Ruling," *American Rifleman*, October, 2008, 110.
[233] Ibid.

District of Columbia challenging the District's definition of a machine gun, the newly imposed bureaucratic obstacles, the refusal of D.C. to allow firearms to generally remain assembled in one's home, and the District's refusal to allow a firearm to be assembled and without a trigger lock for the purposes of "cleaning, inspection or repair."[234]

B. The FCAA, the Firearms Registration Emergency Amendment Act of 2008, and the IPAA

To prevent *Heller II* from proceeding and to stave off future litigation, the D.C. Council, having conducted public hearings, again changed D.C.'s firearm laws by passing a bill ultimately submitted to Congress as the Firearms Control Amendment Act of 2008 (FCAA).[235] The FCAA generally retained the high level of difficulty in registering a firearm and maintaining it in a legal condition in D.C. However, it did substantially liberalize D.C. firearm laws in one area—it provided that machine guns were now to be classified as "any firearm which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." [236]

In the same time period as the D.C. Council promulgated and amended what became the FCAA, they also created companion legislation in the Firearms Registration Emergency Amendment Act of 2008 and the Inoperable Pistol Emergency Amendment Act of 2008. [237] Both bills are significant because, consistent with the general tone of the FCAA, they are quite

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[234] Ibid.

[235] Chu, 3. After the review period passed, the act became effective D.C. law on March 31, 2009. See Council of the District of Columbia, "Firearms Control Amendment Act of 2008," 1, http://www.Dccouncil.washington.dc.us/lims/searchbylegislation.aspx (accessed January 7, 2010).

[236] District of Columbia Metropolitan Police Department, "Firearms Eligible for Registration in the District of Columbia," 1, http://www.mpdc.dc.gov/gunregistration (accessed November, 27 2009); See Appendix I for more information on this act.

[237] District of Columbia Metropolitan Police Department, "Firearm Registration in the District of Columbia," http://www.mpdc.dc.gov/mpdc/cwp/view,a,1237,q,547431.asp (accessed November 27, 2009). Both acts received the signature of the mayor, but the more significant bill was the Inoperable Pistol Emergency Amendment Act. After passing congressional review, this act, now entitled the Inoperable Pistol Amendment Act of 2008 (IPAA), became permanent D.C. law on May 20, 2009. See Ibid; Chu, 3; Council of the District of Columbia, "Inoperable Pistol Amendment Act of 2008," http://www.dccounil.washington.dc.us/lims/searchbylegislation.aspx (accessed January 7, 2010).

illiberal. While they did serve the beneficial purpose of clarifying the District's firearm registration requirements, they also imposed new and substantial burdens on gun owners and banned specific classes of weapons—notably assault rifles (a category very broadly defined) and non-microstamped, semi-automatic handguns.[238]

C. Legal Response to the District's Amendments to the Firearms Code

Despite the considerable revisions already made to D.C.'s firearms code, many in the District still ardently sought more comprehensive changes. As *Heller II* illustrated, filing lawsuits appeared to be the quickest means of prompting the District to liberalize its firearms code. Consequently, two significant Second Amendment lawsuits, in addition to *Heller II*, were filed against the District. Together, these three lawsuits constitute the most significant impact of *Heller* in D.C. because, while the District's legislative response to the case has been to promulgate legislation that does very little to secure gun owners' constitutional rights, these cases either promise to require or have resulted in extensive changes in D.C.'s firearms regulations.

Prior to *D.C. v. Heller*, the D.C. Council had adopted the California Roster of Handguns Certified for Sale as the list that determined what handguns could be legally purchased in D.C.[239] Due to the restrictions the list imposed, Alan Gura, the lead attorney for Heller in *D.C. v. Heller*, filed suit on behalf of three District residents who wished to own a handgun not on the California roster.[240] Consequently, the Chief of Police for D.C., pursuant to her authorization to engage in

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[238] Council of the District of Columbia, "Firearms Registration Emergency Amendment Act of 2008," http://www.mpdc.dc.gov/mpdc/frames.asp?doc=/mpdc/lib/mpdc/info/pdf/firearmsact17651.pdf (accessed November 28, 2009). For more information see Appendix I.

[239] The justification for limiting handguns to those on the roster was that it would protect District residents from buying handguns "prone to accidental discharge, lack[ing] safety devices, and . . . prone to fir[ing] when dropped." See "Firearm Registration in the District of Columbia," 2.

[240] Tim Craig, "D.C. Expands List of Allowed Guns to Avert Lawsuit," *Washington Post*, June 20, 2009, http://www.lexisnexis.com (accessed November 27, 2009).

rulemaking that revises the "roster of handguns permissible for sale,"[241] issued an amendment to the District's firearm rules that after thirty days permanently expanded the different types of handguns eligible to be registered in D.C.[242] Subsequent to the implementation of this amendment,[243] Gura dropped the lawsuit.[244]

As for *Heller II*, due to the alteration in the District's definition of a machine gun and the Chief of Police's amendment that in effect allowed almost all handguns currently being produced and all handguns produced prior to 1985 to be legally registered in the District, Heller and Jordan were allowed to register their handguns.[245] However, *Heller II* is not a moot case, as Halbrook and Gardiner simply amended the complaint. They are now challenging the District's difficult registration requirements (because they make it virtually impossible to register a handgun), ban on assault weapons (particularly AR-15s on the grounds that they are a "common firearm" since over two million have been produced), and prohibition of magazines with ammunition capacities exceeding ten rounds (since such magazines are often used for self-defense).[246]

The potential importance of *Heller II* should not be underestimated. If the case reaches the U.S. Supreme Court, the Court would have to rule on the District's fairly onerous registration requirements, define at least to some extent what constitutes a reasonable restriction on the right

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[241] "Firearm Registration in the District of Columbia," 2.
[242] District of Columbia Metropolitan Police Department, "Firearms Emergency and Proposed Rules," http://www.mpdc.dc.gov/mpdc/frames.asp?doc=/mpdc/lib/mpdc/info/pdf/firearms_emergency_and_proposed_rules_061509.pdf (accessed November 28, 2009).
[243] The amendment expanded the District Roster of Handguns Not Determined to be Unsafe to include both the Maryland and Massachusetts rosters of salable handguns. Furthermore, it permitted handguns to be registered that had been removed from the California roster solely for non-safety reasons and that were only superficially different from other handguns on the roster in terms of insignificant differences such as grip type, handgun color, or finish. An UZI was no longer to be considered an assault weapon, and thus banned, provided that the particular weapon did not possess characteristics that would classify it amongst other assault weapons (i.e. magazines with large capacities, a second handgrip, a detachable magazine located outside of the pistol grip, etc.). See "Firearms Emergency and Proposed Rules."
[244] Matthew Cella, "Lawsuit Seeks Right to Carry Guns in Public," *Washington Times*, August 7, 2009, http://www.lexisnexi.com (accessed November 27, 2009).
[245] ILA Report, "New Action in D.C. Second Amendment Case," *American Rifleman*, October 2009, 109.
[246] Ibid.

to keep and bear arms, and state whether assault weapons are dangerous and unusual weapons and can thus be prohibited. Such a ruling would be particularly momentous because the majority's finding in *Heller* that the Second Amendment guarantees an individual right to keep and bear firearms that includes self-defense purposes has actually not been effectively used to overturn firearm regulations. Even discounting all challenges to state and municipal laws because *Heller* did not incorporate the Second Amendment to the states, one would anticipate that federal firearms regulations would to some extent have been declared unconstitutional by the courts. However, federal judges have virtually unanimously affirmed the constitutionality of most current gun control laws, finding that they fit into one of the categories spoken of in one of the *Heller* majority's concluding statements that:

> [n]othing in [this] 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.[247]

Consequently, lower federal courts have upheld federal statutes prohibiting felons, illegal aliens, drug addicts, and persons who have been convicted of domestic violence misdemeanors from possessing firearms.[248] Furthermore, these courts have sustained bans on specific classifications of weapons, particularly sawed-off shotguns, machine guns, and high-power sniper rifles.[249] Laws that prevent firearms from being carried in places such as post offices and school zones, prohibit concealed carry of handguns, and ban specific types of ammunition and possessing a firearm that has not been registered have also not been overturned.[250]

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[247] District of Columbia v. Heller, ***95.
[248] Adam Winkler, "The New Second Amendment: A Bark Worse Than Its Right," Huffington Post, http://www.huffingtonpost.com/adam-winkler/the-new-second-amendment-b-154783.html (accessed November 27, 2009).
[249] Ibid.
[250] Ibid.

The most recent legal challenge to D.C.'s current gun laws is *Palmer v. District of Columbia.* In this lawsuit, Gura is asking a district court to require D.C. to "issue licenses to carry guns in public to legal gun owners in the city and to people with valid carry permits from outside the city," since the "laws, customs, practices, and policies generally banning" this are violative of the Second Amendment.[251] The lawsuit, however, does not address whether D.C. should allow registered gun owners to conceal and carry their weapons.[252]

This case is clearly important in that, if the plaintiffs succeed, the District will be forced to join the forty-eight states that allow either open or concealed carry of firearms.[253] Furthermore, it would provide a strong federal precedent for overturning the similar bans that Wisconsin and Illinois currently have.[254] It would appear that Gura has crafted a case sufficient to attain such goals. No doubt recognizing that lower courts have used Scalia's dicta regarding permissible restrictions on the Second Amendment to uphold many firearm regulations, he has carefully designed his complaint to show that the D.C. prohibition on the public carrying of firearms lies outside of this framework. Consequently, Gura conceded that the District has the:

> ability to regulate the manner of carrying handguns, prohibit the carrying of handguns in specific, narrowly defined sensitive places, prohibit the carrying of arms that are not within the scope of Second Amendment protection, and disqualify specific, particularly dangerous individuals from carrying handguns.[255]

However, the District is prohibited by *Heller* from entirely "ban[ning] the carrying of handguns for self-defense, deny[ing] individuals the right to carry handguns in non-sensitive places, [and] depriv[ing] individuals of the right to carry handguns in an arbitrary and capricious manner."[256]

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[251] Cella.
[252] Ibid.
[253] National Rifle Association, "Compendium of State Laws Governing Firearms," NRA-ILA.org, 3, http://www.nraila.org (accessed November 25, 2009).
[254] Ibid.
[255] Robert A. Levy, "Gun Owners' Next Victory in D.C.," *Washington Post*, September 6, 2009, http://www.lexsnexis.com (accessed November 25, 2009).
[256] Ibid.

Further aiding Gura's case is the definition of the Second Amendment promulgated by the majority in *Heller*. Scalia declared that individuals have a right to keep and bear arms unconnected with militia service, with "to keep arms" meaning to possess weapons and "to bear arms" denoting carrying weapons "for the purpose of offensive or defensive action"—a definition that in no way limits the right to possession and carrying solely in the home.[257] Finally, since the Supreme Court ruled in *Heller* that "the Second Amendment secures an individual right, expressly enumerated in the Constitution," the D.C. government will bear the burden of proving that the regulations that it has imposed are needed.[258]

D. Conclusion

Heller unequivocally required the District to alter at least a portion of its firearms laws—an action D.C. has been extraordinarily loath to do. While the District has made several substantial alterations to its firearms code, the overall result of the decision has actually been that, while the District's gun laws are now a virtual morass, they still cannot reasonably be said to respect District residents' Second Amendment rights any more than the pre-*Heller* laws did. Consequently, the District is facing multiple lawsuits that they will have difficulty winning. It must be noted though that the District's practice of only slightly altering gun laws that a court specifically declares to be unconstitutional, adding additional firearms licensing and registration requirements to negate any liberalization of firearms laws, and only substantially lessening firearms restrictions if it appears that a court decision will be enforced or that a court will strike them down appears to be a quite effective method for avoiding granting Second Amendment rights. At the very least, the District's reaction to *Heller* clearly demonstrates one of the largest problems with Second Amendment jurisprudence: judges can hand down hundreds of decisions

[257] District of Columbia v. Heller, ***16-22.
[258] Levy.

protecting and expanding Second Amendment rights; but, if the legislative and executive branches of government are not willing to enforce them, Americans' right to keep and bear arms can still be infringed.

Nevertheless, even though the *Heller* decision really cannot currently be considered to have substantively changed the District's restrictions on guns, it has substantially impacted the city. As D.C. has desperately fought to retain its strict firearms code, it has become the darling of gun control advocates who consider the District's actions a model response to *Heller*. At the same time, D.C. has been viewed by those in favor of little gun regulation as an unrepentant abuser of the rights of its citizens who must be made an example of in order to prevent others from replicating its actions. The District has thus become, and promises to continue to be, a focal point for Second Amendment legal battles and propaganda campaigns amongst organizations such as the National Rifle Association (NRA), the CATO Institute, the Second Amendment Foundation, the Brady Campaign, and the Mayors Against Illegal Guns Coalition.

It must also be noted that the District is likely to ultimately find itself forced to significantly alter its firearms laws. Such a result is probable because the District stands a good chance of losing the lawsuits filed subsequent to *Heller*. If this were to happen, the District of Columbia would once again be forced to change its firearm laws to comport with an interpretation of the Second Amendment more consistent with the practices of the majority of the states whose constitutions contain provisions analogous to the federal Second Amendment. In addition, it must not be forgotten that Congress has both the power and the responsibility to ensure that the District's laws are in compliance with the Court's ruling. Congress has yet to actually pass a bill requiring the District to conform. However, legislation, particularly the Ensign Amendment to the District of Columbia Voting Rights Act (a bill that appears to be

highly likely to pass both the House and the Senate), has been introduced in Congress that would considerably lessen the restrictive nature of D.C.'s gun laws and force the D.C. firearms code to come more in line with the spirit of *Heller*.[259] In short, while *Heller*'s impact in D.C. has not been precisely what one would have anticipated, its overall effect has not been nugatory and it promises to generate much more noteworthy changes in the District in the near future than have been seen so far. In the meantime, D.C. remains a key battleground area for gun rights and gun control advocates.

[259] See Appendix IV for more information.

CHAPTER FOUR:

HELLER'S GENERAL IMPACT ON THE COURTS

While *Heller*'s most immediate impact was on the District of Columbia's laws, the decision's most substantial impact, as noted by the dissenting justices in *Heller*, was supposed to be on the caseloads and rulings of the lower courts. However, the effect the case has had in the courts has actually been one of the most surprising results of *Heller*.

A. General Impact on the Courts

Even before the decision was rendered in *Heller*, it was a foregone conclusion that large amounts of litigation would ensue once the ruling was handed down;[260] and, in *Heller* itself, the justices recognized that the case would have a substantial impact on the courts. Justice Stevens stated that the decision would result in a flood of litigation in which, due to the minimal guidance that the Court provided the lower courts with, most gun regulations would be declared unconstitutional.[261] Justice Breyer concurred, also pointing out that Stevens' admonition applied to state and local litigation as well as federal litigation.[262]

Undoubtedly, the dissenting justices were correct about the increased litigation; however, their fears regarding the outcome of these cases were misplaced. While the justices properly noted the insufficient guidance that the majority opinion provided lower courts, they failed to give sufficient weight to the fact that the decision approved of significant limitations on the right to keep and bear arms. The majority granted that laws could permissibly prohibit the possession

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[260] Adam Winkler, "Symposium: the Second Amendment and the Right to Bear Arms After D.C. v. Heller: Heller's Catch-22," *UCLA Law Review* 56 (June, 2009): 1565, http://www.lexisnexis.com (accessed February 5, 2010). In particular, it was anticipated that most criminal defendants would attempt to use the ruling in Heller as a "get out of jail free card." See The Legal Action Project of the Brady Center to Prevent Gun Violence, "Unintended Consequences: What the Supreme Court's Second Amendment Decision in *D.C. v. Heller* Means For the Future of Gun Laws," Brady Center to Prevent Gun Violence, 4, http://www.bradycenter.org/xshare/pdf/reports/post-heller-white-paper.pdf (accessed February 5, 2010).

[261] District of Columbia v. Heller, ***190, ***189.

[262] Ibid., ***254.

of "dangerous and unusual weapons," regulate firearms sales and purchases, prevent the carrying of guns in "sensitive places," and forbid "felons and the mentally ill" from possessing firearms.[263] Not only are these specified permissible regulations fairly broad, but also the Court noted that the list of "presumptively lawful regulatory measures" that it provided was not "exhaustive."[264]Despite conspicuously failing to provide "any real support or evidence" for why these particular restrictions were permissible,[265] the Court proceeded to further limit the radical nature of its decision. Scalia asserted that judges' decisions under a militia-based interpretation of the Second Amendment would not "necessarily have come out differently under a proper interpretation of the right;"[266] and he concluded by implicitly accepting strict firearms licensing requirements, although he did state that they should not be "enforced in an arbitrary and capricious manner."[267]

Federal and state judges appear to have quickly recognized that the vast majority of current gun control laws either fall under the categories the Court enunciated or can be interpreted to be sufficiently similar enough to allow their continued existence.[268] Thus, *Heller* has shown one of its most striking characteristics—it can be construed as a victory for *both* pro-gun and anti-gun forces for, while the case declares that the Second Amendment secures an individual's right to keep and bear arms, it also clearly validates many existing firearms regulations. Perhaps the decision was intended to be applied in a manner that would provide gun

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[263] Ibid., ***95.
[264] District of Columbia v. Heller, ***95, n26.
[265] Allen Rostron, "Symposium: The Second Amendment After District of Columbia v. Heller: Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller," *Lewis & Clark Law Review* 13 (Summer, 2009): 386, http://www.lexisnexis.com (accessed February 5, 2010).
[266] District of Columbia v. Heller, ***90-91, n24.
[267] Ibid., ***102.
[268] As Adam Winkler notes: "Lower courts are . . . hewing closely to the laundry list [of limitations to the right to keep and bear arms noted by Scalia] in cases challenging laws that have no clear relationship to the exceptions specified by the *Heller* majority. In other words, they aren't hewing closely to the list at all. They are stretching it far and wide to capture every conceivable type of gun restriction." See Winkler, 1567.

owners with more protection against current firearms regulations instead of providing support for the continued existence of restrictions. Nonetheless, the lack of guidance the Court provided lower courts with in deciding Second Amendment cases appears to have made judges hesitant about making any controversial decisions.

It must also be noted that the likelihood of *Heller* leading judges to invalidate massive amounts of firearms laws was significantly decreased by the fact that *Heller* did not specifically incorporate the Second Amendment to the states. This left state courts with the option of choosing whether to apply the Court's rationale to the challenged gun laws of state and local governments. As for federal courts, when they heard a challenge to state and local government arms regulations, they were burdened with making the difficult decision of whether to presume that the Second Amendment should be incorporated and that they had the power to do so or to uphold the challenged laws until the Court specifically stated that the amendment was binding on the states. Faced with this dilemma, most federal judges adopted the conservative approach of waiting for the Court to clarify its position on the issue of incorporation.

In short, given *Heller*'s approval of most existing federal regulations on the right to keep and bear arms and lack of guidance on how Second Amendment cases should be decided (as well as the uncertainty over its applicability to the gun laws of state and local governments it engendered), it is not particularly astounding that judges have overwhelmingly declined to use the decision as a tool to either strike down or require the liberalization of federal and state firearm regulations. However, while court decisions resulting from *Heller* have not been particularly groundbreaking, they are significant. Not only has the simple fact that a lawsuit has been filed led some governments to swiftly rescind their challenged firearm regulations,[269] but

[269] Given that these suits were destined for failure without incorporation of the Second Amendment, the liberalization of gun control ordinances by some state and local governments faced with Second Amendment lawsuits is quite notable. See Brannon P. Denning and Glenn H. Reynolds, "Heller, High Water(mark)? Lower

also these cases provide a venue for the Supreme Court to hear cases and deliver rulings that will add clarity to the field of Second Amendment jurisprudence. Also, as previously noted, these court decision recognize the constitutional validity of large segments of current firearms laws.

B. State and Lower Federal Court Decisions

Because *Heller* did not incorporate the Second Amendment against the states, the decision did not require state courts to adhere to the view of the right to keep and bear arms adopted by the Court when addressing challenges to state and local laws regulating the ability to maintain and carry firearms. That fact has not, however, prevented a large number of state firearm regulations from being challenged in state courts using the Second Amendment as interpreted by *Heller*—especially on the grounds that a particular state constitution contains a provision sufficiently analogous to the federal Second Amendment that it should be interpreted in the same manner. Therefore, when addressing issues involving the right to keep and bear arms, state judges have consistently referenced *Heller* in their opinions. While the decision has essentially only been viewed either as further support for the legitimacy of existing precedent upholding gun regulations or as inapplicable to but not inconsistent with state court decisions, state judges clearly see *Heller* as important federal precedent that must be considered. Because state high court decisions are binding on all courts within their respective states and the U.S. Supreme Court will occasionally grant a writ of certiorari (that is, they will agree to hear a case) to these courts' decisions, the most important state court decisions are those rendered by the state high courts. This paper will therefore limit its discussion of state cases to these decisions.

While state high court rulings have been influenced by *Heller*, because the decision is binding on all federal judges and directly permits the reexamination for constitutional validity of

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Courts and the New Right to Keep and Bear Arms," *Hastings Law Journal* 60 (June, 2009): 1263, http://www.lexisnexis.com (accessed February 5, 2010). For some examples of this see the incorporation cases in Appendix II.

federal, not state, laws regulating the keeping and bearing of arms,[270] the case has effected federal courts more extensively than state courts. While the federal district courts have heard and ruled on the most Second Amendment cases, it is the rulings of the federal courts of appeal that are the most significant lower federal court decisions.[271] This is mainly because the decision of a court of appeal is binding on all district court judges within the appellate court's jurisdiction. However, it cannot be considered insignificant that the Supreme Court of the United States has the right to review these decisions and that it is by either affirming or overturning them that the field of Second amendment jurisprudence is most likely to be clarified. Second Amendment cases have been filed in all circuits; the circuit courts have not always uniformly construed the Second Amendment; and losing decisions have been and continue to be appealed. Because the only venue of appeal after a federal court of appeal decision is the U.S. Supreme Court and inconsistencies in the rulings among the different circuits is one of the major factors prompting the Supreme Court to grant certiorari so that a uniform rule of law can be observed, these cases are particularly important.[272]

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[270] Challenges to federal firearms laws overwhelmingly deal with portions of 18 U.S.C. § 922, which establishes federal standards regarding issues such as the commercial sale of firearms, what types of weapons are prohibited, and which individuals are statutorily denied the ability to purchase and possess firearms, ammunition, and firearms accessories. For the text of this important statute see "18 U.S.C. § 922: US Code – Section 922: Unlawful Acts," FindLaw.com, http://www.codes.lp.findlaw.com/uscode/18/I/44/922 (accessed January 21, 2010).

[271] Within the three-tiered hierarchical structure of the federal court system (U.S. district courts, U.S. courts of appeal, U.S. Supreme Court), the ninety-four district courts, as trial courts with general jurisdiction, must necessarily hear and rule on the largest number of cases. It is for this reason that, to date, the district courts have ruled in over sixty post-*Heller* Second Amendment cases. The rulings of district courts, however, are less permanent and influential than the rulings of federal appellate courts. Parties dissatisfied with district court rulings have the right to appeal to the thirteen federal intermediate courts of appeal, and district court decisions are only binding on the immediate parties to a case. Nonetheless, district court decisions are not unimportant. Not all district court decisions will be appealed, and appellate courts give substantial weight to district court decisions upon review. Nevertheless, because the state high courts and federal courts of appeal have dealt with the same issues as the district courts, virtually all district courts have reached the same rulings on Second Amendment issues as the appellate courts, and the decisions of the appellate courts are more significant, this paper will focus on the decisions of appellate courts. For a summary of district court decisions in Second Amendment cases see Appendix II.

[272] Richard A. Mann and Barry S. Roberts, *Business Law and the Regulation of Business,* 9th Ed. (Mason, OH: Thomson / West, 2008), 46.

C. Second Amendment Issues Heard by the Courts

Federal and state courts have rendered decisions on eleven major Second Amendment issues after *Heller*. Specifically, judges have ruled on the constitutionality of: gun storage laws, sentence enhancement for crimes committed with firearms, requiring purchase permits to purchase firearms, preemption, banning gun possession for intoxicated persons, prohibiting juvenile and straw purchases of firearms, restricting the types of weapons and firearms accoutrements that can be legally owned, warrants and searches related to firearms, limiting the carrying of firearms, preventing restricted persons from exercising Second Amendment rights, and municipality and county gun laws (discussed in chapter five).

1. First Eight Issues

The decisions of the state high courts and federal courts of appeal in the first eight areas can be briefly summarized.[273] State courts have used *Heller* to uphold laws that require firearms to be "secured in a locked container or equipped with a tamper resistant mechanical lock or other safety devices,"[274] statutes that necessitate the acquisition of a firearms purchase permit (which is only issued at the discretion of law enforcement authorities) prior to purchasing a firearm,[275] and laws that ban intoxicated individuals from possessing firearms in their homes.[276] They have also not viewed *Heller* as permitting municipalities to pass firearms ordinances if state laws have already established a "complete system of [gun] law[s]."[277]

[273] For a more detailed explanation of these decisions see Appendix III.
[274] Commonwealth of Massachusetts v. Cantelli, 2009 Mass. Super. LEXIS 113, *3, http://www.lexisnexis.com (accessed November 18, 2009).
[275] In the Matter of Anthony Dubov, 2009 N.J. Super. LEXIS 227, http://www.lexisnexis.com (accessed November 18, 2009).
[276] Missouri v. Richard, 2009 Mo. LEXIS 531, http://www.lexisnexis.com (accessed November 18, 2009).
[277] Association of New Jersey Rifle & Pistol Clubs, Inc. v. the City of Jersey City, 2008 N.J. Super. LEXIS 205, *654, http://www.lexisnexis.com (accessed November 18, 2009).

As for the courts of appeal, they have upheld sentence enhancements for firearms usage in the commission of an illegal act,[278] and they have ruled that *Heller* should not be viewed as allowing juvenile possession of firearms in all but the most limited of circumstances[279] nor as legalizing straw purchases of firearms (wherein individuals legally buy firearms but state that the weapons are for themselves instead of for an unauthorized person).[280] Courts of appeal have also read *Heller* as not excusing prosecution for the possession of illegal weapons (pipe bombs,[281] machine guns,[282] sawed-off shotguns,[283] and rifles with barrels less than sixteen inches[284]) and ammunition (armor-piercing ammunition[285]). Furthermore, with regard to firearms and searches, circuit courts have been lenient with law enforcement officials who seize guns that have been found in a search, [286] but they have not removed all restrictions regulating such searches and seizures.[287] While the lower courts have generally been able to easily and expeditiously rule on the foregoing issues, cases involving Right-to-Carry and restricted persons have required more

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[278] Costigan v. Yost, 2009 U.S. App. LEXIS 12955 (3rd Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Cooper, 2009 U.S. App. LEXIS 24956 (4th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. King, 2009 U.S. App. LEXIS 12653 (7th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Walker, 2009 U.S. App. LEXIS 20097 (6th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Hamer, 2009 U.S. App. LEXIS 7351 (6th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

[279] United States v. Rene E., 2009 U.S. App. LEXIS 21896 (1st Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

[280] United States v. Bledsoe, 2009 U.S. App. LEXIS 22857 (5th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

[281] United States v. Tagg, 2009 U.S. App. LEXIS 14139 (11th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

[282] United States v. Ross, 2009 U.S. App. LEXIS 9044 (3rd Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Fincher, 2008 U.S. App. LEXIS 17209 (8th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

[283] United States v. Fincher; United States v. Artez, 2008 U.S. App. LEXIs 18829 (10th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

[284] United States v. Gilbert, 2008 U.S. App. LEXIs 15209 (9th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

[285] Kodak v. Holder, 2009 U.S. App. LEXIS 19156 (4th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

[286] Justice v. Town of Cicero, 2009 U.S. App. LEXIS 18235 (7th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. McCane, 2009 U.S. App. LEXIS 16557 (10th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

[287] Millender v. County of Los Angeles, 2009 U.S. App. LEXIS 9735 (9th Cir.), **27, http://www.lexisnexis.com (accessed November 18, 2009).

extensive analysis. Due to the larger number of decisions that have been rendered in these two areas and the more inflammatory nature of the issues involved, it would appear that the Supreme Court would be more likely to grant certiorari to these rulings than to decisions made in any of the previous eight areas.

2. Firearms Carry Laws

Major court rulings regarding the Right-to-Carry have been in three areas. First, the Supreme Court of California addressed the question of whether the simple act of carrying a firearm in and of itself implied a "threat of force of violence" and could thus be prohibited by law.[288] The court concluded that such a regulation was permissible. *Heller* only addressed the carrying of a handgun in the *home*, and it clearly indicated that the right to possess and bear arms was limited.[289] Therefore:

> *Heller* does not require . . . [the] conclu[sion] that possession in a public place of a loaded, cocked, semi-automatic weapon with a chambered round, concealed . . . and ready to fire, cannot be defined as a crime under state law. Moreover, nothing in that decision requires . . . [the] conclu[sion] that such conduct cannot be considered as carrying with an implied threat of violence.[290]

Secondly, the New York Supreme Court addressed the validity of laws requiring a permit for a pistol to be carried outside the home, even for self-defense purposes. The court held that such statutes do not violate the Second Amendment as interpreted by *Heller* because the Second Amendment may be limited by "reasonable restrictions."[291] Additionally, since the statutes do not enact a total ban on handguns, they are neither "arbitrary and capricious" nor "severe

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[288] California v. Dykes, 2009 Cal. LEXIS 5195, *777-8, http://www.lexisnexis.com (accessed November 18, 2009).
[289] Ibid., *778.
[290] Ibid.
[291] People of the State of New York v. Perkins, 2009 N.Y. App. Div. LEXIS 3824, *1, http://www.lexisnexis.com (accessed November 18, 2009).

restriction[s]" on the right to bear arms within one's home for self-defense purposes.[292] Convictions under these statutes must therefore be upheld.[293]

In the third area, courts of appeal have consistently upheld laws that prohibit the possession and carrying of firearms on restricted properties such as schools, government buildings, and national parks against Second Amendment challenges. Such decisions have been based on the grounds that the area where the gun has been taken falls either under the grouping of sensitive places that the *Heller* Court specifically exempted from having to accommodate the exercise of Second Amendment rights[294] or is private property upon which the owner has prohibited the possession of firearms.[295]

3. Laws Restricting Persons Who May Exercise Second Amendment Rights

The issue of what persons may be constitutionally deprived of their Second Amendment rights has probably been the most litigated in both state and federal courts. With regard to the state courts, the Supreme Court of North Carolina ruled on the prohibition of firearms' ownership by convicted felons. In an unusual decision, the court struck down the 2004 legislative alteration of North Carolina law that precluded all individuals with felony convictions from ever possessing a firearm.[296] Apparently finding the new statute overly broad, the court held that while the "regulation of the right to bear arms is a proper exercise of the General Assembly's police power, . . . any regulation must be at least 'reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.'"[297] Because one cannot reasonably "assert that a nonviolent citizen who has responsibly, safely, and legally owned and

[292] Ibid.
[293] Ibid.
[294] United States v. Davis, 2008 U.S. App. LEXIS 26934 (9th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).
[295] United States v. Dorosan, 2009 U.S. App. LEXIS 22559 (5th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).
[296] Britt v. North Carolina, 2009 N.C. LEXIS 815, ***3, http://www.lexisnexis.com (accessed November 18, 2009).
[297] Ibid., ***6.

used firearms for . . . years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety," the statute violates the North Carolina Constitution.[298]

In another state court decision, the Superior Court of New Jersey ruled on the permissibility of firearms possession by those convicted of domestic violence. The court held that New Jersey's allowance of the "seizure of a defendant's firearms upon a finding of domestic violence" does not violate the Second Amendment's right to keep and bear arms.[299] As *Presser* noted, the Second Amendment is only binding on the federal government.[300] There are currently differences in the federal courts of appeal on the issue of incorporation, as seen by *Maloney v. Cuomo*'s holding that *Presser* is still binding until the Supreme Court distinctly overrules it and *Nordyke v. King*'s ruling that the Second Amendment was incorporated via the Fourteenth Amendment. Nevertheless, Judge Fisher declared that the court would hold with *Maloney* that the Second Amendment is not binding on the states until such a time as the U.S. Supreme Court specifically declared that it was.[301] Even if the court adopted the view of the *Nordyke* court, *Heller* clearly stated that the Second Amendment is not absolute. Therefore, the decision does not "in any way interfer[e]"with the New Jersey Legislature's "declaration that a person found to have committed an act of domestic violence may be subjected to a weapons seizure."[302] The New Jersey statute is thus "a valid, appropriate and sensible limitation on an individual's Second Amendment rights."[303]

As for the circuit courts, they have consistently ruled that the Second Amendment is not violated by federal laws banning the possession of firearms, ammunition, or even body armor by

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[298] Ibid., ***9; The relevant portion of the North Carolina Constitution reads: "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." See Ibid., ***6.
[299] Crespo v. Crespo, 2009 N.J. Super. LEXIS 138, *41, http://www.lexisnexis.com (accessed November 18, 2009).
[300] Ibid.
[301] Ibid., *42.
[302] Ibid.
[303] Ibid., *43.

individuals who have committed a crime of violence, have committed a drug offense, or have a prior felony or sometimes simply a misdemeanor on their record.[304] In general, all these cases deal with *Heller* in precisely the same manner as the district courts. That is, they note the Court's statement that the opinion in *Heller* should not be construed so as to lift the prohibition on the possession of firearms by felons and extrapolate from this that similar classes can be treated in the same manner.

D. Conclusion

In reviewing the decisions of the state high courts and the lower federal courts, it becomes readily apparent that the courts have essentially not viewed *Heller* as requiring either the federal government or the states to liberalize their firearm regulations. As a matter of fact, multiple state courts consider the decision entirely inapplicable to state cases because the Second Amendment has not been made binding on the states. It does appear, however, that the majority of the state courts are willing to find *Heller* useful precedent for decisions involving gun laws. But it must be noted that state courts have restricted their usage of *Heller* to basically supporting the finding of the right of the states to limit firearms possession, usage, and storage.

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[304] United States v. Grier, 2009 U.S. App. LEXIS 13153 (2nd Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Moore, 2009 U.S. App. LEXIS 10811 (5th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Anderson, 2009 U.S. App. LEXIS 2774 (5th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); Triplett v. Roy, 2009 U.S. App. LEXIS 9314 (5th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Smith, 2009 U.S. App. LEXIS 11678 (9th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Nolan, 2009 U.S. App. LEXIS 18307 (10th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Gieswein, 2009 U.S. App. LEXIS 19919 (10th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Brye, 2009 U.S. App. LEXIS 5304 (11th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Battle, 2009 U.S. App. LEXIS 21374 (11th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Banks, 2009 U.S. App. LEXIS 23731 (11th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Brunson, 2008 U.S. App. LEXIS 19456 (4th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Rhodes, 2009 U.S. App. LEXIS 7844 (4th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Richard, 2009 U.S. App. LEXIS 23018 (10th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Frazier, 2008 U.S. App. LEXIS 24023 (6th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Jackson, 2009 U.S. App. LEXIS 2945 (7th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Maye, 2009 U.S. App. LEXIS 21780 (6th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

As for the lower federal courts, they have overwhelmingly interpreted *Heller* in a manner consistent with the state high courts. That is, they have viewed most current gun laws as falling within the categories of permissible regulations that the Court enumerated in *Heller.* Therefore, courts have upheld the prohibition of the possession of "dangerous and unusual weapons," the regulation of firearms sales and purchases, the prevention of the carrying of guns in "sensitive places," and the ban on firearms possession for "felons and the mentally ill."[305] They have also upheld restrictions based on criterion similar to those specifically stated in the decision, provided that such regulations are reasonable and not "enforced in an arbitrary and capricious manner."[306] Due to the unanimity of opinion by the courts and the generally conservative nature of the rulings discussed in this chapter, as well as the fact that the restrictions they uphold are typically easily justifiable, it is difficult to believe that the Supreme Court will grant certiorari to the appeals from any of these particular cases. However, if the Court were to do so, it would appear that cases involving the Right-to-Carry and restricted persons would be the most likely to be heard by the Court. It must be noted though that, to date, the Supreme Court has denied certiorari to all of these decisions that have been appealed. Therefore, it would appear that the main importance of state high court and lower federal court cases dealing with the right to keep and bear arms is that they are clearly illustrative of the general trend of the courts to use *Heller* to uphold virtually all arms regulations. As Adam Winkler aptly noted: "The militia theory of the Second Amendment is dead. Long live gun control."[307]

[305] District of Columbia v. Heller, ***95.
[306] Ibid., ***102.
[307] Winkler, 1577.

CHAPTER FIVE:

THE COURTS AND INCORPORATION

The vast majority of the Second Amendment cases reaching the appellate courts have dealt with fairly obvious Second Amendment limitations, have been generally uncontroversial, and have not engendered different rulings on the same issue in different courts. However, cases involving one of the biggest questions remaining after *Heller*—whether the Second Amendment should be incorporated to the states—have created inconsistencies in the rulings of circuit and state courts and have attracted the most publicity and criticism of any Second Amendment cases that these courts have ruled on.[308]

Due to the difficulty the appellate courts have had in deciding the issue of incorporation and the large effect of such a decision, it is this area that has spawned cases best suited for review by the U.S. Supreme Court. Indeed, of the many court decisions dealing with Second Amendment issues that have been appealed to the Supreme Court, the only one that the Court has deigned to hear is an incorporation case (*McDonald v. Chicago*). Thus, while the predominant effect of *Heller* on the courts has been to simply provide validity for existing firearms regulations, the most important impact of *Heller* in the courts is that it has resulted in incorporation cases that have provided a venue for the Supreme Court to clarify Second Amendment jurisprudence.

A. Methods of Incorporation

In order to best comprehend how the courts have dealt with or will deal with incorporation, it is necessary to understand the methods by which the Second Amendment can be incorporated against the states. This can only be done by: direct application, using the Privileges

[308] The main reason for the controversy over these decisions is that any ruling on incorporation has extensive repercussions. The impact of incorporation will be discussed in more detail in both the arguments for the respondents in *McDonald* and in the analysis of the case.

or Immunities Clause of the Fourteenth Amendment, or utilizing the Due Process Clause of the Fourteenth Amendment.[309]

The first option cannot be exercised because Supreme Court precedent, notably *Barron v. Baltimore* and *Presser v. Illinois*, clearly states that the "Bill of Rights applies only to the federal government."[310] As for the Privileges or Immunities Clause ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"[311]), *The Slaughter-House Cases* made it clear that the rights protected by this clause are strictly those "that derive from United States citizenship, but not those general civil rights independent of the Republic's existence."[312] Whereas the first category involves rights that either the "Federal Constitution grants or the national government enables," the second category engrosses "preexisting rights the Bill of Rights merely protects from federal invasion."[313] Because the Second Amendment right to keep and bear arms existed prior to the U.S. Constitution, the Constitution cannot be said to grant this right.[314] Therefore, under Court precedent, the Privileges or Immunities Clause is the improper means by which to seek incorporation[315] —a fact noted in both *Presser* and *United States v. Cruikshank*. It should be noted, however, that *Slaughter-House*'s interpretation of the Privileges or Immunities Clause (an interpretation that effectively obviates the effectiveness of the clause in securing any federally protected right against

[309] Nordyke v. King, 2009 U.S. App. LEXIS 8244 (9th Cir.), **11, http://www.lexisnexis.com (accessed November 18, 2009).
[310] Ibid.
[311] U.S. Const. amend. 14, sec. 1, cl. 2.
[312] Nordyke v. King, **12.
[313] Ibid.
[314] Ibid., **13.
[315] While Court precedent does preclude the usage of the Privileges or Immunities Clause for incorporation, a good argument can be made for the clause's viability as a means of incorporation. That argument will be discussed in detail in the section dealing with the plaintiffs' arguments in *McDonald.*

state interference) has been subjected to extensive criticism. The decision is nevertheless "good law."[316]

The final option is to follow the path previously used by courts when incorporating a provision of the Bill of Rights: apply an amendment to the states through the Due Process Clause of the Fourteenth Amendment (no "State [shall] deprive any person of life, liberty, or property, without due process of law)."[317] It must be noted that federally-guaranteed, fundamental rights can be protected against state abrogation through the Due Process Clause using either substantive due process analysis or selective incorporation. Either method of incorporation involves essentially the same analysis, but the two methods differ with regard to the nature of the claimed right. Whereas substantive due process is used to incorporate a right that is unenumerated in the U.S. Constitution, selective incorporation is utilized when a right is enumerated.[318] Obviously the Second Amendment is an enumerated right, which would mean that selective incorporation is the method that must be used; but substantive due process doctrine is relevant because, given that selective "incorporation is logically a part of substantive due process," precedent regarding substantive due process is applicable to selective incorporation.[319]

Substantive due process doctrine views the Due Process Clause as "guarantee[ing] more than fair process, and the 'liberty' it protects [as] includ[ing] more than the absence of physical restraint."[320] Thus, the clause, whether used for selective incorporation or in substantive due process analysis, is said to protect those rights that are fundamental to the concept of ordered liberty, particularly those individual rights guaranteed by the first eight amendments to the U.S.

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[316] Ibid., **14.
[317] U.S. Const. amend. 14, sec. 1, cl. 3.
[318] Nordyke v. King, **20-21.
[319] Ibid., **23.
[320] Ibid., **20.

Constitution.[321] As the Court noted in *Duncan v. Louisiana*, incorporation depends on whether "a procedure is necessary to an Anglo-American regime of ordered liberty."[322] And, as *Moore v. City of E. Cleveland* explained, in order for a right to be deemed fundamental, it must be "'deeply rooted in this Nation's history and tradition.'"[323] In making this determination, *Washington v. Glucksberg* stated that "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial guideposts for reasonable decision making."[324] In short, if the right to keep and bear arms is "necessary to an Anglo-American regime of ordered liberty," which is to be determined by whether the claimed liberty interest is "deeply rooted in this Nation's history and tradition," the Fourteenth Amendment incorporates it to the states.[325]

B. Courts of Appeal Incorporation Cases

The most significant lower court decisions involving incorporation are the decisions of the federal courts of appeal in two cases involving challenges to municipality and county gun laws. While the decisions of the Second, Ninth, and Seventh Circuits in *Maloney*, *Nordyke*, and *NRA v. Chicago* are all significant enough to be consistently referenced by the lower courts, the last two rulings are particularly noteworthy because they are best representative of the split in the rulings of the lower courts that have resulted in the Court granting certiorari to a Second Amendment case.[326]

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[321] Ibid., **20-21.
[322] Ibid., **22.
[323] Ibid., **23.
[324] Ibid.
[325] Ibid., **25.
[326] Because the Seventh Circuit in *NRA v. Chicago and Oak Park* reaches the same conclusion as the Second Circuit in *Maloney v. Cuomo* but provides a better analysis of the issues, *NRA* is the case best representative of an anti-incorporation ruling. *Maloney* does, however, merit a brief overview. The question of the case was whether the Second Amendment prohibited the New York law banning the possession of

1. *Nordyke v. King* (2009)

In the first case, the Ninth Circuit held that the Second Amendment both could and should be incorporated to the states. In *Nordyke v. King*, gun show promoters filed suit seeking to overturn a county ordinance banning the possession of firearms on any county property. The Ninth Circuit, in order to render a decision, had to first decide whether the Second Amendment was binding on the states and their political subdivisions. After an extensive analysis of incorporation methods and the history of the right to keep and bear arms,[327] the court ruled that the "necessary" right to keep and bear arms existed as "one of the fundamental rights of Englishmen" prior to the existence of the Second Amendment.[328] Moreover, the historical record indicates that the right to keep and bear arms must be considered "deeply rooted in this Nation's history and tradition" because:

> Colonial revolutionaries, the Founders, and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. It has long been regarded as the "true palladium of liberty." Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later.[329]

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nunchakus within a home. The Second Circuit, then including new Supreme Court Justice Sonia Sotomayor, held that the law was valid because *Heller* did not incorporate the Second Amendment to the states. *Presser v. Illinois* stated that the Second Amendment "is a limitation only upon the power of congress and the national government, and not upon that of the state," and *Bach v. Pataki* noted that *Presser* requires the conclusion "that the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts." While the Court in *Heller* did hold that the Second Amendment guarantees an individual right to keep and bear arms, the Court did not "invalidate [the] long-standing principle . . . that the Second Amendment applies only to limitations the federal government seeks to impose on this right." In a case such as this, where "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.'" As for any substantive due process challenge to the New York law, it must likewise fail. Because "the nunchaku was designed primarily as a weapon and had no purpose other than to maim or, in some instances, kill," the legislature could reasonably conclude that it was an unusually dangerous weapon. The law thus meets the rational basis test. See Maloney v. Cuomo, 2009 U.S. App. LEXIS 1402 (2nd Cir.), **1-5, http://www.lexisnexis.com (accessed November 18, 2009).

[327] The court's discussion of the three methods by which the Second Amendment could be applied to the states and the history of the Second Amendment is exceedingly important because the Supreme Court is likely to follow the logic of the decision if it decides that it is appropriate to incorporate the Second Amendment. For the Ninth Circuit's discussion of incorporation methods and historical analysis see Nordyke v. King, **11-47.

[328] Ibid., **27.

[329] Ibid., **45.

Thus, it is apparent that "the right to bear arms [is] a fundamental right warranting the protection of substantive due process through the Fourteenth Amendment from county interference."[330] The Due Process Clause of the Fourteenth Amendment therefore incorporates the right to keep and bear arms.[331]

As for the appropriate standard of review for subsequent challenges to gun laws, Judge O'Scannlain noted that rights that are deemed fundamental usually must be reviewed under strict scrutiny. However, when a fundamental right is part of the enumerated provisions of the Bill of Rights, the standard of review becomes "that appropriate to the specific right."[332] Upon reviewing the county ordinance, it becomes clear that the county was acting within its rights to prohibit firearms in "its sensitive public places"—not to mention the fact that self-defense is not implicated in this particular prohibition on firearms possession.[333] Therefore, the county laws must be upheld.

Nordyke is undoubtedly the most comprehensive court of appeals analysis of the Second Amendment, and it is arguably one of the best reasoned. Nevertheless, due to the furor created by the ruling, the decision has been scheduled for an en banc rehearing by the Ninth Circuit.[334] Because the Supreme Court decision in *McDonald v. Chicago* (the appeal from the next court of appeals decision on incorporation) will inform the lower courts whether or not the Second Amendment is to be considered as binding the states and their political subunits, the panel has postponed the rehearing until the Court's decision is handed down.[335]

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[330] Ibid., **1.
[331] Ibid., **46.
[332] Ibid., **47.
[333] Ibid., **1.
[334] Nordyke v. King, **1; Chris W. Cox, "U.S. Supreme Court Revisits the Second Amendment," *American Rifleman*, December, 2009, 18.
[335] Cox, "U.S. Supreme Court Revisits the Second Amendment," 18.

2. NRA v. City of Chicago and Village of Oak Park (2009)

The second highly significant court of appeals case is the ruling of the Seventh Circuit in *National Rifle Association of America, Inc. v. City of Chicago and Village of Oak Park*—a decision the U.S. Supreme Court has granted certiorari to. This case was a consolidated appeal from the decision of an Illinois district court dismissing the NRA's suits alleging that the municipalities' prohibitions on virtually all handguns violated the individual right to keep and bear arms found in the Second Amendment, mainly on the grounds that *Heller* had not incorporated the Second Amendment to the states.[336] The Seventh Circuit, consistent with the rulings of the vast majority of the lower courts, affirmed the district court decision to not incorporate the amendment. However, unlike the *Nordyke* decision, if the Supreme Court were to adopt the stance taken by this circuit on incorporation, this opinion would not be overwhelmingly helpful in indicating a rationally cogent way in which the Court could do so. This is because the court uses the majority of the opinion to outline why the Supreme Court should be the one making a decision on incorporation. Because this portion of the opinion is representative of the approach adopted by most courts in incorporation cases and clearly indicative of the trepidation of most courts in ruling on controversial Second Amendment issues, it merits review along with the more substantive legal rationale of the court.

What makes *NRA v. Chicago* distinctive is that the plaintiffs primarily sought to have the court rule that the Second Amendment was incorporated through the Privileges or Immunities Clause of the Fourteenth Amendment. In a similar manner to the *Nordyke* court, the Seventh Circuit had little difficulty dismissing this claim. Writing for the majority, Judge Easterbrook first noted that *The Slaughter-House Cases* clearly held that "the privileges and immunities

[336] National Rifle Association of America, Inc. (NRA) v. City of Chicago and Village of Oak Park, 2009 U.S. App. LEXIS 11721 (7th Cir.), **1, http://www.lexisnexis.com (accessed November 18, 2009).

clause does not apply the Bill of Rights, en bloc, to the states," and *Cruikshank*, *Presser*, and *Miller* also rejected Second Amendment challenges relying on the clause.[337] Notwithstanding the lucidity of Supreme Court precedent in this area, the plaintiffs sought to rebut these decisions with the assertions that: 1) *Slaughter House Cases* was incorrectly decided; 2) while the court would have to apply that decision even if they considered it wrongly decided, the court could avoid doing so by simply using the doctrine of selective incorporation which was not yet in existence when *Cruikshank*, *Presser*, and *Miller* were decided.[338]

The court, however, found these contentions to be untenable. The Supreme Court has repeatedly informed the lower courts that they must "implement the Supreme Court's holdings . . . [i]f a precedent . . . has direct application in a case, . . . even if the reasoning in later opinions has undermined their rationale," thereby leaving to the Supreme Court justices the "prerogative of overruling [their] own decisions."[339] And *Miller*, *Cruikshank*, and *Presser* are all directly applicable to the case at hand. This is clearly illustrated by Justice Scalia's statements in *Heller* that both "*Presser* and *Miller* 'reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government'" and that "*Cruikshank*'s continuing validity on incorporation is a question not presented by this case." [340] The Court was not "licens[ing] the inferior courts to go their own ways;" it was simply stating that the justices will rule on incorporation at an appropriate time.[341] If the appellate courts begin conducting incorporation analyses, these actions will have the desultory effects of "undermin[ing] the uniformity of

[337] Ibid., **4.
[338] Ibid.
[339] Ibid., **5.
[340] Ibid., **6.
[341] Ibid.

national law" and "compel[ing] the Justices to grant certiorari before they think the question ripe for decision."[342]

Furthermore, Judge Easterbrook pointed out that arriving at a proper decision in such a case would be extraordinarily difficult. While the logic behind *Cruikshank*, *Presser*, and *Miller* is admittedly outdated, the Supreme Court has yet to indicate that it in any way intends to declare that *The Slaughter-House Cases* is no longer good law and thereby use the Privileges or Immunities Clause to apply the entire Bill of Rights to the states.[343] The current preferred method of incorporation is selective incorporation; and, under that doctrine, the Court has yet to incorporate the Third Amendment, the Seventh Amendment, the Fifth Amendment's grand jury clause, or the Eighth Amendment's excessive bail clause.[344] Under such a "selective (and subjective) approach to incorporation" it is difficult to determine precisely how the Second Amendment will fare.[345] There simply is no standardized formula for selective incorporation.[346] As for any reliance on William Blackstone to prove that the right to keep and bear arms was "deeply rooted," it is simply misplaced both because Blackstone was discussing *English* law and because he was talking about the right in the context of it being not a constitutional but a political right.[347]

An additional factor Judge Easterbrook considered is that the Bill of Rights "take[s] a different shape when asserted against a state than against the national government."[348] It is hard

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[342] Ibid.
[343] Ibid., **8.
[344] Ibid.
[345] Ibid.
[346] For instance, *Nordyke* held that the Second Amendment should be incorporated because it was sufficiently "deeply rooted in this Nation's history and tradition," but civil jury trials would meet that same test and yet the Court has failed to incorporate them. Furthermore, *Palko v. Connecticut*'s decision that double-jeopardy did not meet the test of being "so rooted in the traditions and conscience of our people as to be fundamental" was overturned in *Benton v. Maryland*—a decision paying "little heed to history." See Ibid., **9.
[347] Ibid.
[348] Ibid., **10.

to say that the legislature's decision of what weapons may permissibly be used for self-defense purposes has "been out of the people's hands since 1868" (the date of the ratification of the Fourteenth Amendment which makes it, instead of 1793, the relevant year for determining the legitimacy of state-based regulations on arms).[349] While both Chicago and Oak Park are hardly in a favored position to make such a claim given that Illinois has neither "abolished self-defense" nor made any differentiation between handguns or "long guns," both cities can effectively argue an important point: "[t]hat the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule."[350] It must be granted that principles of federalism are more "deeply rooted" in tradition than is the "right to carry any particular kind of weapon."[351] Ultimately, the decision as to whether the Second Amendment should be incorporated is for the Supreme Court justices to decide.[352]

C. McDonald v. City of Chicago

Recognizing that the lower courts needed guidance on the issue of incorporation, the Supreme Court granted certiorari to the appeal from the decision of the Seventh Circuit Court of Appeals in *NRA v. Chicago*—a case now entitled *McDonald v. Chicago.* The specific question the Court agreed to render a decision on in the case is:

> Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.[353]

Given the vast legislative and legal repercussions likely to stem from a decision on this question,

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[349] Ibid., **11-12.
[350] Ibid., **12-13.
[351] Ibid., **13.
[352] Ibid.
[353] Alan Gura and David G. Sigale, "McDonald v. City of Chicago, Petitioners' Brief," I. http://www.lexisnexis.com (accessed December 18, 2009).

the additional guidance on Second Amendment issues the Court is apt to provide inferior courts with in such a ruling, and the possibility that the case could significantly alter constitutional law by reviving a provision of the Fourteenth Amendment that would incorporate the first eight amendments against the states, this case merits extensive review.

1. Procedural Background

The procedural background of this case is rather complex. Immediately after the decision in *Heller*, plaintiffs Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, the Second Amendment Foundation, Inc., and the Illinois State Rifle Association filed suit against the City of Chicago in order to have the city's ban on handguns (a duplicate of that struck down in D.C. by *Heller*) be ruled unconstitutional.[354] The day following the filing of this suit, a similar case was filed against Chicago by the NRA, Kathryn Tyler, Anthony Burton, Van F. Welton, and Brett Benson.[355] A third related case was filed by the NRA, Robert Klein Engler, and Gene A. Reisinger against the Village of Oak Park, Illinois.[356] While all three suits dealt with related matters, the district court did not consolidate them; however, on appeal from the district court's rulings against all of the plaintiffs, the Court of Appeals for the Seventh Circuit chose to consolidate the cases.[357]

Together, these cases challenge Chicago laws and statutes in the Village of Oak Park that:

> (1) ba[n] the registration of handguns, thus effecting a broad handgun ban; (2) requir[e] that guns be registered prior to their acquisition by Chicago residents, which is not always feasible; (3) mandat[e] that guns be re-registered on an annual basis, including the payment of what amounts to an annual tax on the

[354] Alan Gura and David G. Sigale, "McDonald v. City of Chicago, Petition for a Writ of Certiorari," ii, 2, http://www.lexisnexis.com (accessed December 18, 2009).
[355] Ibid., ii.
[356] Ibid.
[357] Ibid., ii-iii.

> exercise of Second Amendment rights; and (4) rende[r] any gun permanently nonregisterable if its registration lapses.[358]

While the *NRA* cases and *McDonald* case are very similar in that they challenge the same gun regulations and seek the incorporation of the Second Amendment, they do have a fairly significant difference. The plaintiffs in *McDonald* argued that both the Privileges or Immunities Clause and the Due Process Clause of the Fourteenth Amendment incorporate the Second Amendment.[359] The *NRA* petitioners, on the other hand, originally only argued that those rights "explicitly or implicitly protected by the Constitution" are "fundamental," which would mean that the Second Amendment should therefore "be recognized as incorporated" because, when looking at whether a provision of the Bill of Rights is incorporated, "the Court has relied on their status as such" in determining the importance of the right in question.[360]

While a decision has yet to be rendered in this case, both sides have filed briefs supporting their respective positions. Because the Court is likely to essentially adopt the reasoning of either the plaintiffs' or the defendants' briefs in its ruling, it is important to understand the arguments contained in both parties' briefs. In addition, the incorporation arguments involving the Privileges or Immunities Clause are academically intriguing because they could result in the Court greatly clarifying its civil-rights jurisprudence and, in a similar manner as *Heller*, giving life to a constitutional provision long essentially dismissed by the courts.

2. Plaintiffs' Arguments

As for the plaintiffs' arguments, they begin by noting that both the courts of appeal as well as state high courts are split with regard to whether the Second Amendment is, or should be,

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[358] Ibid., 5.
[359] Ibid., 7.
[360] Ibid.

incorporated to the states through the Fourteenth Amendment.[361] Even though the Seventh Circuit is not alone in finding that the Second Amendment should not be incorporated, it nevertheless erroneously ruled in a manner inconsistent with the Court's precedent. This is particularly so because *Cruikshank*, *Presser*, and *Miller* cannot be construed as directly authoritative on the issue of selective incorporation because the selective incorporation doctrine was not in existence when they were decided.[362] Furthermore, "settled precedent" indicates that that the Second Amendment should indeed be incorporated against the states through the Due Process Clause of the Fourteenth Amendment.[363] The Due Process Clause's prohibition on a state depriving a person of life, liberty, or property without the due process of law has long been viewed as providing both substantive and procedural protection.[364] Therefore, the vast majority of the rights guaranteed by the first eight amendments of the Bill of Rights have been incorporated against the states via the Due Process Clause.[365] In making the determination of whether a right is incorporated against the states through this clause, the Court has asked whether the asserted liberty interest is "fundamental to the American scheme of justice" or "necessary to an Anglo-American regime of ordered liberty."[366] By virtue of its "historical acceptance" in the United States, "its recognition by the States," and its "nature," the right to keep and bear arms clearly meets the selective incorporation standard.[367]

The plaintiffs' argument for incorporation of the Second Amendment through the Privileges or Immunities Clause[368] of the Fourteenth Amendment is more nuanced than their

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[361] Ibid., 12.
[362] Ibid.
[363] Gura, "Petitioners' Brief," 5. The Due Process Clause provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Constitution, amend. 14, sec. 1, cl. 3.
[364] Gura, "Petitioner's Brief," 8.
[365] Ibid.
[366] Ibid., 8-9.
[367] Ibid., 9.
[368] This clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. U.S. Constitution, amend. 14, sec. 1, clause 2.

selective incorporation argument. They begin by observing that, while the Court has yet to directly address the legislative history and the original public meaning of the Fourteenth Amendment, it has consistently rendered decisions upholding individual liberties.[369] Unfortunately, the Court's application of the Fourteenth Amendment has not upheld the amendment's "essential promise."[370] Federal courts have allowed states to violate what was "understood and intended by the ratifying public" to be rights protected by the amendment.[371] Furthermore, the failure of the Court to uphold the amendment's "original public meaning"—notably that the Privileges or Immunities Clause secured the privileges and immunities of citizens of the United States from abrogation by the states—has resulted in "confusion and controversy" because the courts have had to develop other methods by which to protect the fundamental rights of citizens.[372] This case, however, presents the Court with the opportunity to fix previous errors and clarify the Court's civil-rights rulings by giving the Fourteenth Amendment the meaning that it was intended to have.[373]

The Privileges or Immunities Clause was originally intended to prevent the states from violating civil rights—a category that includes those rights enumerated in the Bill of Rights.[374] Such a purpose was both the "frequently expressed, never controverted" intention of the framers of the Fourteenth Amendment and the comprehension of the amendment shared by those who ratified it.[375] As one of the Civil War amendments, the Fourteenth Amendment was intended to prevent the states from abusing newly-freed African-Americans' individual rights (including the right to keep and bear arms) by granting "federal birthright citizenship for all people."[376]

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[369] Gura, "Petitioner's Brief," 5.
[370] Ibid.
[371] Ibid.
[372] Ibid.
[373] Ibid., 6.
[374] Ibid.
[375] Ibid.
[376] Ibid.

With regard to the text of the clause, the fact that the clause begins with "No state shall" was an intentional construction on the part of the Fourteenth Amendment's author, Rep. John Bingham, as a means of overturning the holding in *Barron v. Baltimore* that prevented the entire Bill of Rights from being "direct[ly] appli[ed]" to the states.[377] As for what "privileges or immunities" the clause was supposed to prevent the states from abridging, Bingham repeatedly stated that the clause was certainly designed to protect at least those liberties within the Bill of Rights.[378] Moreover, Senator Jacob Howard, the amendment's sponsor in the Senate, stated that the clause was intended to incorporate privileges and immunities "whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—[but that] to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution."[379] Such an opinion of the scope of the Privileges or Immunities Clause and its inherent incorporative power was also shared by the Fourteenth Amendment's detractors and the period's leading legal scholars.[380] Ultimately, the term "privileges or immunities" can be said to have been considered at the time of its creation and ratification as encompassing a citizen's general rights but, more specifically, as especially referring to the individual rights guaranteed by the first ten amendments to the federal constitution and those rights "naturally inherent in human beings and secured by any free government."[381]

Unfortunately, the Court refused to read the clause in this manner in *The Slaughter-House Cases*. As a matter of fact, the Court all but rendered the clause meaningless by holding that it only protected "the most obscure rights, rarely exercised by any American and with which

[377] Gura, "Petition for a Writ of Certiorari," 23.
[378] Ibid., 24.
[379] Ibid.
[380] Ibid., 25-6.
[381] Gura, "Petitioners' Brief," 6-7.

the States could not ordinarily interfere even had they the will to do so."[382] Following this precedent, the Court in *Cruikshank*, *Presser*, and *Miller* held that the clause did not prevent the states from interfering in citizens' First and Second Amendment rights.[383] However, *The Slaughter-House Cases* was not correct when it was decided, and it should be overturned. "Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the Amendment;" essentially all adhere to the belief that the clause at least protects the individual rights guaranteed by the first eight amendments to the Bill of Rights.[384] Also, the case has not engendered any "valid reliance interests flow[ing] from the wrongful deprivation of constitutional liberties."[385]

In the end, while the Fourteenth Amendment's "original public meaning . . . with respect to incorporation is consistent" with the incorporation that the Court has undertaken using the Due Process Clause, the "original understanding" of incorporation is actually directly related to the Privileges or Immunities Clause not the Due Process Clause.[386] It was the gutting of the Privileges or Immunities Clause that led the Court to rely on substantive due process for incorporation—"a concept which, whatever its merits, rests on shakier textual and originalist roots and is thus more prone to controversy."[387] That is not to say that the Court should read the Privileges or Immunities Clause to preclude substantive due process; however, when the "more straightforward, correct reading" of the Privileges or Immunities Clause would lead to the same result as substantive due process, the use of the former clause is "preferable."[388]

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[382] Ibid., 7.
[383] Ibid., 7-8.
[384]Gura, "Petition for a Writ of Certiorari," 22-3.
[385] Gura, "Petitioners' Brief," 8.
[386] Gura, "Petition for a Writ of Certiorari," 27.
[387] Ibid.
[388] Ibid.

3. Defendants' Arguments

The defendants, of course, strongly disagree. They believe that the Seventh Circuit correctly affirmed the district court's decisions.[389] *Cruikshank* states that the Second Amendment "has no other effect than to restrict the powers of the national government," *Presser* declares that it "is a limitation only upon the power of congress and the national government, and not upon that of the state," and *Miller* notes that it "ha[s] no reference whatever to proceedings in state courts."[390] All three cases "remain good law today," and *Heller* even declares "that the Second Amendment applies only to the federal Government."[391] Neither the Court's previous cases under the Due Process Clause nor the cases under the Privileges or Immunities Clause give "any reason to depart from the Court's conclusion that the Second Amendment does not bind the States."[392]

While it is obviously the prerogative of the Court to determine if the Second Amendment should be incorporated to the states, using the Privileges or Immunities Clause to do so is simply not a viable option. The Court itself "has long ago, and repeatedly, rejected" the clause as a grounds for incorporation of the Bill of Rights, and there is no split amongst the circuits in interpreting this clause.[393] Furthermore, the plaintiffs fail to effectively argue that the Court should overturn the principles of *stare decisis* with regard to this issue.[394] When the Court overturns precedent it "first considers various factors to assess the costs and benefits of overruling or affirming prior cases."[395] Relevant factors would include:

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[389] Benna Ruth Solomon, et al., "Brief for Respondents in Opposition," 5, http://www.lexisnexis.com (accessed December 18, 2009).
[390] Ibid., 5-6.
[391] Ibid., 6.
[392] Ibid.
[393] Ibid., 7-8.
[394] Ibid., 21.
[395] Ibid.

> Whether the decision has proved unworkable; whether there has been individual or societal reliance on the rule; whether the evolution of the law or premises of fact have changed in a way that undermines the original rationale; and whether the decision was well-reasoned.[396]

Petitioners do not show how any one of these factors require that *Slaughter-House Cases* be overturned.[397] The decision is not unworkable. It is "easy to apply," since it simply does not allow any of the guarantees of the Bill of Rights to be incorporated using the Privileges or Immunities Clause; and the Court need not overturn the case in order to apply provisions of the Bill of Rights to the states because the Due Process Clause has been construed so as to allow it to do so.[398] Furthermore, the use of the clause would substantially impact the states that have come to rely upon the fact that all of the Bill of Rights are not imposed on the states, particularly because the petitioners are essentially claiming that every one of the first eight amendments must be incorporated to the states.[399] There has also been no "evolution of the law nor any misinterpretation of fact underlying *Slaughter-House Cases"* that would require the Court to rethink the case's rationale. As for the argument that scholars agree that the Privileges or Immunities Clause at least protects the Bill of Rights, it is simply patently false.[400]

In short, if the Court decides that it is appropriate to incorporate the Second Amendment to the states, the proper vehicle for doing so is the Due Process Clause of the Fourteenth Amendment. It must, however, be noted that there is simply no remaining conflict among the circuits regarding the issue of incorporation under the Due Process Clause because the Ninth Circuit decided that the *Nordyke* decision should be reheard en banc.[401] That point aside, with regard to incorporation under the Due Process Clause, "the right to a handgun as a weapon in

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[396] Ibid.
[397] Ibid.
[398] Ibid., 22.
[399] Ibid.
[400] Ibid., 27.
[401] Ibid., 7-8.

common use . . . is not incorporated merely because it is protected under the Second Amendment."[402] If there is found to be a due process right to own firearms for self-defense, it "does not extend to any particular weapon merely because it is in common use."[403] Furthermore, the laws in question would still survive the finding that the Second Amendment protects a liberty interest because they do allow the possession in the home of long-barreled firearms.[404]

Regardless, the fact remains that the Second Amendment should not be incorporated under the Due Process Clause. In determining whether a right should be incorporated by this Clause, the Court has most consistently sought to determine whether an asserted liberty interest is "implicit in the concept of ordered liberty."[405] In making this determination the Court has "flatly rejected '[t]he notion that the 'due process of law' . . . is shorthand for the first eight amendments'" and has never "held that an amendment that contains a 'substantive' rather than a 'procedural' right is automatically incorporated."[406] And, unlike *Heller's* particular focus on the 1791 intention of the Second Amendment, incorporation under the Due Process Clause requires that "our laws and traditions in the past half century" be considered to be of the "most relevance" in ascertaining whether an asserted liberty interest is protected by the clause.[407]

The Second Amendment right to keep and bear arms is simply *not* "implicit in the concept of ordered liberty."[408] Quite unlike the other provisions of the Bill of Rights protecting individual liberties, the Second Amendment was designed to protect "the militia-related need for militiamen to possess and be familiar with weapons necessary for their militia service," not to protect "individual personal liberties."[409] Also differentiating this amendment from the others in

[402] Ibid., 9.
[403] Ibid.
[404] Ibid.
[405] Ibid., 10.
[406] Ibid.
[407] Ibid., 11.
[408] Ibid.
[409] Ibid., 12.

the Bill of Rights is the fact that the right the amendment protects is unique in that it "carries an inherent risk of danger to the liberty and interest of others."[410] Additionally, the "scope of arms rights under state constitutions confirms" that the Second Amendment does not confer a right that is so "deeply entrenched" as to make it fundamental.[411] This is because both state constitutions and state court decisions construing them "do not reflect a 'uniform and continuing acceptance' of a right to weapons in common use" which is necessary prior to the asserted right "enjoy[ing] 'fundamental principle' status."[412] State courts typically make decisions as to the constitutionality of a firearms measure on the basis of whether it is reasonable not on whether the firearm in question is in common use.[413] That, in combination with the fact that such courts have consistently upheld prohibitions on certain classes of firearms, shows that what protection the right to bear arms for self-defense purposes does have does not automatically extend the right to absolutely all types of weapons in common use.[414] Therefore, the Due Process Clause should not be construed so as to automatically protect all classes of weapons either.[415]

Also relevant to incorporation under the Due Process Clause is the fact that the required analysis "takes into account the existence of other means to the same end."[416] Consequently, the Illinois municipalities are in compliance with due process principles because, while banning handguns, they allow shotguns and rifles within the home for self-defense.[417] Laws that "do not make self-defense in the home impossible," such as those in question here, are valid regulations.[418] States currently possess, and should continue to be allowed to have, the "greatest

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[410] Ibid.
[411] Ibid., 14.
[412] Ibid.
[413] Ibid.
[414] Ibid., 15.
[415] Ibid.
[416] Ibid.
[417] Ibid.
[418] Ibid., 15-16.

flexibility to create and enforce firearms policy," which would include allowing the prohibition of specific classes of weapons deemed to be "highly dangerous in a particular location."[419] The right to "regulate according to the needs of varying local conditions" is a principle of federalism that is as much an inherent part of the "constitutional design" as are the "individual rights provisions of the Bill of Rights."[420] It therefore follows that:

> So long as regulation does not render nugatory the right to arms for self-defense in the home, state and local governments should remain free to impose firearms regulations as they deem necessary for the safety and welfare of their citizens. The right to keep and bear arms in common use should not also, therefore, be imposed on the states.[421]

4. Analysis of Respondents' Arguments

Upon reviewing both the plaintiffs' and the defendants' briefs, one is inclined to believe that the Second Amendment should be incorporated against the states. As *Heller* and *Nordyke* amply demonstrate, the right to keep and bear arms has clearly been historically considered necessary to an Anglo-American regime of ordered liberty, both to protect against tyranny and to defend one's self, possessions, and country. Since the right secured by the Second Amendment was in existence *prior* to even the creation of the United States, it is extraordinarily difficult to plausibly deny that the right to keep and bear arms is not deeply rooted in history, traditions, and conscience of the American people. Furthermore, the facts that gun use and possession has been regulated by law, particularly in the past half century, and that the right to keep and bear arms is distinctive amongst the rights guaranteed in the Bill of Rights because it poses a danger to the liberties and interests of others are hardly sufficient reasons to find that the Second Amendment is not a fundamental right. One need only look at First and Fourth Amendment jurisprudence to realize that rights contained in the Bill of Rights can be subjected to reasonable restrictions

[419] Ibid., 16.
[420] Ibid.
[421] Ibid., 17.

without denigrating their status as undeniably essential to the liberty of the individual. Furthermore, no one is contending that all individuals should be allowed to carry any weapon that they choose into any place that they desire for any purpose whatsoever. Even if such license was sought, *Heller* plainly upheld many existing gun laws designed to protect the public safety. In short, not only does the right to keep and bear arms fairly easily meet the current standard for incorporation, but also incorporating the amendment would not result in gangs of citizens armed with .50-caliber machine guns, automatic assault rifles, and rocket propelled grenades roaming the streets.

If the Court were to incorporate the Second Amendment, using the Privileges or Immunities Clause as a means of incorporation is a viable option. First, the intent of the framers of the Fourteenth Amendment, the public understanding of the amendment at the time of its ratification, and the text of the clause itself all indicate that the Privileges or Immunities Clause was intended to be used to protect against state interference both the individual rights guaranteed by the Bill of Rights and natural rights that any free government secures to its citizens. Therefore, it would appear that the majority of scholars are correct in concluding that *The Slaughter-House Cases* was incorrectly decided, which would mean that *stare decisis* should not be used to continue to perpetuate this error. An additional factor increasing the likelihood of the Court using the Privileges or Immunities Clause to incorporate the Second Amendment is the fact that the plaintiffs have specified that they are not seeking to have the Court preclude the usage of substantive due process analysis—they are simply asking the Court to use the more applicable clause.

It should be noted, however, that there are substantial difficulties with utilizing the Privileges or Immunities Clause as a tool for incorporation. First, the *Slaughter-House* Court

rendered its opinion of the meaning and scope of the clause soon after the Fourteenth Amendment was ratified. They were thus in an excellent position to determine the proper intent and understanding of the clause. Secondly, the plaintiffs are asking the Court to overturn a case that has long been settled and upon which substantial reliance has been placed by the states and the courts. Restoring the Privileges or Immunities Clause to its intended meaning would moreover incorporate provisions of the Bill of Rights other than just the Second Amendment as well as an undefined set of natural liberties that a free government should protect. Finally, it is difficult to see why the Court would wish to incur the difficulties associated with incorporation under the Privileges or Immunities Clause when it could simply continue its long-standing practice of using the Due Process Clause to selectively incorporate the Second Amendment.

Upon reading the plaintiffs' arguments, it appears that they are fully cognizant of the extensive problems associated with incorporation through the Privileges or Immunities Clause. It is probably for this reason that their arguments for incorporation under this clause, while extensive and well-reasoned, seem to be more indicative of an effort to use any means possible to achieve their desired result than of any expectation that the Court will actually incorporate the Second Amendment using the Privileges or Immunities Clause. Thus, it appears that, if the Court were to incorporate the Second Amendment, they would do so using the Due Process Clause. Using this clause would not only obviate the need to overturn *The Slaughter-House Cases*, but also it would be consistent with Court precedent. Furthermore, *Nordyke* provides an excellent example of how the Second Amendment could be incorporated under this standard.

Nonetheless, even if the Court were to incorporate the Second Amendment against the states, it would not necessitate the Court overturning the defendants' gun regulations. It must first be noted that *Heller* most definitely did not interpret the Second Amendment as an

unlimited right. As a matter of fact, the case noted the legitimacy of a fairly broad group of regulations. The Court also did not specifically strike down the District of Columbia's firearms registration requirements—a scheme quite similar to Chicago's. Finally, Oak Grove and Chicago laws do not necessarily substantially interfere with the self-defense purpose the *Heller* Court found in the Second Amendment. While handguns are banned, residents are still permitted to use rifles and shotguns in their homes for self-defense. Given that Oak Park and Chicago could "reasonably conclude that in their communities, handgun bans or other stringent regulations are the most effective means to reduce fear, violence, injury, and death,"[422] the ban appears to be a reasonable restriction neither arbitrarily nor capriciously made.

While it would appear that the Court should incorporate the Second Amendment against the states, it must be acknowledged that doing so would be a departure from the more recent decisions of the Court that favor states' rights. Furthermore, in order to incorporate the amendment, the Court would have to engage in substantive due process analysis—a process consistently subjected to scholarly and popular criticism. Nevertheless, it is difficult to read history and *Heller* in a way that does not make the right to keep and bear arms fundamental. It is likely for this reason that the justices in *McDonald*'s oral arguments debated the method by which and extent to which the Second Amendment should be incorporated instead of *whether* the Second Amendment should be incorporated.[423] Oral arguments, of course, are hardly a sure indication of the decision the Court will ultimately make in a case. They nonetheless strongly indicated that at least the *Heller* majority will hold together and decide to incorporate the

[422] Benna Ruth Solomon, et al., "Brief for Respondents City of Chicago and Village of Oak Park," 4, http://www.lexisnexis.com (accessed December 18, 2009).
[423] For the transcript of the oral arguments in *McDonald* see "McDonald v. City of Chicago," http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-1521.pdf (accessed March 4, 2010).

amendment, although it is quite possible that the right incorporated against the states will be weaker than the federal right in order to provide the states with more latitude in regulating arms.

D. The Importance of Incorporation and Conclusion

McDonald could very well have a more far-reaching impact than *Heller*. First, should the Court choose to incorporate the Second Amendment to the states through the Privileges or Immunities Clause, the Court will be reviving a provision of the Bill of Rights that has been construed since 1873 as having about as much practical effect as the Ninth Amendment. Moreover, such a decision would conceivably require the Court to adhere to the intent of the Fourteenth Amendment's framers who believed that the clause would incorporate *all* of the individual rights guaranteed by the first eight amendments to the Constitution. The states would therefore find themselves forced to comply with the Seventh Amendment's required civil jury trial, the Fifth Amendment's grand jury indictment, the Eighth Amendment's excessive bail clause, and the Third Amendment's prohibition on quartering troops in homes without the owner's consent in time of peace and except as proscribed by law in time of war.

Even if the Court were to incorporate the Second Amendment to the states using the Due Process Clause, the impact of such a decision would be immense. Incorporation under any provision would undoubtedly result in the state courts being flooded with large quantities of lawsuits challenging a vast number of firearm ordinances. Furthermore, both the media and legislators would likely react to such a decision in a manner consistent with their responses to *Heller*. That is, the media would be likely to repeat their 2008 efforts to push the debate over the proper limits of gun control into the forefront of the national consciousness;[424] and legislators

[424] Sandy Froman and Ken Blackwell, "How Heller Brings the Gun Issue Into The Election," Worldnetdaily.com, http://www.worldnetdaily.com (accessed September 2, 2008); Sandy Froman and Ken Blackwell, "The Roe v. Wade of Gun Rights," Worldnetdaily.com, http://www.worldnetdaily.com (accessed September 2, 2008); Tom Head, "District of Columbia v. Heller," About.com, http://www.about.com (accessed September 2, 2008); Christopher Keleher, "The Impending Storm: The Supreme Court's Foray Into the Second Amendment Debate," *The University*

would probably once again quickly cash in on the publicity generated by a high-profile gun decision and generally loudly grandstand in favor of pro-gun causes.[425] Such actions, combined with the fact that protecting gun rights is a bipartisan concern favorably viewed by the majority of Americans,[426] would likely result in a trend of legislatures passing laws expanding the right to

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of Montana Law Review 69 (Winter, 2008): 113-172, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Citizens' Rights Reloaded*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Congress to District of Columbia: Allow Citizens 2nd Amendment Rights*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *D.C. Gun Ban Affects Entire U.S.,* Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *D.C. Gun Case Has Implications for All Americans' Second Amendment Rights*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008).

[425] The actions of members of Congress after *Heller* clearly demonstrate a propensity to do so. See United States, Federal News Service, *Rep. Allen Issues Statement on Supreme Court Decision in District of Columba v. Heller*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Rep. Barton: Supreme Court Gun Ban Ruling 'Restores Freedom,'* Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Rep. Davis Applauds Supreme Court Decision to Overturn District of Columbia Gun Ban*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Rep. Issa Issues Statement on Supreme Court Decision to Restore 2nd Amendment Rights to District of Columbia Residents*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Rep. Jones Applauds Supreme Court Ruling in Favor of Individuals' Second Amendment Rights*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Rep. Lucas Proclaims Victory for Gun Rights in Our Nation's Capitol*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Rep. Mahoney Protects Second Amendment*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Rep. Skelton Praises Supreme Court Ruling Affirming Individual Gun Rights*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Rep. Sullivan Praises Historic Second Amendment Ruling*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Second Amendment Rights in the District of Columbia*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Sen. Cornyn: Supreme Court Decision Reaffirms Americans' Right to Bear Arms*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Sen. Craig Says 2nd Amendment Means Americans Have Right to Gun Ownership*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Sen. Drake Applauds Supreme Court's Decision to Uphold Americans' Second Amendment Rights*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Sen. Graham Applauds Supreme Court Decision Protecting Gun Owners*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Sen. Hutchison: Supreme Court Decision 'Major Victory' for Individual Rights*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); United States, Federal News Service, *Sen. Inhofe Urges Speedy Passage of Second Amendment Rights Legislation*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008).

[426] Approximately 1/3 of all American adults own at least one firearm. Virtually all of these gun owners and 73 % of Americans overall believe that the Second Amendment guarantees the individual right of Americans to own guns. Furthermore, almost 7 out of 10 Americans believe that the possession of a handgun should not be prohibited by law. See Jeffrey M. Jones, "Americans in Agreement With Supreme Court on Gun Rights," Gallop Poll, 1,

keep and bear arms. As for the pro-gun lobby, newly invigorated by the most powerful court in the land legitimizing their beliefs, they would undoubtedly eagerly seek to assist in such efforts both by writing legislation and by rallying support for those willing to introduce it.[427] Of course, gun control advocates in both the federal and state legislatures would hardly be willing to allow a trend of expanding gun rights to emerge unchallenged. Thus, a counter-movement seeking to restrict the right to keep and bear arms would most likely arise. Nevertheless, because a pro-gun ruling in *McDonald* is apt to bring the Second Amendment controversy to the forefront, lead many legislators to publicly make statements in favor of a strong right to keep and bear arms, and strengthen the pro-gun coalition (which has both large monetary resources and the ability to reach with information and to mobilize a large voter base), such a decision is most likely to create a legislative climate conducive to the promulgation and enactment of large amounts of pro-gun legislation.

Moreover, if the Court incorporated the Second Amendment to the states, state legislatures would be forced to reconsider many of the prohibitions on firearms they adopted as an exercise of state police powers. This is because such regulations designed to protect the health and welfare of citizens would no longer be subjected to rational basis scrutiny if the right to keep and bear arms is considered fundamental. While it is difficult to envision the precise nature of the fit between governmental objectives and statutory schemes regulating firearms that the Court would likely require in *McDonald*, *Heller* provides solid precedent for requiring some form of heightened scrutiny. And if heightened scrutiny is applied to gun regulations, it is conceivable

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http://www.gallup.com/poll/108394/Americans-Agreement-Supreme-Court-Gun-Rights (accessed January 11, 2010).

[427] Gun rights interest groups already commonly do so. For instance, the NRA sends out updates on pending legislation in Congress and state legislatures and encourages constituents to contact their representatives and ask them to vote for pro-gun measures. An example of this can be seen in National Rifle Association, "Update on Pending Federal Legislation," NRA-ILA.org, http://www.nraila.org/Legislation/Federal/Read.aspx?id=4951 (accessed January 7, 2010).

that even some of the laws that have been upheld would no longer be considered constitutionally permissible. In such a situation, *Heller*, as the case determining the meaning of the Second Amendment, would be much more likely to have a more substantial impact on the courts' decision-making processes than it currently does.

Regardless of the uncertainty surrounding the exact standard that the Court might choose, it is clear that the Court would be virtually compelled to provide some standard of review for regulations affecting Second Amendment rights. While the courts have often dismissed challenges to federal regulations with ease because of the leeway found in the *Heller* opinion and the fairly non-inflammatory nature of the laws being challenged, courts would find it much more difficult to deal with the myriad state and local gun ordinances that often involve highly controversial regulations. For instance, laws that ban assault rifles, prohibit high-powered "sniper" rifles, substantially inflate ammunition prices so as to effectively prohibit the use of certain firearms, impose excessive registration requirements, effectuate animal preservation laws that interfere with hunting, and refuse to recognize out-of-state gun permits would all be likely to be challenged in court. Given the wide class of cases likely to come before the lower courts, it would clearly behoove the Court to arrive at a standard of constitutional review for challenged firearms regulations if any uniformity in the law is to be preserved.

Even if the Court were to find that the Second Amendment was not so deeply rooted in the history, traditions, and conscience of the people as to be fundamental, the ruling would have a major effect. Such a decision would be likely to stimulate the restriction of gun laws at the state and local level. It is quite conceivable that many municipalities would adopt the stance of the District of Columbia's government and endeavor to see just how strenuous they could make firearms registration, how many additional firearm and ammunition requirements they could

impose, and whether they could ban classes of firearms. Furthermore, while most states have constitutional provisions protecting the right to keep and bear arms, the highest court in the land finding that such a right is not fundamental at the state level could considerably weaken them. This would seem likely because most states with constitutional provisions analogous to the Second Amendment have so far looked to Supreme Court precedent for guidance in ruling in cases arising under their state provisions. Of course, on the basis of the fact that state constitutions may guarantee state citizens more rights than those granted by the U.S. Constitution, a conservative backlash by state legislatures and courts granting more of a right to keep and bear arms on the state level is possible.

One must also not overlook the fact that more radical segments of the population are so terrified of gun regulations and being deprived of their arms that riots and violence could actually result from such a decision. A propensity for behaving irrationally and violently to the threat of gun control can be seen in the reactions of many citizens to the election of President Barack Obama. Because many feared that the president would seek strict gun control measures, gun sales exploded across the nation after the presidential election, as people sought to buy firearms and ammunition while they were still permitted to do so.[428] For instance, in New Jersey, applications for handgun permits doubled and ammunition was bought up to the extent that there were shortages and many popular calibers became all but unavailable.[429] The reaction to the possibility of gun confiscation has not, however, been limited to the mass purchasing of firearms and ammunition. Some individuals are so afraid of such an occurrence that they are willing to take violent action to prevent it. In the words of one New Jersey man, if the government:

> starts screwing around with gun laws, I think the American people are going to flip out. And they're going to go to Pennsylvania Avenue. And they're going to

[428] Applebome, "When Fear and Fury Drive Gun Sales."
[429] Ibid.

> line them up on Pennsylvania Avenue, every Congressional person there. And they're going to shoot every other one. And who's left standing? They're going to send them back in there again and say, 'We're going to line you up and see what you do for the American people in the next 30 days.' I'm serious when I tell you this.[430]

Truly, no matter how the Court decides in *McDonald* , the repercussions are likely to be both strong and long-lasting. Because of the large legislative and legal impact that the *McDonald* decision will produce, the clarification of Second Amendment jurisprudence that it will provide, and the possibility that it could renew a constitutional provision that would incorporate all of the first eight amendments of the U.S. Constitution to the states, *McDonald* promises to become the most important result of *Heller*.

Upon reviewing *Heller*'s impact on the courts, it becomes quite apparent that, while *Heller* is quite important in that it clarified the meaning of the right to keep and bear arms and brought possible infringements of that right to the attention of the courts, the case failed to provide much protection for Second Amendment rights. That is not to say that this was the intention of the Court. As a matter of fact, it is difficult to read the majority opinion in *Heller* as intending to do anything less than protect a strong right to keep and bear arms. Even the dissenting justices must have believed this to be the case or they would not have argued that the ruling would overturn most existing firearms regulations. It is particularly hard to conceive of the majority viewing the decision as essentially only providing the courts with an opportunity to validate existing gun laws. However, the combination of very little guidance for how the lower courts were to apply the holding, the limited nature of the laws the Court reviewed,[431] and the approval of a large number of restrictions on the right to keep and bear arms virtually guaranteed that the lower courts would be wary of doing anything else. In the end, the extent to which the

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[430] Ibid.

[431] Other than D.C., only Chicago and several of its suburbs have handgun bans similar to those the Court struck down. See The Legal Action Project of the Brady Center to Prevent Gun Violence, 3.

courts have adopted a conservative approach toward the ruling is fairly astounding.[432] It is surely the rare instance in which state and federal courts will in effect unanimously rule on the same issues, particularly when the right being regulated is not typically statutorily granted but guaranteed by either the U.S. Constitution or state constitutions.

While the *Heller* decision has to date had a limited direct impact on the courts, it could very well be read in the future as protecting a much stronger right to keep and bear arms. In particular, if the Court articulates a specific form of scrutiny to be applied in Second Amendment cases and demonstrates the logic behind the restrictions on the right to keep and bear arms that it permits, it would be unlikely that the lower courts would continue their general practice of noting that the Court said that the Second Amendment is not without limits, reciting the in dicta list of limitations that the Court approved of, and then finding that whatever gun control measure is before them is not overturned by the Court's decision.[433] It will clearly take more than one Supreme Court decision to correct *Heller*'s imperfections and establish a satisfactory framework for Second Amendment jurisprudence; nevertheless, *McDonald* offers the Court the opportunity to correct some of the more egregious problems with *Heller*. Therefore, while it must be said that it must be said that the immediate impact of *Heller* in the courts has been similar to the case's impact in the District of Columbia in that it has not yet led to the substantial liberalization of firearms laws, the future impact of the decision promises to be immense.

[432] As of 2009, the federal courts had not struck down even one gun control law using the Second Amendment as interpreted by *Heller*. See Winkler, 1566.
[433] Winkler, 1566-1567.

CONCLUSION

At first glance, the Second Amendment appears to patently protect the right of all Americans to possess and carry any firearms that they choose free from interference by the federal government. Like the rest of the Bill of Rights, however, facial generalizations about this amendment are erroneous. Furthermore, as history indicates, this amendment particularly defies any one clear interpretation. Due to the ambiguity surrounding the Second Amendment and the strong public sentiment on both sides of the gun control debate, many anticipated that the Supreme Court's clarification of the meaning and scope of the amendment in *District of Columbia v. Heller* would result in the case becoming a milestone Supreme Court decision. Upon reviewing the case and examining its immediate impact on D.C. legislation and broad legislative and legal implications, it becomes apparent that *Heller* can indeed be considered a landmark in Supreme Court jurisprudence.

Heller required the Supreme Court to engage in a comprehensive analysis of the Second Amendment's history, intent, and meaning for the first time. Having done so, the Court construed the amendment in a manner consistent with most scholarly interpretations of the provision—that is, the Court declared that the Second Amendment secures an individual right to possess and bear arms that is independent of any militia-related interest. The Court then proceeded to find a self-defense purpose in the amendment. On the basis of these findings, the Court stated that the District of Columbia's most opprobrious restrictions on firearms ownership and storage were unconstitutional. Furthermore, the federal government may not completely ban firearms nor arbitrarily and capriciously deny firearms licenses. Finally, the government may not institute excessively restrictive firearms laws.

While the Court's holdings were correct, its rationale was far from exemplary. The Court all but ignored the prefatory clause of the Second Amendment, essentially completely discounted precedent that did not favor its preferred interpretation of the amendment, and was selective in the history that it chose to note. However, the Court did ultimately arrive at a conclusion overall consistent with the vast majority of the evidence indicating the Framers' intentions with regard to the Second Amendment and the public's understanding of the right it protected. It should be noted, though, that this is so not only because of the merits of the Court's rationale, but also because of the opinion's intrinsic flaws that lessened the radical nature of the opinion. First, the Court did not really provide the lower courts with a standard of review for cases involving Second Amendment challenges—the majority simply impliedly rejected rational basis scrutiny. Secondly, even though the Court felt compelled to provide a list of permissible restrictions on the right to keep and bear arms, it did not explain why these restrictions were constitutional. Furthermore, the Court stated that the list was not exhaustive and that court rulings made under a collective right model of the Second Amendment were not necessarily incorrect. The result of the vagueness of the opinion was that the lower courts could conceivably construe *Heller* as either protecting gun rights or upholding gun control laws. It would seem likely that the Court intended to protect a strong right to keep and bear arms, but that it was necessary to provide for restrictions on the Second Amendment and be ambiguous about the scope of the Second Amendment in order to acquire the vote of five justices and to lessen the fears of the dissenters that the decision would overturn most gun laws in the U.S. Regardless, the result is that *Heller* provides a bark worse than its right.

Heller was not altogether vague, however. It clearly required D.C. to alter its firearms code so as to not violate the Second Amendment. One would therefore have imagined that one of

the case's most significant results would have been the substantial liberalization of the arduous requirements the District imposed on its gun owners. The decision's impact in D.C., however, has not been as anticipated. Publically articulating their dissatisfaction with the Court's ruling and intention of retaining the strictest firearm laws constitutionally permissible, the District's officials sullenly rescinded small portions of D.C.'s firearms code and promptly imposed new requirements on gun owners.

Because such actions have met with congressional disapprobation and the filing of lawsuits, the District has been gradually forced to institute slightly less draconian gun regulations. As it now stands, however, while the D.C. laws have undergone a great deal of transformation, they are still so exceedingly restrictive as to make highly dubious the claim that the District has actually complied with the Court's ruling. Thus, the District has provided a workable model of how governments who wish to retain strict gun control laws in the face of pro-gun court rulings can do so. While it is hardly commendable for D.C. to essentially refuse to recognize the constitutional rights of its law-abiding residents, the District's recalcitrance does at least highlight the necessity of the legislative and / or executive branches of government enforcing the decisions of the judicial branch in order for even fundamental rights to be secured.

Fortunately, it does appear that the District will be required to comply with the spirit of *Heller* in the near future. Congress seems to be willing to force the District to substantially lessen its firearms restrictions and requirements, and lawsuits promise to eventually require D.C. to enact more noteworthy changes to their gun laws than have been seen so far. These lawsuits are also significant because they will result in the federal courts ruling on some of the most high-profile gun control issues (notably bans on assault weapons and restrictions on the Right-to-

Carry). For all of these reasons, the District of Columbia has become a key battleground area for gun control and gun rights interest groups.

After *Heller*, one would also have anticipated that the courts would be inundated with Second Amendment cases and that judges would overturn large numbers of gun control laws. Once again, *Heller*'s impact has not as one would have imagined. While lower courts have been flooded with cases dealing with the right to keep and bear arms, judges have virtually unanimously declined to overturn current gun laws. This is undoubtedly due to the Court's failure to articulate a standard of review and inclusion of a laundry list of presumptively lawful (but not exhaustive) restraints on Second Amendment rights without any explanation as to why the Court approved of those restrictions. Judges have therefore been able to use *Heller*'s shortcomings to turn the decision into a valuable gun control tool, as the decision has been utilized to validate existing gun laws.

But *Heller*'s impact in the courts has not been limited to promoting anti-gun causes. The decision has also led to lawsuits being filed against state and local governments in order to have them liberalize their firearms laws. In some cases, governments have voluntarily lessened their firearms restrictions in order to avoid court battles. However, the refusal of Chicago and its suburbs to do so has produced the most significant legal result of *Heller*, as the U.S. Supreme Court has agreed to rule on the lower courts' decisions to uphold the Illinois municipalities' strict firearms codes. Because this case, *McDonald v. Chicago*, will decide whether the Second Amendment will be incorporated against the states and will likely provide a standard of review for Second Amendment cases, its impact promises to be vast. Thus, while *Heller* has not been an immediate force for change in the courts, it appears that the core holding in the case will substantially effect the lower courts' decisions in the future.

In the end, *Heller* can perhaps best be viewed as a modern *Griswold v. Connecticut*. Like *Griswold*, *Heller* dealt with a highly controversial area of law and involved laws that were essentially "national outlier[s]."[434] Both decisions were made possible by a national consensus on the issues in the cases.[435] Furthermore, both cases created important constitutional rights—*Griswold* by crafting the right to privacy out of constitutional penumbras[436] and *Heller* by turning an amendment previously construed as protecting a collective right to keep and bear arms into an amendment securing an individual right to do so. Both cases therefore became one of the most significant and controversial Supreme Court decisions of their respective terms.[437] Unfortunately, *Heller* also suffers from many of the problems that plagued the *Griswold* decision. In particular, both cases' majority opinions fail to substantively discuss the scope and nature of the right that they articulate.[438] This shared vice of vagueness has made it difficult for lower courts to ascertain precisely how each decision should be applied.[439] Fortunately, cases like *McDonald* promise to clarify and expand the right articulated in *Heller* like *Eisenstaedt v. Baird* and *Roe v. Wade* illuminated and developed *Griswold*'s right to privacy. *District of Columbia v. Heller* gave life to a long dormant provision of the Bill of Rights that was intended to protect individual liberties against governmental abuse, required statutory changes in firearms laws, flooded the courts with lawsuits, and significantly influenced court decisions that have extensive repercussions for all Americans. The impact of *Heller* has indeed been substantial, and its repercussions will be felt for years to come.

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[434] Cass R. Sunstein, "Second Amendment Minimalism: Heller as Griswold," *Harvard Law Review* (Forthcoming): 26, http://www.ssrn.com (accessed October 4, 2008).
[435] Ibid.
[436] Michael W. McCann, "Griswold v. Connecticut," in *The Oxford guide to the Supreme Court*, ed. Kermit L. Hall (New York: Oxford UP, 2005), 408.
[437] Ibid.
[438] Ibid., 409.
[439] Ibid.

Appendix I:

DISTRICT OF COLUMBIA GUN LAW ALTERATIONS

The Firearms Control Emergency Amendment Act of 2008:

This act amended the Firearms Control Regulations Act of 1975 that had previously constituted the District's firearms laws:

> to repeal the prohibition on the registration of pistols, to require a ballistics record for each registered pistol, to require a waiting period when registering a firearm, and to establish a self-defense exception to the requirement for safe storage of firearms in the home."[440]

The act specifically did not repeal the ban on handgun possession in most places in the District—it simply created an exception for self-defense in one's home.[441] However, those D.C. residents with handguns that were legally registered no longer needed to have a carry license to carry them within their homes.[442]

Despite this act, D.C. laws still required numerous, unlimited fees for fingerprinting, ballistic tests on handguns to allow for future identification, and handgun registration.[443] If one sought to register a handgun he would be allowed to—but he must also meet the additional bureaucratic barriers of achieving a passing score on a written firearms test and submitting photo identification, proof of residency, and proof of good vision.[444] Moreover, firearms were only allowed to be assembled and unbound by a trigger lock if they were kept at an individual's place of business, were being "used for lawful recreation purposes within the District," or if they were to be used for "immediate self-defense" in one's home.[445] The act also failed to alter the District's extraordinarily broad definition of machine guns from all "semi-automatic weapons that can shoot, or be converted to shoot, more than 12 rounds without reloading," yet it categorically prohibited such weapons. [446] In so doing, D.C. effectively banned the majority of clip-fed semi-automatic handguns.[447]

Firearms Control Amendment Act of 2008:

Due to criticism and legal action taken against the District after their first effort to comply with the Court's decision in *Heller*, D.C. again changed its firearm laws by passing the Second Firearms Control Emergency Amendment Act of 2008. After

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[440] "Firearms Control Amendment Act of 2008," § 1.
[441] District of Columbia's Mayor's Office.
[442] Ibid.
[443] Chris W. Cox, "Lawyers Take Aim to Protect the Second Amendment," *American Rifleman*, March, 2009, 16.
[444] District of Columbia's Mayor's Office.
[445] "Firearms Control Amendment Act of 2008," § 2.
[446] "D.C. Government Faces a New Reality," *Washington Post*, June 27, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/26/AR2008062603988.html (accessed November 27, 2009).
[447] Ibid.

receiving the signature of Mayor Fenty, the bill became law on September 16, 2008; and it was subsequently renewed for another ninety day period on December 16, 2008, as the Second Firearms Control Congressional Review Emergency Amendment Act of 2008.[448] The December version of the bill was to be sent to Congress for approval as permanent legislation under the title of B17-0843, the Firearms Control Amendment Act of 2008 (FCAA).[449] After passing review, the act became effective as D.C. law L17-0372 on March 31, 2009.[450]

The FCAA generally maintained the high level of difficulty in registering a firearm and maintaining it in a legal condition in D.C. While it did ensure that an individual who had registered his firearm would not be "required to obtain a license to carry the firearm within [his] home or place of business, while being used for lawful recreational purposes, or while being transported for a lawful purpose in accordance with a District or federal statute," it did not repeal the previous act's registration requirements and imposed new ones.[451] It limited individuals to registering only one pistol every thirty days, and it banned the possession of ammunition-feeding devices capable of holding more than ten rounds of ammunition (although an exception was made for .22-caliber rimfire ammunition).[452] While maintaining the original act's requirements that firearms be maintained in a disassembled condition or bound with a trigger-guard lock, the act also imposed large fines and imprisonment for up to five years for the "reckless storage of a firearm accessible by a minor."[453] The act further amended D.C. law to prohibit the possession and registration of sawed off shotguns, .50 BMG caliber rifles, rifles with barrels less than sixteen inches, and assault weapons.[454] The one substantial liberalization of D.C. firearm laws provided by the act was that machine guns were now to be classified as "any firearm which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."[455]

Firearms Registration Emergency Amendment Act of 2008 and the Inoperable Pistol Amendment Act of 2008:

At the same time that the Firearms Control Emergency Amendment Act of 2008 was amended, the D.C. Council passed legislation making the Firearms Registration Emergency Amendment Act of 2008 and the Inoperable Pistol Emergency Amendment Act of 2008 effective upon Mayor Fenty's signing of both acts.[456] On January 6, 2009, the mayor signed both pieces of legislation into law; and, subsequently, the Inoperable Pistol Emergency Amendment Act of 2008 was submitted for congressional review as

[448] Chu, 3.
[449] Ibid.
[450] "Firearms Control Amendment Act of 2008."
[451] Council of the District of Columbia, "Second Firearms Control Emergency Amendment Act of 2008," 1, http://www.dc.gov/mayor/pdf/Second_Firearms_Control_Emergency_Amendment_Act_of_2008_Final.pdf, (accessed November 27, 2009).
[452] Ibid., 1, 3-4.
[453] Ibid., 1, 4.
[454] "Firearms Eligible for Registration in the District of Columbia."
[455] Ibid.
[456] "Firearm Registration in the District of Columbia."

proposed permanent legislation under the title of B17-0593, the Inoperable Pistol Amendment Act of 2008 (IPAA).[457] The bill was approved by Congress, and it became D.C. law L17-0388 on May 20, 2009.[458]

The Firearms Registration Emergency Amendment Act of 2008 was essentially implemented as an addendum to the FCAA to clarify the District's firearm registration requirements. In keeping with the general tone of the FCAA, the Firearms Registration Act was quite illiberal and clearly designed to limit firearm possession by imposing substantial burdens on firearm owners and banning specific classes of weapons. The act created a very expansive definition of an assault rifle (i.e. essentially any handgun, rifle, or shotgun that is both semi-automatic and has one or more characteristics of a military-type weapon) and banned all assault rifles.[459] While it did grant a "self-defense exemption for temporary possession of a firearm registered to another person within the registrant's home,"[460] the act added the requirement that all "semi-automatic pistols manufactured and sold in the District be microstamped"[461]—that is, "manufactured to produce a unique alpha-numeric or geometric code on at least 2 locations on each expended cartridge case that identifies the make, model, and serial number of the pistol."[462] As for registration, those individuals who within the last five years had committed an intra-family offense, had committed more than one alcohol-related offense, had a history of violence, and had protection orders against them were ineligible to register a handgun.[463] A person could only register one pistol every thirty days.[464] And, in the process of registering a handgun, the Chief of Police could require the registrant to "receive training and pass testing on the use, handling, and storage of firearms," to "complete one hour of firing training and four hours of classroom instruction," to pass a background check, and to pay for a "ballistics identification procedure."[465]

As for the IPAA, it added to the already substantial difficulty of a District resident exercising his right to keep and bear arms. The act made the discharge of a firearm within the District without a "special written permit from the Chief of Police" a misdemeanor offense, although an exception was made for legitimate self-defense.[466] Furthermore, both D.C. and private individuals who owned property in the District were permitted to "prohibit or restrict the possession of firearms on [their] property and any property under [their] control."[467] Finally, individuals were only allowed to carry a rifle or shotgun in D.C. under very limited circumstances, with violations of this prohibition resulting in penalties analogous to carrying a pistol illegally.[468]

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[457] Ibid; Chu, 3.
[458] "Inoperable Pistol Amendment Act of 2008."
[459] "Firearms Registration Emergency Amendment Act of 2008," 1.
[460] Ibid.
[461] Ibid.
[462] Ibid., 11.
[463] Ibid., 1.
[464] Ibid.
[465] Ibid.
[466] "Inoperable Pistol Emergency Amendment Act of 2008," 2.
[467] Ibid., 2-3.
[468] Ibid., 3, 1.

Appendix II:

UNITED STATES DISTRICT COURT DECISIONS

To date, district court judges have issued approximately sixty rulings on post-*Heller* Second Amendment questions. These cases can be broadly categorized into eight areas: Right-to-Carry, possession of firearms in restricted areas, possession of firearms by restricted persons, laws increasing penalties for crimes committed with firearms, possession of restricted weapons and firearms accoutrements, juvenile and straw purchases of firearms, possession of firearms by illegal aliens, and municipality gun laws.

First, with regard to the Right-to-Carry, district courts have consistently upheld prohibitions on the concealed and unconcealed carry of firearms.[469] As for the carrying of guns in sensitive places, courts have unanimously upheld bans on the possession of firearms in places such as schools,[470] national parks,[471] and U.S. postal property.[472] The largest number of district court cases involve lawsuits challenging both federal and state prohibitions on firearms possession by those with criminal or violent records. Individuals the courts consider to be permissibly denied the right to keep and bear arms by virtue of their status as restricted individuals include violent felons,[473] individuals convicted of either felonies or misdemeanors for using controlled substances and / or selling illegal

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[469] United States v. Hall, 2008 U.S. Dist. LEXIS 59641 (S.D. W. Va.), http://www.lexisnexis.com (accessed November 18, 2009); Young v. Hawaii, 2009 U.S. Dist. LEXIS 62707 (D. Haw.), http://www.lexisnexis.com (accessed November 18, 2009); Young v. Hawaii, 2009 U.S. Dist. LEXIS 28387 (D. Haw.), http://www.lexisnexis.com (accessed November 18, 2009); Simmons v. Gillespie, 2008 U.S. Dist LEXIS 81424 (C.D. Ill.), http://www.lexisnexis.com (accessed November 18, 2009).

[470] Swait v. University of Nebraska at Omaha, 2008 U.S. Dist. LEXIS 96665 (D. Neb.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Walters, 2008 U.S. Dist. LEXIS 53455 (D.V.I), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Lewis, 2008 U.S. Dist. LEXIS 103631 (D.V.I.), http://www.lexisnexis.com (accessed November 18, 2009).

[471] United States v. Masciandaro, 2009 U.S. dist. LEXIS 76802 (E.D. Va.), http://www.lexisnexis.com (accessed November 18, 2009).

[472] United States v. Dorosan, 2008 U.S. Dist. LEXIS 49628 (E.D. La), http://www.lexisnexis.com (accessed November 18, 2009).

[473] United States v. Miller, 2009 U.S. Dist. LEXIS 15080 (W.D. Tenn.), http://www.lexisnexis.com (accessed November 18, 2009); McCormick v. United States, 2009 U.S. Dist. LEXIS 11570 (E.D. Tenn.), http://www.lexisnexis.com (accessed November 18, 2009); Richardson v. United States, 2009 U.S. Dist. LEXIS 25644 (M.D. Tenn.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Whisnant, 2008 U.S. Dist. LEXIS 76460 (E.D. Tenn.), http://www.lexisnexis.com (accessed November 18, 2009); Santiago v. United States, 2009 U.S. Dist. LEXIS 106109 (N.D. Ill.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Robinson, 2008 U.S. Dist. LEXIS 60070 (E.D. Wisc.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Loveland, 2008 U.S. Dist. LEXIS 77389 (W.D. N. Car.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Radencich, 2009 U.S. Dist. LEXIS 3692 (N.D. Ind.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Moore, 2009 U.S. Dist. LEXIS 32953 (W.D. N. Car.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Burris, 2008 U.S. Dist. LEXIS 81030 (W.D. N. Car.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Smith, 2009 U.S. Dist. LEXIS 93948 (E.D. Mich.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Bonner, 2008 U.S. Dist. LEXIS 80765 (N.D. Ca.), http://www.lexisnexis.com (accessed November 18, 2009).

substances,[474] persons previously convicted of a violent misdemeanor[475] or with a restraining order out against them,[476] and individuals convicted of misdemeanors for domestic violence or with domestic violence restraining orders.[477] The only area within the category of restricted persons in which courts sometimes have been inclined to be lenient is when *suspected* criminals seek to exercise their Second Amendment rights. For instance, the District Court for the Southern District of New York held that the government may not require as a condition of pre-trial release that a defendant not possess a firearm.[478] However, demonstrating the inconsistency within this area, the Puerto Rico District Court allowed police officers to interfere with the handgun permits and licenses of an individual who had criminal charges pending against him.[479]

Not only have district courts considered it constitutionally permissible to prohibit restricted persons from possessing firearms or firearms accouterments, but also they have unanimously found that the enhancement of criminal penalties for the commission of a crime with a firearm does not violate the Second Amendment.[480] Additionally, Courts have consistently ruled in favor of governmental regulations prohibiting the possession of illegal attachments to firearms and unusual and dangerous weapons that are not in

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[474] Industrious v. Cauley, 2008 U.S. Dist. LEXIS 77536 (E.D. KY.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Bumm, 2009 U.S. Dist. LEXIS 34264 (S.D. W. Va.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Carter, 2009 U.S. Dist. LEXIS 61019 (S.D. W. Va.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Chafin, 2008 U.S. Dist. LEXIS 95809 (S.D. W. Va.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Lacy, 2009 U.S. Dist. LEXIS 103532 (E.D. Wisc.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Borgo, 2008 U.S. Dist. LEXIS 86560 (W.D. N.C.), http://www.lexisnexis.com (accessed November 18, 2009).

[475] United States v. Skoien, 2008 U.S. Dist. LEXIS 66105 (W.D. Wisc.), http://www.lexisnexis.com (accessed November 18, 2009).

[476] Burns v. Mukasey, 2009 U.S. Dist LEXIS 103511 (E.D. Ca.), http://www.lexisnexis.com (accessed November 18, 2009).

[477] United States v. Yu Tian Li, 2008 U.S. Dist. LEXIS 100867 (E.D. Wisc.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Engstrum, 2009 U.S. Dist. LEXIS 31323 (D. Utah), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Engstrum, 2009 U.S. Dist. LEXIS 33072 (D. Utah), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Chester, 2008 U.S. Dist. LEXIS 80138 (S.D. W. Va.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Booker, 2008 U.S. Dist. LEXIS 61464 (D. Me.), http://www.lexisnexis.com (accessed November 18, 2009); Range v. Indiana, 2008 U.S. Dist. LEXIS 90993 (N.D. Ind.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Luedtke, 2008 U.S. Dist. LEXIS 96597 (E.D. Wisc.), http://www.lexisnexis.com (accessed November 18, 2009); Estate of Leeroy Hickman v. Berkely, 2009 U.S. Dist. LEXIS 104145 (E.D. Tenn.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Lippman, 2008 U.S. Dist. LEXIS 88685, http://www.lexisnexis.com (accessed November 18, 2009).

[478] United States v. Arzberger, Case 1:08-cr-00894-AKH (S.D. NY, 2008), http://www.lexisnexis.com (accessed November 18, 2009).

[479] Marin v. Toledo, 2009 U.S. Dist. LEXIS 21576 (D. Puerto Rico), http://www.lexisnexis.com (accessed November 18, 2009).

[480] United States v. Bowers, 2008 U.S. Dist. LEXIS 103567 (D. Neb.), http://www.lexisnexis.com (accessed November 18, 2009); Richardson v. United States; Santiago v. United States, http://www.lexisnexis.com (accessed November 18, 2009).

common use. [481] As for the sixth area, laws generally prohibiting minors from procuring and possessing firearms and forbidding straw purchases of firearms (wherein individuals legally buy firearms but state that the weapons are for themselves instead of for an unauthorized person) have been upheld.[482] District courts have also upheld convictions of unlawful aliens for possessing firearms.[483]

The cases discussed so far exemplify the obvious propositions that the Second Amendment, like the rest of the Bill of Rights, is not unlimited and that existing limitations generally fall under the exemptions to Second Amendment protection enunciated by Scalia. It is therefore not surprising that most district court opinions only briefly discuss *Heller*, generally listing the majority's stated permissible regulations of the right to keep and bear arm and, in cases involving state regulations, the Court's failure to clearly apply the decision to the states. However, the brevity of opinions in most Second Amendment cases should not be viewed as indicating that the district courts have not had any difficulty answering questions left open by *Heller.* As seen in the fairly extensive analysis of the case provided by lawsuits challenging municipality firearms laws, the courts have particularly struggled to decide what the appropriate standard of review for gun regulations is and whether *Heller* can be construed as having incorporated the Second Amendment to the states and local governments.

The most publicized and important of the cases involving municipality laws are the NRA challenges filed the day after the *Heller* decision was handed down that were specifically designed to allow courts to rule that the Second Amendment was incorporated to the states.[484] These lawsuits sought to overturn gun control ordinances, particularly handgun bans, in the Illinois cities and villages of Chicago, Evanston, Morton Grove, Oak Park, and Winnetka.[485] Also, a lawsuit was filed to test the constitutionality of the San Francisco Housing Authority's policy of prohibiting both handgun and ammunition possession by its tenants.[486]

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[481] Hamblen v. United States, 2008 U.S. Dist. LEXIS 98682 (M.D. Tenn.), http://www.lexisnexis.com (accessed November 18, 2009); Mullinex v. The Bureau of Alcohol, Tobacco, Firearms, and Explosives, 2008 U.S. Dist. LEXIS 51059 (E.D. N. Car.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Willaman, 2009 U.S. Dist. LEXIS 18560 (W.D. Penn.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Prince, 2009 U.S. Dist. LEXIS 54116 (D. Kan.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Perkins, 2008 U.S. Dist. LEXIS 72892 (D. Neb.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Lewis, 2008 U.S. Dist. LEXIS 51652 (D.V.I.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Marzzarella, 2009 U.S. Dist. LEXIS 2836 (W.D. Penn.), http://www.lexisnexis.com (accessed November 18, 2009).

[482] United States v. Bledsoe, 2008 U.S. Dist. LEXIS 60522 (W.D. Tex.), http://www.lexisnexis.com (accessed November 18, 2009).

[483] United States v. Solis-Gonzalez, 2008 U.S. Dist. LEXIS 110133 (W.D. N. Car.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Guerrero-Leco, 2008 U.S. Dist. LEXIS 103448 (W.D. N. Car.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Boffil-Rivera, 2008 U.S. Dist. LEXIS 84633 (S.D. Flor.), http://www.lexisnexis.com (accessed November 18, 2009).

[484] "Lawyers Take Aim to Protect the Second Amendment," 17-18.

[485] Ibid.

[486] Ibid.

Several of these cases were settled quickly. The San Francisco Housing Authority promptly agreed to remove its general ban on tenant possession of firearms and ammunition, although it retained its prohibition of "illegal gun ownership, like the possession of a machine gun or possession of a firearm by a convicted felon."[487] Both Winnetka and Morton Grove likewise swiftly repealed their outright firearms bans.[488] As for the Evanston case, the city rescinded its more severe gun control ordinances. It did, however, retain "a total ban on transporting handguns" and prohibitions on "handgun possession by nonresidents . . . [and] possession outside the home."[489]

While the expeditious alterations in firearms codes by the defendants led to judges simply dismissing the previous cases, the District Court for the Northern District of Illinois actually handed down a substantive ruling on the consolidated lawsuits involving the Village of Oak Park and the City of Chicago. This decision, entitled *National Rifle Association v. Village of Oak Park and City of Chicago*, is undoubtedly the most important district court Second Amendment ruling to date, since the Supreme Court has agreed to hear the appeal of this case from the Seventh Circuit. In his opinion, Judge Milton I. Shadur declined to incorporate the Second Amendment to the states. He opined that the court must render a ruling in favor of the defendants because it is "the judge's duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent case law may point in a different direction."[490] Furthermore, the Supreme Court has clearly informed the lower federal courts that "they are not to anticipate the overruling of a Supreme Court decision, but are to consider themselves bound by it until and unless *the Court* overrules it, however out of step with current trends in the relevant case law the case may be."[491]

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[487] Bob Egelko, "Housing Authority Settles Gun Lawsuit," *San Francisco Chronicle,* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/14/BALM15A1SG.DTL (accessed November 27, 2009).
[488] "Lawyers Take Aim to Protect the Second Amendment," 18.
[489] Ibid.
[490] National Rifle Association of America, Inc. v. Village of Oak Park and City of Chicago, 2008 U.S. Dist. LEXIS 98134 (N.D. Ill.), *753, http://www.lexisnexis.com (accessed November 18, 2009).
[491] Ibid., *753-4.

Appendix III:

STATE HIGH COURT AND FEDERAL COURTS OF APPEAL DECISIONS

Gun Storage Laws

First, the Superior Court of Massachusetts dealt with the permissible extent of gun storage laws. The court upheld a Massachusetts' statute requiring firearms to be "secured in a locked container or equipped with a tamper resistant mechanical lock or other safety devices, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user" against the challenge that it violated *Heller*.[492] Not only does the law in question differ from the D.C. laws in *Heller*, but also the law "can be construed in a way which avoids the constitutional issue."[493] Because the state law allows the firearm owner to carry a firearm on his person within his home for self-defense purpose while requiring that the other firearms that he owns be securely stored, the statute does not conflict with *Heller*'s construction of the Second Amendment.[494]

Sentence Enhancement

Secondly, the courts of appeal have upheld sentence enhancements for firearms use in the commission of illegal acts.[495] The Third Circuit clearly articulated the typical justification for such rulings in *Costigan v. Yost.* The court stated *Heller* "made clear that 'like most rights, the right secured by the Second Amendment is not unlimited.'"[496] *Heller*, furthermore, did not even address the issue of sentence enhancements for firearm use in the commission of a crime—let alone invalidate them under the Second Amendment.[497] Statutes allowing sentence enhancements are therefore constitutional.

Requiring Purchase Permits to Purchase Firearms

In a third area, the Superior Court of New Jersey looked at the permissibility of requiring a firearms purchase permit, which is only issued at the discretion of law enforcement authorities, prior to allowing an individual to purchase a firearm. Under New Jersey law, such a permit can be refused if "issuance would not be in the interest of

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[492] Commonwealth of Massachusetts v. Cantelli, 2009 Mass. Super. LEXIS 113. , *3, http://www.lexisnexis.com (accessed November 18, 2009).
[493] Ibid.
[494] Ibid., *5.
[495] Costigan v. Yost, 2009 U.S. App. LEXIS 12955 (3rd Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Cooper, 2009 U.S. App. LEXIS 24956 (4th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. King, 2009 U.S. App. LEXIS 12653 (7th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Walker, 2009 U.S. App. LEXIS 20097 (6th Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Hamer, 2009 U.S. App. LEXIS 7351 (6th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).
[496] Costigan v. Yost, 2009 U.S. App. LEXIS 12955 (3rd Cir.), **5, http://www.lexisnexis.com (accessed November 18, 2009).
[497] Ibid., *5-6.

the public health, safety or welfare"—the purpose of the statute being "to keep guns out of the hands of unfit persons."[498] The court held that this statute does not violate the New Jersey Constitution because the Court in *Heller* clearly stated that the ruling does "not require invalidation of statutes that require a license to purchase or possess a firearm."[499]

Preemption

A fourth area receiving the attention of state supreme courts is that of preemption. The Superior Court of New Jersey struck down Jersey City's ordinance prohibiting either "the sale or purchase of more than one handgun within a 30-day period" because the New Jersey legislature had already acted in the area, allowing the sale or purchase of more than one handgun provided that an individual obtained the necessary permits.[500] Municipal legislation "cannot permit what a state statute or regulation forbids or prohibit what state enactments allow," and where, as here, "a state enactment provides 'a complete system of law,' the New Jersey Supreme Court infers a legislative intent to preempt parallel municipal legislation."[501] With regard to the Second Amendment as interpreted by *Heller*, it simply does not impact the state or municipal laws in question.[502]

Possession of a Firearm While Intoxicated

The Supreme Court of Missouri addressed the constitutionality of prohibiting the possession of firearms by intoxicated individuals. The court held that a state statute barring "the possession of firearms in the home by anyone who is present in his / her home while intoxicated" even for self-defense purposes is neither facially unconstitutional nor is it unconstitutional as applied.[503] First, the Second Amendment, as noted in *Heller*, is not applicable to the states.[504] Secondly, the Missouri Constitution, by providing that the "right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons," indicates that Missouri "has the inherent power to regulate the carrying of firearms as a proper exercise of the police power."[505] Thus the state right to keep and bear arms, like the right granted by the federal Second Amendment, is not without limits.[506] The state's police power is designed to "preserve the health, welfare and safety of the people by regulating all threats harmful to the public interest," which gives a great deal of latitude to the state legislature in passing laws premised on this power.[507] Since an intoxicated person with a loaded

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[498] In the Matter of Anthony Dubov, 2009 N.J. Super. LEXIS 227, *7, http://www.lexisnexis.com (accessed November 18, 2009).
[499] Ibid., *9.
[500] Association of New Jersey Rifle & Pistol Clubs, Inc. v. the City of Jersey City, 2008 N.J. Super. LEXIS 205, http://www.lexisnexis.com (accessed November 18, 2009).
[501] Ibid., *654.
[502] Ibid., *653.
[503] Missouri v. Richard, 2009 Mo. LEXIS 531, *2-4, http://www.lexisnexis.com (accessed November 18, 2009).
[504] Ibid., *4.
[505] Ibid., *4-5.
[506] Ibid.
[507] Ibid., *6.

firearm is "a demonstrated threat to public safety," the statutory prohibition on firearm possession by such persons is "a reasonable exercise of the legislative prerogative to preserve public safety."[508]

Juvenile and Straw Purchases of Firearms

As for the sixth area, circuit courts have held that *Heller* should not be viewed as allowing juvenile possession of firearms in all but the most limited of circumstances nor as legalizing straw purchases of firearms (wherein individuals legally buy firearms but state that the weapons are for themselves instead of for an unauthorized person). With regard to the possession of firearms by juveniles, the First Circuit stated that even though the ban on possession of firearms by juveniles is quite broad, it does not violate the Second Amendment.[509] It is a prohibition to protect the safety of the public; it has exceptions for "legitimate purposes" such as either hunting or self-defense; and it does not violate the Tenth Amendment because it is within Congress' power to regulate under the Commerce Clause.[510] As for straw purchases, the Fifth Circuit ruled that the fact that an individual is making "knowing, false, material representations to a federally-licensed gun dealer" sufficiently destroys any right that they might otherwise have had to have a "claim of unconstitutionality" heard.[511]

Possession of Restricted Weapons and Firearms Accoutrements

Courts of appeal have also read *Heller* as not excusing prosecution for the possession of illegal weapons and ammunition. The federal laws prohibiting armor-piercing ammunition[512] and pipe bombs[513] are constitutional because *Heller* notes that the Second Amendment is neither without limits nor a protection for "those weapons not typically possessed by law-abiding citizens for lawful purposes."[514] Likewise, the federal bans on machine guns, [515] sawed off shotguns,[516] and rifles with barrels less than sixteen inches[517] are not overturned by *Heller*, particularly because the Court states that the right

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[508] Ibid.
[509] United States v. Rene E., 2009 U.S. App. LEXIS 21896 (1st Cir.), http://www.lexisnexis.com (accessed November 18, 2009).
[510] Ibid., *1.
[511] United States v. Bledsoe, 2009 U.S. App. LEXIS 22857 (5th Cir.), *1-2, http://www.lexisnexis.com (accessed November 18, 2009).
[512] Kodak v. Holder, 2009 U.S. App. LEXIS 19156 (4th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).
[513] United States v. Tagg, 2009 U.S. App. LEXIS 14139 (11th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).
[514] District of Columbia v. Heller, ***92.
[515] Ibid., ***95; United States v. Ross, 2009 U.S. App. LEXIS 9044 (3rd Cir.), http://www.lexisnexis.com (accessed November 18, 2009); United States v. Fincher, 2008 U.S. App. LEXIS 17209 (8th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).
[516] United States v. Fincher; United States v. Artez, 2008 U.S. App. LEXIs 18829 (10th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).
[517] United States v. Gilbert, 2008 U.S. App. LEXIs 15209 (9th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).

to keep and bear arms can be permissibly limited by prohibitions on the possession and carrying of weapons that are dangerous and unusual.

Warrants and Searches Related to Firearms

Finally, circuit courts have been lenient with law enforcement officials who seize guns that have been found in a search, but they have not removed all restrictions regulating such searches and seizures. For instance, the Seventh Circuit ruled that officers executing a valid search warrant may constitutionally seize unregistered firearms.[518] Furthermore, the Tenth Circuit permitted an illegal firearm found through a warrantless search subsequent to a lawful arrest to be admitted into evidence against a defendant.[519] But law enforcement officials' ability to seize firearms is nevertheless not unlimited, even if a valid search warrant is obtained. As the Ninth Circuit noted in *Millender v. County of Los Angeles*, police may not simply seize any firearms that they find through any lawful search because *Heller* indicates that the "[m]ere possession of firearms is not, generally speaking, a crime."[520]

[518] Justice v. Town of Cicero, 2009 U.S. App. LEXIS 18235 (7th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).
[519] United States v. McCane, 2009 U.S. App. LEXIS 16557 (10th Cir.), http://www.lexisnexis.com (accessed November 18, 2009).
[520] Millender v. County of Los Angeles, 2009 U.S. App. LEXIS 9735 (9th Cir.), **27, http://www.lexisnexis.com (accessed November 18, 2009).

Appendix IV:

CONGRESS AND D.C. GUN LEGISLATION

District of Columbia Gun Laws:

First, Congress has sought to force the District of Columbia to comply with the Court's ruling in *Heller*. Given the District's ever-changing gun laws, this has turned into one of the more convoluted areas of congressional gun legislation.[521] Nevertheless, Congress has introduced significant legislation in the Ensign Amendment to the District of Columbia Voting Rights Act of 2009 that would effectively require D.C. to fundamentally change its firearms laws. First, the amendment states that:

> Nothing . . . shall authorize, or shall be construed to permit, . . . any governmental or regulatory authority of the District of Columbia to prohibit, constructively prohibit, or unduly burden the ability of persons not prohibited from possessing firearms under Federal law from acquiring, possessing in their homes or businesses, or using for sporting, self-protection or other lawful purposes, any firearm neither prohibited by Federal law nor subject to the National Firearms Act. The District of Columbia shall not have authority to enact laws or regulations that discourage or eliminate the private ownership or use of firearms. Nothing in the previous two sentences shall be construed to prohibit the District of Columbia

[521] The brief version of the circular process of the District amending its gun regulations and Congress expressing its disapproval and wish for revisions is as follows. After the D.C. Council passed the Firearms Control Emergency Amendment Act of 2008 on July 15, 2008, the council met with a great deal of disapprobation regarding the sincerity of its efforts to conform with the Court's ruling, as particularly evinced by the lawsuit *Heller II*. Probably as a "reaction to the Court's decision or the District's first attempt to temporarily amend its gun laws," Representative Childers introduced the Second Amendment Enforcement Act (H.R. 6691) in the 110th Congress. See Chu, 3. Although not specifically mentioning the District's emergency legislation, the bill sought to either lessen the strictures of or overrule portions of D.C.'s existing laws. See Ibid., 2. In particular, H.R. 6691 would have repealed D.C.'s ban on semi-automatic assault weapons and allowed individuals to carry firearms in public. Furthermore, it would have eradicated D.C.'s firearm registration system and eliminated required criminal background checks for the purchase of secondhand firearms. It would also have prohibited D.C. from passing laws from other jurisdictions and abolished D.C. prohibitions on gun ownership. See United States, Committee on Oversight and Government Reform, *Legislative Analysis: Effects of H.R. 6691 on the Possession and Use of Firearms in the District of Columbia*, Washington, DC: GPO, 2008, http://www.lexisnexis.com (accessed October 3, 2008); GovTrack, "H.R. 6691: Second Amendment Enforcement Act," GovTrack.us, http://www.govtrack.us (accessed January 13, 2009). Although H.R. 6691 failed to receive enough votes to pass the House of Representatives, the substance of the bill was incorporated into H.R. 6842 (also named the Second Amendment Enforcement Act), which the House passed by a vote of 266-152 in September 2008. See Chu, 2. Upon the passage of this bill, the D.C. Council enacted the Second Firearms Emergency Amendment Act of 2008, which it later renewed as the Second Firearms Control Congressional Review Emergency Amendment Act of 2008. See Ibid. This third emergency act was submitted to Congress for review as the Firearms Control Amendment Act of 2008 on February 10, 2009. See "Firearms Control Amendment Act of 2008," 1. Its companion legislation, the Inoperable Pistol Amendment Act of 2008, was likewise submitted for congressional review on February 4, 2009. See "Inoperable Pistol Amendment Act of 2008," 1. Senator John Ensign (R-NV) responded by introducing into the 111th Congress the Ensign Amendment (S.Amdt. 575), which incorporated the language of H.R. 6842 to the District of Columbia Voting Rights Act of 2009 (S. 160 / H.R. 157). See Chu, 2.

> from regulating or prohibiting the carrying of firearms by a person, either concealed or openly, other than at the person's dwelling place, place of business, or on other land possessed by the person.[522]

The amendment then ensures that D.C.'s semi-automatic handgun ban will be repealed by requiring the definition of a machine gun that the District adopted in the FCAA and IPAA.[523] Furthermore, it removes the District's handgun ammunition ban and prohibits criminal penalties for the possession of handguns without a license and for carrying a firearm in one's home, place of business, or other property in one's ownership.[524] The act also repeals D.C.'s firearm registration scheme as well as its trigger-lock requirement.[525] Nevertheless, sawed-off shotguns, machine guns, and short-barreled rifles are to remain illegal within the District.[526]

While most bills die in committee, there is a substantial likelihood that the D.C. Voting Rights Act, with the Ensign Amendment intact, will actually be passed into law. First, the Ensign Amendment contains the same text as H.R. 6842, which was introduced into and passed by the House and made it through senatorial committees to the Senate floor prior to the 110th Congress being disbanded.[527] As for the bill itself, it has received strong bipartisan support, as particularly evinced by the fact that the bill was introduced into the House by Democrat Eleanor Holmes Norton (DC) and into the Senate by Republican Orrin Hatch (UT) and Independent Joseph Lieberman (CT).[528] This legislation has also already passed the Senate by a vote of 61-37, with the Ensign Amendment receiving an approval vote of 62-36.[529] While the House version of the bill is currently in the House Rules Committee, the leaders of the House are optimistic that it will soon reach the House floor.[530]

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[522] Library of Congress, "Reform D.C. Council's Authority to Restrict Firearms, Text of Amendments—(Senate-February 25, 2009), Second Amendment Enforcement Act," §X03, http://www.thomas.loc.gov/cgi-bin/query/F?r111:FLD001:S02491 (accessed 30 November 2009).
[523] Ibid., §X04.
[524] Ibid., §X06-9.
[525] Ibid., §X05.
[526] Ibid.
[527] Chu, 2.
[528] DC Vote Organization, "The D.C. Voting Rights Act—2009, 111th Congress," DC Vote.org, 1-2, http://www.docvote.org/advocacy/dcvra_111thmain.cfm?cid=1867&uid=128004 (accessed November 30, 2009).
[529] Ibid.
[530] Ibid.

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