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## The Second Amendment Right to Keep and Bear Arms is Enforceable against the States through the Due Process Clause of the Fourteenth Amendment: *McDonald v. City of Chicago*

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# The Second Amendment Right To Keep And Bear Arms is Enforceable Against The States Through The Due Process Clause Of The Fourteenth Amendment: *McDonald v. City of Chicago*

CONSTITUTIONAL LAW—CONSTITUTIONAL RIGHTS IN GENERAL—PARTICULAR CONSTITUTIONAL RIGHTS—FOURTEENTH AMENDMENT IN GENERAL—The Supreme Court of the United States held that city ordinances in Chicago and Oak Park forbidding the ownership of firearms were in violation of the Second Amendment right to keep and bear arms. The right to own firearms for self-defense is a fundamental right and the Second Amendment is fully applicable to the states through the Fourteenth Amendment’s Due Process Clause.

*McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

I.	THE FACTS AND PROCEDURAL HISTORY OF <i>MCDONALD</i>	98
II.	THE UNITED STATES SUPREME COURT	
	OPINION IN <i>MCDONALD</i> .....	100
	A. <i>Justice Alito’s Majority Opinion</i> .....	100
	B. <i>Justice Scalia’s Concurring Opinion</i> .....	105
	C. <i>Justice Thomas’s Concurring Opinion</i> .....	105
	D. <i>Justice Stevens’s Dissenting Opinion</i> .....	106
	E. <i>Justice Breyer’s Dissenting Opinion</i> .....	108
III.	THE ORIGINS AND HISTORY OF THE SECOND AMENDMENT AND PRECEDENT LEADING TO <i>MCDONALD</i> .....	108
	A. <i>United States v. Cruikshank</i> .....	109
	B. <i>Presser v. State of Illinois</i> .....	110
	C. <i>United States v. Miller</i> .....	111
	D. <i>District of Columbia v. Heller</i> .....	112
	1. <i>The Facts and Procedural History of Heller</i>	112
	2. <i>Justice Scalia’s Majority Opinion in Heller</i>	113
	3. <i>Justice Stevens’s Dissenting Opinion in Heller</i> .....	117
	4. <i>Justice Breyer’s Dissenting Opinion in Heller</i> .....	118
IV.	HOW THE SUPREME COURT CORRECTLY INCORPORATED THE SECOND AMENDMENT	

THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.....	120
A. <i>Second Amendment Debate in the Legal Community and General Public</i> .....	120
B. <i>Why the Court Was Correct to Incorporate the Second Amendment</i> .....	123
C. <i>New Questions Facing the Courts in the Wake of McDonald</i> .....	124
D. <i>Likely Results of the McDonald Decision</i> .....	127

## I. THE FACTS AND PROCEDURAL HISTORY OF *MCDONALD*

Otis McDonald, a gentleman in his late seventies, lived in a high crime area of Chicago where he had to endure violent threats from drug dealers.<sup>1</sup> Likewise, Colleen Lawson, also a Chicagoan, was burglarized several times.<sup>2</sup> McDonald and Lawson, along with the other plaintiffs in this suit,<sup>3</sup> stored their handguns outside of city limits, when they actually wished to keep them in their city residences.<sup>4</sup> However, a Chicago city ordinance blocked them from possessing a gun without also possessing a registration permit issued by the city.<sup>5</sup> Application for the requisite permit was futile because the same ordinance further prohibited the registration of nearly all handguns to private citizens.<sup>6</sup>

Petitioners, seeking a declaratory judgment, filed suit against the City of Chicago in the United States District Court for the Northern District of Illinois, claiming their Second and Fourteenth Amendment rights were violated by the ordinance.<sup>7</sup> The suit was consolidated with two others, one against a suburb city of Chicago, Oak Park, and another suit against the City of Chicago.<sup>8</sup>

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1. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026-27 (2010).

2. *McDonald*, 130 S. Ct. at 3027.

3. *Id.* Otis McDonald and Colleen Lawson were joined in the suit by Adam Orlov and David Lawson. *Id.* at 3026.

4. *Id.* at 3027. The Court stated that, "In Mrs. Lawson's judgment, possessing a handgun in Chicago would decrease her chances of suffering serious injury or death should she ever be threatened again in her home." *Id.*

5. *Id.* at 3026. "A City ordinance provides that, '[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.'" *Id.* (quoting CHICAGO, ILL., MUNICIPAL CODE § 8-20-040(a) (2009)).

6. *Id.* at 3026.

7. *McDonald*, 130 S. Ct. at 3027. The Illinois Rifle Association and the *Second Amendment* Foundation joined McDonald, Orlov, and the Lawsons in the suit. *Id.* at 3027 n.4.

8. *Id.* The Court noted, "Like Chicago, Oak Park makes it 'unlawful for any person to possess . . . any firearm,' a term that includes 'pistols, revolvers, guns and small arms . . .

The trial judge denied the petitioners their requested relief and held that the ordinances were not unconstitutional because the Fourteenth Amendment did not incorporate the Second Amendment against the states.<sup>9</sup>

On appeal, the Seventh Circuit affirmed relying on extremely old case law, the most recent of which was decided in 1894.<sup>10</sup> The court of appeals did take note in the opinion that the rationale of the cases relied upon, did not include the modern analysis the court applies through selective incorporation.<sup>11</sup> The Supreme Court granted certiorari.<sup>12</sup>

The issues the Court addressed were whether the Privileges and Immunities Clause of the Fourteenth Amendment prohibited states from strict regulation or banning of handguns, and whether the Second Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>13</sup> The petitioners contended that the right to keep and bear arms is a right of American citizenship protected by the Privileges and Immunities Clause.<sup>14</sup> In the alternate, the petitioners also argued that the Second Amendment right to keep and bear arms is a fundamental right that is enforceable against the states through the Due Process Clause of the Fourteenth Amendment.<sup>15</sup> Chicago and Oak Park (“municipal respondents”) asserted that the only rights in the Bill of Rights that are enforceable against the states are those rights that would be inconceivable to not enjoy while living in a civilized society.<sup>16</sup> Further, the municipal respondents argued, because gun ownership is forbidden in many modern socie-

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commonly known as handguns.” *Id.* at 3026 (quoting OAK PARK, ILL., MUNICIPAL CODE § 27-2-1 (2007); OAK PARK, ILL., MUNICIPAL CODE § 27-1-1 (2009)).

9. *NRA, Inc. v. Oak Park*, 617 F.Supp.2d 752, 754 (D. Ill. 2008) (stating the Court “decline[d] to rule that the Second Amendment is incorporated into the Fourteenth Amendment so as to be applicable to the Chicago or Oak Park ordinances.”). The trial judge relied on *Quilici v. Morton Grove*, which explicitly stated that a ban on handguns was constitutional. 695 F.2d 261, 263 (7<sup>th</sup> Cir. 1982). However, the trial judge suggested he believed he might be overruled when he stated that judges have a “duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point in a different direction.” *NRA, Inc.*, 617 F. Supp. 2d at 753.

10. *McDonald*, 130 S. Ct. at 3027.

11. *Id.* The court of appeals made no predictions as to how the current Court would decide the issue using selective incorporation. *NRA, Inc.*, 567 F.3d at 857-58.

12. *McDonald*, 130 S. Ct. at 3028.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

ties, it is not a fundamental right that is enforceable against the states.<sup>17</sup>

## II. THE UNITED STATES SUPREME COURT OPINION IN *MCDONALD*

### A. *Justice Alito's Majority Opinion*

Justice Alito, writing for the Court,<sup>18</sup> agreed with the alternative argument advanced by the petitioners that the right to keep and bear arms is a fundamental right that is fully incorporated by the Due Process Clause of the Fourteenth Amendment.<sup>19</sup> The Court reached this result by first considering the jurisprudence of the Privileges and Immunities Clause and rejecting the petitioner's claim that the right to keep arms is protected through that clause.<sup>20</sup> In considering the history of the Privileges and Immunities Clause, the Court noted that since the first time the Court was called upon to interpret the Privileges and Immunities Clause, the Court has maintained a singular position, namely that the clause only protects those rights which arise as a result of the creation of the federal government.<sup>21</sup> The Court maintained this position that rights existing before the federal government came into being, are not protected by the Privileges and Immunities Clause.<sup>22</sup>

Although the petitioners urged the Court to overturn the jurisprudence of the Privileges and Immunities Clause and declare the entire Bill of Rights applicable to the states, the Court refused.<sup>23</sup> Having declined to follow the petitioners' first argument, the Court then considered their second claim, that the Second

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17. *McDonald*, 130 S. Ct. at 3028.

18. *Id.* at 3050.

19. *Id.* at 3050. Joining Justice Alito in the majority opinion were Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas. *Id.* at 3026.

20. *Id.* at 3028.

21. *Id.* Stated conversely, the Court held that, "other fundamental rights - rights that predated the creation of the Federal Government and that 'the State governments were created to establish and secure' - [are] not protected by the Clause." *Id.* (quoting *Slaughter-House Cases*, 83 U.S. 36, 76 (1873)).

22. *McDonald*, 130 S. Ct. at 3028. The Court explained, "We therefore decline to disturb the *Slaughter-House* holding." *Id.* at 3031.

23. *McDonald*, 130 S. Ct. at 3030. The Court explained that the "[p]etitioners' primary submission is . . . that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter-House Cases*, . . . should now be rejected." *Id.* at 3028. The Court also stated that, "[i]n petitioners' view, the Privileges or Immunities Clause protects all of the rights set out in the Bill of Rights." *Id.* at 3030. However, the Court maintained its adherence to the *Slaughter-House Cases* by stating, "[w]e see no need to reconsider that interpretation here." *Id.*

Amendment right to keep and bear arms is a fundamental right that should be incorporated against the states through the Due Process Clause of the Fourteenth Amendment.<sup>24</sup>

This issue was one of first impression for the Court.<sup>25</sup> The first hurdle the Court overcame in reaching its decision was the assertion made by the respondents that the constitutionality of state regulation of firearms, had already been positively affirmed in *United States v. Cruikshank*,<sup>26</sup> the case relied upon by the court of appeals.<sup>27</sup> Although *Cruikshank* explicitly held that the Second Amendment did not apply to the states, the Court stated that the *Cruikshank* decision was rendered before the current understanding of the Fourteenth Amendment, and therefore, did not employ the due process analysis that is necessary today.<sup>28</sup>

Under a due process analysis, the Court must inquire into whether the right asserted is a fundamental right, and to begin this analysis, Justice Alito noted five principles that have been used by the Court in deciding due process cases.<sup>29</sup> First, the majority noted that due process rights and privileges and immunities are guided by different inquiries.<sup>30</sup> Second, the Court pointed out that only those rights that form the basis of our system of liberty are protected by the Due Process Clause.<sup>31</sup> Third, sometimes the Court has inquired whether a civilized society that did not offer the rights in question could be envisioned.<sup>32</sup> Fourth, not all rights

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24. *Id.* at 3028. The Court explained that “[a]s a secondary argument, petitioners contend that the Fourteenth Amendment’s Due Process Clause incorporates the Second Amendment.” *Id.* The Court agreed to consider the issue and said, “[w]e . . . thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause.” *Id.* at 3031.

25. *Id.* at 3031. The Court stated, “we have never previously addressed the question whether the right to keep and bear arms applies to the States . . . .” *Id.*

26. 92 U.S. 542 (1876).

27. *McDonald*, 130 U.S. at 3030. “[T]he Seventh Circuit concluded that *Cruikshank* . . . doomed petitioners’ claims.” *Id.*

28. *Id.* at 3030. *Cruikshank*’s central holding was that “the Second Amendment applies only to the Federal Government.” *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 620 n.23 (2008)). The Court also noted, however, that *Cruikshank* did not “engage in the sort of Fourteenth Amendment inquiry required by our later cases.” *Id.* at 3031.

29. *Id.* at 3031-32.

30. *Id.* at 3031. The Court stated that it viewed “the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship.” *Id.*

31. *Id.* at 3031. In helping with this determination, the Court spoke of rights that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Id.* at 3032 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). In *Palko v. Connecticut*, the Court famously said that due process protects those rights that are “the very essence of a scheme of ordered liberty” and essential to “a fair and enlightened system of justice.” 302 U.S. 319, 325 (1937).

32. *McDonald*, 130 S. Ct. at 3032.

in the Bill of Rights are fundamental in our scheme of liberty.<sup>33</sup> And lastly, some due process rights are afforded different protection from state infringement than the protection afforded for federal infringement.<sup>34</sup> Although in the past, the Court has used one or more of these principles in analyzing due process issues, the majority declared that three of those five principles have faded or have been eliminated and only two principles guide the inquiry today.<sup>35</sup>

Justice Alito then focused on the second principle and considered whether the right to keep and bear arms is a fundamental right that is essential to the American system of justice and liberty.<sup>36</sup> The Court emphasized that only the traditions and history of *our* nation should be considered when deciding due process rights.<sup>37</sup> The Court then found that the right to keep and bear arms is inextricably linked to the right of self-defense.<sup>38</sup> According to the Court, the right of self-defense is one that has been recognized for centuries and has always been a part of American tradition.<sup>39</sup> To illustrate that fact, Justice Alito pointed to the recent decision in *District of Columbia v. Heller*,<sup>40</sup> which held that the right of self-defense and the right to possess handguns have deep roots in the tradition and history of this nation.<sup>41</sup>

The Court then revisited the historical carousel that the Court rode when deciding *Heller*.<sup>42</sup> Starting with the 1689 English Bill of Rights, continuing through the debates between the Federalists and Anti-Federalist on the ratification of our Bill of Rights, and ending with the reconstruction period following the Civil War, the

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33. *Id.*

34. *Id.*

35. *Id.* at 3034. The Court explained, "The decisions during this time abandoned three of the previously noted characteristics." *Id.*

36. *Id.* at 3036. Justice Alito focused on the fact that the right must be founded in *our* history and quoted *Washington v. Glucksberg*, which held that only the rights "deeply rooted in this Nation's history and tradition" are protected by the Due Process Clause. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

37. *McDonald*, 130 S. Ct. at 3044. The Court reasoned that considering the rights afforded citizens in other civilized countries when deciding fundamental rights would be "inconsistent with the long-established standard we apply in incorporation cases." *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)).

38. *Id.* at 3036. The Court relied on its earlier holding in *Heller* that, "[I]ndividual self-defense is 'the central component' of the Second Amendment right." *Id.* (quoting *Heller*, 554 U.S. at 599 (2009)).

39. *Id.* at 3036-38.

40. 554 U.S. 570 (2009).

41. *McDonald*, 130 S. Ct. at 3036.

42. *Id.* at 3036-38.

Court revisited the eras considered in *Heller*.<sup>43</sup> In every one of these time frames, the Court recognized that the right to self-defense and the corresponding right to possession of firearms existed and were essential to liberty.<sup>44</sup>

Expanding on the historical background laid by *Heller*, the Court continued into the Civil Rights Act of 1866, which was passed by Congress to protect the liberty of newly freed slaves, and was intended to protect the right to bear arms.<sup>45</sup> Justice Alito then connected the Civil Rights Act of 1866 with the Fourteenth Amendment, which was also proposed in 1866 and ratified in 1868, and the Court held that the Fourteenth Amendment was intended to protect the rights of those protected under the Civil Rights Act.<sup>46</sup> The Court validated this holding by looking to debates during and after the ratification of the Fourteenth Amendment and showing that the framers of the Fourteenth Amendment considered the right to bear arms to be essential to the free exercise of liberty.<sup>47</sup>

Writing for the majority, Justice Alito then addressed the arguments of the municipal respondents, starting with the assertion that the Due Process Clause of the Fourteenth Amendment does not include the right to bear arms because it was intended by both Congress and the ratifying states to operate as an anti-discrimination rule.<sup>48</sup> The Court reasoned that if the only true purpose of the Due Process Clause was to be an anti-discrimination clause, all of the other rights incorporated through

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43. *Id.*

44. *Id.* Regarding early English law, the Court noted that “the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense.” *Id.* at 3036 (quoting *Heller*, 128 S. Ct. at 2797-98). In regard to early colonial law, the Court stated, “Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government.” *Id.* at 3037. During the nineteenth century the Court noted that the right to bear arms transitioned from being primarily a safeguard of state autonomy into a guarantee of personal defense, especially to black people. *Id.* at 3038. The Court explained that, “[a]fter the Civil War, many of the over 180,000 African Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks.” *McDonald*, 130 S. Ct. at 3038.

45. *Id.* at 3041. The Court explained, “There can be no doubt that the principal proponents of the Civil Rights Act of 1866 meant to end the disarmament of African Americans in the South.” *Id.* at 3041 n.23.

46. *McDonald*, 130 S. Ct. at 3041. Justice Alito explained, “Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.” *Id.*

47. *Id.* at 3042. The majority concluded, “[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” *Id.*

48. *Id.* at 3042.



it would only be incorporated if the infringed right was violated in a discriminatory manner.<sup>49</sup> However, because the Due Process Clause incorporates rights regardless of whether the rights are discriminatorily violated, the Court rejected this interpretation of the Due Process Clause.<sup>50</sup>

The second argument advanced by the municipal respondents that the Court rejected was that the Due Process Clause protects only those rights that are indispensable in a civilized society.<sup>51</sup> Justice Alito focused exclusively on rights that have been recognized in our nation's history instead of other civilized societies.<sup>52</sup> The Court also disagreed with the municipal respondents' claim that the right to bear arms should be dealt with differently than all of the other due process rights because of the deadly potential involved with firearm possession.<sup>53</sup> The rationale the Court used to defeat this argument is that many other rights incorporated by the Due Process Clause also have deadly potential, and yet the Court fully incorporated those rights notwithstanding any potentially deadly consequences.<sup>54</sup>

Another argument raised by the municipal respondents that the Court addressed is that the right to bear arms ought to be incorporated to a lesser extent to the states than it applies to the federal government.<sup>55</sup> The Court disagreed with this argument, and stated that the Court had already rejected this argument years earlier.<sup>56</sup> The last argument advanced by the municipal respondents was the right to bear arms should not be incorporated because the reasons for its inclusion into the Bill of Rights differs dramatically from what makes the right important in today's soci-

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49. *Id.* at 3043.

50. *Id.* The Court stated that if this interpretation was correct "then the First Amendment . . . would not prohibit nondiscriminatory abridgments of the rights to freedom of speech or freedom of religion; the Fourth Amendment . . . would not prohibit all unreasonable searches and seizures but only discriminatory searches and seizures-and so on." *Id.*

51. *McDonald*, 130 S. Ct. at 3044.

52. *Id.*

53. *Id.* at 3045.

54. *Id.* The Court pointed out that, "The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications." *Id.* The Court mentioned the constitutional requirements for criminal trials, which if unfulfilled allow violent criminals to be released, as examples of rights with deadly potential that are nonetheless enforced through the Due Process Clause. *Id.*

55. *Id.* at 3046.

56. *McDonald*, 130 S. Ct. at 3046. In response the Court stated, "Time and again, however, those pleas failed . . . . [I]f a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States." *Id.*

ety.<sup>57</sup> The Court turned this final argument aside by relying on *Heller*, where the Court rejected precisely the same argument.<sup>58</sup>

### *B. Justice Scalia's Concurring Opinion*

Justice Scalia wrote a concurring opinion, but he did not write to give a different reason for reaching the same result as the Court; he agreed, albeit grudgingly, with the Court's due process analysis.<sup>59</sup> Instead, Justice Scalia wrote exclusively to criticize Justice Stevens's dissent.<sup>60</sup> He wasted no time in deriding Justice Stevens's analysis, and began by questioning why Justice Stevens called the Due Process Clause "the liberty clause."<sup>61</sup> Justice Scalia strongly condemned Justice Stevens's approach, arguing that Justice Stevens allowed too much latitude in judicial discretion in determining what constitutes a fundamental right.<sup>62</sup> Although Justice Stevens listed several things that he argued would work as constraints against unbridled judicial rule, Justice Scalia criticized each one as being ineffective to keep the judiciary from overstepping its constitutional bounds as arbiter instead of legislator.<sup>63</sup> He further accused Justice Stevens of being selective in deciding what principle of law to apply in order to reach predetermined goals.<sup>64</sup> Lastly, Justice Scalia promoted a historical approach to deciding fundamental rights, and asserted that although such an approach is not perfect, it is better than the "judicial Constitution-writing" approach he accused Justice Stevens of employing.<sup>65</sup>

### *C. Justice Thomas's Concurring Opinion*

In addition to Justice Scalia's concurrence, Justice Thomas wrote concurring in part and concurring with the judgment.<sup>66</sup> Justice Thomas disagreed with the Due Process Clause being read to include fundamental rights.<sup>67</sup> Although Justice Thomas did

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57. *Id.* at 3047.

58. *Id.* at 3048.

59. *Id.* at 3050 (Scalia, J., concurring).

60. *Id.*

61. *McDonald*, 130 S. Ct. at 3051 n.1 (Scalia, J., concurring).

62. *Id.* at 3051-52.

63. *Id.* at 3052-54.

64. *Id.* at 3056. Justice Scalia stated that "[o]nce again, principles are applied selectively" when criticizing Justice Stevens's approach. *Id.*

65. *Id.* at 3057-58.

66. *McDonald*, 130 S. Ct. at 3058 (Thomas, J., concurring).

67. *Id.* at 3062. When he described the interpretation of the Due Process Clause accepted by the Court, Justice Thomas stated, "All of this is a legal fiction." *Id.*

agree with the Court's result, he disagreed with the basis of the decision, and instead would decide the case using the Fourteenth Amendment's Privileges and Immunities Clause.<sup>68</sup> Consequently, Justice Thomas rejected the Court's interpretation of the Privileges and Immunities Clause in the famous *Slaughter House Cases*.<sup>69</sup> After a lengthy narration of the drafting, ratification, and original meaning of the Privileges and Immunities Clause,<sup>70</sup> he determined that the words "right," "privilege," and "immunity" are synonymous.<sup>71</sup> Justice Thomas then reasoned that gun ownership is a right or privilege of American citizenship, and should be protected from state infringement by the Privileges and Immunities Clause instead of the Due Process Clause.<sup>72</sup>

#### D. Justice Stevens's Dissenting Opinion

Justice Stevens wrote in solitary dissent from the Court's result.<sup>73</sup> Justice Stevens did agree with the majority that the Privileges and Immunities Clause should not be used to decide the case, and he further agreed that the case must be decided on substantive due process grounds.<sup>74</sup> Justice Stevens focused on the Fourteenth Amendment, and what rights it incorporates through what he calls "the liberty clause."<sup>75</sup> Justice Stevens emphasized that the Fourteenth Amendment stands alone in regard to the rights contained in the Bill of Rights, and that merely because a right is in the Bill of Rights, it does not automatically include or exclude that right from the liberty clause's protection.<sup>76</sup> Justice Stevens next asserted that rights protected by the Bill of Rights from federal infringement do not always receive the same scope or type of protection from state infringement by the liberty element of the Fourteenth Amendment.<sup>77</sup> Looking to examples, such as the right to a grand jury being enforced upon the federal government, but not the states, Justice Stevens argued that many rights do not

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68. *Id.* at 3058-59.

69. *Id.* at 3086.

70. *Id.* at 3036-88.

71. *McDonald*, 130 S. Ct. at 3068 (Thomas, J., concurring).

72. *Id.* at 3083 n.19, 3084, 3088.

73. *Id.* at 3088 (Stevens, J., dissenting).

74. *Id.* at 3089.

75. *Id.* at 3091-92.

76. *McDonald*, 130 S. Ct. at 3093 (Stevens, J., dissenting).

77. *Id.*

receive any protection, or have a lesser level of protection at the state level compared to the federal level.<sup>78</sup>

Justice Stevens also rejected the historical approach used by the Court to decide whether the right to personal firearm possession is a fundamental right, and argued that instead of using history and tradition exclusively to determine fundamental rights, the Court should determine liberty, and the rights encapsulated therein, in the context of their application to real life.<sup>79</sup> Justice Stevens urged the Court to view liberty as a “dynamic concept” that evolves to adapt to the injustices of the current age.<sup>80</sup>

Justice Stevens’s dissent criticized the Court’s holding that the right to gun ownership emanates from the right to self-defense.<sup>81</sup> Justice Stevens argued that the right to self-defense does not include the right to use whatever instrument desired in exercising self-defense.<sup>82</sup> After discussing the concept of liberty at length, Justice Stevens outlined six reasons why he disagreed with the Court’s opinion.<sup>83</sup> First, he noted that firearms were in a unique position, because they could be employed both to ensure liberty, and also to destroy liberty.<sup>84</sup> Second, Justice Stevens opined that the right to keep any firearm is dramatically different from all other rights the Court has recognized as fundamental and that there was no connection to an existing “liberty” right.<sup>85</sup> Third, he noted that other nations that share a common British heritage with America heavily regulate or outlaw firearms.<sup>86</sup> Fourth, Justice Stevens argued that the Second Amendment was adopted to protect the states and not individuals.<sup>87</sup> Fifth, he reasoned that states have a long history of regulating the use and ownership of firearms.<sup>88</sup> Lastly, he argued that even if there is a constitutional manner of interference, there are important reasons why the doctrine of federalism should not allow interference.<sup>89</sup>

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78. *Id.* at 3094.

79. *Id.* at 3097-99. Justice Stevens stated that “our substantive due process doctrine has never evaluated substantive rights in purely, or even predominantly, historical terms.” *Id.* at 3097.

80. *Id.* at 3099 (quoting John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 38 (Winter 1992)).

81. *McDonald*, 130 S. Ct. at 3107 (Stevens, J., dissenting).

82. *Id.*

83. *Id.* at 3107-16.

84. *Id.* at 3107-08.

85. *Id.* at 3109.

86. *McDonald*, 130 S. Ct. at 3110 (Stevens, J., dissenting).

87. *Id.* at 3111.

88. *Id.* at 3114-16.

89. *Id.* at 3112, 3114.

### E. Justice Breyer's Dissenting Opinion

In addition to Justice Stevens, Justice Breyer also wrote in dissent, and was joined by Justice Ginsburg and Justice Sotomayor.<sup>90</sup> Justice Breyer began by attacking the holding in *Heller* as incorrectly characterizing the Second Amendment right to bear arms as a personal right when it was originally intended as a right of the states to defend themselves and a right of the people to defend the states.<sup>91</sup> Justice Breyer then questioned the majority decision's wisdom because of the harmful effect incorporating the Second Amendment has on a state's ability to govern itself.<sup>92</sup> He also argued that incorporation forces the judiciary to make determinations that are better left to the legislature.<sup>93</sup> The dissent next focused on the majority's historical analysis.<sup>94</sup> Justice Breyer argued that history shows the Second Amendment right to bear arms is not a personal right, but a right possessed by the states.<sup>95</sup> Additionally, he contended that from a historical perspective, firearm regulation by the states was more extensive than the majority opinion admits.<sup>96</sup> Justice Breyer advanced his historical view by analyzing different time periods in American history and argued that in each period, states have historically had a heavy hand in regulating firearms.<sup>97</sup>

### III. THE ORIGINS AND HISTORY OF THE SECOND AMENDMENT AND PRECEDENT LEADING TO *McDONALD*

The Second Amendment is an area of Constitutional law that has received little attention from both constitutional scholars<sup>98</sup> and the Court itself.<sup>99</sup> One of the first times the Court mentioned

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90. *Id.* at 3120 (Breyer, J., dissenting).

91. *McDonald*, 130 S. Ct. at 3122 (Breyer, J., dissenting).

92. *Id.* at 3125.

93. *Id.* at 3126.

94. *Id.* at 3129-30.

95. *Id.* at 3131.

96. *McDonald*, 130 S. Ct. at 3131-32 (Breyer, J., dissenting).

97. *Id.* at 3131-36.

98. Stanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 640, 653-54 (1989). Levinson stated, "To put it mildly, the Second Amendment is not at the forefront of constitutional discussion . . ." *Id.* at 639.

99. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self Preservation*, 39 ALA. L. REV. 103 (1987). In the introduction to his analysis of the Second Amendment, Lund stated, "The federal courts have also been manifestly uncomfortable with the Second Amendment and, in recent times, have declined every opportunity to give it the same thorough consideration . . ." the other first eight amendments have received. *Id.*

the Second Amendment was in the 1857 *Dred Scott* case where the Court fleetingly mentioned the right of black people to keep and bear arms as one of the detrimental side effects of permitting black people to be citizens.<sup>100</sup> Although the Court assumed the right to bear arms existed in the states in the *Dred Scott* case, the Court did not address the issue directly until eighteen years later in *United States v. Cruikshank*.<sup>101</sup>

#### A. *United States v. Cruikshank*

In *Cruikshank*, several white people<sup>102</sup> were charged with violating the Enforcement Act of 1870.<sup>103</sup> Part of the indictment alleged that the defendant Cruikshank, and others with him, prevented a group of black voters from exercising their constitutional rights to, peacefully assemble and bear arms.<sup>104</sup> In what came to be known as the Colfax Massacre, a large group of black citizens were shot by a white mob as they attempted to escape a torched building.<sup>105</sup> The Court rejected the claim that the victims' constitutional right to bear arms had been violated.<sup>106</sup> The Court held that the Second Amendment did not confer a right to bear arms; that right existed entirely independent of the Second Amendment.<sup>107</sup> Instead, the Court explained that the Second Amendment operated exclusively as a restraint on the federal government's power, and any actions taken by private citizens that restricted another citizen's ability to keep and bear arms would have to be determined under state law.<sup>108</sup> The Court concluded that the Second Amendment operated solely to limit the federal government's power to infringe upon the right to bear arms for a lawful

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100. Scott R. Erekson, *Is the Day of Reckoning Coming?—The Collectivist View of the Second Amendment is Going the Way of "Separate But Equal,"* 40 IDAHO L. REV. 757, 772 (2004).

101. 92 U.S. 542 (1875).

102. Brian P. Wilson, *How Should States Treat Cruikshank Following Heller? An Analysis Of A State Court's Ability To Hold That Supreme Court Precedent Is Dead,* 40 SETON HALL L. REV. 371, 387 (2010).

103. Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140 (repealed by *United States v. Reese*, 92 U.S. 214 (1875)).

104. Wilson, *supra* note 102, at 387.

105. Wilson, *supra* note 102, at 387.

106. *Cruikshank*, 92 U.S. at 553.

107. *Id.* The Court stated, "[t]his is not a right granted by the Constitution. Neither is it [the right to bear arms] in any manner dependent upon that instrument [the Constitution] for its existence." *Id.*

108. *Id.*

purpose and that this restraint had not been placed upon the states.<sup>109</sup>

*B. Presser v. State of Illinois*

The Court repeated this theme eleven years later, in 1886, when it had the next opportunity to decide a Second Amendment issue in the case of *Presser v. State of Illinois*.<sup>110</sup> *Presser* involved the leader of a society called the 'Lehr und Wehr Verein' who led a group of four hundred armed members through the City of Chicago and was subsequently convicted under an Illinois statute that required approval from the governor to parade or drill a militia within the state.<sup>111</sup> *Presser* argued that the Illinois statute violated the Second Amendment because it restricted his right to keep and bear arms.<sup>112</sup> On appeal, the Supreme Court upheld the conviction, relying on *Cruikshank* to determine that the statute did not violate the Second Amendment.<sup>113</sup> The Court reiterated the holding of *Cruikshank* that the Second Amendment only applied to the federal government and not to the states.<sup>114</sup> The Court reasoned that because it was the state infringing on the right to bear arms and not the federal government, the statute did not violate the Second Amendment.<sup>115</sup> However, the Court did imply there was a limit to the power of the states to regulate firearm possession by acknowledging that the Constitution allowed for the federal government to raise an army using citizens of the states.<sup>116</sup> While the states were free from the restrictions of the Second Amendment, the states could not severely infringe on the people's ability to possess weapons to the extent that the federal government would be hampered in its ability to raise an army.<sup>117</sup>

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109. *Id.* In holding the Second Amendment applies only to the federal government the Court stated:

The second amendment declares that [the right to bear arms for a lawful purpose] shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government . . .

*Cruikshank*, 92 U.S. at 553.

110. 116 U.S. 252, 264-66 (1886).

111. *Presser*, 116 U.S. at 253-54.

112. *Id.* at 254.

113. *Id.* at 265.

114. *Id.*

115. *Id.*

116. *Presser*, 116 U.S. at 265.

117. *Id.*

The Court did not face another Second Amendment case for many years, but several times in the interim the Court cited *Cruikshank* or *Presser* to reiterate that not all rights in the Bill of Rights were enforceable against the states and that, specifically, the Second Amendment only restrained the federal government.<sup>118</sup> The Court maintained this unincorporated viewpoint toward the states until 2010, and even though the Second Amendment applied to the federal government, the Court did not directly address the scope and reach of the Second Amendment to restrain the federal government until *United States v. Miller*.<sup>119</sup>

### C. *United States v. Miller*

In *Miller* the Court was faced with deciding the constitutionality of the National Firearms Act.<sup>120</sup> The Act required the registration of short-barreled firearms, except pistols and revolvers, and required a two hundred dollar tax on all transfers of such firearms.<sup>121</sup> Jack Miller was convicted under the statute for possession and interstate transportation of an unregistered sawed-off shotgun and challenged the validity of the law as an unconstitutional violation of his Second Amendment right to keep and bear arms.<sup>122</sup> In a brief opinion, the Court focused on the prefatory clause to the Second Amendment and considered whether the National Firearms Act frustrated the purpose of the Second Amendment as stated in the prefatory clause.<sup>123</sup> The Court looked at the history of state militias in the United States and the weaponry used by these state militias.<sup>124</sup> In reversing the lower court, which

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118. See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 98 (1908) (stating that, “the right to bear arms, guaranteed by the 2d Amendment [citation omitted] ha[s] been distinctly held not to be [incorporated.]”); *Maxwell v. Dow*, 176 U.S. 581, 597 (1900) (stating that, “the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the national government, and not of the states.”); *Miller v. Texas*, 153 U.S. 535, 538 (1894) (stating that, “it is well settled that the restrictions of these amendments operate only upon the federal power, and have no reference whatever to proceedings in state courts.”); *Logan v. United States*, 144 U.S. 263, 287 (1892) (stating that the Second Amendment Right to bear arms was “limited in its scope” to an act of Congress).

119. 307 U.S. 174 (1939).

120. *Miller*, 307 U.S. at 175 (interpreting 26 U.S.C. § 1132 (1934) originally enacted as Act of June 26, 1934, Ch. 757, § 4-5, 48 Stat. 1236-1240).

121. *Miller*, 307 U.S. at 175 (quoting National Firearms Act, 26 U.S.C. § 1132 (1934)).

122. *Miller*, 307 U.S. at 175.

123. *Id.* The text of the Second Amendment 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.” U.S. CONST. amend. II.

124. *Miller*, 307 U.S. at 179-82.



had sustained a demurrer claiming the Act was a violation of the Second Amendment, the Court held that the Second Amendment only protected the right to keep the types of arms that would be useful in the maintenance of a militia.<sup>125</sup> Because a sawed-off shotgun was not a type of weapon used in arming a militia, the Court concluded that ownership of such a weapon was not protected by the Second Amendment, and therefore the Act did not violate the Constitution.<sup>126</sup>

Although *Miller* was the Court's first Second Amendment case decided in the modern due process era, the Court did not address the broader question of whether the Second Amendment was incorporated against the states through the Fourteenth Amendment, and pointed out that most states already had provisions protecting the right to keep and bear arms.<sup>127</sup> The Court did not address whether the Second Amendment applied to the states because Presser was indicted under a federal statute, and no state regulation was challenged.<sup>128</sup> For the next sixty-nine years the Court continued to rely on *Presser* and *Cruikshank* when discussing fundamental rights, and refused to discuss the applicability of the Second Amendment to the states in any meaningful manner.<sup>129</sup>

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

##### 1. *The Facts and Procedural History of Heller*

This avoidance of the Second Amendment continued until 2008 when the Court granted certiorari to *District of Columbia v. Heller*.<sup>130</sup> In *Heller*, a police officer in the District of Columbia applied for a registration permit to keep a handgun in his home.<sup>131</sup> The District of Columbia had an ordinance that required all handguns to be registered, and further prohibited the registration of any

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125. *Id.* at 178.

126. *Id.*

127. *Id.* at 182.

128. *Id.* at 175.

129. Levinson, *supra* note 98, at 653-55. When discussing Second Amendment jurisprudence, Professor Levinson stated, "The Supreme Court has almost shamelessly refused to discuss the issue." Levinson, *supra* note 98, at 653-55. For example, when given the opportunity to review a case from the Seventh Circuit that upheld the constitutionality of a local ordinance that outlawed the possession of all handguns within the city limits, the Court denied certiorari. *Quilici v. Village of Morton Grove*, 695 F. 2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

130. 554 U.S. 570.

131. *Heller*, 554 U.S. at 575.

handgun, thereby effectively barring the possession of handguns within the city.<sup>132</sup> The ordinance also required all other firearms, such as long guns, stored in any home to be unloaded and equipped with a trigger lock.<sup>133</sup> When the respondent, Dick Heller, was denied the permit to keep the handgun in his home, he filed suit in the Federal District Court for the District of Columbia seeking an injunction to stop the city from enforcing the handgun ban.<sup>134</sup> The district court dismissed the lawsuit, but upon appeal, the Appeals Court for the District of Columbia reversed, holding that the Second Amendment guaranteed a personal right to bear arms and that the ordinance in question violated that right.<sup>135</sup>

## 2. Justice Scalia's Majority Opinion in *Heller*

The Supreme Court granted certiorari and Justice Scalia delivered the opinion of the Court.<sup>136</sup> The first issue the majority addressed was whether the Second Amendment only applied to the right to bear arms in connection with a state militia.<sup>137</sup> Justice Scalia acknowledged that the prefatory clause to the Second Amendment, which states that the security of the state is dependent upon a well-regulated militia, gives the Second Amendment a distinction among other rights contained in the Bill of Rights.<sup>138</sup> It is the only amendment that has a preface to the right.<sup>139</sup> However, the Court determined that this clause, although explanatory of one of the purposes of the right to bear arms, is not restrictive or expansive of that right.<sup>140</sup> The majority concluded that the right to bear arms is a personal right, and that individuals who possess firearms do not receive constitutional protection to do so only when in the service of a state militia.<sup>141</sup> Justice Scalia also opined that the right to bear arms was important not only because of its relation to service in the militia, but that self protection and hunt-

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132. *Id.* at 574-75 (citing D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001)).

133. *Id.* at 575 (citing D.C. CODE § 7-2507.02 (2001)).

134. *Id.* at 575-76.

135. *Id.* 554 U.S. at 576.

136. *Heller*, 554 U.S. at 572. Justice Scalia, the author of the opinion, was joined by the Chief Justice Roberts and Justices Alito, Kennedy, and Thomas. *Id.* at 2786-87.

137. *Id.* at 577.

138. *Id.* at 577. The preface to the Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State . . . ." U.S. CONST. amend. II.

139. *Id.* at 577. Justice Scalia explained, "this structure of the Second Amendment is unique in our Constitution." *Id.*

140. *Id.* at 578.

141. *Heller*, 554 U.S. at 589.

ing were even more important to our founders than serving in the militia.<sup>142</sup> To further show that the right to bear arms is not only a right connected to military service, but that the right is actually a personal right, the majority pointed out that the right is reserved to the people.<sup>143</sup> In every instance in the Bill of Rights where the “right of the people” is mentioned, the Court has held that it is a personal right.<sup>144</sup>

In discussing the history of the right to bear arms in the United States, Justice Scalia wrote that the right to bear arms pre-existed the Constitution and the Bill of Rights.<sup>145</sup> The Court then examined the right to bear arms from pre-colonial English times through the ratification of the United States Bill of Rights.<sup>146</sup> The Court found that the right to bear arms granted by William and Mary in the Declaration of Right is the lineal ancestor to our Second Amendment right to bear arms.<sup>147</sup> Finding that the Second Amendment conferred an undeniable right to personal possession of firearms, the majority conceded that this right, like most other rights in the Bill of Rights, is not unlimited in its breadth.<sup>148</sup> Although the Second Amendment does guarantee a right to possess and carry firearms, the Court was clear that it does not grant a right to carry any type of firearm, to any place, for any sort of conflict.<sup>149</sup> The Court was also abundantly clear that the Second Amendment does not enable insane citizens or felons to carry fire-

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142. *Id.* at 599.

143. *Id.* at 579.

144. *Id.* The other places in the Bill of Rights where rights are reserved to the people are the First Amendment’s Assembly-and-Petition Clause, the Fourth Amendment’s Search-and-Seizure Clause, and the Ninth Amendment’s mention of other rights retained by the people. *Id.* In each of these places, the Court has held the right to be a personal right. *Id.*

145. *Id.* at 592. The Court stated that, “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.” *Id.* (quoting *Cruikshank*, 92 U.S. at 553).

146. *Heller*, 554 U.S. at 593-95. The Court began with the guarantee not to be disarmed given by William and Mary in the Declaration of Right, which was later codified as the English Bill of Rights. *Id.* at 593 (quoting 1 W. & M., c. 2, § 7 (1689) (Eng.)).

147. *Id.* at 593. The Court stated that “[t]his right has long been understood to be the predecessor to our Second Amendment.” *Id.*

148. *Id.* at 595.

149. *Id.* The majority said, “[t]hus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.” *Id.* Later in the opinion, when speaking of the Second Amendment, the Court stated, “The right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 626.

arms at their will nor does it allow the carrying of firearms in “sensitive places,” such as schools or government buildings.<sup>150</sup>

In addition to analyzing the history of the Second Amendment, Justice Scalia considered what the states and citizenry understood the right to bear arms to entail at the time of ratification.<sup>151</sup> The majority opinion cited nine states that ratified provisions similar to the Second Amendment in their state constitutions in the years preceding and following the ratification of the United States Bill of Rights.<sup>152</sup> Of those nine states, seven had language that explicitly stated that the right to bear arms was a personal right, unconnected to service in the state militia.<sup>153</sup> The Court also looked to influential political writers of early colonial times and observed that the overwhelming majority considered the right to bear arms to be a personal right.<sup>154</sup>

In deciding the *Heller* case, the Court looked to the three prior major cases involving the Second Amendment handed down by the Supreme Court, and explained how the holding of *Heller* related to the holdings of those prior cases.<sup>155</sup> The first case considered was *Cruikshank*, which the Court characterized as being out of step with current jurisprudence.<sup>156</sup> Justice Scalia pointed out that in addition to holding the Second Amendment applicable to only the federal government, *Cruikshank* also held that the First Amendment did not apply to the states, an assertion that is clearly contrary to current jurisprudence.<sup>157</sup> The Court pointed out that the holding of *Heller* and *Cruikshank* are consistent in that the connection between militia membership and Second Amendment protection is the same in both decisions.<sup>158</sup> Both *Cruikshank* and *Heller* held that the Second Amendment was a personal right, unrelated to service in a militia.<sup>159</sup>

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150. *Id.* at 626-27.

151. *Heller*, 554 U.S. at 603.

152. *Id.* at 602-03.

153. *Id.* at 603.

154. *Id.* at 605-10. The Court quoted from St. George Tucker, William Rawle, Joseph Story, Joel Tiffany, Charles Sumner, and Benjamin Oliver. *Id.* Of these six, only one author considered the right to bear arms to be reserved to service in the militia while the others all believed that the right to bear arms was personal. *Id.* at 610.

155. *Id.* at 619-22. The prior cases considered by the Court were *Cruikshank*, 92 U.S. 542; *Presser*, 116 U.S. 252; and *Miller*, 307 U.S. 174.

156. *Heller*, 554 U.S. at 620 n.23.

157. *Id.*

158. *Id.* at 620.

159. *Id.*

*Presser* was the next case the Court discussed in examining its own jurisprudence on the Second Amendment.<sup>160</sup> Regarding *Presser*, the Court stated that nothing in the *Presser* case refuted the understanding of the Second Amendment as a personal right and nothing in the case addressed the scope or meaning of the Second Amendment.<sup>161</sup> Justice Scalia then read the holding in the *Presser* case narrowly to only mean that the Second Amendment does not preclude a state from prohibiting private quasi military activity.<sup>162</sup>

The *Miller* case was the final prior decision that the Court considered in *Heller*, and the majority opinion analyzed the holding of this case while simultaneously discussing the dissent's reliance upon its holding.<sup>163</sup> Justice Scalia, writing for the majority, pointed out that the holding in the *Miller* case was entirely consistent with *Heller's* holding that the Second Amendment affords a personal right to keep and bear arms.<sup>164</sup> The majority opinion disagreed with Justice Stevens's interpretation of the holding of *Miller*, which was that the Second Amendment protected the bearing of firearms while in the service of a state militia, but did not curtail the government's power to regulate personal possession of non-militia related firearms.<sup>165</sup> The majority instead concluded that *Miller* stood for the proposition that the protection of the Second Amendment turned on the type of firearm in question.<sup>166</sup> The Court also disagreed with placing much reliance on *Miller* because of the scarce analysis of the Second Amendment in the case.<sup>167</sup> Justice Scalia noted that the defendant and his lawyer did not make an appearance at oral argument in the *Miller* case, there was no brief filed by the defendant, and there was absolutely no mention or discussion of the history of the Second Amendment in the decision.<sup>168</sup> Rejecting Justice Stevens's reading of the *Miller* case, the majority concluded that the holding in *Miller* was the narrow proposition that the Second Amendment does not protect

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160. *Id.* at 620-21.

161. *Heller*, 554 U.S. at 620-21.

162. *Id.* 621.

163. *Id.* at 621-24.

164. *Id.* at 622.

165. *Id.* at 621.

166. *Heller*, 554 U.S. at 623. The Court stated that, "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." *Id.*

167. *Id.* at 623-24.

168. *Id.*

any type of firearm that is not normally possessed by law-abiding citizens.<sup>169</sup>

Justice Scalia concluded the *Heller* majority opinion by considering whether the handgun ban and firearm locking requirements at issue were a violation of the Second Amendment.<sup>170</sup> In making this final determination, the Court focused on the self-defense uses for a handgun and the impossibility of protecting oneself with a firearm that is locked.<sup>171</sup> The Court then declared that the handgun is the “quintessential” choice for personal protection and that the handgun ban and firearm-locking requirement violated the Second Amendment of the Constitution.<sup>172</sup>

### 3. Justice Stevens’s Dissenting Opinion in *Heller*

Justice Stevens offered a dissent to the majority opinion.<sup>173</sup> He emphatically rejected the majority’s interpretation of the *Miller* case, and instead interpreted the holding in *Miller* to mean the Second Amendment does not prohibit states from regulating personal firearm possession.<sup>174</sup> Justice Stevens pointed out that twelve of the thirteen circuit courts of appeal have relied on such a reading of *Miller* and only the Fifth Circuit has rejected that reading in 2001.<sup>175</sup> The dissent opined that the Court should, through *stare decisis* if for no other reason, reaffirm the holding of *Miller*.<sup>176</sup>

Justice Stevens then analyzed the phrases of the Second Amendment individually, starting with the preamble to the Second Amendment.<sup>177</sup> Justice Stevens believed the preamble showed the right was intrinsically linked to membership in a militia and also showed the founders expected firearm ownership to be closely regulated.<sup>178</sup> Justice Stevens then considered the phrase, “the right of the people.”<sup>179</sup> He criticized the conclusion of the majority that “the people” in the Second Amendment did not include

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169. *Id.* at 625.

170. *Id.* at 628.

171. *Heller*, 554 U.S. at 628-30.

172. *Id.* at 629.

173. *Id.* at 636 (Stevens, J., dissenting). Justice Stevens was joined in his dissent by Justices Breyer, Souter, and Ginsburg. *Id.*

174. *Id.* at 637-38.

175. *Id.* 554 U.S. at 638 n.2.

176. *Heller*, 554 U.S. at 639 (Stevens, J., dissenting).

177. *Id.* at 640.

178. *Id.*

179. *Id.* at 644.

felons or insane people, because the majority argued that “the people” referenced in the Second Amendment were the same “people” referenced in the First and Fourth Amendments, and those rights were not reserved to any subset of the population.<sup>180</sup> He also criticized the majority’s interpretation of the phrase, “to keep and bear arms” because of the root meaning and historical implication of the word.<sup>181</sup> Justice Stevens argued that the phrase “bear arms” was always a reference to military service, not personal possession of firearms.<sup>182</sup> He further argued this point by looking at the various proposals for the Second Amendment that were submitted for consideration by the states during the ratification process that included explicit mention of the right to bear arms for personal reasons.<sup>183</sup> The final draft of the Second Amendment that was ratified was drawn largely from the proposal submitted by Virginia, which did not mention personal reasons as a basis for the right to bear arms, and Justice Stevens argued that by rejecting the other proposals which specifically named a personal right to own firearms, the first Congress rejected such a meaning of the Second Amendment.<sup>184</sup>

Justice Stevens finished his dissent by reexamining the *Miller* case and criticizing the majority’s narrow reading of the case.<sup>185</sup> Justice Stevens accused the majority of rejecting the *Miller* case, not because of the thin constitutional discussion contained therein, but because the majority simply did not agree with *Miller*’s result or its implications in the current case.<sup>186</sup> Lastly, Justice Stevens argued that declaring a constitutional right to bear arms for personal reasons would require the judicial system to begin an exhausting journey into constant decision-making regarding the scope and reach of that right.<sup>187</sup>

#### 4. *Justice Breyer’s Dissenting Opinion in Heller*

Justice Breyer also wrote in dissent for the *Heller* case.<sup>188</sup> He asserted that the majority opinion was wrongly decided for two

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180. *Id.* at 644.

181. *Heller*, 554 U.S. at 646-47 (Stevens, J., dissenting).

182. *Id.* at 647.

183. *Id.* at 655-62.

184. *Id.* at 660.

185. *Id.* at 677-79.

186. *Heller*, 554 U.S. at 679 (Stevens, J., dissenting).

187. *Id.* at 679.

188. *Id.* at 681 (Breyer, J., dissenting). Justice Breyer was joined in his dissent by Justices Stevens, Souter, and Ginsburg. *Id.*

reasons that are independent of each other<sup>189</sup> First, Justice Breyer agreed with Justice Stevens that the right to bear arms was not a personal right, but only existed in conjunction with service in a militia.<sup>190</sup> Second, he opined that if the majority was correct in granting a personal right to firearms, that right was not unlimited and could be regulated in a reasonable manner by the states.<sup>191</sup> To support the claim that the right to bear arms should be subject to state regulation, Justice Breyer pointed to many cities in early American history that had ordinances regulating the firing of guns within city limits.<sup>192</sup>

Justice Breyer also pointed to regulations by the states that infringe upon other constitutional rights, but which are upheld by the Court subject to a strict scrutiny or a rational basis analysis.<sup>193</sup> He then urged the Court to likewise adopt a balancing approach to determining whether state regulation of firearms is constitutional without a presumption toward or against constitutionality.<sup>194</sup> The approach that Justice Breyer used weighed the burden that the statute imposed against the legitimate objective to be obtained by the statute.<sup>195</sup>

While applying his proportionality test to the District of Columbia's ordinance, Justice Breyer determined that the object the city hoped to obtain was the saving of lives.<sup>196</sup> To verify the state's interest in banning handguns, Justice Breyer cited extensive statistical findings over a thirty year time span in the city that showed a correlation between handguns and violent crimes.<sup>197</sup> Although he did acknowledge that there is a legitimate debate as to the effectiveness of handgun regulations in reducing crime, Justice Breyer ultimately concluded that conflicting evidence is better dealt with by legislatures, and because there is conflicting evidence, it was not unreasonable for the city to adopt the regulations they did.<sup>198</sup>

Justice Breyer then considered the burden the District of Columbia was placing upon its citizens with the ordinances in ques-

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189. *Id.*

190. *Id.* at 681.

191. *Heller*, 554 U.S. at 681 (Breyer, J., dissenting).

192. *Id.* at 683-86.

193. *Id.* at 687-88.

194. *Id.* at 689-90.

195. *Id.* at 693.

196. *Heller*, 554 U.S. at 693 (Breyer, J., dissenting).

197. *Id.* at 694-96.

198. *Id.* at 704.



tion.<sup>199</sup> He outlined three interests that were argued by the respondent as reasons for firearm possession: (1) maintaining a militia, (2) hunting and sport shooting, and (3) self-defense.<sup>200</sup> Justice Breyer then considered all three interests in firearm possession and the burden placed upon each interest.<sup>201</sup> The first two interests were burdened to a slight degree because the respondent was too old for militia service and hunting and sport shooting is conducted outside of the city, requiring only a short subway ride.<sup>202</sup> The interest of self-defense, however, was burdened to a far greater extent, but Justice Breyer contrasted it with the need of the city police to eradicate handgun violence and the unavailability of any other rational means by which the city could achieve this objective.<sup>203</sup> Having found no other viable means available to the city that would burden the respondent's interest in self-defense to a lesser extent, Justice Breyer concluded that the handgun ban did not violate the Second Amendment.<sup>204</sup>

#### IV. HOW THE SUPREME COURT CORRECTLY INCORPORATED THE SECOND AMENDMENT THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

##### A. *Second Amendment Debate in the Legal Community and General Public*

With the *McDonald* decision, the Court settled one of the most enduring and controversial constitutional debates surrounding the incorporation of the Bill of Rights. However, in this debate, the Second Amendment has not enjoyed the intense academic scrutiny that most of the other rights in the Bill of Rights received.<sup>205</sup> Aside from the Third Amendment,<sup>206</sup> no other amendment has received so little attention from the Court or legal scholars.<sup>207</sup>

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199. *Id.* at 706.

200. *Id.* at 706.

201. *Heller*, 554 U.S. at 706 (Breyer, J., dissenting).

202. *Id.* at 707-08.

203. *Id.* at 710-11.

204. *Id.* at 722-23.

205. Levinson, *supra* note 98, at 640.

206. U.S. CONST. amend. III. The Third Amendment states that, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." *Id.*

207. Levinson, *supra* note 98, at 640. Levinson noted, "Clearly the Second Amendment is not the only ignored patch of text in our constitutional conversations. One will find extraordinarily little discussion about another one of the initial Bill of Rights, the Third Amendment . . ." *Id.*

While the lack of discussion on the Third Amendment can fully be explained by the Third Amendment's lack of relevancy in modern America,<sup>208</sup> the same cannot be said of the Second Amendment. Not only has there been a lack of meaningful discussion on the Second Amendment, much of what has been offered by legal writers is harsh and has been noticeably one sided against incorporation of the Second Amendment.<sup>209</sup> Some scholars suggest that the reason many legal writers and law professors have avoided any discussion of the Second Amendment is that there is an underlying personal opposition to the owning of firearms, and a fear that academic discussion of the Second Amendment would lead to the development of legal arguments in favor of incorporation that would prevail in the Second Amendment debate.<sup>210</sup> Whatever the reason for the distaste and avoidance of the Second Amendment in academic circles, the Supreme Court wisely and correctly dealt with an issue that had been left unresolved for far too many years.

Although the Second Amendment has been largely ignored until recently by the legal community, the same cannot be said of the general population or state legislatures. State legislatures have been active in regulating the manufacture, purchase, and posses-

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208. The first and only time a federal court considered the application of the Third Amendment to the states was in 1982. *Engblom v. Carey*, 677 F.2d 957, 959 (2d Cir. 1982). The Court has since stated in dicta that in *Engblom* the Third Amendment was applied to the states by the Fourteenth Amendment. *McDonald*, 130 S. Ct. at 3035 n.13.

209. See Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's the Embarrassing Second Amendment*, 99 YALE L.J. 661, 664-67 (1989)). In response to Stanford Levinson's article, *The Embarrassing Second Amendment*, in which Levinson described himself as a "card-carrying member" of the American Civil Liberties Union, the Yale Law Journal published an article from Wendy Brown, professor of Women's Studies at the University of California at Santa Cruz. Levinson, *supra* note 98, at 638. In the response Brown characterized proponents of the Second Amendment as being a "man, collectively or individually, securing his autonomy, his woman, and his territory with a gun," and further portrayed those exercising their Second Amendment Rights as, "[A] . . . sportsman making his way through a case of beer, flipping through the pages of a porn magazine," and of whom she had:

one great and appropriate fear: rape . . . I had no reason to conclude that his respect for women's personhood ran any deeper than his respect for the lives of Sierra deer, and his gun could well have made the difference between an assault that my hard-won skills in self-defense could have fended off and one against which they were useless.

Brown, *supra* at 666-67.

210. Levinson, *supra* note 98, at 642. Professor Levinson stated:

I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and perhaps subconscious fear that altogether plausible, perhaps even 'winning' interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.

Levinson, *supra* note 98, at 642.

sion of firearms for many years.<sup>211</sup> The citizenry of America has continued to be the world's largest consumers of firearms with approximately 270 million firearms in the United States.<sup>212</sup> Much debate and rhetoric has taken place in the public square regarding the scope and reach of the Second Amendment, and the gun debate has birthed the most powerful lobbying group in the United States, the National Rifle Association.<sup>213</sup> Even the political debates that occur every election cycle almost always touch on the issue of the Second Amendment with politicians from all parties carefully crafting answers to curry favor with the majority of Americans who believe the Second Amendment confers a personal right to own firearms.<sup>214</sup>

While public opinion is certainly not determinative of whether a right is fundamental, the Court is obligated to recognize and protect those rights that are deeply rooted in the conscience of the people.<sup>215</sup> Furthermore, when the Court correctly identifies a fundamental right, the people honor it and the decision will endure,

211. *McDonald*, 130 S. Ct. at 3135 (Breyer, J., dissenting). In his dissent in *McDonald*, Justice Breyer stated:

[I]n every State and many local communities, highly detailed and complicated regulatory schemes . . . continue to govern . . . nearly every aspect of firearm ownership: Who may sell guns and how they must be sold; who may purchase guns and what type of guns may be purchased; how firearms must be stored and where they may be used; and so on.

*Id.*

212. GRADUATE INST. OF INT'L STUDIES, GENEVA, SMALL ARMS SURVEY 2007: CIVILIAN FIREARMS 39 (Aug. 2007), available at [http://www.smallarmssurvey.org/files/sas/publications/year\\_b\\_pdf/2007/CH2-Stockpiles.pdf](http://www.smallarmssurvey.org/files/sas/publications/year_b_pdf/2007/CH2-Stockpiles.pdf). Americans, although consisting of only 5% of the world's population, own 35-50% percent of the firearms in the world, and of the eight million firearms produced and sold in the world each year, four and a half million of those are purchased in the United States. *Id.* at 46.

213. Jeffrey H. Birnbaum, *Fat & Happy in D.C. Republicans are Busting Out All Over, Not Just in Congress and the White House but also on FORTUNE's Latest List of the Capital's Most Powerful Lobbyists*, FORTUNE (May 28, 2001), available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/2001/05/28/303880/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2001/05/28/303880/index.htm).

The National Rifle Association was ranked as the most powerful lobby group in 2001 by Fortune magazine. Additionally, the results of the 2000 presidential election are widely attributed to NRA activity in the traditional Democratic states of Arkansas, Tennessee, and West Virginia, swinging those states to voting for George Bush, thereby giving him the presidency by a razor margin. *Id.*

214. Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (March 27, 2008), available at <http://www.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx>. Seventy-three percent of Americans believe the Second Amendment guarantees a personal right to gun ownership contrasted with only twenty percent who believe this right is connected to militia service. Even among Americans who personally do not own a gun, sixty-three percent hold this belief. *Id.*

215. *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring). The Court must look to the "traditions and collective conscience of our people" to determine whether a principle is "so rooted there as to be ranked as fundamental." *Id.* (quoting *Snyder*, 291 U.S. at 105).

but when the Court is negligent in protecting the rights of the people, the swell of American sentiment compels the Court to reconsider its ruling.<sup>216</sup> Americans' continued support of the Second Amendment as a personal right proved that the Court was wrong in *Cruikshank, Presser, and Miller*. In *McDonald*, the Court finally, in harmony with the conscience and traditions of the people,<sup>217</sup> acknowledged firearm ownership as a personal, fundamental right.<sup>218</sup>

### B. *Why the Court Was Correct to Incorporate the Second Amendment*

The Court was correct to incorporate the Second Amendment for several reasons. First, the right to self-defense is a tenet of our justice system, and indeed is a right that is universal to all human beings. No other instrument is more appropriate for the exercise of the right of self-defense than the handgun,<sup>219</sup> and to prohibit handguns would be to inhibit the ability of Americans to exercise this right. Additionally, the Court was correct in striking down Chicago's handgun ban because of the disproportionate effect it had on the poor and minority groups.<sup>220</sup> In Chicago, wealthy individuals had the ability to hire armed personal security guards for protection,<sup>221</sup> while citizens of lesser means had to protect themselves. It is unconscionable to allow a wealthy citizen to hire fire-

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216. See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). When describing the check on the Supreme Court's authority to declare rights as fundamental, Justice Harlan described it as a balance, saying:

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed . . . . That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

*Id.*

217. Jeffrey M. Jones, *Americans in Agreement with Supreme Court on Gun Rights*, GALLUP (June, 26, 2008), available at <http://www.gallup.com/poll/108394/Americans-Agreement-Supreme-Court-Gun-Rights.aspx>. A 2008 Gallup survey showed the Supreme Court's decision in *Heller* was in accordance with the opinions of seventy three percent of Americans regarding the Second Amendment. *Id.*

218. See *McDonald*, 130 S. Ct. at 3050.

219. *Heller*, 554 U.S. at 628-29.

220. Kim Janssen & Francine Knowles, *Send in Troops? Weis has Doubts*, CHI. SUN-TIMES, Apr. 26, 2010 at 2. Janssen explained that in the first four months of 2010 there were as many homicides in Chicago as there were American deaths in both Afghanistan and Iraq, and eighty percent of the victims were African-American. *Id.*

221. See 225 ILL. COMP. STAT. 447/10-5 (2004). The state of Illinois regulated private security firms and allowed armed guards to be issued the necessary permit to carry a firearm. 225 ILL. COMP. STAT. 447/35-35 (2004).

arm-wielding guards, while prohibiting a poor man from personally doing the same for himself and his family.

The Court was also correct in *McDonald* because of the interpretation applied to the prefatory clause of the Second Amendment, which states, "A well regulated militia being necessary to the security of a free State . . ." <sup>222</sup> The prefatory clause was interpreted by the Court as being non-restrictive <sup>223</sup> of the operative clause, "the right of the people to keep and bear arms." <sup>224</sup> This interpretation of the Second Amendment is consistent with the jurisprudence of the other rights in the Bill of Rights, especially those rights that are reserved to the people. When a right in the Bill of Rights is reserved to the people, it certainly should be interpreted as a personal right, regardless of the fact that the incidental effect is that the state is secured through its ability to organize and regulate a militia of its armed citizens. The fact that a citizen's exercise of a right creates a benefit to the state should not cause the benefit to become the object or sole purpose of that right. There is nothing in the language or structure of the Second Amendment that indicates that the reason listed in the prefatory clause is the exclusive reason why the right to bear arms exists.

The Court has acknowledged that the right to bear arms is a right that was preserved to the people, meaning the Court recognized that this right predates the Bill of Rights. <sup>225</sup> If a right predates the existence of the Union, it is illogical to argue that a state, which came into being after the right existed, is now the determining factor in whether that right exists in the people today.

### C. *New Questions Facing the Courts in the Wake of McDonald*

Although the Court decisively settled a very old incorporation question in *McDonald*, the ruling did open a Pandora's Box. As predicted by Justice Stevens in his *Heller* dissent, declaring a fundamental right to gun ownership created a whole new set of questions as to the extent of that right. <sup>226</sup> True to his prediction, fol-

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222. U.S. CONST. amend. II.

223. *Heller*, 554 U.S. at 599.

224. U.S. CONST. amend. II.

225. *McDonald*, 103 S. Ct. at 3030. The Court said, "[T]he right of bearing arms for a lawful purpose 'is not a right granted by the Constitution' and is not 'in any manner dependent upon that instrument for its existence.'" *Id.* (quoting *Cruikshank*, 92 U.S. at 553).

226. *Heller*, 554 U.S. at 679-80 (Stevens, J., dissenting). Justice Stevens pointed out that once a right to firearms for self-defense has been declared in the home, other state

lowing the *Heller* case, an immediate burst of litigation ensued, mostly from prisoners challenging their convictions on Second Amendment grounds.<sup>227</sup>

Unfortunately for judges deciding these cases, there are no clear directives in either *Heller* or *McDonald* to determine what constitutes an unconstitutional infringement of the Second Amendment. Both decisions directly held that the right to personal possession of firearms does not extend to all places and both decisions list several presumptively constitutional regulations.<sup>228</sup> The regulations that are identified as presumptively constitutional include restrictions on the commercial sale of arms, the carrying of firearms in schools and governmental buildings, and possession of guns by felons or mentally ill individuals.<sup>229</sup> Additionally, in *Heller*, the Court was clear in stating that these specific areas listed, where constitutionality is presumed, are not an exhaustive list of permissible state regulations.<sup>230</sup>

The challenge that both judges and legislatures are faced with in the wake of *Heller* and *McDonald*, is determining what regulations are permissible. Both decisions stated that gun rights are not automatically beyond the reach of legislative restriction merely because the right to bear arms has been recognized as a fundamental right,<sup>231</sup> but how far does this newly recognized right to bear arms extend? Certainly gun advocates would prefer to focus on the last three words of the Second Amendment, “not be *infringed*” in answering this question, while gun control advocates would prefer to focus on the first three, “a well *regulated*.”<sup>232</sup>

In the debate of how far the government may go in restricting this newly recognized fundamental right, gun advocates do have

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regulations of firearm possession would likely be attacked on grounds of self-defense outside the home. *Id.*

227. *Post-Heller Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, [http://www.lcav.org/content/post-heller\\_summary.pdf](http://www.lcav.org/content/post-heller_summary.pdf) (last visited Sept. 26, 2010).

228. *Heller*, 554 U.S. at 626-27; *McDonald*, 130 U.S. at 3047.

229. *Heller*, 554 U.S. at 626-27; *McDonald*, 130 U.S. at 3047.

230. *Heller*, 554 U.S. at 627 n.26. The majority in *Heller* stated, “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.*

231. The Court stated:

We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’ ‘laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.’ We repeat those assurances here.

*McDonald*, 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at 627 n.26) (citation omitted).

232. U.S. CONST. amend. II.

Supreme Court precedent to argue in their favor. In *Miller*, ironically the case that the dissenting Justice Stevens wanted to follow in *McDonald*, the Court discussed the extent of the Second Amendment as applied to federal regulations.<sup>233</sup> With states now held to the same standard as the federal government regarding firearm restrictions,<sup>234</sup> *Miller* potentially provides gun right advocates a powerful argument. *Miller* held that the Second Amendment permits citizens to possess firearms that are typically used in arming a militia.<sup>235</sup> Whether at that time the Court fully understood the implications of such a statement or not, it is not a stretch of logic for radical gun rights groups to claim that this ruling allows private ownership of all sorts of currently prohibited military weaponry.<sup>236</sup> However, relying on *Miller* to give nearly an unlimited right to own whatever firearm a person chooses is not likely to be a successful argument. In *McDonald*, the Court greatly restricted the holding of *Miller* to mean that only the types of firearms that are in common use at that time are protected by the Second Amendment.<sup>237</sup> If the federal courts follow this guidepost for determining whether a gun law is constitutional, the result will be that gun rights advocates will be required to formulate their arguments against gun restrictions by using examples of firearms that are not regulated in other parts of the nation. This basis for determining what firearms are permissible is certainly subjective and easily manipulated by judges on both sides of the issue who can, and will, cherry pick which region of the country to look to in determining what firearms are in common use.

Gun control advocates, on the other hand, also find hope in both *Heller* and *McDonald*. Both cases discussed the right of self-

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233. *Miller*, 307 U.S. at 175-76.

234. *McDonald*, 130 S. Ct. at 3035. In *McDonald*, the Court rejected different standards for state and federal governments and said, "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights" had been rejected years earlier, and that the Bill of Rights "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.* (quoting *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)).

235. *Miller*, 307 U.S. at 178. The Court stated that the Second Amendment protects weapons if the "weapon is any part of the ordinary military equipment . . ." *Id.*

236. Levinson, *supra* note 98, at 654-55. "Ironically, *Miller* can be read to support some of the most extreme anti-gun control arguments, e.g., that the individual citizen has a right to keep and bear bazookas, rocket launchers, and other armaments that are clearly relevant to modern warfare, including, of course, assault weapons." *Id.*

237. *Heller*, 554 U.S. at 627. In narrowing the holding of *Miller* the Court said, "We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.'" *Id.* (quoting *Miller*, 307 U.S. at 179).

defense, specifically in the home, as being a critical reason why the statutes overturned were unconstitutional.<sup>238</sup> Gun control groups argue that the language of these cases show that personal possession of firearms is protected only in the home, and the Second Amendment does not extend protection elsewhere.<sup>239</sup> Furthermore, advocates of the municipal respondents' point of view will likely emphasize the caveat in the *McDonald* decision that its holding does not threaten every state regulation of personal firearm possession.<sup>240</sup>

#### *D. Likely Results of the McDonald Decision*

The result of the *McDonald* decision is largely a symbolic victory for gun rights advocates. Although federal courts now recognized a fundamental right to personal firearm possession, by giving little or no guidelines for protecting that right, the Supreme Court has implicitly acknowledged that current regulations in most states and municipalities are permissible. Federal courts will likely continue to uphold most regulatory schemes, unless, as in *McDonald*, the regulations are so excessively stifling that they effectively prohibit all ownership of firearms.<sup>241</sup> Otherwise, as long as state and local governments are not altogether banning firearms that other states are permitting their residents to own, legislatures will have wide discretion in regulating firearm possession and ownership. The primary change applies to the courts, who must now simply use the word 'fundamental' in their opinion when upholding firearm regulations. After all, it has become fundamental that in every area of our lives Americans be "well regulated."

*Matthew D. Clyde*

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238. *Heller*, 554 U.S. at 628-29; *McDonald*, 130 U.S. at 3036.

239. LEGAL COMMUNITY AGAINST VIOLENCE, *supra* note 227.

240. *McDonald*, 130 S. Ct. at 3047. The Court said, "Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms." *Id.*

241. *McDonald*, 130 U.S. at 3047. In distinguishing the gun regulations at issue in *McDonald* from other regulatory schemes cited by the municipal respondents as examples of permissible regulations, the Court stated, "what is most striking about their research is the paucity of precedent sustaining bans comparable to those at issue here and in *Heller*." *Id.*



