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## **AFTER *HELLER*: WHAT NOW FOR THE SECOND AMENDMENT?**

**Jeffrey M. Shaman\***

### I.

In *District of Columbia v. Heller*, decided in 2008, the Supreme Court of the United States ruled by a five-to-four vote that the Second Amendment of the Constitution protects an individual right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home.<sup>1</sup> Accordingly, the Court struck down a District of Columbia law that banned the possession of handguns and required lawfully owned firearms to be kept unloaded and disassembled or bound by a trigger lock, unless they were located in a place of business or used for lawful recreational activities.<sup>2</sup>

The *Heller* decision was a severe departure from precedent. Sixty-nine years prior to *Heller*, the Court ruled in *United States v. Miller* that the Second Amendment did not protect an individual right to bear arms for purely private, civilian purposes.<sup>3</sup> The Court reaffirmed *Miller*<sup>4</sup> in 1980, and over the years numerous state and federal courts have relied

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1. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The vote reflected the Court's usual conservative-liberal split, with Justice Kennedy joining the conservative side on this occasion. *See id.* at 2783. In addition to Justice Kennedy, Chief Justice Roberts, along with Justices Thomas and Alito joined Justice Scalia's opinion. *Id.* Justice Stevens entered a dissenting opinion that was joined by Justices Souter, Ginsburg, and Breyer. *Id.* Justices Stevens, Souter, and Ginsburg joined Justice Breyer in his dissenting opinion. *Id.*

2. *Id.*

3. *United States v. Miller*, 307 U.S. 174 (1939).

4. *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980).

*Miller* in upholding gun control laws.<sup>5</sup>

Because the ruling in *Heller* concerned a District of Columbia law, the big question that remains is whether the Second Amendment—and its newly found right to bear arms that is not connected to service in a militia—is incorporated through the Fourteenth Amendment to apply to the states. The Bill of Rights, which consists of the first ten amendments of the Constitution, applies directly to the federal government, not to the states. The various provisions in the Bill of Rights that pertain to the states do so only if the Supreme Court rules that they are incorporated through the Fourteenth Amendment to apply to the states.

In 1875, the Court ruled in *United States v. Cruikshank* that the Second Amendment has no effect other than to restrict the powers of the national government.<sup>6</sup> The Court reaffirmed that holding in *Presser v. Illinois*,<sup>7</sup> and *Miller v. Texas*,<sup>8</sup> the latter of which proclaimed that it was well settled that the restriction of the Second Amendment operated only upon federal authority and had “no reference whatsoever” to state laws.<sup>9</sup>

Those three cases, however, were decided at a relatively early date in the history of the Fourteenth Amendment—a time when the Supreme Court took the position that virtually nothing was incorporated by that Amendment. In subsequent years, the Court began incorporating various provisions in the Bill of Rights one by one and applying them to the states through a process known as “selective incorporation.”<sup>10</sup> The Court has since incrementally incorporated most of the Bill of Rights’ provisions to apply to the states. In fact, only five provisions in the Bill of Rights have not been incorporated. Aside from the Second Amendment, the four provisions in the Bill of Rights that have never been incorporated to apply to

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5. See *Heller*, 128 S. Ct. at 2823 (Stevens, J., dissenting). It was not until 2001 that a federal court of appeals ruled that the Second Amendment protected an individual right to bear arms unconnected with service in a militia. See *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). After *Emerson*, a number of Courts of Appeals declined to adopt the position the Fifth Circuit had advocated regarding the Second Amendment. See *Heller*, 128 S. Ct. at 2823 n.2.

6. *United States v. Cruikshank*, 92 U.S. 542 (1875).

7. *Presser v. Illinois*, 116 U.S. 252 (1886).

8. *Miller v. Texas*, 153 U.S. 535, 538 (1894).

9. *Id.*

10. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 504–05 (3d ed. 2006).

the states are:

- (1) The Third Amendment,<sup>11</sup> which prohibits the quartering of soldiers in one's home;
- (2) The Fifth Amendment right to be indicted by a grand jury in criminal cases;
- (3) The Seventh Amendment right to jury trial in a civil case; and
- (4) The prohibition of excessive fines that is part of the Eighth Amendment.<sup>12</sup>

The rest of the Bill of Rights has been incorporated and applies to the states. Given the evolution of the incorporation doctrine, it is possible that the Second Amendment right to bear arms should now be incorporated to apply to the states. According to this line of thought, the holding in *Cruikshank* has been all but overruled, and the modern concept of incorporation calls for extending the Second Amendment to the states. While the *Heller* Court noted that the incorporation of the Second Amendment was not at issue, it nonetheless alluded to the possibility of incorporation in footnote 23: "With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."<sup>13</sup>

Since *Heller* was decided, three federal courts of appeals have addressed the Second Amendment incorporation question. The Second Circuit, in *Maloney v. Cuomo*,<sup>14</sup> and the Seventh Circuit, in *NRA v. City of Chicago*,<sup>15</sup> took the position that the lower federal courts must adhere to *Cruikshank* until it is overruled by the Supreme Court. On the other hand, a contrary position was taken by the Ninth Circuit in *Nordyke v. King*, which held that the Due Process Clause of the

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11. This amendment, though, has never been incorporated because a Third Amendment case has never been presented to the Supreme Court. If such a case did arise, there is little doubt that the Supreme Court would incorporate the Third Amendment and apply it to the states. *Id.*

12. See CHEMERINSKY, *supra* note 11. (discussing these four unincorporated provisions).

13. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008).

14. *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009).

15. *NRA v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009).

Fourteenth Amendment does incorporate the Second Amendment so as to apply it to the states.<sup>16</sup> It should be noted, though, that in *Nordyke* the court went on to rule that a county ordinance making it a misdemeanor to bring a firearm or ammunition onto county property did not violate the Second Amendment, which allows the prohibition of firearm possession in sensitive places. In *NRA*, the Seventh Circuit felt duty-bound to follow *Cruikshank* because the Supreme Court has repeatedly stated that if one of its precedents has “direct application in a case, yet appears to rest on reasons rejected in another 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.”<sup>17</sup> Likewise, the Second Circuit took the exact same position in *Maloney*.<sup>18</sup> But in *Nordyke*, the Ninth Circuit took a contrary position, based on its reading of footnote 23 of *Heller*,<sup>19</sup> which the court took as implying that there was no direct precedent on point concerning the question of incorporation.<sup>20</sup> It appears that this split among the federal circuits will be definitively resolved by the Supreme Court, which recently granted a writ of *certiorari* in the *NRA* matter.<sup>21</sup>

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16. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009).

17. *NRA*, 567 F.3d at 857 (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

18. *Maloney*, 554 F.3d at 59 (“[w]here, as here, a Supreme Court precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions”).

19. *See supra* p. 103 (quoting footnote 23 of *Heller*).

20. *Nordyke*, 563 F.3d at 457, n.16.

Because, as *Heller* itself points out, 128 S.Ct. at 2813 n.23, *Cruikshank* and *Presser* did not discuss selective incorporation through the Due Process Clause, there is no Supreme Court precedent directly on point that bars us from heeding *Heller*'s suggestions. *Cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls . . .”). *But see Maloney*, 554 F.3d at 58–59 (concluding that *Presser* forecloses application of the Second Amendment to the states).

*Id.*

21. The Seventh Circuit combined *NRA* with another case, *Mc Donald v. City of Chicago*, No. 08-C-3645, 2008 WL 5111112 (N.D.Ill. Dec 4, 2008). After the Seventh Circuit's decision in *NRA*, petitions for *certiorari* were filed in both cases. The Supreme Court granted the petition for *certiorari* in *McDonald*, 130

If the Supreme Court does decide to incorporate the Second Amendment and apply it to the states, an interesting question arises as to whether to use the Privileges or Immunities Clause of the Fourteenth Amendment,<sup>22</sup> or the Due Process Clause of the Fourteenth Amendment<sup>23</sup> as the means of incorporation. In the 1872 *Slaughter-House Cases*, the very first Fourteenth Amendment case to reach the Supreme Court, the Court gave an extremely cramped reading to the Privileges or Immunities Clause, which precluded using it to recognize fundamental rights as entitled to constitutional protection.<sup>24</sup> This interpretation cut short any promise the Privileges or Immunities Clause might have had to incorporate provisions in the Bill of Rights and apply them to the states. Indeed, the Court's interpretation of the Privileges or Immunities Clause was so circumscribed in the *Slaughter-House Cases* as to render the Clause virtually useless. As Justice Field proclaimed in dissent, the majority's interpretation left the Clause "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."<sup>25</sup>

After the *Slaughter-House Cases*, the Privileges or Immunities Clause laid "vain and idle" for 126 years, ignored by the Supreme Court as a source of constitutional rights.<sup>26</sup> In the meantime, however, the Court turned to the Due Process Clause of the Fourteenth Amendment as a kind of substitute for the Privileges or Immunities Clause, which could be used to recognize fundamental rights and incorporate provisions of the Bill of Rights to be applied to the states.<sup>27</sup> In 1908, the Court acknowledged in *Twining v. New Jersey* that some provisions in the Bill of Rights might be incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states.<sup>28</sup> Later, in *Fiske v. Kansas*, the Court held that the Due Process Clause encompassed the First Amendment rights to freedom of

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S. Ct. 48 (2009).

22. U.S. CONST. amend. XIV, § 1, cl. 2.

23. U.S. CONST. amend. XIV, § 1, cl. 3.

24. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

25. *Id.* at 38 (Field, J., dissenting).

26. *Id.*

27. See JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 230–37 (2001).

28. *Twining v. New Jersey*, 211 U.S. 78 (1908).

speech, press, and religion.<sup>29</sup> Then, in 1933, the Court held in *Powell v. Alabama* that the denial of counsel in a capital case violated the Due Process Clause because the assistance of counsel is a fundamental right.<sup>30</sup>

By the 1960s, the process of “selective incorporation” was in full swing. When the Court decided *Duncan v. Louisiana* in 1968, many of the proscriptions contained in the Bill of Rights had been applied to the states and the Court readily admitted that in determining the meaning of the Due Process Clause, it increasingly looked to the Bill of Rights for guidance.<sup>31</sup> One by one, most of the provisions contained in the Bill of Rights have been deemed to be “fundamental principles of liberty and justice” that are essential to due process of law.<sup>32</sup>

Given this evolution of the law, it would seem that if incorporation of the Second Amendment is to be achieved, it would be through the Due Process Clause. However, in 1999, the situation became more complicated when the Supreme Court executed a surprising about-face in *Saenz v. Roe*.<sup>33</sup> There, the Court revived the Privileges or Immunities Clause by ruling that there is a fundamental right to travel from one state to another that is encompassed within the scope of the Fourteenth Amendment Privileges or Immunities Clause.<sup>34</sup> The Court explained that the right to travel from state to state is “firmly embedded in our jurisprudence,” but the specific constitutional source of the right has not always been identified.<sup>35</sup> The *Saenz* Court specifically designated the Privileges or Immunities Clause as the source of that right.<sup>36</sup>

The decision in *Saenz* was particularly surprising because in a number of previous decisions the Court ruled that the right to travel from one state to another was a fundamental right protectable under the Equal Protection Clause of the Fourteenth Amendment.<sup>37</sup> The *Saenz* Court easily could have continued to rely upon the Equal Protection

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29. *Fiske v. Kansas*, 274 U.S. 380 (1927).

30. *Powell v. Alabama*, 287 U.S. 45 (1932).

31. *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968).

32. *Id.* at 148.

33. *Saenz v. Roe*, 526 U.S. 489 (1999).

34. *Id.* at 501.

35. *Id.* at 498.

36. *Id.* at 510–11.

37. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Clause to protect the right to travel interstate, but chose instead to use the Privileges or Immunities Clause as a source of protection for that right. In doing so, the Court once again breathed life into the Privileges or Immunities Clause, which had been smothered by *Slaughter-House Cases* some 126 years before.

Although surprising, *Saenz* was theoretically sound for several reasons. First, it resuscitated a constitutional provision that had been incorrectly nullified years before. The aspect of the *Slaughter-House Cases* that extinguished the Privileges or Immunities Clause was wrong and cried out to be corrected. Second, it makes more sense, both textually and historically, to locate the right to migrate within the Privileges or Immunities Clause rather than the Equal Protection Clause. At the time of the *Slaughter-House Cases*, there was common agreement that the right to travel was a “privilege” of citizenship.<sup>38</sup> The Supreme Court, therefore, should be commended for relocating the fundamental right to travel to a revitalized Privileges or Immunities Clause.

If the Supreme Court is now inclined to incorporate the Second Amendment so as to apply it to the states, *Saenz* opens the door to the possibility of achieving that result through the Privileges or Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause.<sup>39</sup> Or the Court may prefer, if inclined to incorporate the Second Amendment, to continue to use the Due Process Clause as the engine of incorporation.

On the other hand, there is an intriguing possibility that a majority of the Court will not be willing to incorporate the *Heller* interpretation of the Second Amendment. *Heller* was a five-to-four decision, with the four dissenting justices asserting that the Second Amendment only protects an individual right to bear arms when it is connected to service in a militia.<sup>40</sup> Those four justices might take the position that even if the Second Amendment is incorporated and applied to

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38. *Saenz*, 526 U.S. at 503–04.

39. It is interesting to note that Justice Thomas remarked in his dissenting opinion in *Saenz* that because he believes that “the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence,” he “would be open to reevaluating its meaning in an appropriate case.” *Saenz*, 526 U.S. at 527–28 (Thomas, J., dissenting).

40. See *supra* note 1.

the states, it only protects the right to bear arms in connection with service in a militia. If just one of the justices from the *Heller* majority votes against incorporation, there will be a splintered decision incorporating the Second Amendment, but not the *Heller* version of it.<sup>41</sup> If this occurred, states would not be foreclosed from prohibiting individuals from possessing firearms unconnected with military service, and state laws banning possession of firearms would be upheld as constitutional. Thus, a different version of the Second Amendment would apply to state laws than the version that applies to the District of Columbia and other federal laws.

## II.

If the Supreme Court does choose to incorporate the Second Amendment to apply to the states, a large question arises as to what exactly the Second Amendment prohibits. In *Heller*, the Court made it quite clear that the Second Amendment does not provide an absolute right to bear arms; while some regulations of arms are still permissible, others are not. Where, then, will the line be drawn?

In *Heller* itself, the Court struck down a District of Columbia law banning any and all possession of handguns—a law that the Court clearly considered an extreme measure well beyond national norms.<sup>42</sup> Indeed, the Court characterized the D.C. law as a ban on “an entire class of ‘arms’ that is overwhelmingly chosen by American society” for the lawful purpose of self-defense.<sup>43</sup> Moreover, the ban extended “to the home, where the need for defense of self,

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41. For a similarly splintered decision, see *Apodaca v. Oregon* in which eight justices agreed that the Sixth Amendment right to a jury trial applies to the state and five justices agreed that the Sixth Amendment right to a jury trial requires jury unanimity. See *Apodaca v. Oregon*, 406 U.S. 404 (1972). However, Justice Powell took the position that while the Sixth Amendment requires jury unanimity in federal trials and the Fourteenth Amendment requires the states to provide jury trials for serious crimes, the Fourteenth Amendment does not incorporate all of the elements of a jury trial within the meaning of the Sixth Amendment and does not require jury unanimity. *Id.* at 404–05 (Powell, J., concurring). As a result of the splintered vote, the Court concluded that while jury unanimity is required in federal trials, it is not required in state trials. *Id.* at 404.

42. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2787–88 (2008).

43. *Id.* at 2817.

family, and property is most acute.”<sup>44</sup> “Few laws in the history of our Nation,” the Court concluded, “have come close to the severe restriction of the District’s handgun ban.”<sup>45</sup>

Taking a cue from the Court’s view of the D.C. law, Professor Cass Sunstein has suggested that the most sensible reading of *Heller* is that it struck down a proscription that was a “national outlier,” a “draconian” regulation of firearms far beyond the consensus supported by a strong majority of Americans.<sup>46</sup> From this perspective, less extreme gun control laws would be well within the scope of permitted regulation under the Second Amendment.

The *Heller* Court ruled that the Second Amendment must be interpreted according to its original meaning when first adopted in 1791.<sup>47</sup> Following this originalist mode of analysis, the Court readily acknowledged that not all firearm regulations contravene the Second Amendment. The Court stated that the Second Amendment, like the First, is not unlimited, and does not protect the right to bear arms “for any sort of confrontation.”<sup>48</sup> As an historical matter, the Court noted, commentators and courts from Blackstone through the 19th-century have “routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>49</sup> More specifically, the Court said:

Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>50</sup>

The Court also expressly recognized “another important limitation on the right to keep and carry arms” by adhering to the decision in *United States v. Miller*,<sup>51</sup> which held that the

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44. *Id.*

45. *Id.* at 2818. See also *id.* at 2820 (characterizing the D.C. law as a “severe restriction”).

46. Cass Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 263 (2008).

47. *Heller*, 128 S. Ct. 2783.

48. *Id.* at 2799.

49. *Id.* at 2816.

50. *Id.* at 2816–17.

51. *Id.* at 2817. Anticipating an objection to this position, the Court

Second Amendment only protected those weapons that were in “common use at the time of its adoption.”<sup>52</sup> According to the *Miller* Court, this limitation supports the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>53</sup>

The *Heller* Court stressed that the Second Amendment right to bear arms revolves around self-defense, especially in the home.<sup>54</sup> It wrote that “the inherent right of self-defense has been central to the Second Amendment right,”<sup>55</sup> and that the home is “where the need for defense of self, family, and property is most acute.”<sup>56</sup>

It has been noted that Justice Scalia’s majority opinion in *Heller* did not specify which standard of review—strict or intermediate scrutiny—should be applied in Second Amendment cases.<sup>57</sup> While Justice Scalia’s opinion did note that minimal scrutiny would be inappropriate to use in a case, such as *Heller*, involving an enumerated constitutional right, it declined to choose between strict and intermediate scrutiny, observing only that the D.C. law in question fails constitutional muster under either standard.<sup>58</sup>

Furthermore, Justice Scalia’s opinion emphatically rejected any interest-balancing approach to interpreting the

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observed that:

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

*Id.* at 2817.

52. *United States v. Miller*, 307 U.S. 174 (1939).

53. *Heller*, 128 S. Ct. at 2817.

54. *Id.*

55. *Id.*

56. *Id.*

57. Michael P. O’Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 216 (2008).

58. *Heller*, 128 S. Ct. at 2817–18.

Second Amendment; it declared that the Second Amendment “necessarily takes certain policy choices off the table,” thus precluding laws that prohibit possession of handguns that may be used for self-defense in the home.<sup>59</sup> In Justice Scalia’s eyes, the Second Amendment precludes balancing because it “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>60</sup> Hence, his opinion flatly refused to take a balancing approach to determine the permissible limitations that may be placed on the right to bear arms.<sup>61</sup>

How then would Justice Scalia determine which firearm regulations are permissible under the Second Amendment? Evidently, he would do so by turning once again to the original meaning of the Second Amendment when it was adopted in 1791. Firearm regulations that are shown to have an originalist pedigree would pass the Scalia test of constitutionality, but those of more recent vintage would meet Scalia’s axe. Thus, weapons in common use at the in 1791 would be within the Second Amendment’s scope of protection, but those of more recent invention would not.

In *Heller*, Justice Scalia’s rejection of balancing was an extreme deviation from the Court’s well-established jurisprudence. By the mid-twentieth century, balancing had become the Court’s predominant mode of constitutional adjudication in cases involving both unenumerated and enumerated rights.<sup>62</sup> Justice Scalia, however, has never accepted the Court’s modern method of adjudication, believing instead that the Constitution should be strictly interpreted according to its original meaning.<sup>63</sup> *Heller* marked the first time a majority of the Supreme Court signed onto an opinion taking such a decidedly originalist slant,<sup>64</sup> and it is debatable whether a majority of the Court would agree to take an originalist approach when deciding more specifically what the Second Amendment proscribes in regard

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59. *Id.* at 2822.

60. *Id.* at 2821.

61. *Id.* at 2821–22.

62. See Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. (forthcoming 2010).

63. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–54 (1989); see also ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–41 (1997).

64. Sunstein, *supra* note 47, at 254.

to gun control regulations. Decided by the slimmest of majorities, *Heller* leaves originalism in a precarious position, especially because interpreting the Second Amendment according to its original meaning is an extremely haphazard way of deciding what gun control regulations are constitutionally permissible in today's world.

Since *Heller* was decided, there have been a number of federal court decisions upholding laws that restrict the possession of guns and other weapons. The federal courts have upheld regulations prohibiting possession of machine guns,<sup>65</sup> sawed-off shotguns,<sup>66</sup> armor-piercing bullets,<sup>67</sup> nunchaku,<sup>68</sup> and pipe bombs.<sup>69</sup> The federal courts have also upheld laws that prohibit bringing firearms or ammunition onto county property,<sup>70</sup> prevent convicted felons from possessing firearms,<sup>71</sup> prohibit possession of a firearm with an obliterated serial number,<sup>72</sup> and prohibit making a materially false statement in trying to purchase a firearm.<sup>73</sup>

*United States v. Marzzarella*<sup>74</sup> is illustrative of how the lower federal courts have construed *Heller*. In *Marzzarella*, a federal district court in Pennsylvania upheld the constitutionality of 18 U.S.C. § 922(k), which prohibits knowingly possessing a firearm with an obliterated serial number.<sup>75</sup> The defendant in the case asserted that under *Heller*:

“the core right of the Second Amendment is the private possession of firearms for use in defense of hearth and home” and “the only limitations on the right to keep and bear arms identified by the [Supreme] Court were those limitations in effect at the time of the enactment of the Second Amendment.”<sup>76</sup>

Because serial numbers had not come into use at that time,

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65. *United States v. Fincher*, 538 F.3d 868 (8th Cir. 2008).

66. *Id.*

67. *Kodak v. Holder*, 342 F. App'x (4th Cir. 2009).

68. *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009).

69. *United States v. Tagg*, 572 F.3d 1320 (11th Cir. 2009).

70. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009).

71. *United States v. Smith*, No. 04-229, 2009 U.S. Dist. LEXIS 47382 (E.D. Pa. 2009).

72. *United States v. Marzzarella*, 595 F. Supp. 2d 596 (W.D. Pa. 2009).

73. *United States v. Knight*, 574 F. Supp. 2d 224 (D. Me. 2008).

74. *Marzzarella*, 595 F. Supp. 2d 596.

75. *Id.* at 597.

76. *Id.* at 598 (brackets from original omitted).

the defendant claimed that § 922(k) violated the Second Amendment's right to bear arms.<sup>77</sup>

The district court disagreed and found nothing in *Heller* that compelled the conclusion that § 922(k) was unconstitutional.<sup>78</sup> Noting that the law struck down in *Heller* was far broader in scope than § 922(k), the court described the § 922(k) regulation as “practically negligible” in comparison to the complete ban on firearms struck down in *Heller*.<sup>79</sup> As the court pointedly observed, firearms with obliterated serial numbers are of no particular use to the ordinary law-abiding citizen who intends to have a firearm for a lawful purpose, such as defense of hearth and home.<sup>80</sup> To the contrary, “such weapons hold special value only for those individuals who intend to use them for unlawful activity.”<sup>81</sup> Therefore, the court explained, § 922(k) served the government's interest in discouraging the availability of untraceable firearms and ensuring that they do not fall into the hands of individuals inclined to use them for unlawful purposes.<sup>82</sup> In the court's view, § 922(k) was a narrowly tailored regulation that left ample opportunity for law-abiding citizens to own and possess guns within the parameters recognized in *Heller*.<sup>83</sup>

In addition to federal decisions, it is also instructive to consider state court decisions interpreting state constitutional provisions that protect the right to bear arms. Forty-four state constitutions contain provisions guaranteeing the right to bear arms.<sup>84</sup> Most of those state constitutional provisions do not limit the right to bear arms to service in the militia and many of them expressly link the right to bear arms to self-defense.<sup>85</sup> Over the years, hundreds of state court decisions have applied those provisions in cases challenging a

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77. *Id.*

78. *Id.* at 606.

79. *Id.* at 599.

80. *United States v. Marzzarella*, 595 F. Supp. 2d 596, 602–03 (W.D. Pa. 2009).

81. *Id.* at 603.

82. *Id.*

83. *Id.* at 606.

84. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193–204 (2006) The six states whose constitutions do not contain a right to bear arms guarantee are: California, Iowa, Maryland, Minnesota, New Jersey, and New York. See *id.*

85. See *id.*

wide variety of gun control laws.<sup>86</sup> A review of the decisions reveals that state courts uniformly apply a deferential rule of reasonableness to determine whether gun control regulations violate state constitutional proscriptions.<sup>87</sup> This approach grants the legislature a good deal of latitude to enact firearms regulations, the vast majority of which have been upheld as reasonable measures to protect the public safety.<sup>88</sup>

In applying their own state constitutions, state courts have upheld the following: (1) laws that prohibit the possession of firearms by convicted felons;<sup>89</sup> (2) laws that prohibit possession of firearms by the mentally ill;<sup>90</sup> (3) laws that prohibit the possession of firearms by minors;<sup>91</sup> (4) laws that prohibit non-citizens from carrying dangerous weapons;<sup>92</sup> (5) laws that prohibit the carrying of dangerous weapons without a license;<sup>93</sup> (6) laws that prohibit the possession of firearms while intoxicated;<sup>94</sup> (7) laws that prohibit the possession of weapons without serial numbers or identifying marks;<sup>95</sup> (8) bans on short-barreled and “sawed-off” shotguns;<sup>96</sup> (9) bans on handguns;<sup>97</sup> (10) bans on assault weapons;<sup>98</sup> (11) bans on concealed weapons;<sup>99</sup> (12) bans on carrying firearms in liquor establishments;<sup>100</sup> and (13) bans on the transportation of loaded firearms.<sup>101</sup>

State courts rarely find that gun regulations violate state constitutional provisions guaranteeing the right to bear arms. When they do find violations, it is usually because the law in

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86. Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 598 (2006).

87. *Id.* at 598–602, 612.

88. *Id.* at 599; *see also* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686–87 (2007).

89. *People v. Blue*, 544 P.2d 385 (Colo. 1975).

90. *State v. Owenby*, 826 P.2d 51 (Or. Ct. App. 1992).

91. *State v. Bolin*, 662 S.E.2d 38 (S.C. 2008).

92. *State v. Vlacil*, 645 P.2d 677 (Utah 1982).

93. *State ex rel. Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988).

94. *People v. Garcia*, 595 P.2d 228 (Colo. 1979).

95. *State v. Comeau*, 448 N.W.2d 595 (Neb. 1989).

96. *State v. Krantz*, 164 P.2d 453 (Wash. 1946); *Carson v. State*, 247 S.E.2d 68 (Ga. 1978).

97. *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266 (Ill. 1984).

98. *Arnold v. Cleveland*, 616 N.E.2d 163 (Ohio 1993).

99. *Heidbrink v. Swope*, 170 S.W.3d 13 (Mo. Ct. App. 2005).

100. *State v. Dees*, 669 P.2d 261 (N.M. Ct. App. 1983).

101. *State ex rel. W. Va. Div. of Natural Res. v. Cline*, 488 S.E.2d 376 (W. Va. 1997).

question operates as a blanket ban that effectively nullifies the right to bear arms.<sup>102</sup> For example, in *City of Lakewood v. Pillow*, the Supreme Court of Colorado held that an ordinance making it unlawful to possess a dangerous or deadly weapon was overly broad and thus violated the state constitutional article guaranteeing a right to keep and bear arms in defense of home, person, and property.<sup>103</sup> The court noted that the ordinance was so extensive in scope that it would “prohibit gunsmiths, pawnbrokers, and sporting goods stores from carrying on a substantial part of their business[es],” and would make it unlawful for a person to possess a firearm in a place of business for the purpose of self-defense.<sup>104</sup> Thus, the ordinance functioned as a blanket ban that could not be squared with the state constitutional right to bear arms.<sup>105</sup>

On occasion, a few state courts have sustained “as-applied” challenges to gun control laws while upholding the constitutional validity of the laws.<sup>106</sup> This usually occurs where a law is perceived to be unfair in its application to a particular person, but otherwise fair and reasonable. For instance, in *Britt v. State*, the Supreme Court of North Carolina held that a statute prohibiting possession of firearms by convicted felons could not reasonably be applied to an ex-felon who had an uncontested record of lifelong nonviolence, thirty years of law-abiding conduct since his crime, and seventeen years of responsible, lawful firearm possession before the statute was enacted.<sup>107</sup> Given this exemplary record, the court concluded that the statute was unconstitutional as applied to the plaintiff.<sup>108</sup> The court’s ruling, however, did not otherwise question the constitutionality of the statute. The statute therefore remains in effect.

State decisions striking down weapon-regulation laws or holding that such laws are unconstitutional as applied are

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102. Winkler, *supra* note 87, at 609–12.

103. *City of Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972).

104. *Id.* at 745.

105. *See City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. Ct. App. 1971); *City of Junction City v. Mevis*, 601 P.2d 1145 (Kan. 1979).

106. Winkler, *supra* note 87, at 609–10.

107. *Britt v. State*, 681 S.E.2d 320 (N.C. 2009).

108. *Id.* at 323; *see also*, *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003) (granting as-applied challenge to state law banning possession of concealed weapons).

rare.<sup>109</sup> In the vast majority of state cases where gun or weapon regulations are challenged, the courts uphold the laws as constitutional.<sup>110</sup>

### III.

Until relatively recently, it was settled as a matter of law that the Second Amendment protected the right to bear arms only in connection with service in a militia. In a 1939 decision, *United States v. Miller*, the Supreme Court ruled that the Second Amendment did not protect an individual right to bear arms for purely private, civilian purposes.<sup>111</sup> The Court reaffirmed this ruling in 1980,<sup>112</sup> and for over six decades the lower federal courts have uniformly followed *Miller's* interpretation of the Second Amendment.<sup>113</sup> The first aberration from this pattern did not occur until 2001, when in *United States v. Emerson*, the Fifth Circuit held that the Second Amendment protected an individual right to bear arms that is not connected to service in a militia.<sup>114</sup> Still, even after *Emerson*, a number of federal courts of appeals have declined to adopt the Fifth Circuit's interpretation of the Second Amendment.<sup>115</sup> If *Emerson* was the first crack in the structure established by *Miller*, *Heller* brought the structure tumbling down. By the slimmest of majorities, the Supreme Court in *Heller* abandoned years of precedent by ruling that henceforth the Second Amendment will be interpreted as protecting an individual right to bear arms that is not connected to service in a militia.

The *Heller* decision, however, did not speak (except for

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109. Winkler, *supra* note 87, at 612.

110. *Id.* at 687.

Under the standard uniformly applied by the states, any law that is a "reasonable regulation" of the arms right is "constitutionally permissible. Since World War II, state courts have authored hundreds of opinions using this test to determine the constitutionality of all sorts of gun control laws. All but a tiny fraction of these decisions uphold the challenged gun control laws as reasonable measures to protect public safety.

*Id.*

111. *United States v. Miller*, 307 U.S. 174 (1939).

112. *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980).

113. *See United States v. Cole*, 276 F. Supp. 2d 146, 149 (D.D.C. 2003).

114. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

115. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2823 n.2 (2008) (Stevens, J., dissenting).

brief mention in a footnote)<sup>116</sup> to the question of incorporation. As previously discussed, in 1875, the Supreme Court, in *United States v. Cruikshank*, held that the Second Amendment has no effect other than to restrict the powers of the national government.<sup>117</sup> While that ruling was reaffirmed in two other cases from the late 1800s,<sup>118</sup> incorporation of other provisions in the Bill of Rights has proceeded apace since that time, so that by now, all but a few of the provisions in that document have been incorporated. If the Supreme Court is inclined to incorporate the Second Amendment, it now has the option of using either the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment to accomplish that goal.<sup>119</sup>

Of course, if the Supreme Court does choose to incorporate the Second Amendment, a large question remains regarding its exact requirements. If applied to the states, *Heller* would negate any state law operating as a blanket ban on firearm possession. Short of that, though, there is considerable uncertainty as to what the Second Amendment would require of the states. The *Heller* Court itself declared that nothing therein “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.”<sup>120</sup> Before *Heller*, both state and federal courts upheld a wide variety of weapons regulations on the ground that they were appropriate means to protect the public safety. Many of those rulings may remain undisturbed by *Heller*, but some may not. Only one thing now seems certain—much more litigation concerning the Second Amendment right to bear arms is bound to occur.

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116. See *supra* p. 103 (discussing footnote 23 from *Heller*).

117. *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

118. *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894).

119. See *supra* notes 23–40 and accompanying text.

120. *Heller*, 128 S. Ct. at 2816–17.

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