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I. INTRODUCTION

When the Supreme Court rules on a gun case, it instantly makes headlines. Such was the case on June 28, 2010, when the Court handed down its decision in the hotly contested, widely publicized *McDonald v. City of Chicago*. The typical headlines accompanying the Court's decision, that the "Justices Extend[ed] Firearm Rights"[1] in a close ruling are overly simplistic.[2] In reality, *McDonald* stood for much more.[3]

With the enactment of the Fourteenth Amendment, numerous provisions in the Bill of Rights were also held applicable against state and local governments.[4] In the seminal 1973 case, *Roe v. Wade*,[5] for example, the Court held that a woman's right to have an abortion applies not only in regard to the federal government, but also in regard to state and local governments.[6] Until recently, however, not all of the rights enumerated in the Bill of Rights have been applied against the states.[7] One significant exception was the Second Amendment. "For years, the Second Amendment has been the forgotten and neglected stepchild of the Bill of Rights," until the Supreme Court declared that, "just like every other right detailed in the Bill of Rights, the Second Amendment referred to individuals, not the military."[8] In the past, courts held that the state and local governments could regulate guns in ways that the federal government could not.[9] In 2010, however, for the first time, the Court held that the Second Amendment was applicable against the States through the Fourteenth Amendment.

The *McDonald* decision has been met with both favor and criticism.[10] Critics argue that, while the majority made clear that the City of Chicago's handgun ban was unconstitutional and that there is such a

1. Adam Liptak, *Justices Extend Firearms Rights in 5-to-4 Ruling*, N.Y. TIMES, June 28, 2010, http://www.nytimes.com/2010/06/29/us/29scotus.html.

2. *See* Ryan Witt, *A full summary and analysis of the McDonald v. Chicago Supreme Court Case*, EXAMINER.COM, June 28, 2010, http://www.examiner.com/political-buzz-in-national/a-full-summary-and-analysis-of-the-mcdonald-v-chicago-supreme-court-case.

3. The Court's holding in *McDonald* arguably raised more questions than it answered. In his dissent, Justice Breyer catalogued a number of these questions: Does the right to possess weapons for self-defense extend outside the home? What kinds of guns are necessary for self-defense? Who can possess a gun and what kind? Does the presence of a child in the house matter? Does the presence of a convicted felon in the house matter? At what point do registration requirements become unconstitutional?

4. *See* Witt, *supra* note 2.

5. 410 U.S. 113 (1973).

6. *Id.*

7. Witt, *supra* note 2.

8. Kevin Ecker, *Heller Part II:* McDonald v. Chicago, TRUE NORTH, Mar. 2, 2010, http://looktruenorth.com/liberty/right-to-keep-and-bear-arms/11498-heller-part-ii—mcdonald-vs-chicago.html.

9. Witt, *supra* note 2.

10. *See* Press Release, Nat'l Rifle Ass'n. Instit. for Legislative Action, Regarding U.S.

thing as a reasonable regulation of firearms, the Court failed to address which types of regulations are reasonable and which are unreasonable.[11] "States and localities with various gun control measures are now left to wonder whether their laws will meet the Supreme Court's definition of reasonable."[12] Opponents also argue that such incorporation inevitably opened the floodgates to litigation and that the Court erred in failing to clarify the standard of review.[13] "If this Court holds that the Second Amendment is incorporated, state and federal courts undoubtedly will be further inundated with challenges to gun laws."[14] Without the Court's guidance on the standard of review, these challenges may lead to inconsistent outcomes and uncertainty in the legal system.

This note argues that the Court inappropriately based its opinion in *McDonald* on a selective reading of history and *District of Columbia v. Heller*,[15] which was almost entirely centered on a similar historical analysis. The High Court has thus resolved its Second Amendment jurisprudence to be defined by forcing square pegs into round holes, allowing federalism to yield to parochialism. This note maintains that the Court's opinion in *McDonald* is flawed because it fails to give state and local governments guidance by not addressing the level of scrutiny required for the Second Amendment. This note agrees with critics who contend that the Court's decision could potentially invalidate gun regulations throughout the country, precipitating a deluge for litigation.

Part II discusses *District of Columbia v. Heller*, the predecessor case to *McDonald*. Part III presents the factual and procedural background of *McDonald v. City of Chicago*. Part IV details Justice Alito's majority opinion, the dissenting opinions by Justices Stevens and Breyer, and the concurring opinions by Justices Scalia and Thomas in *McDonald*. Part V presents legal and policy arguments supporting the assertion that *McDonald* was wrongly decided. Part VI addresses the Court's critical error in failing to articulate a standard of review for the Second Amendment while discussing a recent Ninth Circuit's decision addressing the issue. Finally, Part VII concludes the note with a brief discussion of the potential future ramifications of *McDonald*.

Supreme Court Decision *McDonald v. City of Chicago*, June 28, 2010, http://www.nraila.org/News/Read/NewsReleases.aspx?ID=13956.

11. Witt, *supra* note 2.

12. *Id.*

13. Brief for Brady Center to Prevent Gun Violence et al. as Amici Curiae in Support of Neither Party at 3, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

14. Sayre Weaver, *Supreme Court's Second Amendment Decision in* McDonald v. Chicago *Likely to Spawn Challenges to Local Firearms Laws*, THE PUBLIC LAW JOURNAL, Vol. 33, No. 3, Summer 2010; *see also* Libby Lewis, *NRA Eyes More Targets After D.C. Gun Ban Win*, NAT'L PUBLIC RADIO, June 29, 2008, http://www.npr.org/templates/text/s.php?sId=92008363&m=1.

15. District of Columbia v. Heller, 554 U.S. 570 (2008).

II. *DISTRICT OF COLUMBIA V. HELLER*: THE PREDECESSOR TO *MCDONALD*

A. *Factual and Procedural Background*

The District of Columbia City Counsel enacted three gun codes,[16] entirely banning the possession of handguns within D.C. Under the ban, D.C. residents were allowed to keep rifles and shotguns in their homes, but such guns were to be disassembled or bound by a trigger lock.[17]

In 2003, the *Heller* Plaintiff's filed suit against the District of Columbia, alleging that the D.C. gun codes violated their Second Amendment right to keep and bear arms.[18] Heller, a D.C. police officer, was allowed to carry a handgun while on duty at the Federal Justice Center, and wished to keep a handgun at his home as well.[19] However, his request to keep a handgun in his home was denied on the basis of the District's gun laws.[20]

The district court denied Heller's motion for summary judgment as being moot, holding that "[b]ecause [the] court rejects the notion that there is an individual right to bear arms separate and apart from service in the militia and because none of the plaintiffs have asserted membership in the militia, plaintiffs have no viable claim under the Second Amendment of the United States Constitution."[21]

The D.C. Circuit Court of Appeals reversed the district court's decision and ordered the lower court to grant Heller's motion for summary judgment.[22] The appellate court relied on its decision in *Seegars v. Gonzales*[23] to conclude that, in order to have standing to challenge the gun ban, the law must have caused plaintiffs to suffer an actual injury.[24] Though the court found that five of the plaintiffs had in fact not been injured as a result of the law, and thus lacked the requisite standing to bring suit, the court also held that, because Dick Heller applied for and was denied a gun permit, he had been injured as a result of the law.[25] Because the other plaintiffs lacked standing, the court dismissed them from the case, leaving Heller as the sole plaintiff.[26]

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16. *See* District of Columbia, Municipal Codes §§ 7-2502.02; 7-2507.02; 22-4504.

17. *Id.*

18. Parker v. District of Columbia, 311 F. Supp. 2d 103 (D.D.C. 2004), *judgment reversed and remanded*, 478 F.3d 370 (D.C. Cir. 2007).

19. *Heller*, 554 U.S. at 570.

20. *Id.*

21. *Parker*, 311 F. Supp. 2d at 109.

22. Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *cert. granted and aff'd*, 554 U.S. 570 (2008).

23. 396 F.3d 1248 (D.C. Cir. 2005).

24. *Parker*, 478 F.3d at 374–75.

25. *Id.* at 375–76.

26. *Id.*

Next, the court of appeals addressed whether the right to bear arms applies only to organized militias or also to individuals in a non-organized militia.[27] The court held that there was an individual right to bear arms and that, "[t]he important point . . . is that the popular nature of the militia is consistent with an individual right to keep and bear arms: Preserving an individual right was the best way to ensure that the militia could serve when called."[28]

Finally, the appellate court referred to the Supreme Court's discussion of the terms "arms" in *United States v. Miller*[29] to further support the assertion that the D.C. gun ban was unconstitutional because the "modern handgun and . . . the rifle and long-barrel shot-gun [are] . . . lineal descendant[s] of that founding-era weapon."[30]

In September, 2007, petitioners, the District of Columbia and Mayor Adrian Fenty, filed a petition for writ of certiorari.[31] The Supreme Court granted certiorari to address "[w]hether the following provisions, D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes."[32]

B. *Majority Opinion: No Militia Needed–The Second Amendment Guarantees an Individual Right to Keep and Bear Arms*

For the first time since *Miller*,[33] the Supreme Court heard oral arguments and ruled on a Second Amendment case.[34] The Court decided the case in a closely divided 5–4 opinion. Justice Scalia delivered the opinion of the Court and was joined by Chief Justice Roberts, and Justices Kennedy, Thomas, and Alito.[35] Justice Stevens filed a dissenting opinion and was joined by Justices Souter, Ginsburg, and Breyer.[36] Justice Breyer also filed a dissenting opinion in which Justices Stevens, Souter and Ginsburg joined.[37]

The Court held that the Second Amendment protects an individ-

27. *Id.* at 386.
28. *Id.* at 389.
29. 307 U.S. 174 (1939).
30. *Parker*, 478 F.3d at 398–401.
31. Petition for Writ of Certiorari, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).
32. District of Columbia v. Heller, 554 U.S. 570 (2008).
33. *Miller*, 307 U.S. at 174.
34. Adam Freedman, *Clause and Effect*, N.Y. TIMES, Dec. 16, 2007, http://www.nytimes.com/2007/12/16/opinion/16freedman.html?r=1.
35. *Heller*, 554 U.S. at 572–73.
36. *Id.* (Stevens, J., dissenting).
37. *Id.* (Breyer, J., dissenting).

ual's right to keep and bear firearms, even those not kept in connection with an "organized militia."[38] The Court stated that such firearms could be used for legal purposes, which include self-defense in the home.[39] The Court, reaching its opinion that by surmising the intention of the founders during the Amendment's drafting, reasoned that, because New Hampshire's Second Amendment drafting proposal, Pennsylvania's minority proposal, and Samuel Adams' Massachusetts proposal "unequivocally referred to individual rights," the Second Amendment, as contemplated by the Constitution's drafters, applies to individuals in non-organized militia.[40] The Court found further support for its conclusion based on the work of Second Amendment scholars St. George Tucker, William Rawle, and Joseph Story, as well as pre-Civil War case law, post-Civil War legislation, and post-Civil war commentators.[41] The majority preemptively defended its conclusion that the Second Amendment extends to individuals by finding that neither *United States v. Cruikshank*[42] nor *Presser v. Illinois*[43] contradicted it.[44] In fact, the Court claimed that *Cruikshank's* limited discussion of the Second Amendment actually *supported* its conclusion that the Second Amendment extended to individuals in non-military settings.[45] Contrary to Justice Stevens' interpretation of *United States v. Miller*,[46] the *Heller* majority read *Miller* as only a limit to the *type* of weapon and individual may keep, not the right to keep and bear arms itself.[47]

Toward the end of the opinion, the Court explicitly stated that an individual's Second Amendment right to keep and bear arms can be, and is, limited.[48] "Courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose . . . [and] the sorts of weapons protected were those in common–use at the time."[49] However, without specifying what those common use weapons were, lower courts were left with more questions than answers.

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38. *Id.*
39. *Id.* at 570.
40. *Id.* at 571.
41. *Id.* at 605–19.
42. 92 U.S. 542 (1876).
43. 116 U.S. 252 (1886).
44. *Heller*, 554 U.S. at 618–20.
45. *Id.* at 619–20.
46. 307 U.S. 174 (1939).
47. *Heller*, 554 U.S. at 621–26.
48. *Id.* at 625.
49. *Id.* at 625–26.

C. *Dissenting Opinions*

1. STEVENS: *HELLER* IS A "DRAMATIC UPHEAVAL IN THE LAW"

The crux of Justice Stevens' dissent is that the Second Amendment was designed to protect an individual's right to keep and bear arms *only* as part of a well-regulated militia.[50] Justice Stevens relied on the Court's interpretation of the Second Amendment in *Miller*, stating that

> the view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.[51]

Justice Stevens found that "no new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons."[52] The absence of new evidence, coupled with the fact that the Court itself endorsed the *Miller* interpretation of the Second Amendment in *Lewis v. United States*,[53] led Justice Stevens to conclude that the majority's blatant failure to follow accepted precedent is a "dramatic upheaval in the law."[54] The Court, Stevens continued, "stakes its holding on a strained and unpersuasive reading of the Amendment's text . . . and, ultimately [makes] a feeble attempt to distinguish *Miller* that places more emphasis on the Court's decisions process than on the reasoning in the opinion itself."[55]

Justice Stevens next analyzed the majority's textual argument.[56] He pointed out that while the majority insisted that the words "the people" in the Second Amendment must have the same meaning as they do in the First and Fourth Amendment, "the Court *itself* reads the Second Amendment to protect a 'subset' significantly narrower than the class of persons protected by the First and Fourth Amendment . . . . [T]he Court limits the protected class to 'law-abiding, responsible citizens,'" whereas "the people" protected by the First and Fourth Amendments is not limited in such a way.[57] Further, Justice Stevens argued that the Court's interpretation of the term "to keep and bear arms" is flawed:[58]

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50. *Id.* at 636 (Stevens, J., dissenting).
51. *Id.*
52. *Id.* at 637.
53. 445 U.S. 55 (1980).
54. *Heller*, 554 U.S. at 637–41(Stevens, J., dissenting).
55. *Id.* at 686.
56. *Id.* at 644.
57. *Id.*
58. *Id.* at 646.

"Had the framers wished to expand the meaning of the phrase 'bear arms' to encompass civilian possession and use" Stevens explained, "they could have done so by the addition of phrases such as 'for the defense of themselves,' as was done in the Pennsylvania and Vermont Declarations of Rights."[59] Stevens maintained that the Court provided a "short shrift" to the history of the drafting of the Second Amendment and "dwelled" on four other sources that "shed only indirect light" on the question the Court was addressing.[60]

2. BREYER: FIREARMS SHOULD BE REGULATED BY THE STATES

Justice Breyer provided two main reasons for his conclusion that the majority's opinion was wrong.[61] Agreeing with Justice Stevens, Justice Breyer first reasoned that the Second Amendment protects militia-related, and not individual self-defense related interests.[62] He then reasoned that the Second Amendment's protection is not absolute, and that the government can regulate the interests served by the amendment.[63] Because Justice Breyer joined Justice Stevens' dissent, the majority of his dissent focused on proving his second point; that "the District's law falls within the zone that the Second Amendment leaves open to regulation by legislatures."[64]

Justice Breyer began his dissent by providing examples of historical gun regulations that "citizens would then have thought compatible with the 'right to keep and bear arms.' "[65] He cited Boston, Philadelphia, and New York City as examples of three American cities that restricted the use of guns and regulated the storage of gunpowder, "a necessary component of an operational firearm," to some degree.[66]

Justice Breyer then addressed how courts should determine whether a firearm regulation is constitutional. He began by asserting that the majority was wrong when it said that D.C.'s gun ban was unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[67] Justice Breyer claimed that the D.C. ban would be constitutional if the rational-basis standard were applied, as the gun law in question "seeks to prevent gun-related accidents, [and]

59. *Id.* at 645–46.

60. These four sources were the Seventeenth-century English Bill of Rights; *Blackstone's Commentaries on the Laws of England*; postenactment commentary on the Second Amendment; and post-Civil War legislative history.

61. *Heller*, 554 U.S. at 680 (Breyer, J., dissenting).

62. *Id.*

63. *Id.*

64. *Id.* at 682.

65. *Id.*

66. *Id.*

67. *Id.* at 687.

at least bears a 'rational relationship' to that 'legitimate' life-saving objection."[68] Justice Breyer agreed with the majority's view that adopting a strict-scrutiny standard for gun regulations would be impossible because "almost every gun-control regulation will seek to advance a 'primary safety concern of every government—a concern for the safety and indeed the lives of its citizens.' "[69] Justice Breyer continued by finding that, "any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other."[70] Justice Breyer advocated for the adoption of "such an interest-balancing inquiry explicitly."[71] He argued that, because of the importance of the interests that lie on both sides of the balancing equation, gun regulation should not be an area where either constitutionality or unconstitutionality should be presumed.[72] Further, he stated that Courts normally defer "to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional fact-finding capacity."[73]

Justice Breyer next analyzed the specific D.C. firearm restrictions in question.[74] In particular, he focused on the third restriction, which, in most cases, prohibited the registration of a handgun within the District.[75] He analyzed whether this restriction violated the Second Amendment by assessing "how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests."[76] Justice Breyer concluded that, because the District's legislatures anticipated judgments that were based on "substantial evidence," the "statute properly seeks to further the sort of life-preserving and public-safety interests that the Court has called 'compelling.' "[77] Based on the generally accepted belief that the principal purpose of the Second Amendment is "the preservation of a well-regulated militia,"[78] and that there is no "evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' . . . has some reasonable relationship to the preserva-

68. *Id.*
69. *Id.* (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).
70. *Id.* at 689.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 692.
75. *Id.*
76. *Id.*
77. *Id.* at 698–705.
78. *Id.*

tion or efficiency of a well regulated militia," Justice Breyer concluded that the D.C. gun ban only minimally, if at all, burdens the primary objective of the amendment.[79] Because the "ban's very objective is to significantly reduce the number of handguns in the District," he reasoned that there were no superior, less restrictive alternatives to the ban.

III. *McDONALD v. CITY OF CHICAGO*: FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

The Petitioners were Chicago residents Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson.[80] These Chicagoans wanted to keep handguns in their homes for self-defense, but were unable to do so because of Chicago's law prohibiting ownership of such firearms.[81] For example, one Chicago ordinance stated, "no person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm."[82] The subsequent section of that code forbade the registration of most handguns, resulting in an effective ban on handguns.[83] The City of Oak Park, Illinois enacted similar ordinances prohibiting personal possession of "any firearm [including] pistols, revolvers, guns and small arms. . . ."[84] The Chicago petitioners wanted to keep guns in their homes for self-defense, as many of them had previously been the targets of violence.[85] For example, Colleen Lawson's home had been burglarized on several occasions.[86] Otis McDonald, a community activist, lived in a high-crime neighborhood where dangerous drug dealers threatened his life.[87]

Following the Court's 2008 decision in *Heller*,[88] the petitioners, along with the Illinois State Rifle Association and the Second Amendment Foundation, Inc., filed suit in the United States District Court for the Northern District of Illinois.[89] They challenged Chicago's handgun

79. *Id.* at 705–07.

80. McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).

81. *Id.*

82. *Id.* (citing CHI., ILL., MUNICIPAL CODE § 8-20-040(a) (2009)).

83. *Id.* (citing CHI., ILL., MUNICIPAL CODE § 8-20-050(c) (2009)).

84. *Id.* (citing OAK PARK, ILL., MUNICIPAL CODE § § 27-2-1 (2007), 27-1-1 (2009)).

85. *Id.* at 3026.

86. *Id.* at 3027.

87. *Id.*

88. *See* NRA, Inc. v. Village of Oak Park, 617 F. Supp.2d 752 (N.D. Ill. 2008). Counsel for the plaintiff's in *McDonald* filed suit on the same morning that *Heller* was to be decided. The National Rifle Association filed two suits the day after *Heller* was decided. Attorneys for the plaintiff's in all three suits filed under the presumption that the Court would rule the way it did in *Heller*.

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

ban, claiming it violated the Second and Fourteenth Amendments.[90] The National Rifle Association and two Oak Park residents filed a similar action in the same district, challenging Oak Park's handgun ban.[91] The National Rifle Association filed an action challenging the Chicago ordinances, as well.[92]

B. *Procedural Background*

The three cases were assigned to District Judge Milton I. Shadur.[93] Rejecting the plaintiffs' arguments that the City of Chicago and Oak Park's gun bans were unconstitutional, the district court held that the Second Amendment was not incorporated to the States through the Fourteenth Amendment.[94] The district court relied on the Seventh Circuit's decision in *Quilici v. Morton Grove*,[95] where the Seventh Circuit upheld the constitutionality of a handgun ban.[96] Judge Shadur further reasoned that because "*Heller* . . . explicitly refrained from opining on the subject of incorporation ven non of the Second Amendment,"[97] and "a district judge has a duty to follow established precedent in the Court of Appeals to which he or she is beholden . . . ,"[98] Chicago's and Oak Park's gun bans were constitutional.

The petitioners in the related cases separately appealed the district court's decision, and the Seventh Circuit consolidated the cases.[99] The Seventh Circuit affirmed the district court's decision that the gun bans in question were constitutional.[100] The Seventh Circuit relied on *United States v. Cruikshank*,[101] *Presser v. Illinois*,[102] and *Miller v. Texas*.[103] *Cruickshank, Presser and Miller* were decided following the Seventh Circuit's analysis of the Privileges or Immunities Clause[104] in the *Slaughter-House Cases*.[105] "The Seventh Circuit described the rationale

90. *Id.*
91. *Id.*
92. *Id.*
93. NRA, Inc. v. Village of Oak Park, 617 F. Supp. 2d 752 (N.D. Ill. 2008).
94. *Id.*
95. 695 F.2d 261 (7th Cir. 1982).
96. *Id.* at 271.
97. *Oak Park*, 617 F. Supp. 2d at 754.
98. *Id.* at 753.
99. Brief for Respondents the National Rifle Association of America, Inc. et al. in Support of Petitioners at ii, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).
100. NRA, Inc. v. City of Chicago, 567 F.3d 856 (7th Cir. 2009).
101. 92 U.S. 542 (1876).
102. 116 U.S. 252 (1886).
103. 153 U.S. 535 (1894).
104. *McDonald*, 130 S. Ct. at 3027.
105. *Slaughter-House Cases*, 83 U.S. 36 (1873). The Supreme Court upheld a Louisiana law requiring butchering of all animals in New Orleans to be done by a single private corporation.

of those cases as 'defunct' and recognized that they did not consider the question whether the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right to keep and bear arms."[106] The Seventh Circuit, however, declined to forecast how the Second Amendment would hold up under the Court's modern selective-incorporation approach and pointed out its unambiguous responsibility to follow Supreme Court precedents that have direct applications.[107] Therefore, the Seventh Circuit affirmed the district court's ruling that the gun laws were constitutional.[108]

Although the cases were consolidated by the Seventh Circuit, because of their slight differences in scope, the parties (McDonald and the National Rifle Association) appealed separately to the Supreme Court.[109] The Supreme Court granted certiorari[110] to address

> [w]hether the right of the people to keep and bear arms is guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home.[111]

The Court heard oral arguments and issued its 5–4 decision on June 28, 2010.[112]

IV. *McDONALD v. CITY OF CHICAGO*: THE SECOND AMENDMENT APPLIED TO THE STATES

A. *Majority and Plurality Opinions: The Second Amendment Is Incorporated to the States Through the Fourteenth Amendment*

Justice Alito began the *McDonald* analysis with a discussion of the historical relationship between the Bill of Rights and the States.[113] The Court provided a summary of the 1873 landmark decision in the *Slaugh-*

Justice Miller held that the law was a valid public health measure, essentially erasing the Privileges or Immunities Clause.

106. *McDonald*, 130 S. Ct. at 3027 (citing NRA, Inc. v. Chicago, 567 F.3d 856, 857–858 (7th Cir. 2009)).

107. *Id.*

108. NRA v. City of Chicago, 567 F.3d 856, 860 (7th Cir. 2009).

109. *See generally* Petition for Writ of Certiorari, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

110. David Savage & Kristin Schorsch, *Supreme Court to Hear Challenge to Chicago Gun Law*, CHICAGO BREAKING NEWS, Sept. 30, 2009, http://www.chicagobreakingnews.com/2009/09/supreme-court-may-decide-on-hearing-chicago-gun-cases.html.

111. Petition for Writ of Certiorari, *supra* note 114.

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

113. *Id.* at 3028.

ter-House Cases.[114] Justice Miller's opinion for the *Slaughter-House* Court concluded, "[t]he Privileges or Immunities Clause protects only those rights which owe their existence to the Federal government, its National Character, its Constitution or its laws."[115] Despite extensive disagreement about the correctness of the *Slaughter-House Cases*,[116] the *McDonald* plurality declined to reconsider whether that case was correct.[117] The plurality rejected the argument that the Second Amendment should be incorporated against the States through the Privileges or Immunities Clause.[118] "For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause."[119] Therefore, the plurality agreed only to consider whether the Second Amendment was incorporated to the States through the Due Process Clause of the Fourteenth Amendment.[120] In order to justify its consideration of the Due Process Clause, the Court stated that its decisions in *Cruikshank*,[121] *Presser*,[122] and *Miller*[123] did not prevent it from considering the question.[124] "*Cruikshank, Presser and Miller* all preceded the era in which the Court began the process of 'selective incorporation' under the Due Process Clause, and we have never previously addressed the question of whether the right to keep and bear arms applies to the States under that theory."[125]

The Court then provided a historical framework on the theory of selective incorporation,[126] giving examples of cases where the Court overruled earlier decisions that held that the Bill of Rights did not apply to the States.[127] Justice Alito proclaimed that, in order to answer the

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114. *See* Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995); *see also* Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).

115. *McDonald*, 130 S. Ct. at 3028 (quoting Slaughter-House Cases, 83 U.S. 36, 79 (1873)).

116. *Id.* at 3029.

117. *Id.*

118. As exemplified by Justice Thomas's concurrence in this case and his dissent in *Saenz v. Roe*, 526 U.S. 489 (1999), Thomas alone opined that the Privileges or Immunities Clause protects certain rights.

119. *McDonald*, 130 S. Ct. at 3029.

120. *Id.* at 3031.

121. United States v. Cruikshank, 92 U.S. 542 (1876).

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

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

124. *McDonald*, 130 S. Ct. at 3031.

125. *Id.*

126. *Id.* at 3034–36.

127. For example, the Court cited Mapp v. Ohio, 367 U.S. 643 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949); Gideon v. Wainwright, 372 U.S. 335 (1963), *overruling* Betts v. Brady, 316 U.S. 455 (1942).

question of whether the Second Amendment right to keep and bear arms is incorporated to the States through the Due Process Clause, it was critical to "decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty . . . [or whether] this right is deeply rooted in this Nation's history and tradition."[128] The Court reasoned that, because the right to keep and bear arms is "deeply rooted in this Nation's history and tradition," the Second Amendment *is* incorporated to the States through the Due Process Clause.[129] The Court relied primarily on its decision in *Heller*:

> Self-defense is a basic right, recognized by many legal systems from ancient times to the present day . . . [e]xplaining that the need for defense of self, family, and property is most acute in the home . . . we found that this right applies to handguns because they are the most preferred firearm in the nation to keep and use for protection of one's home and family.[130]

In further support of its conclusion, the *McDonald* majority referred to the same selective readings of Seventeenth, Eighteenth, and Nineteenth-century history that it relied on in *Heller*. For example, the Court referenced Blackstone for the proposition that "the right to keep and bear arms was one of the fundamental rights of Englishmen,"[131] and that American colonists agreed with this assessment.[132] Likewise, the Court reiterated its assertion from *Heller* that the Second Amendment right to keep and bear arms was fundamental to the ratifiers of the Bill of Rights. "During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric."[133]

The Court emphasized that, even after the fear of the national government taking over the universal militia had subsided in the 1850s, the right to keep arms was still valued for self-defense purposes.[134] By way of example, the Court referenced a number of situations where firearms were taken from recently freed slaves, and used the fact that Union Army commanders and Congress took action to return the firearms to their owners, to support the assertion that the right to keep and bear arms was fundamental.[135] The majority cited the 39th Congress' reference to the right to keep and bear arms as a fundamental right deserving of pro-

128. *McDonald*, 130 S. Ct. at 3036 (citing Duncan v. Louisiana, 391 U.S. 145 (1968); Washington v. Glucksberg, 501 U.S. 702 (1997)).

129. *Id.*

130. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570 (2008)).

131. *Id.*

132. *Id.* at 3037.

133. *Id.* (citing Heller, 554 U.S. at 598).

134. *Id.* at 3038.

135. *Id.* at 3039.

tection: "Every man . . . should have the right to bear arms for the defense of himself and family and his homestead . . . "[136] Furthermore, the Court cited the fact that, in 1868, a majority of States[137] had clauses in their constitutions that protected the right to keep and bear arms.[138]

The majority then rejected a number of the respondent's additional arguments, based largely on the claim that these arguments "are at war with [its] central holding in *Heller*."[139] The Court first discarded the assertion that, in the year immediately following the Civil War, Congress "sought to outlaw discriminatory measures taken against freed men, which it addressed by adopting a non-discrimination principle," and, therefore, an outright ban on the possession of guns would have been considered acceptable, as long as it applied equally to all citizens.[140]

It next dismissed the argument that the Due Process Clause "protects only those rights recognized by all temperate and civilized governments,"[141] reasoning that this line of argument is "inconsistent with the long-established standard [the Court] appl[ies] in incorporation cases."[142] The Court continued, "if *our* understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of *any* civilized country, it would follow that the United States is the only civilized Nation in the world."[143] Moreover, the Court rejected the respondents' suggestion that the aforementioned argument applies only to substantive rights on grounds that this argument "flies in the face of more than a half-century of precedent."[144]

For two reasons, the Court rejected the respondents' public safety argument that, because the Second Amendment involves the right to possess a deadly weapon, it should be treated differently from the other provisions of the Bill of Rights.[145] First, the Court reasoned that, because "all of the constitutional provisions[146] that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category," the Second Amendment should *not* be treated differently.[147]

136. *Id.* (citing 39TH CONG. GLOBE 1182).

137. The Court clarified that the States whose constitutions reflected such a right to keep and bear arms often lacked formal law enforcement agencies, such as police forces. *Id.* at 3042 n.27.

138. *Id.* at 3042.

139. *Id.* at 3044.

140. *Id.* at 3042.

141. *Id.* at 3044.

142. *Id.* (citing Duncan v. Louisiana, 391 U.S. 145 (1968)).

143. *Id.*

144. *Id.* at 3045 (citing Everson v. Board of Ed. of Ewing, 330 U.S. 1 (1947)).

145. *McDonald*, 130 S. Ct. at 3045.

146. The Court cited the exclusionary rule and the right to a speedy trial as examples of such constitutional provisions. *Id.* at 3035.

147. *Id.* at 3045.

The Court also rejected this argument because the respondents failed to cite a case in which the Court "refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications."[148]

The respondents' suggestion that state and local governments should be allowed to enact any gun control law they deem reasonable was rejected on the ground that the same argument has been rejected in the past.[149] The Court proclaimed, "unless we turn back the clock or adopt a special incorporation test applicable only to the Second Amendment, . . . respondents' argument must be rejected."[150]

Despite its own recognition of the truth of the argument, the Court disregarded the respondents' complaint that incorporation of the Second Amendment right to the States would lead to extensive and costly litigation.[151] The Court utilized the exclusionary rule as an example to support its position that this argument was without merit, since the respondents' "argument applies with even greater force to constitutional rights and remedies that have already been held to be binding on the States."[152]

The Court again referred to its decision in *Heller* in rejecting the respondents' assertion that firearm rights are generally subject to an interest-balancing test.[153] "In *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing."[154] Likewise, the Court used the fact that, in *Heller*, it rejected the suggestion that the right to keep and bear arms was "valued only as a means of preserving the militia."[155] Rather, the Court "stressed that the right was also valued because the possession of firearms was thought to be essential to self-defense."[156]

In summary, as many legal scholars predicted it would be, the *McDonald* plurality is based primarily on the Court's two-year old decision in *Heller*.[157] There, for the first time, the Court held that the Sec-

148. *Id.*

149. The Court referenced members of the Court who unsuccessfully made the argument in opposition to the concept of incorporation. *Id.* at 3046.

150. *Id.* at 3046.

151. *Id.* at 3047.

152. *Id.*

153. *Id.*

154. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

155. *Id.* at 3047–48.

156. *Id.*

157. *See* Josh Blackman, THE FUTURE OF THE PRIVILEGES OR IMMUNITIES CLAUSE AFTER MCDONALD V. CHICAGO, Josh Blackman's Blog (June 28, 2010, 1:58 PM), http://joshblackman.com/blog/?p=4744.

ond Amendment was incorporated to the States through the Due Process Clause of the Fourteenth Amendment.

B. *The Dissents*

1. Stevens: Removing the States' Ability to Regulate Firearms Could Lead to a Destabilization of Liberty

Justice Stevens framed the issue in *McDonald* as one of substantive due process. Justice Stevens insisted that, instead of answering the question of "whether the Fourteenth Amendment incorporates the Second Amendment," the *McDonald* Court should have addressed the question of "whether a federal enclave's prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution."[158] Therefore, Justice Stevens, the Court was generally required to consider the term "liberty" in the Fourteenth Amendment.[159] He advised that such consideration *may be*, though is not required to be, informed by the content of the Bill of Rights.[160] He reasoned that the "so-called incorporation question was squarely, and . . . correctly resolved in the late 19th century."[161]

Justice Stevens agreed with the plurality's rejection of the argument that the Second Amendment is incorporated to the States through the Privileges or Immunities Clause. He proclaimed that the petitioners' suggestion that "invigorating the Privileges or Immunities Clause will reduce judicial discretion . . . [is] implausible, if not exactly backwards."[162] While Justice Stevens admitted that "there are weighty arguments" supporting the stance that the Second Amendment is incorporated through the Due Process Clause, he claimed that "these arguments are less compelling than the [p]lurality suggests; they are much less compelling when applied outside the home; and their validity does not depend on the Court's holding in *Heller*. For that holding sheds no light on the meaning of the Due Process Clause . . . ."[163]

Justice Stevens claimed that there were legitimate reasons to hold state governments to different standards than the federal government and that failing to do so could have substantial costs.[164] In recognizing that the Court has made some of the Bill of Rights fully applicable to the States, he reiterated the fact that "we have never accepted a 'total incor-

158. *McDonald*, 130 S. Ct. at 3088 (Stevens, J., dissenting).
159. *Id.* at 3092–93.
160. *Id.*
161. *Id.* at 3088.
162. *Id.* at 3089.
163. *Id.* at 3090.
164. *Id.* at 3094–95.

poration' theory of the Fourteenth Amendment . . . and we have declined to apply several provisions to the States in any measure."[165] Justice Stevens maintained that when state authorities are required to follow a federal court on "matter[s] not critical to personal liberty or procedural justice," states could be thwarted from experimenting in areas that could potentially provide their citizens with economic and social benefits.[166] He explained that such risks are increased when the same legal standard is applied across multiple jurisdictions with "disparate needs and customs."[167]

Justice Stevens' next point was that the Court's "rigid historical test" was improper in the instant case, namely because "our substantive due process doctrine has never evaluated substantive rights in purely . . . historical terms."[168] Justice Stevens explained that, in the 1960s, when the Court applied many of the procedural guarantees in the Bill of Rights to the States, the Court evaluated the guarantees' functional significance within the States' regimes, as opposed to the guarantees' historical conceptions.[169] He elucidated that, if the Fourteenth Amendment's guarantee of liberty embraces only those rights so rooted in history, tradition, and practice as to require special protection, then, besides ratifying rights that state actors already afforded the most extensive protection, the Fourteenth Amendment would serve little function.[170]

Next, Justice Stevens explained that, in order to answer the question whether the right asserted by the petitioner applied to the States because of the Fourteenth Amendment itself, the Court had to make two determinations: first, whether "the nature of the right that has been asserted," and whether that "right is an aspect of Fourteenth Amendment liberty."[171]

At the core, Justice Stevens provided six reasons for his disagreement with the Court's approach to *McDonald* and the conclusions it drew.[172] First, he argued, "firearms have a fundamentally ambivalent relationship to liberty."[173] He emphasized that, just as handguns have the potential to help homeowners defend themselves and their property, they also have the potential to "help thugs and insurrectionists murder innocent victims."[174] Further, he explained that, because a gun that ends up

165. *Id.* at 3094.
166. *Id.* at 3095.
167. *Id.*
168. *Id.* at 3098.
169. *Id.* at 3099.
170. *Id.* at 3098.
171. *Id.* at 3103.
172. *Id.* at 3105.
173. *Id.* at 3017.
174. *Id.*

in the wrong hands has the potential to facilitate death, it could potentially "destabilize" ordered liberty.[175] He summarized this point vividly when he said,

> [y]our interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence. And while granting you the right to own a handgun may make you safer on any given day—assuming the handgun's marginal contribution to self-defense outweighs its marginal contribution to the risk of accident, suicide, and criminal mischief—it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation.[176]

Next, Stevens argued that a person's right to choose which firearm he or she will use is "different in kind from the liberty interests we have recognized under the Due Process Clause."[177] Despite his attempt, Justice Stevens reported an inability to identify a single substantive due process case *even suggesting* that "liberty" includes a common-law right to self-defense or a right to keep and bear arms. Justice Stevens suggested that the right at issue is "in some respects . . . better viewed as a property right," pointing out that "interests in the possession of chattels have traditionally been viewed as property interests subject to definition and regulation by the States."[178]

In direct response to the plurality, Justice Stevens explained that, while "some of the other Bill of Rights procedural guarantees may 'place restrictions on law enforcement' that have 'controversial public safety implications,' . . . those implications are generally quite attenuated . . . [and] [t]he link between handgun ownership and public safety is much tighter."[179]

Third, while recognizing that the United States must be the focus of the Court, Justice Stevens maintained that it was important to consider the approaches other countries have taken regarding firearm policies and regulations.[180] He pointed out that the United States is an "international outlier in the permissiveness of its approach to guns. . . ."[181]

Justice Stevens contended that, despite the Court's attempt in *Heller* to find otherwise, because the Second Amendment was adopted for the benefit of the States, the Amendment functions to protect the States

175. *Id.*
176. *Id.* at 3018.
177. *Id.* at 3019.
178. *Id.*
179. *Id.*
180. *Id.* at 3110.
181. *Id.*

from encroachment by the Federal Government.[182] Subsequently, he concluded that the Second Amendment "is a federalism provision . . . directed at preserving the autonomy of the sovereign States, and its logic therefore resists incorporation by a federal court against the States."[183]

Next, Justice Stevens clarified that, just as Americans' history of firearm possession may, in fact, be "deeply rooted," so is the States' history of regulating their possession.[184] In fact, he pointed out, the States' interest in regulating firearm possession is a "far older and more deeply rooted tradition than is a right to carry . . . [a] weapon."[185]

Finally, Justice Stevens invoked policy reasons to support his argument that firearm regulation is an area of the law that should "be allowed to flourish without the Court's meddling."[186] One reason was that cities and states vary greatly in their problems with crime and gun use and, consequently, a broad rule on firearm regulation was insufficient.[187] Justice Stevens asserted, "the Court ought to pay particular heed to state and local legislatures"[188] and let them individually address these issues because local government is most knowledgeable about local problems with gun violence.[189] Further, he argued that, because the Constitution's history, structure, and text are ambiguous, on the issue at bar, the "best solution is far from clear," and the Court should "limit experimentation in [this] area."[190] Additionally, he reasoned that incorporation of the Second Amendment to the states through the Fourteenth Amendment would open the floodgates to litigation "that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right."[191]

Relieved that the Court's decisions in *Heller* and *McDonald* are, for now, limited to the home, Justice Stevens concluded that the *McDonald* holding overturned hundreds of years of Supreme Court precedent and was not "built upon respect for the teachings of history . . . [or] a wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[192]

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182. *Id.* at 3111.

183. *Id.* (citing Elk Grove Unified Sch. Dist. V. Newdow, 542 U.S. 1 (2004) (Thomas, J., concurring in judgment)).

184. *Id.* at 3112.

185. *Id.*

186. *Id.* at 3114.

187. *Id.*

188. *Id.* (citing New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)).

189. *Id.*

190. *Id.* at 3115.

191. *Id.*

192. *Id.* at 3120.

2. BREYER: *McDONALD* IS A REJECTION OF PREEXISTING JUDICIAL CONSENSUS

Justice Breyer's core argument was that the Second Amendment's right to keep and bear arms *is not* incorporated to the States through the Fourteenth Amendment.[193] Justice Breyer declared,

> I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as "fundamental" insofar as it seeks to protect the keeping and bearing of arms for private self defense. Nor can I find any justification for interpreting the Constitution as transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislatures to courts or from the States to the Federal Government.[194]

Justice Breyer reiterated his dissent in *Heller*. He maintained that the "Court rejected the pre-existing judicial consensus that the Second Amendment was primarily concerned with the need to maintain a 'well regulated Militia,' . . . and based its conclusions almost exclusively upon its [flawed] reading of history."[195] Justice Breyer stated that, because history in this area is ambiguous, the *Heller* and *McDonald* Courts erred in relying solely on history.[196]

Next, Justice Breyer provided four reasons to support his conclusion that "incorporation of the right *will* work a significant disruption in the constitutional allocation of decision-making authority, thereby interfering with the Constitution's ability to further its objectives."[197] First, he argued that incorporation of the right recognized in *Heller* would deprive the States of their ability to enact laws under their police powers.[198] Like Justice Stevens, Justice Breyer then suggested that state legislatures are better equipped than the Court to find answers to the perplexing questions that determining the constitutionality of an individual state's firearm regulations produce.[199] He stated, "[legislatures] are far better suited than judges to uncover facts and to understand their relevance. And legislators, unlike Article III judges, can be held democratically responsible for their empirically based and value-laden conclusions."[200] In a blunt final statement on this point, Justice Breyer declared that, just because the Court erred in "*Heller* is no reason to make matters

193. *Id.* (Breyer, J., dissenting).
194. *Id.*
195. *Id.* at 3121.
196. *Id.* at 3122.
197. *Id* at 3125.
198. *Id.*
199. *Id.* at 3126.
200. *Id.* at 3128.

worse here."[201] Further, he pointed out that, historically, States and local communities have differed with regard to their need for firearm regulations and the appropriate levels of these regulations.[202] Fourth, Justice Breyer provided a brief history of Oak Park's reason for instituting its gun ban, stating, "although incorporation of any right removes decisions from the democratic process, the incorporation of this right does so without strong offsetting justifications . . . ."[203]

Justice Breyer concluded his dissent by providing an outline of the numerous flaws in the plurality's historical analysis, with the goal of demonstrating that States have enacted gun regulations similar to Chicago's and Oak Park's throughout the history of the nation.[204] He argued that the plurality's assertion that the right to keep and bear arms is deeply rooted for purposes of self-defense was inconclusive for four reasons.[205]

First, the Second Amendment was enacted in order to protect militia-related rights.[206] Next, historians who evaluated the Court's historical analysis in *Heller* concluded that Eighteenth-century language alluding to the right to keep and bear arms was *not* intended to refer to a private right to self-defense.[207] Third, despite the *Heller* Court's claim to the contrary, scholarly articles indicated that firearms were heavily regulated at the time of the framing of the Constitution.[208] Further, he highlighted the fact that even after the adoption of the Constitution, many States continued their practices of regulating firearms.[209]

Finally, Justice Breyer argued that the majority erred in failing to evaluate Twentieth and Twenty-first-century evidence about the Second Amendment.[210] He stated, "it is essential to consider the recent history of the right to bear arms for private self-defense when considering whether the right is fundamental."[211]

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201. *Id.*

202. *Id.* at 3129 (citing Medtronic, Inc. v. Lohr et vir, 518 U.S. 470 (1996) for the proposition that the law has treated gun control as matters of local concern).

203. *Id.*

204. *Id.* at 3131.

205. *Id.*

206. *Id.*

207. *Id.* (citing Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139 (2007)).

208. *Id.* at 3132.

209. *Id.*

210. *Id.* at 3135.

211. *Id.*

C. *The Concurrences*

1. SCALIA: STEVENS SELECTIVELY APPLIES PRINCIPALS THAT SUPPORT HIS DESIRED CONCLUSION

According to Justice Scalia, the reasons Justice Stevens provided for his conclusion that the right to keep and bear arms is not fundamental enough to be applied to the states were flawed, "do[ing] nothing to stop a judge from arriving at any conclusion [Justice Stevens] sets out to reach."[212] He argued that Justice Stevens' reasons were unpersuasive, ". . . intrinsically indeterminate, would preclude incorporation of rights we have already held incorporated, or both."[213]

For example, Justice Scalia criticized Justice Stevens' argument that firearms have a "fundamentally ambivalent relationship to liberty," as they can be used in an injurious manner.[214] Citing the First Amendment as an example of a right that would be excluded from incorporation under Justice Stevens' standard, Justice Scalia asserted that there was no way Stevens could have meant that the Due Process Clause covers only rights with *no potential harm to anyone*.[215]

Justice Scalia also addressed Justice Stevens' assertion that even if there is a "plausible constitutional basis for holding the right to keep and bear arms is incorporated," the Court should not do so for prudential reasons. Justice Scalia responded,

> The obviousness of the optimal answer is in the eye of the beholder. The implication of Justice Stevens' call for abstention is that if We The Court conclude that They The People's answers to a problem are silly, we are free to "intervene," but if we are too uncertain of the right answer, or merely think the States may be on to something, we can loosen the leash.[216]

Finally, Justice Scalia contended that Justice Stevens inappropriately attempted to employ criteria that "appl[y] only when judges want it to" and selectively applied principles that support only his desired conclusion.[217]

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212. *Id.*
213. *Id.*
214. *Id.* at 3054.
215. *Id.* at 3055.
216. *Id.* at 3057.
217. *Id.* at 3056.

2. THOMAS: THE RIGHT TO KEEP AND BEAR ARMS IS INCORPORATED TO THE STATES THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE

Justice Thomas concurred in part and concurred in the judgment.[218] While he agreed with the Court's conclusion that the Second Amendment is incorporated to the States through the Fourteenth Amendment, Justice Thomas was the only Justice who concluded that the right to keep and bear arms is not incorporated through the Due Process Clause; rather, he said, because it is a privilege of American citizenship, it is incorporated through the Privileges or Immunities Clause.[219] In response to the Court's holding that the Second Amendment is incorporated through the Due Process Clause, Justice Thomas stated, "any serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does."[220]

While acknowledging the important role *stare decisis* plays in the legal system, he maintained, "*stare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means."[221] Justice Thomas preemptively defended his position, saying that he was by no means promoting a revision of the country's Fourteenth Amendment case law; instead, he viewed *McDonald* as an opportunity for the Court to reinstate "the meaning of the Fourteenth Amendment agreed upon by those who ratified it."[222]

Thomas dedicated a generous portion of his concurrence to providing a history of what "ordinary citizens" at the time of and immediately following ratification of the Fourteenth Amendment understood the Privileges and Immunities Clause to mean.[223] He summarized "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms [i]n my view, the right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause."

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218. *Id.* at 3059 (Thomas, J., concurring).

219. *Id.*

220. *Id.* at 3062 (Thomas, J., concurring).

221. *Id.* (citing Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part)).

222. *Id.* at 3063.

223. *Id.* at 3063–76. Thomas undertook this textual analysis operating under the proposition from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."

V. A SHOT IN THE DARK: WHY THE COURT'S ANALYSIS IN *MCDONALD* IS WRONG

Second Amendment activists celebrated their victory when the Court released its opinion in *McDonald.* At the same time, critics of the decision were busy expressing their outrage and frustration. One critic claimed the Court's ruling was nothing more than the result of "five conservative, activist judges whose arc of justice bends towards those with guns no matter the circumstance and no matter the community."[224] This critic exclaimed, "[The] U.S. Supreme Court unleashed an unabated free for all by the NRA and other pro-gun extremists over who can arm how many people in the shortest period of time."[225]

Arguments opposing the Court's decision to incorporate the Second Amendment are not without fortitude. Because evidence supports the conclusions that the Framers did not intend the Second Amendment to apply to the States; the Second Amendment is dissimilar to the incorporated provisions of the Bill of Rights; and state and local governments are in a better position to regulate firearm possession and use, the Court's decision in *McDonald* is flawed.

A. *The Second Amendment Was Not Intended to Apply to the States*

In *Palko v. Connecticut*, the Court stated that provisions of the Bill of Rights are incorporated into the Due Process Clause only if they are "implicit in the concept of ordered liberty."[226] The Court explained, "[i]n order for a right to be implicit in the concept of ordered liberty, it must be . . . essential . . . to the very concept of ordered liberty . . . , meaning that that neither liberty nor justice would exist if the right were sacrificed."[227]

Therefore, the standard for Fourteenth Amendment incorporation "is and should be an exacting one."[228] Federalism operates under two crucial presumptions: When conditions vary from one locale to another, residents and local governments should be able to address them without interference of the federal government; and, even if conditions in two states are comparable, each state may experiment to determine what solutions work best for that particular state.[229] "The Constitution estab-

224. Rep. Bobby L. Rush, *Supreme Courts Decision in* McDonald v. City of Chicago *Usurps Local Control Over Public Safety*, THE HILL'S CONGRESS BLOG (June 29, 2010, 7:45 AM), http://thehill.com/blogs/congress-blog/judicial/106089-supreme-court.

225. *Id.*

226. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

227. *Id.* at 326.

228. Brief for Respondents City of Chicago & Village of Oak Park at 10, *McDonald*, 130 S. Ct. at 3020 (No. 08-1521).

229. *Id.* at 10–11.

lishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule."[230]

These presumptions are of specific applicability and importance to the Second Amendment, as "it is the only Bill of Rights provision that confers a substantive right to possess a specific highly dangerous physical item—an item designed to kill or inflict serious injury on people."[231] The decision whether to incorporate the federal right to bear arms must consider its uniquely dangerous character.[232] The fact that there is considerable debate surrounding firearms regulation helps support the assertion that States and local governments should be given the latitude to impose and monitor regulations on their own.[233] As the Court said in *United States v. Morrison*, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the states, than the suppression of violent crime and vindication of its victims."[234] The Courts' incorrect holding that the Second Amendment is incorporated to the states "interfere[s] significantly with each states' ability to structure relations exclusively with its own citizens" and "threaten[s] the future fashioning of effective and creative programs for solving local problems."[235]

The *Heller* and *McDonald* Courts' rejection of Justice Breyer's proposal that reasonable gun control regulations should be upheld was erroneous. States recognizing a right to bear firearms explicitly acknowledge the fact that this right is subject to interest-balancing.[236] The interests that must be balanced are "the individuals' ability to defend herself [and] the collective need to protect all others."[237] Under the reasonableness standard, state courts have historically approved a wide range of firearm regulations.[238] Because "the reasonableness test has been the

230. Nat'l Rifle Ass'n. of Am., Inc. v. City of Chicago, Ill., 567 F.3d 856, 860 (2009) (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country)).

231. Brief for Respondents City of Chicago & Village of Oak Park, *supra* note 228, at 11.

232. Brief for the States of Illinois, Maryland et al. as Amici Curiae Supporting Respondents at 18, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521).

233. *Id.*

234. United States v. Morrison, 529 U.S. 598, 618 (2000).

235. Brief for the States of Illinois, Maryland et al., *supra* note 232, at 18.

236. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 194–203 (2006); *see also* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007).

237. Winkler, *supra* note 236, at 715.

238. Brief for Respondents City of Chicago & Village of Oak Park, *supra* note 228, at 25.

rule, not the exception, throughout most of our nation's history,"[239] there is "no reason to fear that the democratic processes at work in the States will not strike the proper balance between the legitimate interests of gun owners and public safety."[240]

Contrary to its holding in *McDonald*, the Supreme Court previously made clear that a right that was "sufficiently valued to [be] include[d] in the Bill of Rights is not sufficient to establish that it was implicit in the concept of ordered liberty and therefore should be applied to the States."[241] Firearm regulations have an interesting relationship to the concept of liberty. "Because handguns are so well adapted for the commission of crimes and the infliction of injury and death, stringent handgun regulations, including prohibitions, can be reasonably thought to *create* the conditions necessary to foster ordered liberty, rather than detracting from it."[242] By reducing violence, injury, and death, firearm bans may in fact enhance a system of ordered liberty.[243] Inversely, because incorporation substantially limits a state's ability to make decisions about the best solution to its particular problems, it can actually intrude upon a system of ordered liberty.[244]

The *McDonald* Court relied heavily on its historical analysis in *Heller* to reach the conclusion that the Second Amendment was incorporated to the States through the Fourteenth Amendment's Due Process Clause. In *Heller*, the Court analyzed framing-era history in an attempt to determine if the right to keep and bear arms was a right only connected to militia service or if it was an individual right unrelated to militia service.[245] The Court concluded that the Second Amendment was an "individual right to possess and carry weapons in case of confrontation.[246] The *Heller* Court noted, however, that the right to keep and bear arms was not codified to protect individuals in the case of confrontation.[247] Instead, the right was codified to protect the militia against the federal government in the event that the federal government would take away the militia's arms.[248]

Historically, "when the Court has examined the Framing-era history as support for incorporating a right in the Due Process Clause, the

239. Brief of the United States Conference of Mayors as Amicus Curiae Supporting Respondents at 22, *McDonald*, 130 S. Ct. at 3020 (No. 08-1521).

240. Brief for the States of Illinois, Maryland et al., *supra* note 232, at 22.

241. Brief for Respondents City of Chicago & Village of Oak Park, *supra* note 228, at 31.

242. *Id.* at 15.

243. *Id.*

244. *Id.*

245. *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

246. *Id.* at 591.

247. *Id.* at 598.

248. *Id.*

right was included in the Bill of Rights because its protection of individual liberty was valued for its own sake."[249] The Second Amendment, however, was not codified because the Framers thought its protection of individual liberty was essential to a free society.[250] Nothing in *Heller* or anywhere else suggests that the Framers would have included the Second Amendment in the Bill of Rights, if not for the militia-related purpose.[251] From this, only one conclusion can be made: The Framers did not intend the Second Amendment to be incorporated to the States.

B. *The Second Amendment Is Unlike the Incorporated Provisions of the Bill of Rights*

In *Thornhill v. Alabama*,[252] the Court stated that the First Amendment was incorporated to the States because a person's First Amendment rights are "essential to free government." Likewise, in *Wolf v. Colorado*,[253] the Court held that the Fourth Amendment is incorporated to the States because "[t]he security of ones privacy against arbitrary intrusion by the police is basic to a free society and implicit in the concept of ordered liberty." Unlike the other incorporated provisions of the Bill of Rights, the Second Amendment is the only provision that confers a substantive right to possess a specific, highly dangerous item designed to kill or inflict serious injury.[254] Petitioners argued[255] that, because the Due Process Clause incorporated almost all the other enumerated rights, the Second Amendment should be incorporated as well. However, "there is no 'me, too' principle applicable to incorporation. To establish that a particular provision of the Bill of Rights applies to the States, *that* particular provision . . . must be so fundamental that it warrants displacing the ability of local governments to make their own sovereign choices . . . for their own conditions."[256] While other incorporated provisions of the Bill of Rights were motivated primarily by the protection of private rights, the Second Amendment was created to preserve state sovereignty. Thus, the Second Amendment is not a private right, but rather a federalism provision that should resist incorporation.[257]

In fact, the Second Amendment is closer to the *non-enumerated*

249. Brief for Respondents City of Chicago & Village of Oak Park, *supra* note 228, at 33.
250. *Id.* at 34.
251. *Id.*
252. 310 U.S. 88, 95 (1940).
253. 338 U.S. 25, 27 (1949).
254. Brief for Respondents City of Chicago & Village of Oak Park, *supra* note 228, at 11.
255. Brief for Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, Second Amendment Foundation, Inc., and Illinois State Rifle Association at 66, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).
256. Brief for Respondents City of Chicago & Village of Oak Park, *supra* note 228, at 40.
257. Brief for the States of Illinois, Maryland et al., *supra* note 232, at 8.

rights (the Fifth Amendment grand jury and Seventh Amendment civil jury rights) than to the *enumerated rights* (First, Fourth, Fifth, Sixth Amendments).[258] The enumerated rights were enumerated because they themselves are core aspects of liberty.[259] Historically, when the Court evaluated the meaning of each of the provisions of the Bill of Rights, it had to address hotly contested issues concerning each of those rights.[260] "But the necessity to a free society of each of the [incorporated] substantive rights . . . is not seriously open to question."[261] On the contrary, firearms, the subject matter of the Second Amendment, is highly controversial because of a firearm's propensity for causing injury or death.[262] Consequently, the argument that, because other provisions of the Bill of Rights have been incorporated, the Second Amendment should also be incorporated, fails because the Second Amendment is unlike any of the incorporated provisions of the Bill of Rights and is not, in and of itself, a core aspect of ordered liberty.

C. *Different Communities, Different Problems: States and Local Government, Not the Federal Government, Should Regulate Firearm Use*

In the United States, handguns are used to kill more people than all other weapons combined.[263] Handguns are designed to injure or kill, and conditions of their use and abuse vary widely around the country.[264] Therefore, different communities, not the courts, should be allowed to come up with varying conclusions about the proper approach to addressing these community-specific issues.[265] "Gun regulation requires highly complex socioeconomic calculations regarding how to balance within a particular community the individual's ability to defend herself against the collective need to protect others—a balance that courts are not institutionally equipped to make."[266]

Under certain circumstances, stringent firearm regulations can reduce injury and death and limit violence altogether.[267]

> Firearms cause well over 60,000 deaths and injuries in the United States each year. Those who live in urban areas, police officers,

258. Brief for Respondents City of Chicago & Village of Oak Park, *supra* note 228, at 40.
259. *Id.*
260. *Id.*
261. *Id.* at 41.
262. *Id.*
263. *See* Josh Sugarmann, EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING GUNS 75 (2001).
264. Brief for Respondents City of Chicago & Village of Oak Park, *supra* note 228, at 13.
265. *Id.* at 12–13.
266. Winkler, *supra* note 236, at 683.
267. Brief for Respondents City of Chicago & Village of Oak Park, *supra* note 228, at 13.

> women, and children all may be particularly at risk. And gun regulation may save their lives. Some experts calculated, for example, that Chicago's handgun ban has saved several hundred lives, perhaps close to 1,000, since it was enacted in 1983. Other experts argue that stringent gun regulations can help protect police officers operating on the front lines against violence.[268]

A recent study found that stop-and-frisk tactics that focused on discovering concealed handguns reduced crime by disrupting open-air drug sales.[269] Further, firearm regulations play an important role in increasing police authority to engage in stop-and-frisk tactics.[270] A stop-and-frisk conducted by a police officer who reasonably suspects an individual is carrying a firearm banned by law is considered constitutionally permissible. However, when law does not ban possession of such firearms, the Fourth Amendment does not permit stop-and-frisks, even when officers have a reason to believe an individual is armed or dangerous.[271] The latter situation not only limits a police officer's ability to fight crime, but it also increases the risk that ordinary citizens will be injured or even killed by these guns.

In general, urban areas face higher levels of firearm crime and homicides, while rural areas tend to have more problems with gun suicide and accidents.[272] Because the amount and nature of gun violence varies greatly among cities, municipalities have historically pursued disparate approaches regarding the necessity of firearm regulations.[273] A state's interests in protecting its citizens from injury, loss of life, and damage caused by firearms should not be handcuffed by the federal government's unwarranted intrusion into a field resting exclusively within the State's police powers.

The "[h]ealth and safety of . . . citizens are . . . matters of local concern, [and] states traditionally have had great latitude under their police powers to legislate as to protection of lives."[274] For example, by 1770, Boston, New York City, and Philadelphia had enacted laws prohibiting the shooting of guns.[275] Boston's law directly addressed the storage of firearms in the home, as did the municipalities in *Heller* and

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268. McDonald v. City of Chicago, 130 S. Ct. 3020, 3129 (2010) (Breyer, J., dissenting).

269. Bruce D. Johnson, Andrew Golub & Eloise Dunlop, *The Rise and Decline of Hard Drugs, Drug Markers, and Violence in Inner-City New York*, in THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman eds., 2d ed. 2006).

270. Brief of the United States Conference of Mayors, *supra* note 239, at 14.

271. *See generally* 4 Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(a) (4th ed. 2004).

272. *McDonald*, 130 S. Ct. at 3130 (Breyer, J., dissenting).

273. *Id.* at 3129.

274. Hillsborough Cty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 719 (1985).

275. Churchill, *supra* note 207, at 162.

McDonald.[276] This law imposed monetary fines upon anyone who "shall take [any firearm] into [a] Dwelling-House or Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building, within the Town of Boston. . . ."[277] The Supreme Court of Michigan upheld a statute banning the possession of any machine gun capable of being fired sixteen times without reloading.[278] The court reasoned that the statute was a reasonable exercise of the State's police power.[279] In 1960, the Court of Criminal Appeals of Texas upheld a ban on the possession of machine guns, stating the ban was constitutional.[280] Further, in 1990, the Supreme Court of Nebraska upheld a statute prohibiting possession of a shotgun. The court reasoned that the prohibition was a reasonable exercise of the State's police powers, and did not violate Nebraska's Constitution.[281]

Judges lack the experience and knowledge necessary to make important decisions regarding firearm regulations specific for each community. The Court is bound by stare decisis and, absent the accountability to be held responsible for value-laden conclusions, state and local governments are better suited to retain the long-recognized right to regulate firearms as they see fit for their particular communities' needs.[282]

VI. WHAT IS A STATE TO DO: THE STANDARD OF REVIEW (OR LACK THEREOF) FOR THE SECOND AMENDMENT

Although there is little question about *McDonald's* importance in Second Amendment jurisprudence, in many ways, it merely opened a Pandora's Box of uncertainty.[283] Despite this author's disagreement with the Court's holding in *McDonald*, given the Second Amendment's incorporation and the *Heller* and *McDonald* court's failure to articulate the standard of review, the lower court's are now charged with determining the appropriate standard on a case-by-case basis.

Justice Breyer "chided"[284] the majority for not determining the standard of review and insisted "the question matters."[285] The majority justified its failure to establish the standard of review for the Second Amendment: "Since this case represents this Court's first in-depth

276. *Id.*
277. *Id.*
278. People v. Brown, 253 Mich. 537, 539 (1931).
279. *Id.* at 541.
280. Morrison v. State, 339 S.W.2d 529, 532 (Tex. Crim. App. 1960).
281. State v. LaChapelle, 451 N.W.2d 689, 691 (Neb. 1990).
282. McDonald v. City of Chicago, 130 S. Ct. 3020, 3128 (2010) (Breyer, J., dissenting).
283. Ben Howell, *Come and Take it: The Status of Texas Handgun Legislation After District of Columbia v. Heller*, 61 BAYLOR L. REV. 215 (2009).
284. *Heller*, 554 U.S. at 635 ("Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt.")
285. *Id.* at 687 (Breyer, J., dissenting).

examination of the Second Amendment, one should not expect it to clarify the entire field."[286] True as it may be that *Heller* was a case of first impression for the Court, that justification does not explain the Court's failure to adopt a standard of review in *McDonald*. In the latter case, the Court erroneously determined that the Second Amendment applies to the States, but failed to provide the States with guidance on a standard of review to evaluate firearm regulations.

A. Nordyke v. King: *The Ninth Circuit's Standard of Review for the Second Amendment*

Since *McDonald*, lower courts have been left to determine the standard of review in Second Amendment cases. In *Nordyke v. King*[287] the Ninth Circuit addressed whether the Second Amendment prohibited Alameda County, California from banning gun shows on county property.[288] The *Nordyke* court applied the substantial burden test and held that the county's gun show was constitutional in that it did not substantially burden Second Amendment rights.[289]

Writing for the majority, Judge O'Scannlain reasoned that applying a single standard of review to all gun-control regulations would be inconsistent with *Heller*, where the court "suggested a distinction between remote and severe burdens on the right to keep and bear arms."[290]

Echoing Justice Breyer's dissent in *Heller*,[291] the *Nordyke* court concluded that applying strict scrutiny to all gun-control regulations would force courts to "determine whether each challenged gun-control regulation is narrowly tailored to a compelling governmental interest."[292] This would not work since courts cannot determine whether a regulation is narrowly tailored without deciding whether the regulation

286. *Id.* at 634 (majority opinion).

287. Nordyke v. King, No. 07–15763, 2011 WL 1632063 (9th Cir. May 2, 2011).

288. *Id.* at *7.

289. *Id.* at **7–13. "When deciding whether a restriction on gun sales substantially burdens Second Amendment rights, we should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes." The court stated, "a law does not substantially burden a constitutional right simply because it makes the right more expensive or more difficult to exercise." Further, simply declining to use government funds or property to facilitate the exercise of that right is also unlikely to substantially burden a constitutional right.

290. *Id.* at *4.

291. "Adoption of a true strict scrutiny standard for evaluating gun regulations would be impossible . . . because almost every gun-control regulation will seek to advance . . . a primary concern for every government—a concern for the safety and . . . the lives of its citizens." District of Columbia v. Heller, 554 U.S. 570, 687 (2008) (Breyer, J., dissenting) (citing United States v. Salerno, 481 U.S. 739, 755 (1987)).

292. *Nordyke*, 2011 WL 1632063 at *4.

is likely to be effective.[293] Further, the court stated, "Sorting gun-control regulations based on their likely effectiveness is a task better fit for the legislature."[294]

The *Nordyke* court held the application of a substantial burden test would be more "judicially manageable" than an approach that broadly applies strict scrutiny to all gun-control laws, arguing that this test will not produce as many difficult empirical questions as strict scrutiny.[295] The court relied on the Supreme Court's application of the substantial or undue burden test in other contexts[296] to support its position and emphasized "the Supreme Court does not apply strict scrutiny to every law that regulates the exercise of a fundamental right . . . ."[297] While the *Nordyke* majority's substantial burden test may in fact be more judicially manageable than a reflexive use of strict scrutiny, the application of the substantial burden test, a form of heightened scrutiny, would be equally paradoxical and fatal, leaving presumptively lawful regulations to be struck down as unlawful.

B. *Justice Breyer's Interest Balancing, Or, In the Alternative, Judge Gould's Reasonableness Review Should be Adopted*

Because "gun-control regulation is not a context in which a court should effectively presume either constitutionality . . . or unconstitutionality . . . [and] important interests lie on both sides of the constitutional equation,"[298] Justice Breyer's interest-balancing approach should be implemented as the standard of review in Second Amendment cases. Justice Breyer stated, "where a law significantly implicates competing constitutionality protected interests in complex ways, the Court asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[299] The majority rejected Breyer's interest-balancing approach, claiming no other enumerated right has been "subjected to [such] a freestanding 'interest-balancing'

293. *Id.*

294. *Id.*

295. *Id.* at *5.

296. For example, the Nordyke court cited Planned Parenthood, 505 U.S. 833 (1992) for its holding that pre-viability abortion regulations are unconstitutional if they impose an "undue burden" on a woman's right to terminate her pregnancy, and Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 293 (1984) for its holding that content-neutral speech regulations are unconstitutional if they do not leave open alternative channels for communication. *Nordyke*, 2011 WL 1632063 at *6.

297. *Id.*

298. *Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

299. *Id.* (internal quotations omitted) (citing Nixon v. Shrink Mo. Govn't. PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

approach."[300] However, contrary to this assertion, the Court *has* utilized this approach[301] in election-law cases,[302] due process cases,[303] and speech cases.[304]

Justice Breyer further stated that experience and logic has "led the Court to decide that in one area of constitutional law or another the interests are likely to prove stronger on one side of a typical constitutional case than on the other."[305] Further, because articulating the standard of review for the Second Amendment is a task the Court has never previously undertaken, the Court should implement the interest-balancing standard, as it would "give courts the opportunity to weigh the interests without the built-in bias for or against the regulation that exists from the beginning of the evaluation in either the rational-basis or strict-scrutiny contexts."[306]

Because the *Heller* Court explicitly rejected Justice Breyer's interest-balancing approach[307] lower courts may be reluctant to adopt such a methodology. In the alternative, lower courts may consider adopting Judge Gould's reasonableness standard as laid out in his *Nordyke* concurrence.

"I would subject to heightened scrutiny only arms regulations falling within the core purposes of the Second Amendment, that is, regulations aimed at restricting defense of the home, resistance of tyrannous government, and protection of country; I would subject incidental burdens on the Second Amendment right to reasonableness review."[308] Gould analogized the Second Amendment reasonableness standard to First Amendment time, place and manner speech restrictions. "Reasonable time, place, and manner restrictions are allowed, but restrictions based on the content of the speech must satisfy strict scrutiny."[309] The *Nordyke* majority incorrectly conflated reasonableness review with rational basis review and assumed that subjecting Second Amendment

300. *Id.* at 634 (majority opinion).

301. *Id.* at 689 (Breyer, J., dissenting).

302. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

303. Matthews v. Eldridge, 424 U.S. 319, 339–49 (1976).

304. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Ctny., 391 U.S. 563, 568 (1968).

305. *Heller*, 554 U.S. at 689–91.

306. Ryan L. Card, *An Opinion Without Standards: The Supreme Court's Refusal to Adopt A Standard of Constitutional Review in District of Columbia v. Heller Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations*, 23 B.Y.U. J. PUB. L., 259, 287 (2009).

307. "The very enumeration of the right takes out of the hands of government-even the Third Branch of Government-the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 684.

308. *Nordyke*, 2011 WL 1632063 at *15.

309. *Id.*

regulations to reasonableness review would essentially be applying rational basis scrutiny to every gun-control regulation that is not a total ban on handguns.[310] Gould differentiated the reasonableness test as focusing on the balance of the interests at stake,[311] as opposed to rational basis under which a court evaluates whether any public welfare rationale exists for the restriction.[312] Unlike rational basis review, which would "approve laws that make guns nearly impossible to obtain," depending on the interests at stake, under reasonableness review some arms restrictions will be invalidated.[313] Because "prudent, measured armed restrictions for public safety are not inconsistent with a strong and thriving Second Amendment,"[314] incidental burdens on the Second Amendment should be subject to reasonableness review.

VII. CONCLUSION

McDonald is undisputedly a landmark case. A pernicious combination of the Court's self-serving reading of history, its over-reliance on *Heller*, and the majority's crude love affair with the gun has led to the erroneous conclusion that the Second Amendment is incorporated to the States through the Fourteenth Amendment's Due Process Clause.

Because gun use varies widely among communities, local governments should retain their historic privilege of regulating firearm control. Further, unlike the neutral arbiters of the law, state and local representatives have direct access to empirical data relating to community-specific issues and have experience with these matters. Contrary to the Courts previous holding that the safety and well-being of a state's citizens falls within a states police powers, the *McDonald* Court has upset the principles of federalism on which this country was founded.

As demonstrated in the Ninth Circuit's lengthy discussion in *Nordyke*, in failing to articulate the standard of review for the Second Amendment the Supreme Court has left the lower courts shooting blanks in a live-ammunition gunfight.

310. *Id.* at *16.

311. Given Gould's explanation of reasonableness review as "focusing on the balance of interest at stake," reasonableness review can be considered analogous to Justice Breyer's interest-balancing approach. However, because the Court has not explicitly rejected reasonableness review, lower courts may feel more inclined to adopt this standard.

312. *Nordyke*, 2011 WL 1632063 at *16.

313. *Id.* at *17.

314. *Id.* at *18.