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TRENDS IN GUN LEGISLATION: THE METAMORPHOSIS OF OUR SECOND AMENDMENT RIGHTS

Matthew W Loeser

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TRENDS IN GUN LEGISLATION: THE METAMORPHOSIS

OF OUR SECOND AMENDMENT RIGHTS

By Matthew Loeser

I. Abstract

The United States Constitution, and more specifically the amendments to the Constitution, are often erroneously considered to be archaic relics of an earlier time of our country; rules that, despite instilling fundamental rights, are static documents that are frozen in time. This ideology, however, is far from reality. Much like our country, the amendments are in a constant state of flux, ever-changing and evolving to fit the advancements and changing needs of society. Although the wording of these amendments does not change, the way in which they are interpreted does, sometimes quite far from what the framers’ intent may have been.

As a general overview, in looking at the Supreme Court's interpretation of amendments over time, we can identify a shift instilling a greater emphasis on individual rights. When looking at the metamorphosis of interpretation of the Second Amendment since its inception in the English Bill of Rights, the cases of: Miller, Heller, and McDonald immediately spring to mind. The aim of this article will be to accurately spot and predict the direction in which gun laws will take. However, when making a prediction, we cannot simply look to the present and hope to gain a full understanding of the issue at hand; we must first look to understand the meaning and intent behind the object. By analyzing these cases and the history behind the Second Amendment, we will be better able to predict with some element of substantial certainty the future trends that gun law will take in the United States.
The outcome of *Heller* was significant not only because of its holding, but in the questions of incorporation that arose from it. These very questions have provided the essence of cases such as *McDonald*, in which courts have begun to evaluate the constitutionality of individual states' regulations and statutes on the use and availability of firearms.\(^1\) The ability to spot trends in gun legislation will be of great importance in years ahead due to the upsurge in Second Amendment ligation that has crept, and will more prominently creep, into the courtroom post-*McDonald*. Despite these recent developments, the Supreme Court has yet to develop a standard that courts can use to rule in these state-by-state cases, a question that undoubtedly must be addressed in the near future.

This article, not only will analyze these three aforementioned cases and predict future trends, but will address unanswered questions that these cases created. To particular, this article will address the empirical questions that arose from the holding of *Heller* and will provide probable standards that the courts will utilize in the near future to address them.

**II. Introduction**

To predict the future, it is imperative to first understand the past. In the case of gun control legislation, a discussion of likely trends should begin with a discussion of where the concept of the Second Amendment was taken from, and why the framers of the Constitution believed that it was necessary to include the Second Amendment in the Bill of Rights. The Second Amendment of the United States Constitution states that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not

be infringed.”

Prior to being drafted as an amendment to the Constitution however, this phrase made an appearance in the English Bill of Rights in 1688.

Whereas the late King James the Second by the Assistance of diverse evill Councellors Judges and Ministers imploied by him did endeavour to subvert and extirpate the Protestant Religion and the Lawes and Liberties of this Kingdome (list of grievances including) ... by causing severall good Subjects being Protestants to be disarmed at the same time when Papists were both Armed and Imploied contrary to Law,... thereupon the said Lords Spirituall and Temporall and Commons pursuant to their respective Letters and Elections being now assembled in a full and free Representative of this Nation taking into their most serious Consideration the best means for attaining the Ends aforesaid Doe in the first place (as their Auncestors in like Case have usually done) for the Vindicating and Asserting their ancient Rights and Liberties, Declare... That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.

By looking at the historical context from which this bill was written, the reader gains an insight as to what rights and liberties it sought to protect. The wording of this bill was made to protect the right of Protestant subjects to not be disarmed by their king. During this period in history, England had just undergone the Glorious Revolution, in which King James II was overthrown and succeeded by the Protestants William III and Mary II. By enacting the English Bill of Rights in 1688, Parliament intended to give back the “ancient Rights and Liberties”, including the right to have arms, which had been revoked under the rule of King James II.

Flashing forward to 2008, Justice Scalia of the Supreme Court in *Heller* references this in support of the decision that the right to bear arms was “clearly an individual right, having

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2 U.S. Const. amend. II
4 J. de Lolme. *The Rise and Progress of the English Constitution*. 886–887 (1784) (A. Stephens ed. 1838);
nothing whatsoever to do with service in the militia".\(^7\) Indeed this statement is valid insofar as the right did not pertain to service in a militia, but to the individual; however, this might largely be attributed to the fact that at this time England had no standing army, making it the duty of the individual to protect the king’s peace and ensure the safety and well-being of themselves and others.\(^8\)

From this text, it becomes abundantly clear that the Second Amendment, as we know it, was not taken from context, but is instead an interpretation, loosely based on the language of the bill. It is interesting to note that nowhere in this passage is it stated, or even implied, that these individuals had been given the right to acquire new firearms; they simply been given back an existing right to keep the arms they had. Furthermore, the bill specifies that the arms it refers to are only those “as allowed by law”. This clause is an essential element of the bill because it enabled the British Parliament to regulate gun laws.\(^9\) Although the Second Amendment began as being very closely associated with the intent behind this section of the English Bill of Rights, the subtle differences between the two have seemingly grown over time. By employing this historical perspective when analyzing the modern cases of gun litigation – namely \textit{Heller} and \textit{McDonald} – a clear distinction between the original and the modern interpretation of Second Amendment becomes evident.\(^10\)

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7 W. Rawle, \textit{A View of the Constitution of the United States of America}. page122 (1825).
9 Malcolm, Joyce Lee, \textit{"The Role of the Militia, in the Development of the Englishman’s Right be Armed — Clarifying the Legacy"} pp. 139-51. (1993)
III. Formation of the Second Amendment in Early America

Following the signing of the Constitution, and its approval by delegates of the Constitutional Convention of 1787, it then had to be ratified by the states. Under Article VII of the Constitution, ratification required the approval of nine special state conventions. States that decided not to ratify the Constitution would consequently not be considered a part of the Union and would therefore be considered separate countries. At this time, however, there was a considerable group of people, known as Anti-Federalists, who were opposed to the idea of the creation of a federal government that would have power over the states. The Anti-Federalists were primarily comprised of farmers and tradesmen, and believed that each state should have a sovereign, independent government. Some of the more prominent Anti-Federalists included Patrick Henry, George Mason, and Thomas Jefferson later in his life.\(^{11}\)\(^{12}\)

During the ratification process by the states, the Anti-Federalists expressed their views on the relationship between freedom and arms in pamphlets, such as Letters from the Federal Farmer to the Republican by Richard Henry Lee.\(^{13}\) The Federal Farmer argued that a national government would undermine the freedom of the people:

“[T]he general government, far removed from the people, and none of its members elected oftener than once in two years, will be forgot or neglected, and its laws in many cases disregarded, unless a multitude of officers and military force be continually kept in view, and employed to enforce the execution of the laws and to make the government feared and respected.”\(^{14}\)


\(^{12}\)Crosskey, Politics and the Constitution in the History of the United States (1953 (vols. 1 & 2), 1980 (vol. 3 with W. Jeffrey)).

\(^{13}\)Although Richard Henry Lee is commonly given credit for writing the "Letters From the Federal Farmer to the Republican" the true author is unknown.

\(^{14}\)Lee, Richard Henry. Letters from the Federal Farmer to the Republican. (1787).
Although Lee understood the necessity for maintaining a common defense, he thought there should be an additional means of safeguarding this right in order to ensure the federal government wouldn’t be too strong. In this pamphlet, he suggested a requirement of two-thirds consent in Congress before the national government could raise a standing army or the militia could be called into service. Another major element of the Anti-Federalist argument that was brought forth in this pamphlet was that in order to ensure freedom from tyranny, all the citizens should have the right to carry arms and train in the using of them. This sentiment was mirrored by George Mason, who stated that every individual citizen had the right of self-defense; a position that would come to be echoed in the Heller case. Indeed the heart of the Anti-Federalist’s argument clearly resonates in that of the modern day gun control advocates. In order to protect individual rights against the oppression of a tyrannical central government, the Antifederalists demanded the addition of a Bill of Rights, which included the right to keep and bear arms.

In opposition to the Anti-Federalists were the Federalists, who favored the creation of a strong federal government that would serve to unite all the sovereign states as a single nation. The Federalists predominantly came from the wealthier class of merchants, business oriented citizens, and plantation owners. Some notable leaders of the Federalists included George Washington, Benjamin Franklin, James Madison, and Alexander Hamilton. The Federalists supported the Constitution as it had been drafted, and agreed with the Anti-Federalists that

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governmental tyranny was the main danger that citizens had to protect against.¹⁷ This concern was a valid one, especially after the recent overthrow of a tyrannical government in the American Revolution. For this reason, the Federalists were also weary of governmental despotism. James Madison encapsulated the Federalist position by arguing that although there would be a system of checks and balances, the right of the people to bear arms in militias would be the greatest deterrent to the abuse of power by the government.¹⁸ Unlike the Anti-Federalists, who argued against the formation of a centralized national army, Madison used this same logic in defending the creation of a standing army:

To these [the standing army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from amongst themselves, fighting for their common liberties, and unitéd and conducted by government possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Besides the advantage of being armed, which Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.¹⁹

Although the ratification of the Constitution by the states lasted from 1787 to 1790, the required nine states had ratified the Constitution by 1788.²⁰ Despite this victory by Federalists, the Anti-Federalists gathered enough support to put pressure on them to include a bill of rights to the Constitution. For the Federalists, it was preferable to concede the addition of a bill of rights, rather than to change the Constitution itself. The bill of rights was amended to the Constitution in

¹⁸ Federalist No. 46.
¹⁹ Id.
1791 in an effort of both parties to seek a middle ground, and with it came the “right to bear arms”. In the following cases, we will see how the Second Amendment has been modified by the courts over time: from its conception in the Constitution, to the present day.

IV. United States v. Miller

The Supreme Court case of United States v. Miller (1939) marked the first time in which the Supreme Court directly addressed the interpretation of the Second Amendment. In this case, the court ruled on the issue of whether Section 11 of the National Firearms Act was invalid as violating the Second Amendment to the Constitution of the United States. It is interesting to note that both sides of the gun control issue have cited this case in making their arguments for, or against, stricter regulations of firearms in the future.

The case of United States v. Miller was first brought to the District Court of the United States in the Western District of Arkansas. The defendants in this case, Jack Miller and Frank Layton were charged with:

“[U]nlawfully and feloniously transporting in interstate commerce…a double barrel twelve gauge shot gun having a barrel less than eighteen inches in length, and at the time of so transporting said fire arm in interstate commerce they did not have in their possession a stamp-affixed written order for said fire arm as required by Section 1132 c, Title 26 U. S. C. A., and the regulations issued under the authority of said Act of Congress known as the National Fire Arms Act”.

The defendants filed a demurrer to the indictment which alleged, that the National Firearms Act and the provisions of it with respect to the registration of firearms and the

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23 Miller. at 174.
possession of stamp-affixed orders were in violation of the Second Amendment to the Constitution. The defendants’ demurrer to the indictment was sustained, and as a result the indictment was thrown out. The district court consequently held that the Section 11 of the National Firearms Act was invalid in that it infringed on the Second Amendment to the Constitution of the United States. The government United States appealed this decision on March 30th 1939.24

The defendants, in their demurrer, challenged several facts stated in the indictment as to demonstrate that there were insufficient facts to constitute a crime under the statutes and laws of the United States. Furthermore, the defendants challenged the sections of the National Firearms Act under which the indictment was said to be in contravention of the Second Amendment to the Constitution of the United States. The alleged criminal act that led to the indictment of Miller and Layton was a violation of Title 26, Section 1132, in the United States Code, commonly referred to as the National Firearms Act. Section 11 of the National Firearms Act provides, “It shall be unlawful for any person who is required to register as provided in Section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in Section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce.”25

The defendants argued that since the Second Amendment to the Constitution of the United States provides for: "A well regulated militia being necessary to the security of a free state, the right of people to keep and bear arms, shall not be infringed;"26 the "National Firearms Act" was in violation of the Second Amendment. Therefore the charging a crime against the

26 U.S. Const. amend. II.
defendants, would be unconstitutional and consequently insufficient to constitute a crime under the laws of the United States.

The opposition addressed this argument by establishing that the Second Amendment relates to the right of people to keep and bear arms only for lawful purposes, and that it could not possibly relate to type of weapons referred to in the National Firearms Act. These weapons, such as: sawed-off shotguns, sawed off rifles, and machine guns can all be said to have no legitimate use in the possession of private citizens, but they do however regularly compose the arsenal of the "public enemy" and the "gangster".27 The opposition further stated in distinguishing these types of weapons that we must follow the example set in *People v. Brown*, that held that legitimate weapons were those that were “recognized by the common opinion of good citizens as proper for defense”.28

The opposition then went on to say that the Second Amendment does not grant to the people the right to keep and bear arms, but simply recognizes the prior existence of that right and prohibits Congress from infringing upon it. In both the United States and England the right to keep and bear arms had been restricted to the keeping and bearing of arms by the people collectively for their common defense and security. By following this logic, it can therefore be said that the carrying of weapons without a lawful reason or excuse is a crime under the common law of the United States. They further argued that the language of the Second Amendment grants this right in reference only to the keeping and bearing of arms by the people who were members of the state militia or other similar military organization provided for by law. The "arms" referred to in the Second Amendment were those that were ordinarily used for military or public defense

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27 This phrase would be stated in reference to this holding by Justice Scalia in the opinion of *District of Columbia v. Heller*.
purposes, and that weapons being more likely to use by criminals (i.e. sawed-off shotguns, sawed-off rifles, and machine guns) were not within the protection of the Second Amendment. It follows then that in regard to the National Firearms Act, Section 11, on which the indictment was based, the placement of restrictions on the transportation in interstate commerce of only weapons of this character would not constitute an infringement of "the right of the people to keep and bear arms," as used in the Second Amendment.

On May 15, 1939 the Supreme Court, in a unanimous opinion by Justice McReynolds, reversed and remanded the District Court decision. The reasoning of this holding of the Supreme Court was that Section 11 of the National Firearms Act did not infringe on "the right of the people to keep and bear arms" secured by the Second Amendment. The Supreme Court declared that no conflict between the National Firearm Act and the Second Amendment had been established, writing: "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."29

Describing the constitutional authority under which Congress could call forth state militia, the Court stated:

"The significance attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline. And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.'30

29 Miller. at 178
30 Miller. at 174, 179.
The *United States v. Miller* case has had a unique effect on how the Second Amendment was interpreted in the years following its decision. This holding has since resonated in arguments both in favor of gun control and in the opposition of it.\(^{31}\) Gun rights advocates have cited this case in defending the ownership and carrying of ordinary military use firearms for the individual’s belonging to a militia. Conversely, gun control advocates cite this case in upholding the National Firearms Act and providing a sixty-year precedent in the courts of only allowing weapons that were suited for the common defense, rather than simply personal defense. Despite both of these claims, one would be hard pressed to determine a clear “winner” of this case since it was remanded to the federal district court for further proceedings that never took place due to Miller’s death and Layton’s acceptance of a plea bargain.\(^{32}\)

V. District of Columbia v. Heller

*District of Columbia v. Heller* was a landmark case in which the Supreme Court of the United States held that the Second Amendment to the United States Constitution protects an individual’s rights to possess firearms for lawful purposes, such as in the home, outside of membership to a militia.\(^{33}\) *Heller* marked the first Supreme Court case in United States history to decide the issue of whether the Second Amendment protects an individual person’s right to keep

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and bear arms. This case also signified the first time since the case *United States v. Miller* (1939) that the Supreme Court directly dealt with the scope of the Second Amendment. The holding, did not however, answer the question of how the Second Amendment would be incorporated into the states’ laws and statutes, an issue which would later be addressed by the case of *McDonald v. Chicago* (2010).

The case of *District of Columbia v. Heller*, arose from six residents of Washington, D.C. who filed a lawsuit in the District Court for the District of Columbia in February 2003. This lawsuit challenged the constitutionality of the provisions in the Firearms Control Regulations Act of 1975, which was a part of the District of Columbia Code. The Firearms Control Regulations Act restricted the residents of District of Columbia from owning firearms, with exemption given to any handguns that had been registered prior to 1975, and the guns already possessed by both active and retired law enforcement officers. This law also required for all firearms, including those kept in the homes, to be "unloaded and disassembled or bound by a trigger lock." The plaintiffs filed for an injunction pursuant to 28 U.S.C. § 2201, 2202, and 42 U.S.C. § 1983 and the District Court Judge, Ricardo M. Urbina, ruled to dismiss the lawsuit. On an appeal by the plaintiffs, the U.S. Court of Appeals for the District of Columbia Circuit reversed the dismissal in a 2–1 decision.

The Court of Appeals held that the provisions of the Firearms Control Regulations Act of 1975 were unconstitutional. It had determined that handguns were "arms" in regards to the Second Amendment, and that the District of Columbia's Firearms Control Regulations Act was

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35 Id.

an unconstitutional infringement of those rights protected under it by requiring that all firearms including rifles and shotguns be kept "unloaded and disassembled or bound by a trigger lock." Furthermore it held that the restriction on residents from owning handguns except for those registered prior to 1975, was also unconstitutional because it interfered with those individual’s rights to bear arms. The issue brought to the Supreme Court was whether the Second Amendment bestows an individual the right to bear arms in concurrence to their natural right of self-defense.

In a 5-4 decision the Supreme Court held that the Second Amendment protects an individual’s right to possess a firearm even if they are unconnected with service in a militia, and that they may use that arm for traditionally lawful purposes, such as self-defense within the home.  

The Court reasoned, in a majority opinion by Justice Antonin Scalia, that the Second Amendment’s prefatory clause stated a purpose of "[a] well regulated Militia, being necessary to the security of a free State," but did not limit or expand the scope of the operative clause "the right of the people to keep and bear Arms, shall not be infringed." Justice Scalia, employing a textual analysis approach to interpretation, stated the operative clause’s text and history demonstrated that it implies an individual right’s to keep and bear arms. The Court interpreted the term “militia” to be comprised all males physically capable of acting together for the common defense. The Court also supported its position from history in that the Antifederalists believed the government would disarm the people in order to weaken the individual militia. This disarming of the citizens would have allowed for a Federal Government army to have power

37 DC ST § 7-2507.02 (1981).
38 Heller, at 2–53.
over the states. By allowing the rights of the citizens to keep and bear arms, the state militias would be preserved.  

The Supreme Court claimed the interpretations of the Second Amendment from United States v. Miller, 307 U. S. 174, did not limit the right of the individual to keep and bear arms to militia purposes, but instead limited the type of weapon that the right applied to, such as those weapons commonly used for lawful purposes. The Supreme Court clarified this holding by going on to state that the Second Amendment right to bear arms was not without limit. To clarify this statement, the right to bear arms does not grant the right to carry whatever weapon, whenever and wherever you want: there are statutes depending on the state, which prohibit or limit the ability to carry concealed weapons. Furthermore, the Court did not extend this ruling to the prohibitions on the possession of firearms by felons and the mentally ill, or the laws forbidding the carrying of firearms in schools and government buildings. Laws that place conditions and qualifications on the commercial sale of arms were also unaffected. Miller held that it only protects weapons that were “in common use at the time”, and supports in the prohibiting of carrying dangerous and unusual weapons.

The holding on the issue of the handgun ban and the trigger-lock requirement was that it was in violation of the Second Amendment. The District of Columbia’s ban on handgun possession in the home would result in the prohibition of an entire class of “arms” that reasonable, law-abiding citizens commonly choose for the lawful purpose of self-defense. Therefore the holding of United States Court of Appeals for the District of Columbia Circuit was

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39 Heller. at 22–28.
40 Id. at 47–54
41 Id. at 54–56.
affirmed. The reasoning behind this holding, as stated by Justice Scalia in the majority opinion, was:

Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition—in the place where the importance of the lawful defense of self, family, and property is most acute—would fail constitutional muster. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional. Because Heller conceded at oral argument that the D. C. licensing law is permissible if it is not enforced arbitrarily and capriciously, the Court assumes that a license will satisfy his prayer for relief and does not address the licensing requirement. Assuming he is not disqualified from exercising Second Amendment rights, the District must permit Heller to register his handgun and must issue him a license to carry it in the home.42

In issuing the opinion, Justice Scalia also stated that the *United States v. Miller*, “does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, i.e., those in common use for lawful purposes.”43 From this interpretation comes the rule that the Second Amendment grants the individual the right to possess a firearm, unconnected to service in a militia, and use that firearm in the act of self-defense within the home.

The *Heller* case did not address, however; what level of scrutiny should be employed by the lower courts in deciding future cases of possible infringement of Second Amendment right, and other questions of how this ruling should be incorporated into the states. These questions, albeit incredibly important ones, were not answered until the case of *McDonald*; after all, as Justice Scalia said, "[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."

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42 Id. at 56–64.
43 Id.
To the Court’s merit, two theories of how lower courts could rule on this issue were proposed. A rational basis approach was considered, but then rejected because "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." Justice Breyer proposed a "judge-empowering 'interest-balancing inquiry,'" however this too was rejected as the Court stated, "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.". How then can the courts conceivably address these empirical issues of incorporation and constitutionality? We will return to this question again after the analysis of the McDonald case.

VI. McDonald v. City of Chicago

The McDonald case is important in gun legislation in that it picked up where Heller left off. In McDonald v. Chicago, the Court held that the Second Amendment was capable of being incorporated in state and local governments, through the Due Process Clause of the Fourteenth Amendment. This ruling answered the question of incorporation left by Heller in its determining that the Second Amendment applied to the individual states, but left the courts with new questions about on what basis should the courts rule on the constitutionality of the individual state statutes dealing with gun litigation.

44 Id. Breyer, J., dissenting, at 42
In the procedural history of this case, the Court of Appeals for the Seventh Circuit had upheld a Chicago ordinance that banned the possession of handguns and regulated rifles and shotguns.\(^\text{46}\) A petition for the writ of certiorari was then filed by the attorney who had successfully argued \textit{Heller}, Alan Gura, and a Chicago attorney David G. Sigale. Plaintiffs of this case were several Chicago residents, including a retiree named Otis McDonald, from which the case’s name was derived.\(^\text{47}\)

The plaintiffs in \textit{McDonald} challenged four aspects of Chicago’s gun registration law, which: prohibited the registration of handguns, required that guns be registered prior to their acquisition by Chicago residents, mandated that guns be re-registered annually (for another payment of the registration fee every year), and rendered any gun permanently non-registrable if its registration lapses.\(^\text{48}\) These aspects of the Chicago gun registration law severely inhibited the accessibility of fire-arms to its citizens. Despite this, the overarching issue addressed by this case was whether the Second Amendment, as interpreted by \textit{District of Columbia v. Heller}, would apply to the individual states.

In \textit{Heller}, the court in a 5–4 decision held that the Second Amendment protected the rights of individuals to possess a handgun in the home for the purpose of self-defense. The court reasoned that unless considerations of stare decisis counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. Following this logic, Justice Alito delivered the opinion of the Court which concluded that the that the Due Process Clause of the Fourteenth Amendment

\(^{46}\) \textit{Parker v. District of Columbia}, supra.
\(^{48}\) D.C. Official Code, 2001 Ed. § 7-2507.02.
incorporates the Second Amendment rights in their application to the states, reversing the Seventh Circuit's decision.\textsuperscript{49} The court then remanded the case back to Seventh Circuit to resolve conflicts between certain Chicago gun restrictions and the Second Amendment.

Although the court’s conclusion that the Fourteenth Amendment incorporates the Second Amendment right was by far the most important issue addressed, the \textit{McDonald} case was also notable in that the court addressed the possibility of overturning the \textit{Slaughter-House Cases}, 83 U.S. 36 (1873).\textsuperscript{50} Justice Thomas in a concurring opinion reached the same conclusion as the majority regarding the incorporation issue but argued that the holding could have been found by a more direct reasoning: the Privileges or Immunities Clause of the Fourteenth Amendment. This \textit{Slaughter-House} determination stated that the Privileges or Immunities Clause under the Fourteenth Amendment did not apply the Bill of Rights to the actions of states and local governments, but only protected certain federal rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws,” (such as the right to peaceably assemble and the privilege of the writ of habeas corpus) from state infringement.\textsuperscript{51} Justice Thomas alone voted for the overturn of this \textit{Slaughter-House} holding. Had it been overturned, the questions of incorporation could have been avoided since the result would have been that the entire Bill of Rights, including the 2nd Amendment, could then be applied against the states.\textsuperscript{52}

\begin{footnotesize}
\textsuperscript{49} \textit{District of Columbia v. McDonald}. 567 F.3d 856 (2009).
\textsuperscript{50} Sandefur, Timothy, \textit{Privileges, Immunities, and Substantive Due Process} (December 1, 2009). NYU Journal of Law & Liberty, Vol. 5, No. 1
\textsuperscript{51} \textit{United States v. Cruikshank}, 92 U.S. 542, 23 L.Ed. 588 (1876).
\textsuperscript{52} \textit{McDonald}, at 78.
\end{footnotesize}
VII. Aftermath of Heller and McDonald: Recently Overturned Cases

Following the decisions of Heller and McDonald, several cases were consequently overturned and/or remanded. Due to the holdings of these two cases, the following rulings were modified in the past three years:

In Nordyke v. King, the court held that the Second Amendment applied to the states in the Ninth Circuit. However, this ruling was vacated for en banc reconsideration, and the prohibition of firearms on county property remained constitutional in Alameda County, California until it was overturned by McDonald v. Chicago.53

Maloney v. Rice (a.k.a. Maloney v. Cuomo and Maloney v. Spitzer), the court held that the Second Amendment did not apply to the states in the Second Circuit, and that a state ban on Nunchaku sticks was constitutional. This ruling was vacated by the Supreme Court in June 29, 2010, and remanded for further consideration as a result of McDonald's holding that the Second Amendment did apply to the states.54

In the case of Commonwealth V. Runyan, the Supreme Court of Massachusetts held that the gun lock requirement enacted by a Massachusetts statute was different from the gun lock regulation in Heller and therefore did not apply to its ruling. The court further claimed that the holding in Heller did not apply to the individual states, and therefore did not extend to the Massachusetts’ state legislature. Although the court conceded that the decisions made in Heller did apply to Massachusetts following the McDonald ruling, the Massachusetts court still

53 Nordyke v. King. 563 F.3d 439 (9th. Cir. 2009).
maintained that the gun lock requirement under Massachusetts’ laws may still be different enough from those in *Heller* that it could still be found constitutional.\textsuperscript{55}

In the Seventh Circuit, the case of *Ezell v. Chicago*, reversed a district court decision that held the post-\textsuperscript{McDonald} measures implemented by the City of Chicago to be constitutional. The measure in question included a requirement of firearms training in a shooting range in order to obtain a gun permit, while simultaneously banning shooting ranges within the City of Chicago. The defense argued that individuals seeking permits could travel to the suburbs to obtain them, however the court ruled against that logic as Judge Sykes stated in the majority opinion, “It's hard to imagine anyone suggesting that Chicago may prohibit the exercise of a free-speech or religious-liberty right within its borders on the rationale that those rights may be freely enjoyed in the suburbs.”\textsuperscript{56}

In addition to the aforementioned cases involving a remanded, overturned, or vacated ruling, the district and appellate courts have seen a rise in Second Amendment related cases. Organizations such as the National Rifle Association and the Second Amendment Foundation have backed several cases in various districts throughout the United States. These recent cases have resulted in varied rulings as individual states still struggle on how to incorporate the holding of *Heller*. In particular, the issue of what level of scrutiny is applicable in these cases has been speculative at best. Although none of these cases have yet to reach the Supreme Court, several cases have filed writs of certiorari that were ultimately denied. Some of these cases include *Williams v. State (Maryland)*\textsuperscript{57}, *United States v. Masciandaro*\textsuperscript{58}, and *Willis v. Winters*\textsuperscript{59};

\textsuperscript{55} *Commonwealth V. Runyan*, 456 Mass. 230 (2010).
\textsuperscript{56} *Ezell v. Chicago*. 651 F.3d 684 (2011).
all three of these cases involved the issue of whether a right exists to carry firearms outside the home for self-defense.

On January 17, 2012, *Lowery v. United States* was denied writ of certiorari by the Supreme Court. The Lowery case dealt with the issue of whether Heller’s ruling applied retroactively to a person who was convicted of a handgun violation found unconstitutional in Heller. The same day as the Lowery case, the Supreme Court of the United States declined to accept and review *People v. Delacy*. The Delacy case dealt with the issue of what level of judicial scrutiny should apply to a claim under the Equal Protection Clause that the government created discriminatory classifications depriving individuals of their Second Amendment rights. What is interesting to note however, is that the Supreme Court requested a response to the Delacy petition from the government.

The relevance of the request for a response in Delacy and others is more important than it would seem at first glance. The Supreme Court receives an approximate 8000-9000 petitions for review each year, but only requests a response from the opposing party in a few hundred of them. The Supreme Court granted an oral argument about 0.9% of the time; however, a request for response increases that rate to about 8.6%. In more recent years, the court receives approximately 10,000 petitions for a writ of certiorari and grants and hears oral argument in about 75-80 cases making this percentage even lower. It follows that if the court has requested a response, the court is interested or at the very least considering looking into the topic of the case. In relation to these particular cases, such as Delacy, it is a safe assumption that the reason for this.

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request was because the Court is interested in further clarifying the scope of Second Amendment rights after Heller and McDonald, but is searching for the most appropriate case to accomplish that in.63

VIII. Future Trends

In the interim between McDonald and the next Supreme Court case that will clarify the unresolved issues left in its wake, will inevitably continue to wrestle with the issue of how to rule on issues of constitutionality in state laws dealing with the Second Amendment rights. To this end, there are three appropriate vehicles the court may implement in deciding how such cases will be resolved in the future. The first of these approaches might very well be the Supreme Court selecting a case in order to establish a clear-cut level of scrutiny the courts must employ when evaluating a second amendment infringement case. Another method of clarifying the issues of scrutiny and incorporation would be the overturn of the Slaughter House cases. Alternatively, the court may simply decide to maintain the status quo in which the lower courts must weigh several factors and select an appropriate level of scrutiny on a case by case basis.

Currently the courts have adopted selective incorporation under a two-pronged approach to Second Amendment challenges.64 This two-pronged test, as defined in Heller v. District of Columbia, states, “First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.... If it does not, our inquiry is complete.

63 Id.
If it does, we evaluate the law under some form of means-end scrutiny".\textsuperscript{65} This process has been implemented in several Second Amendment related cases such as: \textit{Ezell v. City of Chicago}, 651 F.3d 684, 701–04 (7th Cir.2011); \textit{United States v. Chester}, 628 F.3d 673, 680 (4th Cir.2010); \textit{United States v. Reese}, 627 F.3d 792, 800–01 (10th Cir.2010); \textit{United States v. Marzzarella}, 614 F.3d 85, 89 (3d Cir.2010). This method attempts to reserve strict scrutiny for, “only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment”.\textsuperscript{66} However there still exists no true method of defining the scope and scrutiny of these issues to date, making it extremely difficult to predict which way a current Second Amendment case will go.

As mentioned in the preceding section, the need for a Supreme Court holding is warranted to define these issues for the state courts. The one means in which the court will do this was alluded to in a footnote of \textit{Heller}:\textsuperscript{67}

With respect to \textit{Cruikshank}’s continuing validity on incorporation, a question not presented by this case, we note that \textit{Cruikshank}\textsuperscript{67} also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in \textit{Presser v. Illinois}, 116 U.S. 252, 265 (1886) and \textit{Miller v. Texas}, 153 U.S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.\textsuperscript{68}

This a notable point in that these cases, aka the \textit{Slaughter House} cases, were said to hold that the Second Amendment right only applied to the Federal Government. "The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due

\textsuperscript{66} \textit{Nordyk v. King}, 644 F.3d 776, 786 (9th Cir.2011).
\textsuperscript{67} \textit{United States v. Cruikshank} 92 U.S. 542, 23 L.Ed. 588, (1876).
process of law; but this adds nothing to the rights of one citizen as against another." 69 Since 
*McDonald* reversed this holding, would this not therefore imply that *Cruikshank*, and by 
extension the *Slaughter House* cases, be eligible for reexamination by the Supreme Court when 
the appropriate case arrives to accomplish this in? Akhil Amar, a Yale law professor, wrote 
“Virtually no serious modern scholar—left, right, and center—thinks that Slaughter-House is a 
plausible reading of the Fourteenth Amendment.” and is surely not alone in this sentiment.70 It is 
quite possible that this very agreement is what the Supreme Court will take up once it finds, and 
grants the writ of certiorari, to a suitable case to address this issue.

The case of *McDonald v. Chicago* marked the first real attempt to overturn Slaughter-
House and in doing so gained the recognition and support of legal scholars, both liberal and 
conservative alike. If *Slaughter-House* had been overturned here, or is overturned in the future, 
the repercussions will be staggering. Not only would the rights granted to the individual under 
the Second Amendment be applied to the states, but through the Privileges and Immunities 
Clause, the entirety of the Bill of Rights would be encompassed as a result.71 Despite the benefits 
this would have in matters of incorporation of these rights into the individual states, the result of 
this outcome is the subject of mixed reviews, as Justice Steven stated, “the consequences could 
prove far more destructive—quite literally—to our Nation’s communities and to our 
constitutional structure”.72 Individuals advocating the overturn of *Slaughter House* argue that this 
change would only be a minor one; as seen in *McDonald*, courts have found ways to work 

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69 *Cruikshank*, 92 U.S. 542 at 554.
71 Lash, Kurt T., *The Origins of the Privileges or Immunities Clause, Part I: ‘Privileges and Immunities’ as an 
around the Privileges and Immunities clause. The validity of these claims, however, is a topic to which only time will tell.73 74

Currently, state courts must examine several factors in evaluating a Second Amendment infringement claim. The *Heller* court specified that regulatory measures such as: prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, and laws imposing conditions and qualifications on the commercial sale of arms would all be constitutional.75 What was not definitively answered in *Heller*, however, was what made these measures constitutional. Unfortunately the omission of a standard by which to evaluate the constitutionality of the aforementioned regulations has directly resulted in difficulties of the lower courts in evaluating other regulations that state governments have enacted into legislation. Without such a standard courts must look at each case individually to ensure that the language of the statute at bar does not infringe on the individual’s reasonable ability to acquire and maintain a firearm pursuant to his or her Second Amendment rights.

**IX. Conclusion**

In this article, we have followed the metamorphosis of gun legislation from its conception in the English Bill of Rights, infancy in the United States in its inclusion to the Bill of Rights as the Second Amendment, and adolescence as it has been shaped by the *Miller, Heller,* and *McDonald* cases. As a result, the Second Amendment has grown from granting the right to

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75 *Heller* at 2816-17.
carry arms in a militia, to an individual right to bear arms for the purposes of self-defense.

Furthermore, the recent shift in application of the Second Amendment from the federal courts to the individual state courts has led to changes in the incorporation of these rights, as well as the revival of broader issues such as the Privileges and Immunities clause as it pertained to the *Slaughter House* cases. The development of a law over time is wrought with reversed holdings and new interpretations that mirror our society’s constant growth. As we look to the Second Amendment in the future, an inevitable Supreme Court case awaits on the horizon in which the ultimate questions of how states will incorporate it in its current form will be addressed and determined. Having knowledge of where the Second Amendment originated and how it has developed is essential in following the court’s decisions and understanding the implications that changes to it will bring.