FULLY LOADED: AN ALTERNATIVE VIEW OF THE GUN CONTROL DEBATE

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I. INTRODUCTION

With the recent increase in gun-related fatalities and random acts of violence caused by firearms,[1] the issue of gun control has become one of today's most controversial topics of political, social, and cultural interest in the United States. Although to some it may seem clear what the Framers of the United States Constitution intended when they developed and wrote the Second Amendment, which states, "[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[,]"[2] differences of opinion persist within society and the Supreme Court about the Second Amendment's real meaning and the extent to which it grants the fundamental right of every individual to keep and bear arms. The Supreme Court has provided some clarification of the issue, determining that the right to keep and bear arms is an individual right applicable to all Americans, separate and apart from a military context.[3] Furthermore, the Supreme Court has articulated that the "core" purpose of the Second Amendment is self-defense.[4] Although the right to keep and bear arms is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose[,]"[5] the Court's decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago* emphasize that government legislation cannot regulate the right to keep and bear arms to an extent that arbitrarily infringes upon the ability of law-abiding citizens to keep and bear arms for the purpose of self-defense.[6] Nevertheless, questions still remain unanswered regarding the scope of the Second Amendment, and debate continues surrounding possible solutions to the ever-increasing problem of firearms in the wrong hands.

In the wake of several mass shootings in the last decade, states have recently reinstituted regulations and bans on firearm

[1] *See* Jennifer Brown, *12 Shot Dead, 58 Wounded in Aurora Movie Theater During Batman Premier,* DENVER POST (July 21, 2012), http://www.denverpost.com/ci_21124893/12-shot-dead-58-wounded-aurora-movie-theater; *see also Sandy Hook Shooting: What Happened?*, CNN, http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline/ (last visited Aug. 16, 2014).

[2] U.S. CONST. amend. II.

[3] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3036–37 (2010); District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

[4] *Heller*, 554 U.S. at 630.

[5] *Id.* at 626.

[6] *McDonald*, 130 S. Ct. at 3026; *Heller*, 544 U.S. at 599.

magazines holding more than ten rounds of ammunition.[7] The Violent Crime Control and Law Enforcement Act of 1994, also known as the Federal Assault Weapons Ban, enacted on September 13, 1994, was the first act to define and ban "large capacity ammunition feeding devices."[8] Large capacity ammunition feeding devices were defined as "a magazine, belt, drum, feed strip, or similar device" that was manufactured to have the "capacity of, or that can be readily restored or converted to accept, more than [ten] rounds of ammunition."[9]

Although the Ban was not renewed by Congress after it expired by its sunset provision ten years later on September 13, 2004, the regulation of magazines holding more than ten rounds of ammunition has had a lasting effect on the nature of firearm magazine manufacturing and recent state gun control legislation.[10] After a lone shooter claimed the lives of twelve people and injured more than fifty others at a movie theater in Aurora, Colorado,[11] the Colorado state legislature instituted a new law, effective July 1, 2013, prohibiting the sale, transfer, and possession of a large capacity magazine designed to hold more than fifteen rounds of ammunition or eight shotgun shells.[12] On April 4, 2013, Connecticut adopted a ban on firearms holding more than ten rounds of ammunition[13] in the aftermath of the second most deadly shooting in U.S. history at Sandy Hook Elementary School, in which twenty elementary school children and six staff members were killed.[14] In Maryland, the Firearm Safety Act made it illegal, as of October 1, 2013, to purchase, sell, or manufacture magazines with a capacity to hold greater than

[7] *See, e.g.*, CAL. PENAL CODE §§ 16740, 32310(a) (Deering 2013); HAW. REV. STAT. ANN. § 134-8(a),(c) (LexisNexis 2014); MD. CODE ANN., CRIM. LAW § 4-305(b) (LexisNexis 2013).

[8] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110103(a),(b), 108 Stat. 1796, 1998–99 (1994).

[9] *Id.* § 110103(b).

[10] *Id.* § 110105; s*ee* Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994–2004: Key Findings and Implications, in* REDUCING GUN VIOLENCE IN AMERICA 157, 159 (Daniel W. Webster & Jon S. Vernick eds., 2013) ("[a] number of gun manufacturers began producing modified, legal versions of some of the banned guns . . . .").

[11] Brown, *supra* note 1.

[12] COLO. REV. STAT. §§ 18-12-301–02 (2013).

[13] CONN. GEN. STAT. § 53-202w (2013); Shew v. Malloy, 994 F. Supp. 2d 234, 239, n.4 (D. Conn. 2014).

[14] *25 Deadliest Mass Shootings in U.S. History Fast Facts*, CNN (Sept. 2, 2014, 8:00 AM), http://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/.

ten rounds of ammunition.[15] In May of 2013, California amended its previous regulations regarding large capacity magazines under California Senate Bill 396.[16] As a result, any person that manufactures, imports, sells, offers for sale, "or who gives, lends, buys, or receives any large-capacity magazine[,]" regardless of the date the magazine was acquired, shall be subject to imprisonment in a county jail for a period not exceeding one year.[17]

The foregoing public and state-legislated sentiment regarding gun control has prompted a move by the federal government, under President Obama, to nationalize existing state regulations by banning high-capacity magazines.[18] Like the states now instituting these reforms in order to make schools and other public accommodations safer, President Obama has characterized handguns or semi-automatic weapons with magazines holding more than ten rounds as instruments of "mass violence"[19] and is contending that a ban on magazines of this magnitude will be an effective means of reducing the level of gun violence, and promoting gun safety and gun ownership.[20]

However, the social and political climate regarding the issue of gun control has intensified to a new level with the enactment of the New York Secure Ammunition and Firearms Enforcement Act of 2013, also known as the NY SAFE Act.[21] Prior to the enactment of the NY SAFE Act, New York had codified the large capacity magazine provision of the Federal Assault Weapons Ban.[22] The NY SAFE Act continues this ban by making it unlawful for individuals to knowingly possess, sell or transfer large capacity magazines able to hold ten rounds or more, even if owned before passage of the Act.[23] Although .22 caliber tubular

[15] S.B. 281, 2013 Sen. (Md. 2013) (codified at MD. CODE ANN., CRIM. LAW § 4-305(b)).

[16] *See* S.B. 396, 2013 Sen. (Cal. 2013) (codified at CAL. PENAL CODE § 32310 (Deering 2013).

[17] CAL. PENAL CODE § 32310 (Deering 2013).

[18] *See* THE WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT'S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 5 (Jan. 16, 2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf.

[19] *Id.*

[20] *Id.* at 5, 10.

[21] *See* S. Assemb. 2230, 2013 Reg. Sess. (N.Y. 2013) (codified at N.Y. PENAL LAW § 265.00 (McKinney 2013)).

[22] *See* N.Y. PENAL LAW § 265.00(23) (McKinney 2010), *amended by* N.Y. PENAL LAW § 265.00(23) (McKinney 2013), *held unconstitutional by* N.Y. State Rifle & Pistol Ass'n v. Cuomo, 990 F. Supp. 2d 349 (W.D.N.Y. 2013).

[23] N.Y. PENAL LAW § 265.36 (McKinney 2013) (noting that an individual who

magazines are exempt from this limit, magazines with a capacity of thirty rounds are not exempt, and must be sold within one year to an out-of-state resident or turned in to local authorities.[24]

However, the NY SAFE Act does not simply ban the possession of large capacity magazines, as New York had done in the past.[25] Instead, it goes even further and bans the possession of any magazines in combination with a firearm loaded with more than seven rounds of ammunition, whether in the home or elsewhere.[26] Ten round magazines can, nevertheless, still be fully loaded at firing ranges or in shooting competitions.[27] The NY SAFE Act brings with it a misdemeanor conviction, together with a fine and the possibility of imprisonment.[28] The law is retroactive and affects magazines able to hold ten rounds or more, regardless of when the magazines were made or sold.[29]

The ultimate question is whether the NY SAFE Act, mandating that a firearm magazine be loaded with less ammunition than what the magazine is designed and manufactured to hold,[30] is constitutional or infringes upon an individual's Second Amendment right to keep and bear arms for the purpose of self-defense. As discussed *infra*, while it is constitutionally sound for New York to regulate an individual's possession and use of a firearm, the NY SAFE Act is an unconstitutional infringement on

has a "reasonable belief" that a firearm magazine is of such character and "disposes" or "surrenders" it to law enforcement or county-licensing officials, the individual will not be guilty of violating the Act).

[24] *See id.* § 265.00.

[25] *See id.* §§ 265.00, 265.02, 265.37. Section 265.37 was first adopted in 2013, adding more specific governance of "large capacity ammunition feeding devices." New York first defined "large capacity ammunition feeding device" and criminalized the possession of such a device in 2000. *Id.* §§ 265.00(23), 265.02(8). At that time, the device was defined as one that accepts more than ten rounds of ammunition. *Id.* § 265.00.

[26] *Id.* § 265.00.

[27] *Id.* § 265.20 (7-f).

[28] *Id.* § 265.37 (exacting that an individual in possession of a firearm loaded with a magazine containing more than seven rounds of ammunition in the home, will be guilty of a class B misdemeanor, and subject to a fine of two hundred dollars and imprisonment up to three months. An individual in possession of a firearm loaded with a magazine containing more than seven rounds of ammunition in any location outside the home, will be guilty of a class B misdemeanor, and subject to a fine of two hundred dollars and imprisonment of up to six months for the first offense, and a class A misdemeanor for the second offense).

[29] *Id.* § 265.36.

[30] *Id.* §§ 265.00(23), 265.37 (noting that magazines under the old ban that are modified can be restored to hold more than seven but less than ten rounds).

the right to keep and bear arms for the purpose of self-defense to the extent that its restrictions are not similarly imposed on manufacturers.[31] As a result, despite it being unlawful for an individual to possess a magazine loaded with more than seven rounds of ammunition, firearm manufacturers within the state are able to manufacture and produce magazines, as they have done since the Federal Assault Weapons Ban in 1994, capable of holding up to ten rounds of ammunition.[32] Although the NY SAFE Act does not prohibit the use of an entire class of firearms,[33] the dichotomy it creates between the individual and manufacturer by allowing the manufacture of firearm magazines capable of holding ten rounds of ammunition to continue, while at the same time prohibiting individuals from loading their firearms with more than seven rounds of ammunition,[34] places law-abiding citizens at a disadvantage in defending themselves with a firearm against criminals disinclined to follow the law and in possession of a more lethal, fully-loaded firearm.

Gun control is the regulation of the sale and use of firearms,[35] such as handguns and rifles. Considering that over one-third of Americans possess a firearm,[36] the enforcement of different types of gun ownership requirements and regulations have caused great debate. In 2012, 58% of Americans favored the passage of stronger gun control laws regarding the sale of firearms.[37] In addition, more than 50% of Americans are dissatisfied with the overall state of gun control laws and policies in the nation.[38]

[31] *See id.* § 265.20; s*ee also infra* pp. 32–33.

[32] *See id.* §§ 265.10(1), 265.00(23) (showing that the laws with respect to the manufacturing of magazines in New York only apply to magazines of ten rounds or more); Jessica Alaimo, *N.Y. Gun Law Mandates Magazines That Don't Exist*, USA TODAY (Mar. 1, 2013, 4:58 PM), http://www.usatoday.com/story/news/nation/2013/02/27/new-york-gun-law-seven-round-magazines-dont-exist/1950433/.

[33] *See* § 265.37 (prohibiting the possession of firearms containing an ammunition feeding device holding more than seven rounds of ammunition).

[34] *Id.* §§ 265.00(23), 265.20(10), 265.37.

[35] BLACK'S LAW DICTIONARY 824 (10th ed. 2014).

[36] *See* Lydia Saad, *Self-Reported Gun Ownership in U.S. Is Highest Since 1993*, GALLUP (Oct. 26, 2011) http://www.gallup.com/poll/150353/self-reported-gun-ownership-highest-1993.aspx (reporting that 34% of adults in the United States personally own a gun and 13% live in households where another member owns a gun).

[37] *See id.* (reporting public opinion on whether laws covering the sale of firearms in the United States should be more strict, less strict, kept as is, or no opinion at all).

[38] *See id.* (showing public opinion on whether Americans are very satisfied, somewhat satisfied, somewhat dissatisfied, very dissatisfied, or had no opinion

Approximately 24% of Americans in 2011 considered stricter gun control laws to be the most important avenue to prevent the reoccurrence of mass shootings in the United States.[39] However, in the same Gallup poll, 15% of Americans believed that better mental health screening and support would be more effective in preventing mass shootings in the country.[40] Other possible options to reduce gun violence in the United States include: enhanced education on gun violence and the proper use of guns, more extensive background checks, stricter security measures at public gatherings, a ban on handguns and bullets, better parenting, better enforcement of existing gun laws, less media coverage of shootings, better cooperation between political parties, and a crack-down on illegal immigration.[41] The issue is complicated as a result of the use of guns by law enforcement agencies, to apprehend criminals and to protect the public against crime, and by private citizens, as a means of self-defense for themselves and their property.[42] While Americans generally agree that something needs to be done in response to the growing gun violence, many "disagree—often passionately—on exactly what to do and how to do it."[43]

Part II examines the nation's history of gun use and gun laws from the period commencing in the pre-Revolutionary days to the present. Specific to this discussion will be an analysis of the development and understanding of the role and composition of the American militia in relation to the individual right to keep and bear arms for the purpose of self-defense under the Second Amendment.

Part III evaluates the Supreme Court's interpretation of the Second Amendment. Furthermore, and more importantly, Part III evaluates the extent of the right to keep and bear arms as addressed in the Supreme Court's decision in *United States v. Cruikshank*[44] to its most recent decision in *McDonald v. Chicago*.[45]

Finally, Part IV considers the current issues and ideological

at all about the nation's laws or policies on guns).

[39] *See id.* (showing public opinion of the most important steps that can be taken to prevent the occurrence of mass shootings in the United States).

[40] *Id.*

[41] *Id.*

[42] SUSAN DUDLEY GOLD, OPEN FOR DEBATE: GUN CONTROL 12 (2004).

[43] *Id.* at 16.

[44] *See generally* United States v. Cruikshank, 92 U.S. 542 (1876).

[45] *See generally* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

differences surrounding the gun control debate as a result of the ambiguity and lack of decisiveness on the part of the Supreme Court. Moreover, it discusses the implications of the gun control debate on the constitutionality of current state laws, particularly, the NY SAFE Act.

II. THE FRAMERS AND THEIR UNDERSTANDING OF THE MILITIA

The controversy surrounding the Second Amendment concerns not only whether it supports an individual's right to keep and bear arms, as opposed the right of an independent state militia to do so, but also the extent of its protection from infringement by the state government.[46] Most recently, the scope of an individual's right to possess and use a firearm was determined by the Court in *District of Columbia v. Heller* and *McDonald v. Chicago*.[47]

In *Heller*, the District of Columbia banned handgun possession by prohibiting the registration of handguns, and making it a crime to carry unregistered firearms.[48] Furthermore, the law prohibited a person from keeping an unlicensed handgun and required any lawfully owned firearms to be kept "'unloaded and disassembled or bound by a trigger lock or similar device.'"[49] Before the matter reached the Supreme Court, the D.C. Circuit Court held that the City's requirements for registering and possessing a firearm fashioned a total ban on firearms, infringing on an individual's Second Amendment right to possess firearms and use them when necessary for self-defense.[50] On appeal to the United States Supreme Court, Justice Scalia, writing for the majority, affirmed the Circuit Court's decision and reaffirmed the individual right to keep and bear arms.[51] Significantly, however, in doing so, Justice Scalia also recognized that the Second Amendment was not without boundaries, stating, "the Second Amendment is not unlimited. . . . [It is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for

[46] NELSON LUND, VIRGINIA INSTITUTE FOR PUBLIC POLICY, A PRIMER ON THE CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS 2 (2002).

[47] *See McDonald*, 130 S. Ct. at 3050; District of Columbia v. Heller, 554 U.S. 570, 573 (2008).

[48] *Heller*, 554 U.S. at 574–75.

[49] *Id.* at 575.

[50] *See id.* at 576.

[51] *Id.* at 635–36.

whatever purpose."[52]

The opinion of the Court in *Heller* was echoed two years later in *McDonald v. Chicago*. In reversing the Circuit Court decision and striking down a Chicago gun control ordinance, Justice Alito, writing for the majority, opined that although the Second Amendment right to bear arms was incorporated against the states through the Due Process Clause of the Fourteenth Amendment, state laws regulating firearms were not imperiled.[53] Indeed, the Court noted that notwithstanding principles of *stare decisis* establishing the right to keep and bear arms as a fundamental right,[54] state and federal gun control laws aimed at insuring public safety, through the regulation of a person's ability to possess, manufacture, distribute and use firearms, have nevertheless long withstood constitutional scrutiny.[55] Thus, by way of example, blanket prohibitions against the possession and use of firearms by felons and the mentally ill had been sustained, as had regulations directed at the right to carry and use firearms in "sensitive places such as schools and government buildings."[56] Of equal importance, ammunition had been regulated by "laws imposing conditions and qualifications on the commercial sale of arms."[57]

Relevant to an understanding of the foregoing decisions and to the issue here, regarding the constitutionality of the NY SAFE Act, is an assessment of the fundamental right to keep and bear arms and the standards invoked by the Supreme Court for enforcing amendments incorporated against state and federal governments. The starting point for any such assessment is the historical origin of the Second Amendment, from the ratification of the Constitution to the establishment of the Bill of Rights.[58] Although the Second Amendment right to keep and bear arms was only a part of the Bill of Rights when initially established, it was implemented at a time when Americans were protective of their individual rights from oppression by the government.[59] With British oppression and the presence of its standing army in

[52] *Id.* at 626.
[53] McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010).
[54] *Id.* at 3046.
[55] *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).
[56] *Id.*
[57] *Id.*
[58] *Id.* at 576–77, 582, 584, 603, 625, 635.
[59] THE ORIGIN OF THE SECOND AMENDMENT xxiii–xxiv (David E. Young ed., 2d ed. 2001).

colonial America, the colonial populace armed itself and formed colonial militias for protection.[60] Prior to the American Revolution, the right to keep and bear arms was chief among colonial America's rights.[61] Firearms, ammunition, and essentials for using both were not only available to the entire population, but were required of the adult male population—generally ages sixteen to sixty—of a given colonial jurisdiction.[62] However, with the ever-present threat emanating from the presence of the British standing army, colonial Americans decided to organize and regulate their militia through officers and the command of the colony's governor.[63] The colonies had a long history of militia laws ensuring that the colonies' entire adult male population was not only armed but also trained for military defense.[64]

Prior to the end of the American Revolution in 1783, Americans transformed the colonial governments that commanded, organized, disciplined, and regulated the militia into state governments with bills of rights that fundamentally established an individual's right to bear arms, in conjunction with the militia.[65] Just as American citizens had defended the rights to which they were entitled during the war against Britain, the Framers of the Constitution recognized that Americans had to be given the ability to continue to defend those rights under the new system of government with the fundamental right to bear arms.[66]

It was these principles that were ingrained in the Virginia and Pennsylvania constitutions and Bill of Rights in 1776, which set a standard for all bill of rights subsequently established by the state constitutions and ultimately the U.S. Constitution.[67] Specifically, Section 13 of the Virginia Bill of Rights stated:

> "[t]hat a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence [sic] of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil

[60] *Id.* at xxv.
[61] *Id.* at xxvi–xxvii.
[62] *Id.* at xxiv.
[63] *Id.*
[64] *Id.*
[65] *Id.* at xxvi–xxvii.
[66] *Id.* at xxiii (indicating that the Federal Bill of Rights adopted similar provisions to its earlier counterparts in various state governments).
[67] *Id.* at xxvi–xxviii.

power."[68]

Furthermore, the Pennsylvania Declaration of Rights stated:

> "[t]hat the people have a right to bear arms for the defence [sic] of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under the strict subordination to, and governed by, the civil power."[69]

Pennsylvania's Declaration of Rights was a model for several other states, particularly, North Carolina, Vermont, and Massachusetts.[70]

Each of the several states, through their state constitutions, declared in one form or another that "'[t]he people have a right to keep and to bear arms'" either for "'themselves and the [s]tate'" or for the "'common defence [sic].'"[71] As a result of the foregoing, the Framers adopted the view that a well-regulated militia was "'composed of the body of the people'" rather than a select group of organized citizens trained and under military readiness.[72] Although the Framers debated over whether a militia was an organized military force conscripted by the government as opposed to a body composed of the entire yeomanry of the people, the opinions of delegates to the Federal Convention and citizens during the formation of the Constitution and the Federal Bill of Rights reveal that a "militia" was considered to be what was traditionally the unorganized body of the people of each state,[73] specifically, farmers, mechanics, and laborers.[74] Indeed, the right to keep and bear arms was considered "the birthright of an American."[75] Ultimately, the decision of the Framers accommodated both views, to the extent that a militia was

[68] *Id.* at xxvi–xxvii (internal citations omitted).
[69] *Id.* at xxviii (internal citations omitted).
[70] *Id.*
[71] *Id.* (internal citations omitted).
[72] *Id.* at xxvii–xxviii (internal citations omitted).
[73] FEDERAL CONVENTION AUGUST 18, 1787: DEBATES (EXCERPTS) (1995), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 2–4 (David E. Young ed., 2d ed. 2001); Tench Coxe, *A Pennsylvanian III,* PENNSYLVANIA GAZETTE, Feb. 20, 1788, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 275 (David E. Young ed., 2d ed. 2001).
[74] ARISTOCROTIS, THE GOVERNMENT OF NATURE DELINEATED OR AN EXACT PICTURE OF THE NEW FEDERAL CONSTITUTION (April 15, 1788), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 331 (David E. Young ed., 2d ed. 2001).
[75] Coxe, *supra* note 73, at 276.

defined as both an unorganized group of the people, as well as an "active" or organized group in the service of the United States: "young men chiefly, who will not be attached to any particular place, on account of their families" and "will assist, in conjunction with the standing army, to quell insurrections that may arise . . . ."[76] Furthermore, it would be used as a tool for Congress to "fulfill their engagements with foreign nations, [and] their allies . . . ."[77]

The fundamental right of each person to keep and bear arms for self-defense and for the common defense of the state became the touchstone for the development of the well-regulated militia established under the Articles of Confederation in 1781, and the U.S. Constitution in 1787.[78] To this extent, one of the primary issues facing the Convention in 1787 was securing "effectual discipline" and regulation of the militia.[79] Although it was recognized that the states and federal government had a measure of shared authority in regulating the militia, there was debate over where that authority should be centered and, by extension, how such power could be exercised over the right to keep and bear arms.[80] Delegates such as James Madison and George Mason asserted that the powers of regulating and disciplining the militia should be left to the general government rather than the states, which appointed their own officers in order to secure the public defense.[81] On the other hand, many argued that:

> the power of the sword, even so far as it is placed in the hands of Congress, is subject to the controul [sic] of the state legislatures, for they name one branch of the federal government (the Senate) without whom no military officers can be appointed, no monies granted, no armies raised, no navies provided. The state governments also have 'the *authority* of training the militia, and

[76] ARISTOCROTIS, *supra* note 74, at 331.

[77] *Id.*

[78] THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 59, at xxiii, xxviii.

[79] FEDERAL CONVENTION AUGUST 23, 1787: DEBATES (EXCERPTS) (1995), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 9 (David E. Young ed., 2d ed. 2001).

[80] FEDERAL CONVENTION AUGUST 18, 1787, *supra* note 73, at 3–5.

[81] *Id.* at 2–3; FEDERAL CONVENTION AUGUST 23, 1787, *supra* note 79, at 9 (Madison argued, "[t]his will no more be done, if left to the states separately, than the requisitions have been hitherto paid by them. The states neglect their militia now, and, the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety . . . . The discipline of the militia is evidently a *national* concern, and ought to be provided for in the *national* Constitution.").

appointing all the officers.[']82

Following the approval of the Constitution for ratification, American citizens and former delegates of the Federal Convention continued to argue over whether granting Congress the authority for "organizing, arming, and disciplining" the militia endangered individual liberty and whether such authority should belong to the states instead.[83] Ultimately, there was an agreement that the militia was necessary for the defense and preservation of liberty on an individual and national level.[84] Toward this end, despite the level of distrust by some members of the Federal Convention in placing exclusive control and responsibility in the states, it was agreed, although not explicitly, that the regulation and discipline of the militia was to be concurrent between the state and federal governments.[85] Despite being a strong proponent of national regulation and discipline of the militia, Alexander Hamilton maintained that the key to superintending the common defense of the country and "watching over the internal peace of the confederacy" was uniformity.[86] Uniformity between the federal and state governments in the organization and discipline of the militia would produce the most beneficial effects toward achieving their inherent responsibility for the nation's internal and external security and the preservation of the liberties of individual citizens.[87]

Accordingly, while the states were to have the authority to train the militia, they could only do so according to the uniform discipline proscribed by Congress.[88] Thus, Article I, Section 8 of the United States Constitution was written to provide Congress with the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[89] However, together with the states, Congress was authorized:

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[82] Coxe, *supra* note 73, at 276

[83] FEDERAL CONVENTION AUGUST 23, 1787, *supra* note 79, at 7–8; VIRGINIA CONVENTION JUNE 14, 1788: DEBATES (EXCERPTS), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 402 (David E. Young ed., 2d ed. 2001).

[84] FEDERAL CONVENTION AUGUST 23, 1787, *supra* note 79, at 9–10.

[85] VIRGINIA CONVENTION JUNE 14, 1788, *supra* note 83, at 403.

[86] Alexander Hamilton, *Publius*, N.Y. INDEP. J., Jan. 9, 1788, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 195 (David E. Young ed., 2d ed. 2001).

[87] *Id.*

[88] *Id.* at 196.

[89] U.S. CONST. art. I, § 8, cl. 18.

> [t]o provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections, and repel Invasions[90]; [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.][91]

Therefore, the Constitution granted state governments the power to govern the militia when Congress neglected to do so or when it was not called into service for "general national purposes," at which time Congress would govern its activity.[92] This concurrence of power with the state governments would create a unified platform from which to provide and ensure supplementary security from such insurrection and invasion, and more importantly, acts of domestic violence at the hands of the nation's own citizens.[93] While "Congress may, at their pleasure, on application of the state legislature, or (in vacation) of the executive, protect each of the states against domestic violence" so too can the states "in full possession of the power of using its own militia to protect itself against domestic violence; and the power in the general government cannot be exercised, or interposed, without the application of the state itself."[94]

This historical backdrop makes clear that Congress and the state governments had the authority to create limits or establish parameters on the right to keep and bear arms for the protection of the nation. Indeed, without the authority of state government and Congress to regulate the people and their ability to take up arms, whether in self-defense or for the security of the nation, "[e]ach would have the power of taking his neighbor's life, liberty, or property; and no man would command more than his own

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[90] *Id.* at cl. 15.

[91] *Id.* at cl. 16.

[92] Robert Yates, The Notes of the Secret Debates of the Federal Convention of 1787 (May 25, 1787), *reprinted in* Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787. TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION, LUTHER MARTIN'S LETTER, YATES'S MINUTES, CONGRESSIONAL OPINIONS, VIRGINIA AND KENTUCKY RESOLUTIONS OF '98-'99, AND OTHER ILLUSTRATIONS OF THE CONSTITUTION, VOL. III, at 424 (2d ed. 1836).

[93] VIRGINIA CONVENTION JUNE 14, 1788, *supra* note 83, at 428–29.

[94] *Id.* at 432.

strength to repel the invasion."[95] As an "inactive" and traditionally unorganized body of people with arms, it was considered "good policy" for the government to regulate their activity based on the belief that "[i]t would be dangerous to trust such a rable . . . with arms in their hands. They might employ them in opposing the supreme laws of the land instead of employing them to execute them."[96]

However, while the state and federal governments were able to regulate the militia in order to execute the laws of the nation, they only had the authority to do so to the extent that such regulation of the militia did not endanger citizen's themselves by arbitrarily infringing upon their ability to exercise the constitutional right to keep and bear arms for the purpose of self-defense.[97] According to *Blackstone's Commentaries on the Laws*, published prior to the American Revolution, the right to bear arms was recognized as a natural right necessary for an individual to defend his life, family, or property against another individual or the government.[98]

This interpretation of the right to keep and bear arms had a lasting effect on the construction and interpretation of the Second Amendment.[99] Today, as in the past, the issue arising out of the Second Amendment is the balance between the government's obligation and authority to protect the citizens of the nation not only from foreign invasion but also from each other, and the ability of law-abiding citizens to exercise their constitutional right to self-defense with a firearm.[100]

III. FEDERAL REGULATIONS AND JUDICIAL PRECEDENT ON THE RIGHT TO BEAR ARMS

The issue of defining the limits of the state and federal governments' ability to regulate the right to keep and bear arms was not a novel one to the Supreme Court of the United States at the time *McDonald v. Chicago* was decided.[101] Although the first

[95] NOAH WEBSTER, A CITIZEN OF AMERICA (1787), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 39 (David E. Young ed., 2d ed. 2001).

[96] ARISTOCROTIS, *supra* note 74, at 331.

[97] U.S. CONST. amend. II.

[98] DAVID BARTON, THE SECOND AMENDMENT 15 (2000).

[99] *See id.*

[100] *See id.*

[101] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010) (noting the court's decision in *Heller* just two years prior).

decision of the Court regarding the right to keep and bear arms and the issue of gun control came with the holding in *United States v. Cruikshank* in 1876,[102] it is important, within this context, to briefly examine the incorporation of the Bill of Rights against the laws of the federal government and the states. The incorporation of the Second Amendment against the federal and state governments indicate the extent to which each has authority over a law-abiding citizen's right to keep and bear arms.[103]

Throughout the 1800's, the Bill of Rights only applied to the federal government.[104] It was not until the aftermath of the Civil War that the Supreme Court began to adopt the principle that the Bill of Rights applies to both the federal government and the states through the Due Process Clause of the Fourteenth Amendment.[105] The Due Process Clause protected citizens from the arbitrary denial of life, liberty, and property by the government.[106] Specifically, Section one of the Fourteenth Amendment states, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"[107]

By the end of the 19th century, the Court moved away from its position in the *Slaughter-House Cases*, which held that the Privileges and Immunities Clause of the Fourteenth Amendment only protected those fundamental rights from arbitrary action by the federal government,[108] and began to develop a rationale for applying the Bill of Rights against the federal government and the states through the Fourteenth Amendment Due Process Clause.[109] This was first evidenced in 1897, in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, in which the Supreme Court applied the Fifth Amendment to the state governments through the Fourteenth Amendment.[110] This

[102] *See id.* at 3030.

[103] *See id.* at 3050 (arguing that the Bill of Rights limits both federal and state power).

[104] *Id.* at 3028.

[105] *See id.* at 3031, 3033–34.

[106] U.S. CONST. amend. VIV, § 1.

[107] *Id.*

[108] Slaughter-House Cases, 83 U.S. 36, 74 (1873); *see also McDonald*, 130 S. Ct. at 3031.

[109] *McDonald*, 130 S. Ct. at 3030–31.

[110] Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (discussing the state seizure of private property for public use without just

approach, defined as "selective incorporation,"[111] was adhered to years later by Justice Moody in *Twining v. New Jersey*.[112] Specifically, Justice Moody stated:

> it is possible that some of the personal rights safeguarded by the first eight Amendments against [n]ational action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.[113]

This trend towards incorporation against the states continued with subsequent holdings by the Court in *Snyder v. Massachusetts* in 1934, incorporating the Sixth Amendment,[114] and *Palko v. Connecticut* in 1937, incorporating the Fifth Amendment protection against double jeopardy.[115] Specifically, Justice Cardozo writing for the Court in *Snyder* held that each state may regulate the procedure of its courts under "its own conception of policy and fairness unless" it limits or abridges those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[116] Furthermore, in *Palko*, Justice Cardozo determined that the Due Process Clause only protected those rights which were considered "the very essence of a scheme of ordered liberty" so as to be fundamental and thus applicable to the federal government and the states.[117]

In 1947, Justice Hugo Black's dissent in *Adamson v. California* redefined the Court's application of the doctrine of incorporation of the Bill of Rights.[118] Justice Black argued that the intent of the Framers of the Fourteenth Amendment should control the Court's interpretation of the Amendment.[119] Although he advocated for total incorporation, rather than selective incorporation, he contended that not incorporating the Amendments of the Bill of Rights at all would, "degrade the constitutional safeguards of the

compensation); *see* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation.").

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

112 *See* Twining v. New Jersey, 211 U.S. 78, 92 (1908).

113 *Id.* at 99 (citation omitted).

114 *See* Snyder v. Massachusetts, 291 U.S. 97, 106 (1934).

115 *See* Palko v. Connecticut, 302 U.S. 319, 323 (1937).

116 *Snyder*, 291 U.S. at 105 (citing *Twining*, 211 U.S. at 106, 111–12).

117 *Palko*, 302 U.S. at 325.

118 *See* Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

119 *See id.* at 89.

Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise."[120] In doing so, he influenced the Court's movement to firmly establish boundaries that now dictate the application of the first eight Amendments of the Bill of Rights, in particular the Second Amendment, to the states.[121] Justice Black's belief, in combination with Justice Cardozo's well-defined limits as to what rights are considered fundamental so as to be applied against the states, created the doctrine of selective incorporation.[122] By virtue of the doctrine of selective incorporation of particular rights contained in the first eight Amendments, the Second Amendment is now applied to the states.[123]

The Second Amendment right to keep and bear arms for the purpose of self-defense is considered a fundamental right free from arbitrary state and federal legislation.[124] As discussed in Part II of this Article, the Second Amendment right to keep and bear arms for the purpose of self-defense is "so rooted in the traditions and conscience of our people as to be ranked as fundamental[,]" and thus, implicit in the concept of ordered liberty.[125] Although the Supreme Court originally considered the protection or remedies afforded against state infringement of particular fundamental rights to be different from those applicable to federal infringement, it abandoned such a notion and declared that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"[126]

The Court's history regarding the application of the right to bear arms against the action of not only the federal government but also against that of the states has evolved from the decision in *United States v. Cruikshank* to the Court's most recent decision in *McDonald v. Chicago*.[127] *United States v. Cruikshank* was one of the first decisions to consider the application of the Second

[120] *Id.* at 70.
[121] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3022 (2010).
[122] *See Adamson*, 332 U.S. at 68 (Black, J., dissenting); *Palko*, 302 U.S. at 324–28 (discussing the application of the Fourteenth Amendment to the states).
[123] *McDonald*, 130 S. Ct. at 3034 ("the Due Process Clause fully incorporates particular rights contained in the first eight Amendments" to the states).
[124] *Id.* at 3044.
[125] *Id.* at 3032 (quoting Synder v. Massachusetts, 291 U.S. 97, 105 (1934)).
[126] *Id.* at 3035 (quoting Malloy v. Hogan, 378 U.S. 1, 10 (1964)).
[127] *See id.* at 3026; United States. v. Cruikshank, 92 U.S. 542, 553 (1876).

Amendment to the states.[128] In addressing federal charges against a white mob for impeding the rights of freedmen to bear arms and assemble, the Court held that the right to freely assemble under the First Amendment and keep and bear arms under the Second Amendment was only protected from infringement by federal government action, but not by the states.[129] By characterizing the system of government of the United States as comprised of two separate entities, one encompassing the federal government and the other the states, the Court determined that the Second Amendment:

> is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The [S]econd [A]mendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes.[130]

In declaring that the Second Amendment is only applicable to the federal government, *Cruikshank* upheld the contention that the state governments, in maintaining a "well-regulated militia," were free to regulate firearms in any manner they deemed appropriate.[131] *Cruikshank* has been cited and reaffirmed for over a century, in *Presser v. Illinois* and *Miller v. Texas*,[132] and most recently in the Court's decision in *McDonald v. Chicago*.[133]

By the twentieth century, the Court began adopting the notion that both the state and federal government could impose limits on individual gun ownership and use through non-arbitrary legislation regulating the manufacture, importation, and sale or delivery of firearms and ammunition.[134] Indeed, the decisions of the Court in *Cruikshank*, *Presser*, and *Miller* had all preceded the establishment of the doctrine of selective incorporation.[135] In

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[128] *See Cruikshank*, 92 U.S. at 553.

[129] *Id.* at 552, 553.

[130] *Id.* at 553.

[131] *See id.* (discussing the rights of citizens to provide for their own defense).

[132] Presser v. Illinois, 116 U.S. 252, 265 (1886); Miller v. Texas, 153 U.S. 535, 538 (1984).

[133] McDonald v. City of Chicago, 130 S. Ct. 3020, 3031 (2010).

[134] *See, e.g.*, United States v. Miller, 307 U.S. 174, 175 (1939) (addressing federal gun legislation).

[135] *McDonald*, 130 S. Ct. at 3031.

United States v. Miller, the Court began to link the right of every able-bodied citizen to keep and bear arms to service in the state militia.[136] In doing so, the right to keep and bear arms under the Second Amendment began its first phase of state regulation.[137] The ruling in *United States v. Miller* was based on the National Firearms Act of 1934.[138] The Act imposed a high tax on the manufacture and sale of short barreled shotguns and machine guns and the defendant contended that this infringed upon his Second Amendment right to keep and bear arms.[139] The Court held that the Act was not unconstitutional as the use of short barreled shotguns and machine guns bore no reasonable relationship to the preservation and efficiency of a well-regulated militia that provided for the common defense of the nation and security among individual citizens.[140] The decision in *United States v. Miller* was the first holding of many made by the Court to narrow the scope of the right to keep and bear arms and

[136] *See Miller*, 307 U.S. at 179.

[137] *Id.* at 182.

[138] *Id.* at 175. The National Firearms Act of 1934 not only established a national excise tax on the manufacture and transfer of certain firearms but also required that firearms were to be registered by those individuals that carried them. 26 U.S.C. §§ 5801–02 (2012). In doing so, Congress categorized the firearms that fell under the Act, specifically including, machine guns, short-barreled shotguns, and any other weapons considered concealable other than a pistol or revolver. *Id.* § 5845. The National Firearms Act of 1934 was the first federal legislation to define a "firearm" as a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition. *Id.* § 5845(a). Furthermore, under the Act, a "machine gun" consisted of "any weapon, which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." *Id.* § 5845(b). Today, a firearm is "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; . . . the frame or receiver of any such weapon; . . . any firearm muffler or firearm silencer; or . . . any destructive device." 18 U.S.C. § 921(a)(3) (2012). In addition, a "rifle" means "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger." *Id.* § 921(a)(7).

[139] *Miller*, 307 U.S. at 175 n.1 (discussing fines for guns with barrels less than eighteen inches); LIBRARY OF CONGRESS, *United States: Gun Ownership and the Supreme Court*, http://www.loc.gov/law/help/second-amendment.php (last visited Sept. 2, 2014).

[140] *See Miller*, 307 U.S. at 178.

effectively regulate it through non-arbitrary federal legislation.[141]

In the year preceding the Court's decision in *Miller*, Congress passed the Federal Firearms Act of 1938, establishing one of the largest federal controls on the commerce and possession of firearms prior to the Gun Control Act of 1968.[142] In regulating almost all firearms available on the market, the Federal Firearms Act also regulated "many classes of ammunition suitable for handguns."[143] Specifically, the Act required that all manufactures, dealers, and importers obtain a federal license for handling and transferring firearms and ammunition in interstate commerce.[144] In addition, all dealers were required to refrain from shipping any firearm and ammunition in interstate commerce to felons, fugitives, persons under indictment, or any person required to have a license, but who did not, at the time of the purchase.[145] All dealers were mandated to keep records of their firearms transactions.[146]

The increase in annual imports of firearms, and the increase in urban gun violence, provoked Congress to amend the Federal Firearms Act of 1938, so as to create the more comprehensive Gun Control Act of 1968.[147] The Gun Control Act of 1968 primarily sought to ban the interstate shipment of firearms and ammunition, specifically "armor piercing ammunition," between persons that did not possess a federal license as a manufacturer, dealer, importer or collector.[148] While private citizens were not regulated directly, licensed dealers, manufacturers, collectors or importers of firearms and ammunition were heavily regulated in the manufacture, importation, and sale or delivery of firearms and ammunition.[149] All licensed dealers, manufacturers, collectors, and importers were prohibited from selling or delivering firearms and ammunition in violation of federal and state law, to individuals in another state, to persons whom they knew resided outside the state, and to any individual under the

[141] LIBRARY OF CONGRESS, *supra* note 139.

[142] Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 139 (1975).

[143] GREGG LEE CARTER, GUN CONTROL IN THE UNITED STATES: A REFERENCE HANDBOOK 131 (2006); Zimring, *supra* note 142, at 140.

[144] Zimring, *supra* note 142, at 140.

[145] *Id.*

[146] *Id.*

[147] The Gun Control Act of 1968, 18 U.S.C. §102 (1968); CARTER, *supra* note 143, at 7–9.

[148] 18 U.S.C. § 923(a)(1)–(2); CARTER, *supra* note 143, at 158.

[149] 18 U.S.C. § 923(a); Zimring, *supra* note 142, at 149.

age of eighteen and under the age of twenty one if the ammunition was for a firearm other than a shotgun or rifle.[150] Further, the Gun Control Act required that upon selling a firearm or ammunition, all dealers had to maintain a record of signed forms acknowledging the name and place of residence of the purchaser, and describing the type of firearm and ammunition sold.[151] In addition, the Act limited the importation of firearms and ammunition, with certain exceptions that included those needed for scientific research and training purposes, or those that were suitable for, or readily adaptable for, sporting purposes.[152] Subsection three of the Act specifically banned the importation of surplus military firearms.[153]

The Gun Control Act also established a list of persons prohibited by federal law from owning a gun or ammunition and transferring firearms in interstate commerce.[154] These people included: minors under the age of eighteen, persons convicted of a state or federal felony, fugitives, defendants under indictment, adjudicated persons for mental illness, and persons who were deemed an "unlawful user of or addicted to any controlled substance."[155] Although the purpose of the Act was to deny access to firearms and ammunition to these defined groups, firearms still remained available to them.[156] Guns could be purchased from non-dealers and the regulation of dealers did not bar them from misrepresenting the status of their prospective customers.[157] Thus, the effectiveness of the regulations promulgated by the Gun Control Act of 1968 was limited.[158]

In response to the difficulties involved in enforcing the Gun Control Act, Congress revised many of its provisions.[159] In 1986, Congress enacted the Law Enforcement Officers Protection Act, which, although limited to concealed weapons, prohibited

[150] 18 U.S.C. § 922(b)(1)–(3)(2006); CARTER, *supra* note 143, at 159.
[151] 18 U.S.C. § 923(g)(2).
[152] *Id.* § 925(d)(1)–(3); Zimring, *supra* note 142, at 154.
[153] 18 U.S.C. § 925(d)(3); Zimring, *supra* note 142, at 154.
[154] 18 U.S.C. § 922(d); *see also* CARTER, *supra* note 143, at 158–59.
[155] 18 U.S.C. § 922(d); *see also* CARTER, *supra* note 143, at 159.
[156] CARTER, *supra* note 143, at 85 (the secondary market consists of many private sales providing an outlet for prohibited persons to obtain a firearm).
[157] *Id.*
[158] *Id.* at 159 ("Concerns about abusive enforcement of the GCA eventually led Congress to pass the Firearm Owners' Protection Act of 1986, which curtailed some provisions of the GCA, while leaving the basic structure intact.").
[159] *Id.*

carrying any type of firearm ammunition.[160] Specifically, the Act made it illegal for anyone to manufacture, import, distribute, and use "armor piercing" ammunition.[161] Excluded from the definition of "armor piercing" ammunition was shotgun rounds utilized for hunting purposes, projectiles designed for target shooting, and projectiles that the Secretary of the Treasury determined were primarily intended for sporting purposes or industrial use.[162]

Although more strict and specific gun control regulations were put in place by the Gun Control Act and the Law Enforcement Officers Protection Act, the Firearm Owners' Protection Act in 1986 reformed provisions of the Gun Control Act.[163] Despite banning the sale of machine guns to both civilians and law enforcement officers and maintaining restrictions on the purchase of handguns across state lines, the Firearm Owners' Protection Act, in particular, amended regulations regarding the interstate transportation of firearms.[164] The Firearm Owners' Protection Act also broadened the range of firearms allowed to be imported and reopened, on a limited basis, the interstate sale of firearms by dealers and non-dealers.[165] By redefining what constitutes a person "engaged in the business" of selling firearms, the dealer restrictions originally authorized under the Gun Control Act reached fewer dealers.[166] Furthermore, it was no longer necessary for a person engaged in the business of dealing firearms to follow many of the restrictions imposed by the Gun Control Act on interstate ammunition shipments, specifically the requirement to keep records of sales of non-armor-piercing ammunition.[167]

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[160] *Id.* at 160–61.

[161] 18 U.S.C. § 921(a)(17)(B) (2006) (according to the Act, "armor piercing ammunition" was defined as "a projectile or projectile core which may be used in a handgun" or "a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile.").

[162] *Id.* § 921(a)(17)(C).

[163] CARTER, *supra* note 143, at 160; *see* Firearms Owners' Protection Act, Pub. L. No. 99–308, 100 Stat. 449 (1986).

[164] CARTER, *supra* note 143, at 160; *see* sec. 102, § 922, 100 Stat. at 451–53 (amending 18 U.S.C. § 922 (1968) to regulate the interstate shipment, transport, and sale of firearms by a licensed dealer, manufacturer, or importer).

[165] CARTER, *supra* note 143, at 160.

[166] *See* sec. 101, § 921, 100 Stat. at 450 (amending 18 U.S.C. § 921 (1968) to redefine who qualifies as an individual engaged in the business of dealing and manufacturing firearms and ammunition); CARTER, *supra* note 143, at 160.

[167] CARTER, *supra* note 143, at 160; *see* sec. 102, § 922, 100 Stat. at 451 (amending 18 U.S.C. § 922 (1968) to regulate the record keeping procedures of licensed importers, manufacturers, and dealers).

Inspections by the Bureau of Alcohol, Tobacco, and Firearms were limited to one per dealer per year, but unlimited inspections were still allowed in cases of criminal investigation.[168]

In the 1990's, the pendulum started swinging back with the passage of three federal acts initiating new crime control reforms.[169] The Crime Control Act of 1990 made it unlawful for any individual to possess a firearm at a place he or she knew, or had reasonable cause to believe, was a school zone.[170] Furthermore, and more importantly, the Act banned the assembling of certain semiautomatic weapons, known as "assault weapons," from foreign parts unless done by a licensed manufacturer.[171] However, other types of semiautomatic weapons such as semiautomatic rifles, shotguns, and pistols could still be imported.[172]

Another Congressional gun control act in the 1990's was the Brady Handgun Violence Prevention Act in 1993.[173] The Brady Handgun Violence Prevention Act made it unlawful for any licensed manufacturer, importer, or dealer to sell, deliver, or transfer a handgun to an unlicensed individual unless the transferor received a statement from the purchaser giving his or her name, address, and date of birth from a valid identification document containing a photograph of the purchaser.[174] A prospective purchaser was rejected if he or she had been convicted of a crime that carried a sentence of at least a year, was the subject of a violence based restraining order, was convicted of domestic abuse, was an unlawful user of or addict of drugs, was an illegal alien or had renounced citizenship from the United States, was dishonorably discharged from the Armed Forces, or was certified as mentally unstable or in a mental institution.[175] The Brady Handgun Violence Prevention Act authorized police officers to make a "reasonable effort" to determine whether or not a transferor's possession of a weapon would be in violation of the

[168] CARTER, *supra* note 143, at 160.

[169] *Id.* at 161–63.

[170] Gun-Free School Zones Act of 1990, Pub. L. No. 101–647, §1702, 104 Stat. 4844, 4844 (amending 18 U.S.C. § 921 (1968)), *invalidated by* United States v. Lopez, 514 U.S. 549, 552 (1995). *See* CARTER, *supra* note 143, at 161.

[171] Crime Control Act of 1990, Pub. L. No. 101-647, sec. 2204(b), § 922, 104 Stat. 4789, 4855; CARTER, *supra* note 143, at 161.

[172] CARTER, *supra* note 143, at 161.

[173] Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat. 1536 (1993).

[174] *See id.* at sec. 102, § 922.

[175] *Id.* at sec. 102(a)(3)(B); CARTER, *supra* note 143, at 162.

law.[176] In 1997, the provision requiring police officers to conduct background checks was struck down by the Court in *Printz v. United States*, as a violation of states rights under the Tenth Amendment.[177] Under the Brady Handgun Violence Prevention Act, a handgun was considered "a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and []any combination of parts from which a firearm . . . can be assembled."[178]

The final congressional gun control act of importance was the Violent Crime Control and Law Enforcement Act of 1994, hereinafter referred to as the Assault Weapons Ban.[179] For a ten-year period, the Assault Weapons Ban outlawed the manufacture, sale, and possession of nineteen assault weapons, while exempting 670 semi-automatic firearms associated with sporting.[180] More specifically, the ban made it unlawful for any person to transfer or possess a large capacity magazine or "large capacity ammunition feeding device."[181] The term "large capacity ammunition feeding device" meant "a magazine, belt, drum, feed strip, or similar device manufactured after the date of enactment of the [Assault Weapons Ban] . . . that ha[d] a capacity of, or that [could] be readily restored or converted to accept, more than 10 rounds of ammunition . . . ."[182] However, this definition did not include or apply to any "attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition."[183] Any large capacity magazine manufactured or imported after the Act was enacted on September 13, 1994, was identified by a serial number.[184]

Although the Assault Weapons Ban expired on September 13, 2004, the state and local governments of the District of Columbia and several states including, Massachusetts, California, Hawaii,

[176] *See* sec. 102(2), §922, *invalidated by* Printz v. United States, 521 U.S. 898, 933 (1997) (holding that "the central obligation imposed upon CLEOs by the interim provisions of the Brady Act . . . is unconstitutional.").

[177] *Printz*, 521 U.S. 898 at 936 (O'Connor, J., concurring).

[178] Brady Handgun Violence Prevention Act, sec. 102(2), § 921(a).

[179] *See generally* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (1994).

[180] NANCY E. MARION, FEDERAL GOVERNMENT AND CRIMINAL JUSTICE 152 (2011).

[181] Violent Crime Control and Law Enforcement Act, sec. 110103(a)(w)(1), §922.

[182] *Id.* at sec. 110103(b)(31)(A), § 921(a).

[183] *Id.* at sec. 110103(b)(31)(B), § 921(a).

[184] *Id.* at sec. 110103(d), §923(i).

Maryland, Connecticut, and, more importantly, New York, maintained the ban on magazines capable of holding more than ten rounds of ammunition.[185] However, effective March 16, 2013, the New York legislature amended its version of the gun control law with the passage of the NY SAFE Act, prohibiting both the possession of high capacity magazines, defined as magazines able to hold more than ten rounds, *and* the possession of a firearm loaded with more than seven rounds of ammunition, yet not prohibiting manufacturers from producing magazines with a capacity of ten rounds.[186]

The foregoing acts of Congress are significant not only in their regulation of the right to manufacture, produce, and possess a firearm, but also in their regulation, albeit indirectly, of the possession and use of ammunition. Indeed, ammunition is an inherent part of what is considered a firearm and is also essential to the use of a firearm, whether for sporting purposes or for self-defense.[187] This is evidenced, most pointedly, by the Court's explanation of what it is to make a firearm in *United States v. Thompson/Center Arms Company*,[188] a case that arose when officials from the Bureau of Alcohol, Tobacco, and Firearms informed Thompson/Center Arms Company that a pistol distributed with a conversion kit was a "firearm" subject to the Federal Firearms Act.[189] The Court considered a firearm to be "made" when "[it] was placed together with a further part or parts that would have had no use in association with [a] gun except to convert it into a firearm."[190] Although some parts of the firearm referenced in *Thompson/Center Arms Company* could have been used without ever assembling a firearm, the Court held that "the likelihood of that is belied by the utter uselessness of placing the converting parts with the others except for just such a conversion[]" into a firearm.[191]

Like the kit in *Thompson/Center Arms Company*, *supra*, the

[185] *See id.* at sec. 110105; CONN. GEN. STAT. §§ 53-202w(a)(1), w(b) (2013); CAL. PENAL CODE §§ 16740, 32310 (Deering 2014); MD. CODE ANN., CRIM. LAW § 4-305(b) (LexisNexis 2014); MASS. ANN. LAWS ch. 140, §§ 121, 131M (LexisNexis 2014); N.Y. PENAL LAW §§ 265.36–265.37 (Consol. 2013); D.C. CODE §7-2506.01(b) (2013); HAW. REV. STAT. § 134-8 (West 1992).

[186] N.Y. PENAL LAW § 265.36–265.37 (Consol. 2013) (emphasis added).

[187] *See, e.g.,* N.Y. PENAL LAW §§ 265.00(11)–(12), (15) (Consol. 2013).

[188] United States v. Thompson/Ctr. Arms Co., 504 U.S. 505 (1992).

[189] *Id.* at 508.

[190] *Id.* at 511–12.

[191] *Id.* at 512.

aggregation and use of ammunition can serve no useful purpose except in the assembly of a firearm, and can have no utility except to convert a gun into what is considered a firearm according to the federal gun control legislation discussed above.[192] Use of a firearm, in its natural and original meaning, includes its "active employment" or using the firearm as a weapon.[193] This view was adopted by the dissenting opinion in *Smith v. United States* in which it was noted that the use of a firearm includes discharging or firing it.[194] The majority of the Court, however, went one step further when it concluded that there is no dichotomy between "using" a firearm and "carrying" a firearm.[195] The Court held, "[j]ust as a defendant may 'use' a firearm . . . so too would a defendant 'carry' the firearm by keeping it on his person" whether he intends to exchange it for something else or fire it.[196] Carrying a firearm, like using a firearm, "implies personal agency and some degree of possession."[197]

This reasoning was further applied by the majority in *Muscarello v. United States*.[198] The Court referred to Black's Law Dictionary's definition of the phrase "carry arms or weapons" when it stated that to "carry" a firearm means, "[t]o wear, bear or carry [it] upon the person or in the clothing or in a pocket, for the purpose of use, *or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person*."[199] The majority further reasoned that an individual was "carrying" a firearm when "armed and ready for offensive or defensive action in case of a conflict" but also when possessing, or keeping a firearm in a vehicle.[200] For a firearm to be armed and ready it must be loaded with ammunition. Any regulation of an individual's right to carry a firearm inherently regulates the possession and use of ammunition. Indeed, from past to present, "'[t]he possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to

[192] *See* 18 U.S.C. § 921(a)(3) (1968).

[193] Muscarello v. United States, 524 U.S. 125, 136 (1998) (citing Bailey v. United States, 516 U.S. 137, 144 (1995)); Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting).

[194] *Smith*, 508 U.S. at 242–43.

[195] *Id.* at 236 (majority opinion).

[196] *Id.*

[197] *Muscarello*, 524 U.S. at 134.

[198] *See id.* at 130.

[199] *Id.* (citing BLACK'S LAW DICTIONARY 214 (6th ed. 1990)) (emphasis added).

[200] *Id.* at 128–30.

the latter as to the former.'"[201] As a result, just as individuals are regulated in their ability to possess, manufacture, distribute, carry, and use firearms, so too can they be subject to regulation by the federal and state government in the amount of ammunition they possess or may use in a firearm.[202] In fact, according to the Supreme Court in *District of Columbia v. Heller*, the Second Amendment right to keep and bear arms is not without limits and the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" is not the standard of liberty to be enjoyed.[203]

However, the decisions of the Court in *District of Columbia v. Heller* and *McDonald v. Chicago*, have narrowed the extent that the federal and state governments can regulate an individual's use and possession of firearms.[204] In *Heller*, Justice Scalia, writing for the majority, opined that the Second Amendment right to keep and bear arms is an individual right belonging to all Americans,[205] independent of militia service.[206] Although "arms" generally referred to weapons used in times of war, all firearms around the period of the American Revolution constituted "arms."[207] Furthermore, Justice Scalia reasoned that a citizen carrying a weapon was not necessarily a participant in an organized military.[208] Although the Second Amendment does not "protect the right of citizens to carry arms for *any sort* of confrontation,"[209] the majority opinion in *Heller* clearly and unequivocally asserted that the individual right to keep and bear arms is applicable outside a military context to all Americans in instances of confrontation and for the purpose of self-defense.[210]

Nevertheless, as recognized by Justice Scalia, the prefatory clause of the Second Amendment sanctions "the imposition of proper discipline and training,"[211] in the possession and use of

[201] United States v. Miller, 307 U.S.174, 180 (1939).

[202] *See generally* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES OFFICE OF ENFORCEMENT PROGRAMS & SERVS., FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (2005).

[203] District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

[204] *See* Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1132 (2011)

[205] *Heller*, 554 U.S. at 581.

[206] *Id.* at 584.

[207] *Id.* at 581.

[208] *Id.* at 584.

[209] *Id.* at 595.

[210] *Id.* at 584, 592, 628.

[211] *Id.* at 597.

firearms through federal and state regulations that do not arbitrarily infringe upon the right to keep and bear arms.[212] The regulation by the District of Columbia was unconstitutional not only because it amounted to an excessive ban on an entire class of firearms, but also because the firearms at issue were used by an overwhelmingly large number of Americans for self-defense; a core purpose of the Second Amendment.[213] As a result, Justice Scalia concluded that a regulation of, or in relation to, the right to keep and bear arms that overextends itself so as to prohibit an individual's ability to use and keep a firearm, let alone the most preferred one in the country, thus denying protection of the home, family, and the "security of a free state[,]" will not survive any standard of constitutional scrutiny.[214]

Following the opinion in *Heller*, the Supreme Court decided its most recent gun control case, *McDonald v. Chicago*.[215] In response to neighborhood violence by gangs and drug dealers, the petitioners filed suit against Chicago for prohibiting the lawful ownership of handguns.[216] The Court had to determine whether the right to keep and bear arms was "fundamental to our scheme of ordered liberty," or "deeply rooted in th[e] Nation's history and tradition," ultimately deciding that the possession and use of a firearm is a fundamental right applicable against the states through the Due Process Clause of the Fourteenth Amendment.[217] The Court rejected the arguments made by the municipal respondents that the Second Amendment right to bear arms as established in *Heller* was different from the other Amendments due to its implications for public safety,[218] finding that other constitutional rights were similarly situated, particularly those that "impose[d] restrictions on law enforcement and on the prosecution of crimes . . . ."[219] Further, the Court opined that while different jurisdictions across the country have different views on the issue of gun control, state and local governments

[212] *See id.* at 628–29, 631.

[213] *Id.* at 628–29.

[214] *Id.* at 597, 628–29.

[215] Lawrence Hurley, *Supreme Court Declines Challenges to Gun Laws,* REUTERS (Feb. 24, 2014), http://www.reuters.com/article/2014/02/24/us-usa-court-guns-idUSBREA1N12820140224. *See generally* McDonald v. City of Chicago, 561 U.S. 742 (2010).

[216] *McDonald*, 130 S. Ct. at 3026–27.

[217] *See id.* at 3036 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[218] *Id.* at 3045.

[219] *Id.* (citing Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

cannot simply enact any gun control law that they deem reasonable.[220] Rather, the Court was bound to follow precedent, which declared that if a Bill of Rights guarantee is fundamental, such guarantee is fully binding on the states and "thus limits . . . [the states'] ability to devise solutions to social problems that suit local needs and values."[221]

What is to be learned from the foregoing is that state and federal regulations limiting the possession and use of ammunition will withstand constitutional scrutiny when the restriction is simultaneously imposed on the individual and the firearms manufacturer. Indeed, by regulating the manufacture and distribution of firearms and ammunition, law-abiding citizens have the same ability to use a firearm for self-defense as a criminal using a firearm for an unlawful purpose or objective. On the other hand, regulating legislation that limits the ability of a law-abiding citizen to possess and use a magazine holding the required maximum of rounds of ammunition *without* related restrictions on firearm manufacturers would be a violation of the Second Amendment.[222] In fact, neither Congress nor state governments have the constitutional authority to disarm law-abiding citizens by regulating the right to keep and bear arms to a point that endangers the right of self-defense with a firearm.[223] Yet, munitions regulations that do not equally apply to the individual and the manufacturer do just that by placing the individual at risk of confronting a firearm that is fully loaded. Within this context, the NY SAFE Act is constitutionally defective.

IV. UNDERSTANDING WHERE WE ARE IN THE GUN CONTROL DEBATE TODAY

Although considered landmark decisions of the Court on the issue of gun control,[224] the decisions in *Heller* and *McDonald* provide no definite guidance on how far state and federal governments can regulate the right to keep and bear arms

[220] *Id.* at 3046.
[221] *Id.* (emphasis omitted).
[222] *See, e.g.,* N.Y. PENAL LAW § 265.00(23) (McKinney 2013).
[223] *See* Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AM. CONST. SOC'Y FOR L. & POL'Y 0 (2010), *available at* https://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf (citation to unmarked first page is indicated by "0").
[224] *See id.*

without infringing on an individual's rights.[225] While arguing on the one hand that the right to keep and bear arms for self-defense is fundamental and may not be arbitrarily infringed upon, the Supreme Court has stated on the other hand that it is not without limits.[226] The question then remains to be answered: what are those limits, and whether if any exist at all?

The Supreme Court has not clearly indicated any standard of review or scrutiny for the Second Amendment with which to guide Americans, the federal government, or state governments.[227] As a result, several different theories have evolved regarding the type of scrutiny to be applied.[228] For example, prior to *Heller*, gun laws were reviewed under a "'reasonable regulation'" standard."[229] This standard required courts to determine "whether a law effectively destroys or nullifies the ability of law-abiding people to possess firearms for self-defense. If so, the law [was] unconstitutional; if not, the law [was] deemed to be only a regulation, not a prohibition, of the right."[230] This standard is not the same as the rational basis test since "even a complete ban on all civilian firearms might be constitutional [under the rational basis test] because a legislator could rationally believe that the prohibition furthers the government's legitimate objective of reducing gun violence."[231]

However, some argue that strict scrutiny should apply to gun regulations because the Supreme Court declared that the Second Amendment protects the fundamental right to keep and bear arms for the purpose of self-defense.[232] Strict scrutiny demands that a law be "'narrowly tailored to . . . a compelling government interest.'"[233] Yet, despite being a fundamental right, which typically triggers strict scrutiny, there are some instances when the Court has applied lesser standards of scrutiny to fundamental

[225] *See id.*
[226] *See id.*
[227] *See id.*
[228] *See id.* at 2.
[229] *Id.* (citing Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007)).
[230] *Id.*
[231] *Id.*
[232] *Id.* (citing United States v. Booker, 570 F. Supp. 2d 161 (D. Me. 2008); United States v. Montalvo, No. 08-CR-004S, 2009 WL 667229, at *3 (W.D.N.Y. Mar. 12, 2009)).
[233] District of Columbia v. Heller, 554 U.S. 570, 688 (2008) (Breyer, J., dissenting) (quoting Abrams v. Johnson, 521 U.S. 74, 82 (1997)).

rights.[234] For example, strict scrutiny has been applied by the Court in select cases dealing with the First and Fifth Amendments and a lesser standard of review has been applied to cases involving the Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Amendments.[235]

As a result, some argue that intermediate scrutiny should be applied in Second Amendment cases.[236] As implied by the opinion of Justice Scalia in *Heller*, public safety in conjunction with self-defense is a legitimate interest of the state and federal governments.[237] Justice Scalia explained that providing a "well-regulated" militia implies nothing more than the discipline of the people for the purpose of providing for the "security of a free State" i.e. public safety.[238]

In addition, courts have applied a hybrid scrutiny[239] or "interest-balancing inquiry" similar to that advocated by Justice Breyer in *Heller*.[240] According to his dissent in *Heller*, under this standard of review the Court is to determine "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."[241] As applied in his dissent, Justice Breyer argued that the District of Columbia's handgun ban was constitutional because:

> [A] legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was

234 Mehr & Winkler, *supra* note 223, at 0.
235 *Id.*
236 *Id.*
237 *Id. See Heller,* 554 U.S. at 628–29.
238 *Heller*, 544 U.S. at 597 ("[T]he phrase 'security of a free State' and close variations seem to have been terms of art in 18th-century political discourse, meaning a 'free country' or free polity.").
239 Mehr & Winkler, *supra* note 223, at 0.
240 *Heller*, 554 U.S. at 634.
241 *Id.* at 689–90 (Breyer, J., dissenting).

adopted.[242]

Although this standard of review offers greater opportunities for the establishment and application of state and federal gun control legislation, "no other enumerated constitutional right . . . has been subjected to a[n] . . . 'interest-balancing' [inquiry]."[243] Indeed, in *Heller*, Justice Scalia argued that under this so-called standard of review, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[244]

Today, some courts distinguish whether the gun-control law at issue "burdens the 'core' right of self-defense in the home with a firearm," or "burdens . . . peripheral elements of the Second Amendment[ ]" right to keep and bear arms.[245] For example, courts have held that if the law at issue burdens the "core" right of self-defense in the home with a firearm, then strict scrutiny applies, otherwise intermediate scrutiny applies to other burdensome gun right laws.[246] Notably, among the decisions of several circuit courts throughout the country, are the opinions of the Second Circuit in *United States v. Decastro* and *Kachalsky v. County of Westchester*, in which the court recognized that intermediate scrutiny was appropriate when the requirements of the law do not burden the "core" protection of the Second Amendment, i.e. the right of a law abiding citizen to keep and bear arms for self-defense in the home.[247]

Although the Second Circuit recognized in *Kachalsky* that "'where the need for defense of self, family, and property is most acute'"[248] a higher standard of review in the form of strict scrutiny might be applicable, it had no occasion to decide that as the New York law before it only dealt with the ability of individuals to carry handguns in public.[249] In concluding that the law was constitutional, the Second Circuit distinguished its opinion from *Heller*, which addressed the constitutionality of regulations banning the possession of firearms in the home, by holding that

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[242] *Id.* at 682.
[243] *Id.* at 634 (majority opinion).
[244] *Id.*
[245] *See* Mehr & Winkler, *supra* note 223, at 0.
[246] *Id.*
[247] United States v. Decastro, 682 F.3d 160, 164, 166 (2d Cir. 2012); Kachalsky v. County of Westchester, 701 F.3d 81, 93 (2d Cir. 2012).
[248] *Kachalsky,* 701 F.3d 81, 94 (quoting Heller v. District of Columbia, 554 U.S. 570, 628 (2008)).
[249] *Id.*

"while the state's ability to regulate firearms is circumscribed in the home, 'outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.'"[250]

Recently, the Western District of New York had occasion to address the issue unanswered by the Second Circuit when it applied intermediate scrutiny to assess the constitutionality of the NY SAFE Act in *New York State Rifle & Pistol Ass'n v. Cuomo*.[251] While the Western District relied on the Second Circuit and other circuit court opinions throughout the country that "universally" applied intermediate scrutiny for its analysis of the Second Amendment,[252] its approach was misplaced because the decisions relied on were determining the constitutionality of state and federal laws affecting the ability to keep and carry commonly used firearms in public or in a context outside the scope of possessing a firearm in the home.[253] Furthermore, in reaching this result, the Western District reasoned that the decisions in *Heller* and *McDonald*, which impliedly rejected strict scrutiny by acknowledging the constitutionality of laws that prohibit the possession of concealed weapons and firearms in certain locations, permit the forfeiture of a criminal's Second Amendment right, and government regulation of the commercial sale of firearms.[254]

However, the decision of the Western District ignores that the scope of these laws do not directly impose severe and arbitrary limitations on the individual right to keep and bear arms for self-defense in the home,[255] unlike the ammunition capacity regulation imposed by the NY SAFE Act.[256] As a result, despite the fact that

[250] *Id.* (citing United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011)).

[251] N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 990 F. Supp. 2d 349, 365–66 (W.D.N.Y. 2013) (citing *Kachalsky*, 701 F.3d at 89).

[252] *Id.* at 365–66.

[253] *Id. See, e.g.,* United States v. Lahey, 967 F. Supp. 2d 731, 753, 755 (S.D.N.Y 2013) (statutory prohibition of the possession of guns by convicted felons and drug users is valid); United States v. Skoien, 614 F.3d 638, 639, 651–52 (7th Cir. 2010) (statutory prohibition of the possession of guns by persons who have committed a misdemeanor crime of domestic violence is valid); United States v. Walker, 709 F. Supp. 2d 460, 462, 466–67 (E.D. Va. 2010) (statutory prohibition of possession of a firearm by any person convicted of a felony or a misdemeanor crime of domestic violence is valid).

[254] *N.Y. State Rifle & Pistol Ass'n, Inc.*, 990 F. Supp. 2d at 366 (citing United States v. Heller, 554 U.S. 570, 688 (2008).

[255] *See generally N.Y. State Rifle& Pistol Ass'n Inc.,* 990 F. Supp. 2d 349.

[256] *See id.* at 371–72.

intermediate scrutiny may be applied to some forms of gun control legislation,[257] the Supreme Court, Second Circuit, and other lower courts have made the distinction that laws arbitrarily infringing upon the "core" Second Amendment right of an individual to keep and carry a firearm in the home for the purpose of self-defense may be subject to strict scrutiny.[258] Like the Supreme Court's analysis of the First Amendment, in which different standards of review have been applied based on whether the law places content-based or content-neutral restrictions on speech,[259] the Court has also established subtle yet significant distinctions in its review of the Second Amendment, as evidenced by the decisions in *Heller* and *McDonald*, based on whether the gun control law arbitrarily infringes the right to keep and bear arms for self-defense in the home.[260] For example, *Heller* and its progeny have determined that laws banning the use of a class of firearms or an individual's possession of firearms within the home are unconstitutional under a higher standard of review for arbitrarily infringing on the "core" right of the Second Amendment.[261] By comparison, laws regulating assault rifles and ammunition magazines, have been held to fall within the peripheral range of rights protected by the Second Amendment that are not subjected to a higher standard of review.[262] Based on these findings, if federal or state law regulates the amount of ammunition an individual may possess and use in a firearm to a point that places an arbitrary and severe burden on the "core" right of self-defense with a firearm in the home, then the regulating legislation should be subject to strict scrutiny.

Arguably, therefore, strict scrutiny is the most appropriate standard of review to be applied to a challenge of the NY SAFE Act and its limitation on the amount of ammunition an individual may possess and use in a firearm. Although law-abiding citizens are not wholly denied their ability to use a firearm for self-

[257] *Id.* at 366.

[258] *See* Mehr & Winkler, *supra* note 223, at 0; Kachalsky v. County of Westchester, 701 F.3d 81, 93 (2d Cir. 2012).

[259] *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000). *See generally* United States v. Grace, 461 U.S. 171, 177 (1983); U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981).

[260] United States v. Heller, 554 U.S. 570, 628–29 (2008). *See generally* McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (citing *Heller*, 554 U.S. at 626).

[261] *See generally* Mehr & Winkler, *supra* note 223, at 0.

[262] *See id.*

defense, New York has failed to provide a substantial explanation of the public safety benefits that arise from setting the maximum amount of ammunition a law-abiding citizen may possess and carry in a firearm at seven rounds.[263] As a result, this particular provision of the NY SAFE Act is exceedingly arbitrary, demanding that a strict standard of review be applied. Furthermore, by regulating the amount of ammunition an individual is able to possess and use in a common type of firearm without imposing proscriptions on the manufacturer of magazines, the NY SAFE Act impedes law-abiding citizens seeking to exercise their "core" right to keep and bear arms for the purpose of self-defense. Indeed, the manner in which a firearm is manufactured and designed determines how a law-abiding citizen may enjoy the right to keep and bear arms and use the firearm for purposes of self-defense against a criminal with a firearm. More specifically, while law-abiding citizens will choose to load their firearms within the legally prescribed seven round limit, a criminal who by definition is disinclined to follow the law, will likely fully load a firearm with ten rounds of ammunition, after legally or illegally purchasing a magazine designed and manufactured for this purpose. The difference between seven rounds of ammunition and ten rounds of ammunition can make the difference in both a confrontation and the level of risk to the personal safety of a law-abiding citizen.[264] Despite invoking intermediate scrutiny in reviewing the seven round limit of the NY SAFE Act, the Western District reached a similar conclusion holding, "a restraint on the amount of ammunition a citizen is permitted to load into his or her weapon—whether [ten] rounds or seven—is also more than a 'marginal, incremental or even appreciable restraint' on the right to keep and bear arms."[265] In fact, if law-abiding citizens choose to exercise their right to keep and bear arms for self-defense against criminals by possessing a firearm magazine loaded with ten rounds of ammunition rather than seven, they will be subject

[263] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 990 F. Supp. 2d 349, 372 (W.D.N.Y. 2013).

[264] *Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment: Hearing Before the S. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights and Human Rights*, 113th Cong. 19 (2013) (statement of Charles J. Cooper, Partner at Cooper & Kirk, PLLC).

[265] *N.Y. State Rifle & Pistol Ass'n*, 990 F. Supp. 2d 349 at 365 (citing Kachalsky v. County of Westchester, 701 F.3d 81, 93 (2d Cir. 2012).

to the penalties prescribed under the law, including fines and imprisonment.[266] As a result, the NY SAFE Act places a "severe" rather than "substantial" burden on the Second Amendment's "core" right to keep and bear arms, subjecting it to strict scrutiny rather than intermediate scrutiny as the Western District held.

In contrast to New York, states across the country such as Colorado, Connecticut, Maryland, and California have limited the amount of ammunition that can be possessed and used by an individual to ten rounds of ammunition.[267] Some of these states have also prohibited the manufacture, import, sale, transfer, exchange, and/or purchase of magazines with a greater ammunition capacity than the amount that can be possessed under the law.[268] As compared to NY's SAFE Act, law-abiding citizens in these states are given an equal advantage to criminals when it comes to their possession and use of a firearm. By establishing a regulation that places the firearm capabilities of the law-abiding citizen and criminal on the same plane, the aforementioned states eliminate the disadvantage to law-abiding citizens exercising their right to keep and bear arms for self-defense that otherwise exists as a result of the NY SAFE Act.

Accordingly, the NY SAFE Act should fail a strict standard of review. Although the government interest in public safety and security can be considered a compelling government interest,[269] the NY SAFE Act seven round limit is not narrowly tailored. Clearly, in order for New York's law to withstand constitutional scrutiny, the manufacturer of firearms must be regulated as equally as the individual. Although a ban on an entire class of firearms of common use is unconstitutional,[270] at the very least, such a limitation on the manufacturer would place law-abiding citizens and criminals on an equal playing field by implicitly disincentivizing the manufacturer from producing and distributing the particular firearm on an open market available to criminals and law-abiding citizens alike.

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[266] N.Y. PENAL LAW § 265.37 (McKinney 2013).

[267] *See* CAL. PENAL CODE § 16740; COLO. REV. STAT. § 18-12-301(2)(a)(I), 18-12-302(1)(a),(2) (2013); CONN. GEN. STAT. ANN. § 53-202w(a)(1), (3)(c) (West 2013); MD. CODE ANN., CRIM. LAW § 4-305(b) (LexisNexis 2014).

[268] *See* CAL. PENAL CODE § 32310(a); COLO. REV. STAT. § 18-12-302(1),(2) (2013); CONN. GEN. STAT. § 53-202w(a)(3)(b) (West 2013); MD. CODE ANN. CRIM. LAW § 4-305(b) (LexisNexis 2014).

[269] *Kachalsky*, 701 F.3d at 97.

[270] District of Columbia v. Heller, 554 U.S. 570, 628–29 (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).

However, the application of this line of reasoning depends on the Supreme Court and its future decisions regarding the issue of gun control. In the interim, the absence of guidance by the Supreme Court as to what standard applies has left the federal government, state governments, and more importantly Americans, in the dark as to the breadth of the Second Amendment as it relates to gun control laws. Since gun violence is still occurring, at times on massive scales, responses to federal and state regulations on the scope of the right to keep and bear arms continue to be proffered. [271] A definitive response by the Supreme Court is needed.

V. CONCLUSION

The issue of gun control seems to represent a crossroad between judicial restraint and judicial activism. Despite the longstanding precedent and history of gun use in America, gun violence is an ever-increasing public safety problem drawing public and political attention.[272] Each year thousands of people of all ages are killed or injured by firearms.[273] Although there was a marked decline in gun violence in 2000, between 1981 and 2000 there were more than 675,000 people killed by firearms in the United States, 83,000 of which were younger than twenty years old.[274] Additionally, between 1981 and 1990 gun suicides increased by forty-six percent among people age seventy-five and older.[275] Nonfatal gunshot wounds treated in emergency rooms were estimated at 75,000 people in 2000.[276] Indeed, "[f]or every gun homicide, an estimated four people are shot during nonfatal gun assaults; for every five people who commit suicide with a gun, one person attempts suicide with a gun and survives; and for every unintentional gun death, another thirty people are estimated to survive unintentional gun shootings."[277] More

[271] *See generally* EDWARD W. HILL, CLEVELAND STATE UNIV. COLL. OF URBAN AFFAIRS, ADDING UP THE "BUTCHER'S BILL" THE PUBLIC HEALTH CONSEQUENCES OF AMERICA'S SYSTEM OF GUN REGULATION 3, 7, 10 (2013).

[272] Julie Samia Mair, Stephen Teret & Shannon Frattaroli, *A Public Health Perspective on Gun Violence Prevention*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 39, 39 (Timothy D. Lytton ed., 2006).

[273] *Id.* at 44.

[274] *Id.*

[275] *Id.* at 46.

[276] *Id.* at 47.

[277] *Id.*

recently, "[i]n 2011, a total of 478,400 fatal and nonfatal violent crimes were committed with a firearm."[278] Furthermore in 2011, there were approximately 11,101 gun homicides in America.[279] From 1993 to 2011 about seventy percent of all homicides were committed with a firearm.[280] The number of nonfatal firearm related crimes fluctuated in 2011, between 400,000 and 600,000.[281]

Despite these statistics, there are individuals who argue that gun violence is unaffected by the public's access to firearms.[282] Criminologists maintain that government regulations of firearms can only "marginally reduce gun violence rates."[283] According to criminological research, gun availability to the ordinary citizen does not promote violence but rather secures an individual's safety.[284] Gun ownership can deter crime and violence by allowing self-defense.[285] Victims that can "defend [themselves] with a gun are *less* likely to be injured than those who submit" to a criminal.[286] In 2003, 272 million firearms were civilian-owned in the United States.[287] In 2012, it was estimated that forty-four percent of American households possessed at least one firearm.[288] The point of gun control is to reduce death.[289] However, gun control has not reduced the number of deaths in America overall.[290] Criminologists question gun control's purpose because even if guns are not available, suicide and murder occur through other means.[291] Moreover, they contend that criminals are able to find firearms even when gun ownership has declined.[292]

[278] MICHAEL PLANTY & JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, FIREARM VIOLENCE, 1993-2011 (2013), *available at* http://www.bjs.gov/content/pub/pdf/fv9311.pdf.

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *See* Don B. Kates, *The Limited Importance of Gun Control from a Criminological Perspective*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 62, 62 (Timothy D. Lytton ed., 2006).

[283] *Id.*

[284] *Id.* at 68–69.

[285] *Id.* at 68.

[286] *Id.*

[287] *Id.* at 63.

[288] EDWARD W. HILL, CLEVELAND STATE UNIV. COLL. OF URBAN AFFAIRS, HOW MANY GUNS ARE IN THE UNITED STATES? 2 (2013).

[289] Kates, *supra* note 282, at 65.

[290] *Id.*; ADDING UP THE "BUTCHER'S BILL", *supra* note 271, at 7.

[291] Kates, *supra* note 282, at 65.

[292] *Id.* at 74.

Therefore, reducing gun availability or increasing regulations on the use of firearms does not mean less gun violence, murder, or injury by guns, since supply-side regulations on legal dealers would not prevent criminals from receiving firearms elsewhere.[293] The imposition of harsher penalties for gun-related crimes would not help either, as prisons are already strained.[294]

Those who argue that laws regulating the manufacture and distribution of firearms will reduce the lethality of gun violence in the United States have opposed this view.[295] With regard to current state laws and the most recent gun control proposals by the federal government, which are aimed at reducing the number of bullets one may carry and use in a firearm, advocates contend that the greater number of rounds of ammunition a firearm can carry the more likely that an armed encounter will result in death or injury.[296] Despite the fact that most handgun shootings occur at a close range, "most bullets fired, even by trained law enforcement officers, miss their targets."[297] Unfortunately, there is no uniform national data available to correlate the effect of shootings with the number of rounds in a firearm.[298] However, more inclusive state-based statistics on shootings do show a correlation between the design and manufacture of firearms and the likelihood of injury or death with greater ammunition capacity.[299]

The American gun industry relies in part on the domestic manufacturing of firearms.[300] Domestic firearms and ammunition manufacturers are required to obtain Federal Firearms licenses and subject all retail sales of firearms to background checks, but they advertise and sell millions of firearms that may then be resold by unlicensed dealers to any person, regardless of their background.[301] Additionally, ammunition is typically bought and sold free of background checks and record keeping regulations.[302]

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[293] *Id.* at 65, 74.
[294] *Id.* at 76.
[295] *See* Tom Diaz, *The American Gun Industry: Designing & Marketing Increasingly Lethal Weapons*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 84, 95–96 (Timothy D. Lytton ed., 2006).
[296] *Id.* at 99.
[297] *Id.*
[298] *Id.*
[299] *See id.* at 99–100.
[300] *See id.* at 85.
[301] *Id.* at 85–86.
[302] *Id.* at 86.

Arguably, as a result, ammunition manufacturers and dealers are able to dictate the commercial sale of firearms.[303] If an ammunition manufacturer does not produce ammunition for a firearm, old or new, the production and sale of that particular firearm will fail.[304] On the other hand, as fewer people own more guns there is a premium on designing, manufacturing, and marketing innovative guns and ammunition to attract new buyers in a highly competitive commercial market.[305] Although all firearms are capable of injuring or killing, not all firearms are equally capable of doing so.[306] As a result, the firearm and ammunition manufacturer is responsible for incorporating specific design features that affect lethality and stimulate market sales.[307] The direction and success of the gun industry begins with the manufacturer who determines the design and production of firearms and ammunition, and finishes with the dealer who distributes firearms of increasing lethality attracting not only law-abiding citizens, but also, and more importantly, criminals who seek and obtain more lethal weapons for unlawful purposes through both legal and illegal channels.

An assessment of the assault weapons ban from 1994 to 2003, and the impact of these regulations on the manufacture of large capacity magazines, indicates that the manufacture of ammunition and magazines impacts gun use and the level of gun violence in the country.[308] Large capacity magazines are considered "the most functionally important feature of many [assault weapons]."[309] In addition, most crime guns with large capacity magazines are handguns.[310] During the 1980's and early 1990's, assault weapons with large capacity magazines were used in some of the most deadly incidents of mass shootings.[311] Between 1984 and 1993, firearms equipped with large capacity magazines were involved in six out of fifteen, or forty percent, of mass shootings in which six or more people were killed or twelve

303 *See id* at 86–87.
304 *Id.*
305 *Id.* at 87.
306 *Id.* at 95.
307 *Id.*
308 *See generally* CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003, 7 (2004).
309 *Id.* at 7.
310 *Id.* at 18.
311 *Id.* at 14.

or more people were wounded.[312] Prior to the 1993 assault weapons ban in the United States, firearms with large capacity magazines were utilized in roughly fourteen to twenty-six percent of gun crimes.[313]

As a result, despite the inability to determine the relationship between a ten round magazine and gun violence, reports have indicated that a "[large capacity magazine] ban has greater potential for reducing gun deaths and injuries than does the [assault weapons] ban."[314] As offenders are not typically "good shooters," the ability to fire more bullets increases the likelihood that they hit both their targets and innocent bystanders.[315] Accordingly, a reduction in the number of bullets in a firearm should reduce the number of fatalities or injuries caused by the firearm.[316]

While the arguments by gun control advocates are compelling, caution should be exercised before invoking their approach on a national scale, as the data upon which they rely for their position has been limited in its scope and timeliness.[317] Moreover, although it has been suggested that policies geared toward providing better screening and treatment for potentially violent individuals is the most effective solution to the growing level of gun violence in America, the mental health of an individual is difficult to monitor and is not enough to remedy the problem.[318]

Like redesigning an automobile, safer use of firearms can be affected by regulating not only firearm manufactures but also ammunition manufacturers. Through government mandated regulation, safer technology and guidelines for the use of firearms can be established and practiced.[319] Specifically, through government regulation over the manufacturer, the goal of preventing unregulated and increasingly lethal firearms in the hands of criminals, youths, and other prohibited users can be realized.[320] Controlling the use and possession of firearms by

[312] *Id.*
[313] *Id.* at 18.
[314] *Id.* at 19, 80.
[315] *Id.* at 83.
[316] *See id.* at 89.
[317] *See id.* at 79, 90.
[318] *See generally* Jeffrey W. Swanson et al., *Preventing Gun Violence Involving People with Serious Mental Illness, in* REDUCING GUN VIOLENCE IN AMERICA, INFORMING POLICY WITH EVIDENCE AND ANALYSIS 3, 40, 44 (Daniel W. Webster & Jon S. Vernick eds., 2013).
[319] *See* Mair, Teret & Frattaroli, *supra* note 272, at 50.
[320] *See id.* at 51.

regulating firearm and ammunition manufacturers offers the potential for a reduction in gun death and injury, and thus gun violence.[321] Although such intervention and regulation at the level of the manufacturer is promising, the enforcement of such regulations is challenging as the gun industry and prospective buyers of a firearm can go to other potential sources, in particular foreign manufacturers, for firearms and ammunition that fall outside the regulated scope.[322] Gun ownership can have dramatic economic and political implications.[323] Furthermore, the effect of gun control regulations is dependent on the legislature. The legislature has been an unwilling recipient of proposed changes to our current system of gun control. Although the federal government has the authority to create widespread and uniform regulations of firearms manufacturers in interstate commerce, it has instead created laws limiting the effectiveness of firearm regulations. In response to their constituents and once again a lack of decisiveness on the part of the Supreme Court regarding the Second Amendment, the state and federal government's efforts to reduce gun violence through more effective avenues of regulation is undermined.

So what is the solution? Clearly, the issue of gun control is not the sole responsibility of any particular branch of government and must be viewed as a national problem requiring action on a unified front. Foreseeably, through affirmative action and decision-making on the part of the Supreme Court complementary to regulatory efforts on the part of state and federal legislatures and administrative agencies, effective gun control policies regulating manufacturers, while not completely disarming the people, can be realized. The Supreme Court has the opportunity, through deference to the statistics and data produced by the legislature, to resolve the doctrinal ambiguities surrounding the Second Amendment and the issue of gun control. When presented with the proper case, the Court has the authority to provide a decisive understanding of the scope of the Second Amendment that will produce a stable and uniform system of rules for regulating firearms across the country. In doing so, the Court will resolve the continued inconsistency in this field of law and uncertainty underlying disputes over gun control and gun violence. Left without a clear decision and

[321] *See id.* at 50–51.
[322] *See* Diaz, *supra* note 295, at 85, 89.
[323] *Id.* at 87.

interpretation of the boundaries of the Second Amendment, the legislature cannot establish effective gun control legislation while balancing the demands of a democracy.