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The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment

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THE NEXT STEP IN SECOND AMENDMENT ANALYSIS: INCORPORATING THE RIGHT TO BEAR ARMS INTO THE FOURTEENTH AMENDMENT

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I. INTRODUCTION

The United States Supreme Court has the power to incorporate certain individual rights guaranteed by the Federal Constitution to the states through the Due Process Clause of the Fourteenth Amendment.[1] The current incorporation framework calls for incorporation of only those rights that are fundamental to the American system of law.[2] Despite this selective approach, the Court has incorporated nearly every provision of the Bill of Rights into the Fourteenth Amendment and subsequently applied them to the states.[3] One right the Court has not yet incorporated is the Second Amendment right to bear arms. In fact, the Supreme Court has not addressed the Second Amendment in over sixty years, and even then, the Court failed to indicate whether the right to bear arms applies to the states as well as the federal government.[4]

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[1] The Fourteenth Amendment provides "[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 the law. . . ." U.S. Const. amend. XIV, § 1.

[2] *See e.g. Duncan v. La.*, 391 U.S. 145, 148-49 (1968) (incorporating the Sixth Amendment); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 10.2, 368 (6th ed. West 2000). The selective incorporation approach will be discussed in more detail in Section III, *infra*.

[3] The Supreme Court has held the following portions of the Bill of Rights enforceable against the states: First Amendment: *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925) (freedom of speech); *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (the right to free exercise of religion); *Near v. Minn.* 283 U.S. 697, 707 (1931) (freedom of the press). Fourth Amendment: *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (unreasonable search and seizure). Fifth Amendment: *Benton v. Md.*, 395 U.S. 784, 793-96 (1969) (the double jeopardy provision); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (the privilege against self-incrimination); *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 236 (1897) (the provision against the taking of property without just compensation). Sixth Amendment: *Duncan*, 391 U.S. and 149 (the right to a jury trial in criminal cases); *Klopfer v. N.C.*, 386 U.S. 213, 222-26 (1967) (the right to a speedy trial); *Wash. v. Tex.*, 388 U.S. 14, 19 (1967) (the compulsory process for obtaining witness); *Pointer v. Tex.*, 380 U.S. 400, 403 (1965) (the right to confrontation of witnesses); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (the right to counsel); *In re Oliver*, 333 U.S. 257, 273 (1948) (the right to public trial); *Cole v. Ark.*, 333 U.S. 196, 202 (1948) (the right to notice of the charge). Eighth Amendment: *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (the provision against excessive bail); *Robinson v. Cal.*, 370 U.S. 660, 667 (1962) (the provision against cruel and unusual punishment).

[4] The most recent Supreme Court precedent regarding the Second Amendment did not address the issue of incorporation. *U.S. v. Miller*, 307 U.S. 174 (1939).

Before addressing the issue of incorporation, however, the Court must first decide whether the Second Amendment confers an individual right to bear arms to all citizens or whether it merely guarantees the collective right of the states to maintain a militia.[5] Some federal courts have accepted the collective rights view.[6] However, the most recent federal circuit court decision[7] and an overwhelming majority of the academic community[8] agree that the Second Amendment does indeed grant an individual right to bear arms.[9]

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[5] The Court must first resolve the debate as to whether the Second Amendment grants an individual or a collective right because only individual rights can be incorporated under the Fourteenth Amendment. U.S. Const. amend. XIV, § 1 (stating that "No State shall make or enforce any law which shall abridge the privileges or immunities *of citizens of the United States*") (emphasis added). Thus, if the Second Amendment does not guarantee an individual right, the right cannot be incorporated into the Fourteenth Amendment and subsequently applied to the states.

[6] *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *U.S. v. Napier*, 233 F.3d 394, 403 (6th Cir. 2000); *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996). The main argument in support of the collective rights view is that the plain meaning of the text limits the guarantee. *Id.* The second clause of the Second Amendment states that the purpose is to preserve the security of the free state. *Id.* The first clause declares "that a 'well–regulated militia' is necessary to this end." *Id.* at 101-02. Therefore, the Second Amendment merely grants a state the right to maintain an armed militia. *Id.* at 102. In addition, supporters of the collective rights theory believe the Supreme Court validated the theory in *Miller*. *Id.* In *Miller*, the Court indicated that the Bill of Rights provided for an armed militia because the public disapproved of standing armies. *Id.* (citing *Miller*, 307 U.S. at 179). Further, the militia could also sufficiently defend the country. *Id.* Collective rights supporters infer that, in this part of the *Miller* opinion, the Court indicated only an armed militia fits the purpose of the Second Amendment. *Id.*

[7] *U.S. v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

[8] *See e.g.* Anthony Gallia, *"Your Weapons, You Will Not Need Them." Comment on the Supreme Court's Sixty-Year Silence on the Right to Keep and Bear Arms*, 33 Akron L. Rev. 131 (1999); Roland H. Beason, *Printz Punts on the Palladium of Rights: It Is Time to Protect the Right of the Individual to Keep and Bear Arms*, 50 Ala. L. Rev. 561 (1999); Christopher Chrisman, Student Author, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 Ariz. L. Rev. 439 (2001); David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. Rev. 55 (1998); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359 (1998); Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 Chi.-Kent L. Rev. 3 (2000); Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment*, 77 U. Det. Mercy L. Rev. 1 (1999); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994); Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 Duq. L. Rev. 71 (2000); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1 (1996); Brandon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 Harv. J.L. & Pub. Policy 719 (1998); William C. Plouffe, Jr., *A Federal Court Holds the Second Amendment is an Individual Right: Jeffersonian Utopia or Apocalypse Now?*, 30 U. Mem. L. Rev. 55 (1999); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. Rev. 831 (1998); Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way*, 75 N.C. L. Rev. 781 (1997); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995); Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 Tenn. L. Rev. 597 (1995).

[9] The Fifth Circuit's rationale in *Emerson* includes the majority of the arguments advanced by the foregoing academic authorities in support of an individual rights interpretation. This footnote provides

additional academic arguments in conjunction with the rationale from *Emerson*. The *Emerson* court began by rejecting the argument that the Supreme Court's opinion in *U.S. v. Miller* requires rejection of the individual rights model. *Emerson*, 270 F.3d at 221. Further, the Court concluded that no other portion of *Miller* supports a collective rights interpretation. *Id.* at 226.

Next, the Court evaluated the text of the Second Amendment and concluded the words "people," "bear arms," and "keep . . . arms," as well as the substantive guarantees as a whole, indicate the Second Amendment grants an individual right. First, the term "people" has the same meaning in the Second Amendment as it does in the rest of the Constitution. *Id.* at 227. The Court noted that there is no evidence in the text of the Second Amendment or the Constitution as a whole suggesting the term "people" should be given a unique meaning in the Second Amendment. *Id.* Moreover, other Supreme Court opinions refer to the Second Amendment in a way that indicates it accords the "people" with a personal right. *Id.* at 228. Thus, the term "people" in the Second Amendment refers to individual Americans, just as it does throughout the Constitution. *Id.* at 229.

Second, the phrase "bear arms" refers to any wearing or carrying of a firearm as opposed to only a militia member's wearing or carrying a firearm. *Id.* at 231. There are several examples where the phrase "bear arms" describes an ordinary citizen's carrying of arms, including early constitutional provisions and various states' declarations of rights. *Id.* In addition, a proposed amendment to the Pennsylvania Constitution and a bill Thomas Jefferson proposed to the Virginia legislature both included language indicating, "bear arms" referred "to the carrying of arms by civilians for non-military purposes." *Id.* Moreover, the 1828 dictionary definition indicated "bear arms" was a universal description of anyone carrying arms. *Id.*

Third, the Fifth Circuit concluded the right of the people to "keep . . . arms" referred to an individual right. *Id.* at 232. Further, the right to keep arms is not limited to keeping arms during military service. *Id.* Additionally, the Fifth Circuit completed the textual analysis by examining the substantive guarantees as a whole. The court evaluated the preamble and determined it provides a guarantee of the substantive right to enable and promote the militia when it is necessary to the security of the state. *Id.* at 233. Further, a collective rights reading of this guarantee, which limits the guarantee to members of the militia, does not give the preamble its full and proper meaning. *Id.* at 236. The plain meaning of the guarantee, its placement in the Bill of Rights, and the text of other articles in the Constitution show that the collective rights reading of the preamble is incorrect. *Id.* at 233.

Along with the Fifth Circuit's textual arguments in *Emerson*, academics have made additional textual arguments. For example, some scholars argue that, similar to other Bill of Rights provisions, the Second Amendment contains the phrase "the right of the people" which indicates the amendment conveys a personal right. *See e.g.* Van Alstyne, *supra* n. 8, at 1237; Volokh, *supra* n. 8, at 832. Another author argues that an update of the archaic language in the Amendment shows the framers intended to draft text conveying an individual right. Beason, *supra* n. 8, at 563-64. Further, some believe the term "militia" actually referred to the whole class of citizens subject to military duties, thus it included all men eligible for standing military duty. *See e.g.* Beason, *supra* n. 8, at 565; Lund, *supra* n. 8, at 22-23.

Following the textual analysis, the Fifth Circuit traced the history of the adoption of the Second Amendment and determined that history also favors an individual rights reading. *Emerson*, 270 F.3d at 236-55. The Fifth Circuit first reasoned that the Framers intended to create an individual right because the Federalists' position on the militia and the standing army at the Federal Convention for ratifying the Constitution depended on the fact that the American people themselves were armed. *Id.* at 240. Next, the Court found additional support for the individual rights theory from the states' ratifications of the Constitution because many of the objections for ratification pointed out the lack of annunciation of an individual right to bear arms. *Id.* at 241-44.

In addition, the Court analyzed the proposal of the Second Amendment to further support the individual rights theory. *Id.* at 244-55. James Madison proposed an insert to Article I, including the clause:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

Consequently, in light of this recent federal circuit decision and extensive academic support, the Court should incorporate the Second Amendment into the Fourteenth Amendment and apply it to the states. The Second Amendment satisfies the modern test for incorporation because the history of the right to bear arms, the states' historical acknowledgment of the right, current state laws regarding the right to bear arms, and the purpose of the right show that it is part of American tradition. In addition, the right to bear arms is still essential to the American system of justice today. Moreover, dictum from Supreme Court precedent supports incorporation because it categorizes the right to bear arms as a right within the "realm of personal liberty" with which the government cannot interfere.[10]

This Comment will argue that the Supreme Court should apply the Second Amendment to the states through the Fourteenth Amendment. Section II analyzes the history of incorporation of the Bill of Rights to the states, highlighting the modern test for incorporation and the factors the Supreme Court analyzes in applying this test.[11] In addition, Section II evaluates relevant precedent concerning the Second Amendment and incorporation.[12] Section III then applies the modern test for incorporation to the Second Amendment by evaluating each of the Supreme Court factors and argues that the Supreme Court should incorporate the Second Amendment.[13] Additionally, Section III provides examples of dicta in Supreme Court cases

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Id. at 246.

Madison submitted this proposal, with others, to a House Committee and the House began considering the proposal. *Id.* Once the House finished working with the proposal, they forwarded it to the Senate. *Id.* at 248-49. The Senate made minute changes to the proposal that later became the Second Amendment, but the most important Senate action was their rejection of an amendment "that would have granted the power of the states to arm and train their own militias." *Id.* at 249. This action is important because it directly shows that the Congress ratifying the Second Amendment rejected the effect the collective rights model tries to give to the Second Amendment. *Id.* It specifically denied an amendment seeking to give states the power to arm the militia.

Academics have added to these arguments by cataloging the Second Amendment's English History. *See e.g.* David Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 Mich. L. Rev. 1333 (1995); Plouffe, *supra* n. 8. The right to bear arms has a lengthy English pedigree. Plouffe, *supra* n. 8, at 64. The framers based the Second Amendment on the British Bill of Rights. Eugene Volokh, *Guns and the Constitution*, Wall St. J. A23 (April 12, 1999). The British did not have states, thus the right to arms in the British Bill of Rights was clearly an individual right. *Id.* Accordingly, the framers intended to create an individual right. *Id.*

The focus of this Comment will not be on whether the right to bear arms is an individual or collective right, as the leading authorities have completely explored the issue. Rather, this Comment is devoted to addressing whether the Supreme Court should incorporate the right to bear arms to the states, after, or if, it determines the right is an individual right.

[10] *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992).

[11] *See infra* nn. 20-43 and accompanying text.

[12] *See infra* nn. 44-65 and accompanying text.

[13] *See infra* nn. 66-115 and accompanying text.

that further support incorporation of the Second Amendment.[14] Finally, this article argues that upon incorporation, the Supreme Court needs to establish the proper standard for judicial review of federal, state, and local gun control regulations. This Comment examines the Supreme Court's three judicial standards of review and proposes a method of review analogous to judicial treatment of content-neutral speech regulation.[15] The proposed method recognizes that while the right to bear arms is a fundamental right, it is a qualified right. Accordingly, courts should subject these regulations to time, place, and manner restrictions.

II. BACKGROUND

The Second Amendment 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."[16] The phrase "bear arms" refers to the carrying or wearing of arms.[17] According to this definition, the Second Amendment confers a right to gun ownership.[18] Justice Story expressed that this right has been regarded as "the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them."[19] Thus, the right to bear arms is a significant right and the Court must address whether it applies to the states in addition to the federal government.

A. The Modern Test for Incorporation

As originally drafted, the Bill of Rights only limited the federal government and did not directly apply to the states.[20] This changed when

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[14] *See infra* nn. 116-28 and accompanying text.

[15] *See infra* nn. 129-57 and accompanying text.

[16] U.S. Const. amend. II.

[17] *Emerson*, 270 F.3d at 231.

[18] Collective rights proponents claim the Second Amendment only guarantees the right of the state to arm its militia and only militia members have the right to own guns. *Id.* at 218. On the other hand, the individual rights theory asserts that the Second Amendment guarantees the right of individuals to keep and bear arms. *Id.* at 220.

[19] Joseph Story, *Commentaries on the Constitution of the United States*, § 1001, 708 (Carolina Academic Press 1987).

[20] Nowak & Rotunda, *supra* n. 2, at § 10.2, 368.

Congress enacted the Fourteenth Amendment in 1868.[21] The Fourteenth Amendment provides, in part, "[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 the law. . . ."[22]

Since Congress enacted the Fourteenth Amendment, the Supreme Court has adopted a selective approach for applying the Bill of Rights to the states through the Fourteenth Amendment Due Process Clause,[23] applying to the states only those provisions of the Bill of Rights that are fundamental to the American system of law.[24] The Supreme Court first enunciated the selective incorporation approach in *Palko v. Connecticut*.[25] Under the test in *Palko*, a provision of the Bill of Rights was applicable to the states through the Fourteenth Amendment if it was "implicit in the concept of ordered liberty" and one of the fundamental principles at the base of American institutions.[26] The Supreme Court updated and refined this test for incorporation in *Duncan v. Louisiana*.[27] Under the modern test articulated in *Duncan*, the inquiry is whether the right is "fundamental to the American scheme of justice."[28]

In *Duncan*, the Court looked to history and traditions to determine whether the Fourteenth Amendment protected the Sixth Amendment right to a jury trial from state action.[29] The Court analyzed four factors: (1) the history of the right to trial by jury in America; (2) historical recognition by the states; (3) recent trends including current recognition by states; and (4) the purpose behind the right.[30]

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[21] *Id.*

[22] U.S. Const. amend. XIV, § 1.

[23] Nowak & Rotunda, *supra* n. 2, at § 10.2, 368.

[24] *Id.*

[25] 302 U.S. 319 (1937).

[26] *Id.* at 325-26, 328.

[27] 391 U.S. 145.

[28] *Id.* at 149.

[29] *Id.* at 145. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

[30] *Duncan*, 391 U.S. 145.

First, the Court evaluated the history of trial by jury.[31] Trial by jury had a long English history and came to America with the English colonists.[32] In addition, the First Continental Congress adopted the right to trial by jury as one of the most important rights.[33] The right to trial by jury was also later included as one of the original guarantees in the Bill of Rights.[34] For these reasons, the Court concluded the colonists considered the right to trial by jury to be an important right, and thus, it was part of American history.

Second, the Court looked at state constitutions.[35] The Court noted that every state entering the Union protected the right to trial by jury in some form, which further showed importance in American tradition.[36]

Third, the Court analyzed the current status of the right to jury trial in state constitutions.[37] At the time of the decision, in 1968, every state continued to ensure a right to trial by jury in serious criminal cases, and no state had eliminated the right.[38] Moreover, three recent revisions to state constitutions provided more protection for the right to trial by jury in serious criminal cases.[39] Thus, recent trends and the status of state laws showed the right to jury trial remained fundamental to the American scheme of justice.

Finally, the Court examined the objective behind the right to trial by jury.[40] The framers of the Constitution knew the right to a jury trial "was necessary to protect against unfounded criminal charges brought to eliminate enemies" and to provide a check against the power of judges "too responsive to the voice of higher authority."[41] These purposes reflected the underlying message in state and federal constitutions that official power should be checked, and thus the purposes behind the right to trial by jury further demonstrated that it was fundamental to the American scheme of justice.[42]

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[31] *Id.* at 151-52. The Court noted that the right to trial by jury had been in existence in England for many centuries and could be traced back to the Magna Carta. *Id.* at 151. The right came to America with the colonists and the American colonists strongly supported it by resisting royal interference with the right. *Id.* at 152.

[32] *Id.*

[33] *Id.* At the First Continental Congress, the representatives objected to trial before judges and declared that citizens were entitled to the right to be tried by their peers in accordance with English common law. *Id.*

[34] *Id.* at 151.

[35] *Id.* at 153.

[36] *Id.*

[37] *Id.* at 154.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 155-56.

[41] *Id.* at 156.

[42] *Id.*

By looking at these four factors, the Court determined the right to trial by jury was a fundamental element of fairness in our criminal process and subsequently incorporated it into the Fourteenth Amendment.[43]

B. Relevant Precedent Concerning the Second Amendment and Incorporation

Prior to the declaration of the selective incorporation approach in *Palko* in 1937, the Supreme Court expressly declared that the Second Amendment does not apply to the states in *United States v. Cruikshank*[44] and *Presser v. Illinois*.[45] In 1876, in *Cruikshank*, the defendants were indicted under the Enforcement Act when they invaded a meeting, confiscated two African Americans' weapons, and prevented them from voting in a state election.[46] The primary issue in the case was the statutory interpretation of the Enforcement Act and whether the defendants' offenses fit within the statutory language.[47] In dicta, the Court went on to discuss the Fourteenth Amendment and the applicability of the Bill of Rights to the states.[48] The Court stated that the Fourteenth Amendment applied the Bill of Rights provisions to the states, but only to the extent that those rights related to the national government.[49] In addressing the Second Amendment, the Court stated that the Second Amendment provides that the right to bear arms shall not be infringed, but that phrase *only* implies that Congress shall not infringe the right to bear arms.[50]

In 1886, in *Presser*, the defendant was indicted under the Illinois Military Code when he organized a private militia and led a parade of armed men through the streets of Chicago without a license.[51] The issue before the Court was the validity of the Illinois statute prohibiting men from acting as private militia.[52] Ultimately, the Court held that the Illinois statute was a valid exercise of the state's police power to regulate militia.[53] In dicta, the

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[43] *Id.* at 157-58. "Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and assuring that fair trials are provided for all defendants." *Id.*

[44] 92 U.S. 542, 553 (1876).

[45] 116 U.S. 252, 265 (1885).

[46] 92 U.S. at 542-43.

[47] *Id.* at 548.

[48] *Id.* at 554-55.

[49] *Id.*

[50] *Id.* at 553.

[51] 116 U.S. at 253.

[52] *Id.* at 260.

[53] *Id.* at 267-68:

Court discussed whether the Illinois statute interfered with the defendant's right to bear arms.[54] The Court cited *Cruikshank* and reiterated that the Second Amendment only limits the federal government.[55]

The Supreme Court has reversed other portions of the incorporation dicta in these cases. For example, in *Cruikshank*, the Supreme Court expressly stated that the First Amendment, "like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the national government alone."[56] Despite this declaration, the Supreme Court later incorporated the First Amendment rights of freedom of speech and freedom of the press to the states through the Due Process Clause of the Fourteenth Amendment.[57]

In addition, other Supreme Court cases indicate that the Court has not settled the issue of incorporation of the Second Amendment. In *Miller v. Texas*,[58] the Court dismissed an appeal on procedural grounds.[59] The Court did not set out the specific facts of the case; however, the Court mentioned that the case involved a claim that a Texas statute forbidding the carrying of weapons violated the petitioner's Second Amendment rights.[60] The opinion provided, "if the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court."[61] Based on this language and the fact that the Court decided the case only eight years after *Presser*, some scholars conclude that *Cruikshank* and *Presser* did not

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> It cannot be successfully questioned that the state governments, unless restrained by their own constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States, and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this power by the states is necessary to the public peace, safety, and good order. To deny the power would be to deny the right of the state to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.

Id.

[54] *Id.* at 265.

[55] *Id.*

[56] 92 U.S. at 552.

[57] *Gitlow*, 268 U.S. 652 (freedom of speech); *Cantwell*, 310 U.S. 296 (free exercise); *Near*, 283 U.S. 697 (freedom of the press).

[58] 153 U.S. 535 (1894).

[59] *Id.* at 537-38.

[60] *Id.* at 538.

[61] *Id.*

definitively rule out incorporation of the Second Amendment.[62] In addition, the most recent Supreme Court precedent regarding interpretation of the Second Amendment, *U.S. v. Miller*,[63] failed to address the issue of incorporation. Recently, Justice Thomas noted the Supreme Court's failure to address the incorporation issue in his concurring opinion in *Printz v. United States*.[64] Thomas confirmed that *Miller* only held that the Second Amendment "did not guarantee a citizen's right to possess a sawed-off shotgun" and the Court did not attempt "to define, or otherwise construe, the substantive right protected by the Second Amendment."[65]

III. ANALYSIS

A. The Second Amendment Meets the Modern Standard for Incorporation

Application of the factors the Supreme Court considered in *Duncan* shows that the Second Amendment was fundamental to the American scheme of justice at the time the framers drafted the amendment, and remains fundamental to the American scheme of justice today. In addition, dictum from Supreme Court cases implicitly characterizes the Second Amendment as a fundamental right. Thus, it passes the modern test for incorporation.

1. Application of the *Duncan* Factors

Application of the four *Duncan* factors demonstrates that the right to bear arms was historically fundamental to the American scheme of justice and continues to be essential to the scheme of justice today. First, an examination of the history of the Second Amendment reveals that it is part of American tradition. Like the genesis of the Sixth Amendment right to trial by jury in *Duncan*, the origin of the right to bear arms in America indicates that the right came to America with the English colonists, and the colonists highly valued the right. The right to bear arms had an extensive history and strong

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[62] Cynthia Leonardatos, David B. Kopel & Stephen P. Halbrook, *Miller versus Texas: Police Violence, Race Relations, Capital Punishment, and Gun-Toting in Texas in the Nineteenth Century*, 9 J.L. & Pol'y 737, 764-65 (2001) (suggesting that there is no binding precedent regarding Second Amendment incorporation).

[63] 307 U.S. 174.

[64] 521 U.S. 898, 938 n. 1 (1997) (Thomas, J., concurring).

[65] *Id.*

foundation in England.[66] William Blackstone, the primary authority on the English Constitution, asserted that two chief purposes for the right to bear arms were to afford individual citizens a means of protecting the natural right of self-preservation and to guard the citizens against government tyranny.[67]

The idea that the English colonists carried the right to bear arms into the American colonies is evidenced by the fact that prior to the American Revolution, the colonists were well-armed and many of the colonies had laws explicitly mandating ownership and public carrying of arms.[68] In addition, the framers directly based the Second Amendment on the British Bill of Rights.[69] Scholars believe that in light of these facts, it is apparent that Americans accepted Blackstone's theory, that the right to bear arms stems from the natural right of self-preservation and is necessary to resist oppression.[70] Based on their adoption of these two fundamental purposes, the colonists seemingly considered the right to bear arms to be a principal right. Also, the original Bill of Rights contained the Second Amendment, which further illustrates that the colonists considered it a valuable right.[71] For these reasons, consideration of the first factor in the modern test for incorporation shows that the Second Amendment is part of American tradition.

Second, the states' historical acknowledgement of the right to bear arms also shows that the Second Amendment is fundamental to the scheme of American justice. State recognition of the importance of the individual right to bear arms is apparent from discussions and proposals from state conventions for ratifying the Constitution.[72] Most states refused to ratify the Constitution unless it included a Bill of Rights.[73] Moreover, many states included a provision guaranteeing the right to bear arms in their demands for a federal Bill of Rights to prevent tyranny by the federal government, to provide for self-defense, and for other lawful purposes.[74] For example, the Anti-Federalists advocated the inclusion of a provision guaranteeing the right to bear arms in order to limit the power of the federal government at the

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[66] Plouffe, *supra* n. 8, at 64 (outlining the English history of the right to bear arms).

[67] *Id.* (citing William Blackstone, Commentaries, vol. 1, *409).

[68] *Id.* at 70.

[69] Volokh, *supra* n. 9, at A23.

[70] Lund, *supra* n. 8, at 14.

[71] *Emerson*, 270 F.3d at 251 (stating that Congress forwarded the Second Amendment to the states with the rest of the Bill of Rights on September 26, 1779).

[72] *Id.* at 241.

[73] *Id.*

[74] Scott Bursor, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 Tex. L. Rev. 1125, 1136 (1996).

Massachusetts convention.[75] Similarly, the omission of the individual right to bear arms for self-defense, defense of the state, and for the purpose of killing game was one of the Anti-Federalists' principles for rejecting ratification at the Pennsylvania convention.[76] In fact, the right to bear arms was "[t]he most frequently appearing proposed amendment."[77] New Hampshire's proposed amendments, Virginia's proposed Bill of Rights (also demanded by North Carolina), New York's Declaration of Rights, and Rhode Island's incorporated Bill of Rights all contained a proposed amendment enumerating the right to bear arms for the purpose of limiting the power of the federal government along with other lawful purposes.[78] These demands for inclusion show that the states believed the right to bear arms was essential to the American scheme of justice because it provided a check on the federal government's power and also served the purpose of providing a means for self-preservation, including self-defense.

In addition, an examination of state constitutions in effect after Congress ratified the Bill of Rights also shows state recognition of the importance of the right to bear arms. Congress ratified the Bill of Rights on December 15, 1791.[79] At this time, many of the state constitutions or charters included provisions relating to the right to bear arms for the purpose of protecting the state and giving the individuals the right to protect themselves.[80] Each of these constitutions contained provisions relating to gun possession within the list of constitutionally guaranteed individual rights.[81] Moreover, the states without enumerated provisions likely assumed the right to bear arms because it had a strong foundation in the common law of England as well as the English Bill of Rights. The colonists likely presumed that they maintained the right when they settled in America.[82] Thus, virtually all states recognized that the right to bear arms was important in order to protect the state from oppression by the federal government and provide for self-defense. Therefore, the second factor in the modern test weighs in favor of incorporation.

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[75] *Id.*

[76] *Emerson*, 270 F.3d at 241-42.

[77] Plouffe, *supra* n. 8, at 80.

[78] *Emerson*, 270 F.3d at 242.

[79] U.S. House of Representatives, *Amendments to the Constitution* <http://www.house.gov/Constitution/Amend.html> (accessed Feb. 25, 2001).

[80] Chrisman, *supra* n. 8, at 449 (citing David E. Young, *The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792*, at 74-75 (Golden Oak Books 1995)).

[81] *Id.*

[82] Joyce Lee Malcom, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 148 (Harv. U. Press 1994).

Third, recent trends and current state laws also support a finding that the Second Amendment is fundamental to the American scheme of justice. A federal circuit court and much of the academic community advocate an increased emphasis on Second Amendment rights. The Fifth Circuit provided support for incorporation in *Emerson* by holding that the Second Amendment guarantees an individual right to bear arms, and citing nineteenth century commentary designating the Second Amendment as a fundamental right.[83]

Additionally, many modern academics endorse the view that the Second Amendment is a fundamental individual right and should be incorporated into the Fourteenth Amendment because it is still effective in preventing governmental oppression and it remains necessary for self-preservation.[84] For example, Nelson Lund argues that the right to bear arms still deters political oppression today.[85] The framers included the Second Amendment to allow citizens to act as a credible counterweight to the federal military and thus enable them to resist tyranny.[86]

Lund concedes that political events and technological advances have made the federal military far more powerful than the framers could have ever imagined.[87] It is true that there is no longer a serious threat of a military conflict between the states and the federal government.[88] Despite these changes, state governments continue to pose a threat to individual liberty because they can enact laws infringing individual liberties under the police power.[89] The passage of the Fourteenth Amendment recognized this threat, and the Supreme Court has acknowledged it as well by incorporating many Bill of Rights provisions to the states to prevent the states from inhibiting certain fundamental liberties.[90] Further, the Supreme Court's failure to incorporate the Second Amendment allowed states to use gun control laws to

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[83] *Emerson*, 270 F.3d at 255-60. For example, the quote from Justice Story emphasizes, "[t]he right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them." *Id.* at 257 (quoting Story, *supra* n.19, at 708).

[84] *See* Beason, *supra* n. 8, at 582-84; Lund, *supra* n. 8, at 56-68; Kopel, *supra* n. 8, at 137-38.

[85] Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 112 (1987).

[86] *Id.* at 114.

[87] *Id.* at 112.

[88] *Id.* This threat no longer exists because political and cultural changes, beginning with the Civil War, have weakened the loyalties to individual states.

[89] *Id.*

[90] *Id.* at 112-13.

oppress citizens in the past.[91] For example, government leaders used gun control laws to help secure political subordination of African-Americans during the Jim Crow era, thus oppressing them.

More importantly, Lund argues the Second Amendment is still fundamental in modern America to protect the natural right of self-preservation, which includes personal safety.[92] In the absence of an organized police force, the militia and individual citizens provided for the defense of the community, which was essential to "the security of a free State."[93] The militia apprehended criminals, and by arming themselves, individual citizens contributed by providing self-defense and defense of others against criminals.[94] Furthermore, the evolution of police forces has not eliminated the need for individual citizens to continue serving this function.[95] "[T]he police do not and cannot protect law-abiding citizens from criminal violence;" rather, they perform a responsive function.[96] Though the ideal role of the police would be to prevent all crime, many crimes today occur in circumstances where the police are not readily available to prevent the violence. Therefore, individuals still need the right to bear arms for self-defense and defense of others, to ultimately contribute to the defense of the community, and to secure a free state.

A current examination of state constitutions and legislation also shows the right to bear arms remains fundamental to the American scheme of justice. Forty-four of the fifty states today include right to bear arms provisions in their constitutions.[97] These provisions vary from state to state and some specify that the purpose for the right to bear arms is the protection of the individual and the state.[98] In addition, "[s]ince 1970, 15 states have

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[91] *Id.* at 116.

[92] *Id.* at 117-30.

[93] U.S. Const. amend. II; Lund, *supra* n. 8, at 61.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Second Amendment Foundation, *The U.S. Constitution and 44 States Have Constitutional Provisions Enumerating the Individual Right to Keep and Bear Arms*, <http://www.saf.org/Constitutions.html> (accessed Feb. 25, 2001). Only California, Iowa, Maryland, Minnesota, New Jersey, and New York do not have right to bear arms provisions. *Id.*

[98] Some of these state constitutional provisions basically repeat the "well regulated militia" clause of the federal Constitution with minor variations. Alaska Const. art. I, § 19; Haw. Const. art. I, § 17; N.C. Const. art. I, § 30; S.C. Const. art. I, § 20; Va. Const. art. I, § 13. Other states specifically mention that the right to firearms exists for the protection of the individual and the state. Ala. Const. art. I, § 26; Ariz. Const. art. II, § 26; Conn. Const. art. I, § 15; Fla. Const. art. I, § 8; Ind. Const. art. I, § 32; Ky. Const. art. I, § 1; Mich. Const. art. I, § 6; Or. Const. art. I, § 27; Pa. Const. art. I, § 21; S.D. Const. art. VI, § 24; Tex. Const. art. I, § 23; Vt. Const. ch. I, art. 16; Wash. Const. art. I, § 24; Wyo. Const. art. I, § 24. In addition, several state constitutions specifically proclaim that the right to bear arms belongs to an individual, rather than any

enacted new state constitutional rights to bear arms or strengthened old ones."[99] For example, in 1987, the Maine legislature amended the firearms clause by striking the words "for the common defense" from the text in order to expand the right to bear arms into an individual right.[100] Further, in the mid-1980s, nine states allowed virtually all law-abiding adults to obtain a license to carry concealed weapons, and as of 1999, the number of states had increased to thirty-one.[101] The existence and strengthening of these provisions illustrate that states continue to value the right to bear arms today.

Even though the majority of states have these provisions, the Supreme Court still needs to incorporate the Second Amendment to the states through the Fourteenth Amendment, because six states do not guarantee the right to bear arms. All U.S. citizens, including the citizens of these states, deserve this important right. Moreover, without incorporation, there is no provision in place to prevent the other forty-four states from eliminating the right to bear arms. Furthermore, the states that do codify the right do not have uniform purposes and applications.[102] Uniformity is essential to ensure that all the states guarantee the individual right to bear arms for the security of the free state, not merely a collective right. Thus, evaluation of the third factor in the modern incorporation test indicates the Supreme Court should incorporate the Second Amendment.

Fourth, the purposes of the Second Amendment support incorporation. James Madison included the purpose in the text of the amendment. As stated in the text, the purpose is to ensure "the security of a free State."[103] This objective can be broken down into two components: (1) to prevent tyranny and (2) to provide a means for self-preservation. The first component made the right to bear arms fundamental in colonial times and the second component makes the right to bear arms fundamental today.

First, the Second Amendment secures the free state by providing the states with a check on the federal government, thus allowing the states to resist governmental tyranny.[104] From their experience in fighting the English Crown in the American Revolution, the framers realized that giving citizens

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collective body, such as the state or the people as a whole. Alaska Const. art. I, § 19; Ariz. Const. art. II, § 26; Conn. Const. art. I, § 15; Ill. Const. art. I, § 22; Utah Const. art. I, § 6.

[99] Volokh, *supra* n. 9, at A23.

[100] *State v. Brown*, 571 A.2d 816, 816 (Me. 1990) (determining that prohibition of firearm possession by a felon is a permissible regulation of the individual right to bear arms under the amended version of the Maine Constitution).

[101] Volokh, *supra* n. 9 at A23.

[102] *Supra* nn. 97-98 and accompanying text.

[103] U.S. Const. amend. II.

[104] Plouffe, *supra* n. 8, at 87-89.

the right to bear arms was the best way to prevent tyranny.[105] As noted above, this purpose is still relevant today because without incorporation states can use gun control laws to oppress citizens.[106]

Next, the Second Amendment secures the free state by guaranteeing the individual right to bear arms for self-preservation and self-defense. The English considered the right to self-preservation a primary natural right upon which all other rights depended.[107] The American colonists shared this belief and preserved the natural right of self-defense through the Second Amendment.[108] Although times have changed, the right to bear arms is still necessary for self-preservation and self-defense. Early Americans feared wild animals, Native Americans, and the new federal government. Americans today, however, fear other threats of violence such as attacks by burglars, murderers, rapists, and gangs.

The Second Amendment is necessary today to provide Americans with a way to defend themselves and their property. Statistics show Americans today face a significant threat of criminal violence. The FBI crime reports reveal that in 2000, there were over 11.6 million property and violent crime incidents.[109] Moreover, modern criminal codes recognize that individuals have the right to use deadly force for self-defense and defense of others when the individual or another person is threatened with immediate danger of death or serious bodily harm and the individual believes the use of deadly force is necessary to avoid the danger.[110] In addition, an individual may use deadly force to defend a dwelling place when the dwelling is occupied or when the individual believes the invader intends to commit a dangerous felony.[111] Based on these criminal law principles and the fact that Americans face a

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[105] *Id.* at 83-85.

[106] *Supra* nn. 76-84 and accompanying text.

[107] Bursor, *supra* n. 74, at 1134.

[108] *Id.* at 1137. Madison did not include an express declaration of the right to self-defense in the Second Amendment because he believed its inclusion was widely understood. *Id.*

[109] FBI, *Section II Crime Index Offenses Reported* <http://www.fbi.gov/ucr/cius_00/00crime2.pdf> (accessed Apr. 1, 2002). The statistics include the violent crimes of murder, non-negligent manslaughter, forcible rape, robbery, aggravated assault; and the property crimes of burglary, larceny-theft, motor vehicle theft, and arson. *Id.*

[110] Wayne R. LaFave, *Criminal Law* §§ 5.7-5.9, 491-503 (3rd ed. West 2000). "One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger." *Id.* at § 5.7, 491. The actor can use deadly force if he believes that the other is about to inflict "unlawful death or serious bodily harm." *Id.* at § 5.7(b), 492. In addition, an actor can use deadly force to defend another person, regardless of whether the actor has a relationship with the other person, when he reasonably believes that the other person is in immediate danger of serious bodily harm and use of force is necessary to avoid danger. *Id.* at § 5.8, 501.

[111] *Id.* at § 5.9, 503.

strong threat of criminal violence, the right to bear arms is fundamental today to ensure the natural right of self-preservation.

Further, granting individuals the right to bear arms does not threaten the security of the people by giving criminals easier access to guns.[112] The overwhelming majority of gun owners are law-abiding citizens who use guns for sport and self-defense, not criminals.[113] Additionally, criminals will obtain guns regardless of whether they legally have a right to do so.[114] Thus, conferring an individual right will not affect criminal firearm abuse; rather, it will enhance security by affording individuals threatened by criminal violence an opportunity to protect themselves and others. Accordingly, the fourth factor of the modern test for incorporation shows that the Second Amendment remains fundamental to the American scheme of justice today.

In addition, the differences between the world today and the world of our founding fathers do not automatically void certain provisions of the Constitution because some people believe they are no longer applicable. The drafters of the Constitution included Article V to give legislators the opportunity to make changes to the Constitution when necessary.[115] Even though Congress has never used its power under Article V to make any changes to the text of the Second Amendment, it could if the circumstances demanded it. For all these reasons, application of each of the four factors in the modern test for incorporation suggests that the Supreme Court should incorporate the Second Amendment into the Fourteenth Amendment and apply it to the states.

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[112] Beason, *supra* n. 8, at 583.

[113] The rate of abuse for firearms is approximately 0.0000625% for murder and 0.0009188% for aggravated assault. *Id.* Despite the low rate of abuse of firearms, individuals face a significant threat of violence. *Supra* n. 109 and accompanying text. Firearms are merely one type of weapon a criminal can use to commit property and violent crimes.

[114] Beason, *supra* n. 8, at 583.

[115] U.S. Const. art. V:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Conventions for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Id.

2. Supreme Court Precedent Shows the Right to Bear Arms Meets the Modern Test for Incorporation

Dictum from Supreme Court precedent also implies that the Second Amendment passes the modern test for incorporation. Language in early Supreme Court cases shows that the Second Amendment guarantees an essential natural right that predates the Constitution. For example, in *Brown v. Walker*,[116] dissenting Justice Field quoted *Boyd v. United States*:[117]

> The freedom of thought, of speech and of the press; *the right to bear arms*; exemption from military dictation; security of the person and of the home; the right to speedy and public trial by jury; protection against oppressive bail and cruel punishment, are, together with exemption from self-crimination, the essential and inseparable features of English liberty. Each one of these features had been involved in the struggle above referred to in England within the century and a half immediately preceding the adoption of the constitution, and the contests were fresh in the memories and traditions of the people at that time.[118]

This quote demonstrates that the right to bear arms is a vital element of freedom. Further, in *Logan v. United States*,[119] the Court asserted that the Second Amendment does not create a new individual right; rather, it declares that the federal government shall not infringe a preexisting general right.[120] This illustrates that the right to bear arms protects the natural right of self-preservation, which is still necessary today to defend against both violent crimes and property crimes.

Recent Supreme Court cases indicate the Second Amendment remains fundamental to the American scheme of justice. In *Planned Parenthood v. Casey*,[121] the Court discussed the scope of the Fourteenth Amendment and

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[116] 161 U.S. 591 (1896) (determining that the appellant was not allowed to refuse to testify under the Fifth Amendment).

[117] 116 U.S. 626 (1885).

[118] *Id.* at 635 (Field, J., dissenting) (emphasis added).

[119] 144 U.S. 263, 286-87 (1892) (affirming *Cruikshank*'s position that the First and Second Amendments recognized preexisting fundamental human rights rather than creating new rights).

[120] *Id.*

[121] 505 U.S. 833 (evaluating the constitutionality of a Pennsylvania abortion statute and holding that: (1) the statutory provision defining a medical emergency did not violate the due process clause; (2) the provision requiring spousal notice violated the due process clause by imposing an undue burden on a woman's abortion rights because the notice requirement enabled a husband to override his wife's decision concerning an abortion; and (3) the principles of integrity and stare decisis required the Court to reaffirm the holding of *Roe v. Wade*, 410 U.S. 113 (1973)).

relied on an earlier statement by Justice Harlan from his dissent in *Poe v. Ullman*,[122] which included the right to bear arms within the realm of personal liberty that the government cannot interfere with.[123] The Court specified that the Due Process Clause of the Fourteenth Amendment protects all fundamental rights encompassed within this realm of liberty from invasion by the states.[124] Thus, the Court indicated that the right to bear arms is a liberty guaranteed by the Bill of Rights and worthy of incorporation to the states through the Due Process Clause of the Fourteenth Amendment.[125] Similarly, in *Moore v. East Cleveland*,[126] the Court analyzed the reach of the Due Process Clause of the Fourteenth Amendment.[127] The Court again approvingly quoted Justice Harlan's statement, thus including the Second Amendment within "the full scope of the liberty guaranteed by the Due Process Clause."[128] Likewise, Justice Stevens emphatically adopted Justice Harlan's statement in his dissent in *Albright v. Oliver*.[129] These examples of language from recent Supreme Court decisions show that the Second Amendment is still an essential element of liberty and passes the modern test for incorporation. Thus, because it satisfies the *Duncan* factors and is supported by modern Supreme Court dictum, the Supreme Court should incorporate the Second Amendment into the Fourteenth Amendment and make it applicable to the states.

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[122] 367 U.S. 497, 541, 543 (1961) (Harlan, J., dissenting).

[123] 505 U.S. at 848-49 (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Id.

[124] *Id.* at 847 (citing *Whitney v. Cal.*, 274 U.S. 357, 373 (1927) (concurring opinion)).

[125] *Id.* at 848-49.

[126] 431 U.S. 494 (1977) (reversing appellant's conviction for violating a city ordinance by housing a member of her extended family because the ordinance violated constitutional due process protections by interfering with the family, and the ordinance only had a weak relationship to legitimate city goals).

[127] *Id.* at 502.

[128] *Id.*

[129] 510 U.S. 266, 306 (1994) (Stevens, J., dissenting). Stevens asserted that he could not improve on Justice Harlan's declaration concerning the scope of the Due Process Clause of the Fourteenth Amendment. *Id.*

B. *The Effect of Incorporation and Judicial Standards of Review on State and Local Gun Control Legislation*

When the judicial branch makes a provision of the Bill of Rights applicable to the states via the Fourteenth Amendment, the provision applies to state and local legislation in the same manner as it does to federal legislation.[130] Nevertheless, there is very little Supreme Court precedent evaluating the Second Amendment. Only three Supreme Court decisions provide examples of judicial review of legislation impairing the Second Amendment right to bear arms.[131] These three decisions are: (1) *United States v. Cruikshank*;[132] (2) *Presser v. Illinois*;[133] and (3) *United States v. Miller*.[134] *Cruikshank* and *Presser* are outdated because they were decided before the Supreme Court adopted the selective incorporation approach. The Second Amendment discussions in each case are merely dicta and the Court has overruled other dicta from these cases regarding incorporation. Further, *United States v. Miller*[135] provides little, if any, guidance. In *Miller*, the Court evaluated a federal statute that made it a crime to transport an unregistered sawed-off shotgun in interstate commerce.[136] The Court upheld the statute and emphasized that there was no evidence indicating that a sawed-off shotgun had a "reasonable relationship to the preservation or efficiency of a well regulated militia" and the use of a sawed-off shotgun could not "contribute to the common defense."[137] In reaching their conclusion, the *Miller* court did not provide a judicial standard for reviewing government legislation that impairs the right to bear arms. Hence, the Supreme Court today is free to determine the proper standard of review.

The Supreme Court has officially adopted three standards of judicial review. The first standard of judicial review is the rational basis test. Under this level of review, a court will uphold a law against a claim that it violates

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[130] Nowak & Rotunda, *supra* n. 2, at § 11.6, 432.

[131] Plouffe, *supra* n. 8, at 104.

[132] 92 U.S. 542.

[133] 116 U.S. 252.

[134] 307 U.S. 174.

[135] *Id.*

[136] *Id.* at 175. The indictment charged that the defendants willfully transported a double barrel 12-gauge Stevens shotgun from Claremore, Oklahoma to Siloam Springs, Arkansas in violation of the National Firearms Act. *Id.*

[137] *Id.* at 178. As noted by the Fifth Circuit in *Emerson*, one interpretation of this rationale is that the defendants in *Miller* could not challenge the constitutionality of the statute because they were not keeping or bearing a weapon with a potential military use. 270 F.3d at 222.

government end that is not prohibited by the Constitution.[138] The second standard of judicial review is intermediate scrutiny. Under this standard of review, a court will uphold a law against a claim that it violates due process if the law has a substantial relationship to an important governmental interest.[139] The third and most stringent standard of review is strict scrutiny. Under strict scrutiny, a court will uphold a law against a claim that it infringes due process only if it is narrowly tailored to serve a compelling government interest.[140] Traditionally, courts use the strict scrutiny test when evaluating legislation that limits a fundamental right.[141] In the context of determining rights subject to strict scrutiny review, courts define fundamental rights as rights that have an essential value to individual liberty in our society.[142]

As argued above, the Second Amendment is fundamental to the American scheme of justice. Although the test for finding that a right is fundamental and worthy of strict scrutiny review is slightly different from the test for incorporation, commentators have noted that the *Duncan* test for incorporation shows the Supreme Court's willingness "to enforce values [with] . . . special importance in the development of individual liberty in American society."[143] Thus, it logically follows that if the Supreme Court considers a right fundamental to the American scheme of justice, it would likely find that right essential to individual liberty. Accordingly, it appears the Supreme Court should use the strict scrutiny test when reviewing legislation infringing on the Second Amendment right to bear arms.

In *Emerson*, the Fifth Circuit followed this rationale and applied strict scrutiny in reviewing a regulation restricting gun possession, following its

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[138] *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (concluding city ordinance prohibiting pushcart food sales violated a vendor's equal protection rights). "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *Id.*

[139] *Craig v. Boren*, 429 U.S. 190, 197 (1976) (reversing lower court's dismissal of an action challenging the constitutionality of an Oklahoma liquor statute with gender classifications). "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.*

[140] *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (affirming that the minority business enterprise (MBE) provision of the Public Works Employment Act was constitutional). "We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Id.*

[141] Nowak & Rotunda, *supra* n. 2, at § 14.3, 639.

[142] *Id.* at § 11.7, 433.

[143] *See generally Calder v. Bull*, 3 U.S. 386, 388 (1798) (discussing fundamental principles of republican government that legislatures cannot inhibit).

declaration that the Second Amendment confers an individual right.[144] The court held that even though the Second Amendment protects individual rights, those rights are subject to narrowly tailored restrictions "for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country."[145]

However, the right to keep and bear arms is not an absolute right; rather, it is a qualified right. In addition, if courts were to apply strict scrutiny to all laws infringing the right, a significant amount of current gun legislation would not survive. Considering the Second Amendment as a qualified right would allow the Court to recognize the fundamental nature of the right to bear arms, while preserving modern gun control schemes. The proposed method for judicial review is analogous to the Supreme Court standard for reviewing content-neutral speech restrictions.[146] The Supreme Court has incorporated the First Amendment right to free speech, making it a fundamental right.[147] However, the Supreme Court also considers it a qualified right.[148] In *Gitlow*, the Court explained the definition of a qualified right as follows:

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.[149]

Thus, even though a qualified right is fundamental, laws may infringe the right if the alternative would harm the general welfare.[150] Consequently, the Supreme Court has determined that content-neutral speech may be

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[144] 270 F.3d at 261.

[145] *Id.* The court found that the restriction at issue, 18 U.S.C. § 922(g)(8)(C)(ii), which prohibits a person, who is subject to a court order that explicitly prohibits use or threatened use of physical force against a spouse or child, from shipping, transporting or possessing a firearm. *Emerson*, 270 F.3d at 263. The court based their decision on the fact that courts issue these types of court orders only when the opposing party does not contest the request or the protected party puts forth evidence of a real threat of injury. *Id.* at 262.

[146] The idea for this analogy comes from a fictitious draft opinion created by Daniel O. Conkle. *See* Daniel O. Conkle, *The New First Amendment and Its Impact on the Second*, 68 Ind. L. J. 679, 682 (1993).

[147] *Gitlow*, 268 U.S. at 666.

[148] *Id.* at 666-67.

[149] *Id.* at 666.

[150] *Id.* at 666-70.

subject to time, place, and manner restrictions as long as the restrictions serve an important governmental interest and leave open adequate alternative channels for communication.[151] In summary, courts generally apply strict scrutiny to First Amendment legislation, but, when the law imposes a time, place, or manner restriction, courts instead apply an intermediate level of scrutiny.

Similarly, the Supreme Court should establish that the Second Amendment is a qualified right and consequently, federal and state gun control laws and regulations may infringe the right if the alternative would harm the general welfare. The plain wording of the Second Amendment qualifies the right to bear arms with the introductory phrase regarding the necessity of a "well regulated militia" for the "security of a free State."[152] The introductory clause preceding the guarantee of the right to bear arms makes the right conditional upon advancing the security of the state, which includes preventing oppression by the government and furthering self-preservation. In view of that qualification, courts should apply intermediate scrutiny to time, place, and manner restrictions on the right to bear arms and reserve strict scrutiny for regulations outside these restrictions.

Under this standard, legislatures could restrict gun use by creating narrowly tailored laws that serve an important governmental interest provided that alternative channels for use remain open. As a result, a law completely banning a class of people that can own a gun would be subject to strict scrutiny because the law is not a time, place, or manner restriction. On the other hand, laws containing prohibitions on carrying a firearm in a public building, carrying a concealed weapon, carrying a handgun where alcohol is sold, and carrying a weapon into a school zone would only be subject to intermediate scrutiny.[153] Thus, modern comprehensive gun control legislation could survive.[154]

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[151] *U.S. Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1980). "This Court has long recognized the validity of reasonable time, place, and manner regulations on such a forum so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication." *Id.*

[152] U.S. Const. amend. II.

[153] *E.g.* 18 U.S.C. § 922 (2001).

[154] It must be noted that scholars' opinions vary as to the types of guns within the purposes for which the Second Amendment protects the right to keep a gun. Kopel, *supra* n. 8, at 1365. One commentator suggests that "artillery pieces, tanks, nuclear devices and other heavy ordinances" along with "grenades, bombs, bazookas and other devices" do not fall within the constitutional protection of the right to bear arms because they have never been commonly possessed for self-defense. Kopel, *supra* n. 8, at 1533 (citing Stephen Halbrook, *What the Framers Intended: A Linguistic Analysis of the Second Amendment Right to "Bear Arms,"* 49 Law & Contemp. Probs. 151 (1986)).

For example, Ohio Rev. Code Ann. § 2923.13, which restricts fugitives, violent felons, drug dependents, and mental incompetents from having a weapon, would be subject to strict scrutiny.[155] It is not a time, place, or manner restriction because it only limits the right to bear arms of certain classes of citizens. This regulation would likely survive the strict scrutiny test because the State of Ohio has a compelling interest in protecting the safety of its citizens and the regulation strictly defines persons who are susceptible to abusing their right to bear arms and threaten the safety of others. In addition, Ohio courts have held that the statute does not restrict the right of such an individual when that individual is faced with an immediate threat to personal safety.[156] Thus, the regulation provides minimal invasion of this class of citizens' rights in furtherance of the State's goal.

Conversely, Ohio Rev. Code Ann. § 2923.121, which prohibits possession of a firearm on liquor permit premises, would only be subject to intermediate scrutiny.[157] This is a time, place, or manner restriction because

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[155] Ohio Rev. Code Ann. § 2923.13 (Anderson 2001) provides:

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply: (1) The person is a fugitive from justice. (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence. (3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse. (4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic. (5) The person is under adjudication of mental incompetence. (B) No person who has been convicted of a felony of the first or second degree shall violate division (A) of this section within five years of the date of the person's release from imprisonment or from post-release control that is imposed for the commission of a felony of the first or second degree. (C) Whoever violates this section is guilty of having weapons while under disability. A violation of division (A) of this section is a felony of the fifth degree. A violation of division (B) of this section is a felony of the third degree.

Id.

[156] *State v. Hardy*, 397 N.E.2d 773, 776-77 (Ohio App. 8th Dist. 1978).

[157] Ohio Rev. Code Ann. § 2923.121 (Anderson 2001) provides:

(A) No person shall possess a firearm in any room in which liquor is being dispensed in premises for which a D permit has been issued under Chapter 4303. of the Revised Code. (B)(1) This section does not apply to officers, agents, or employees of this or any other state or the United States, or to law enforcement officers, authorized to carry firearms, and acting within the scope of their duties. (2) This section does not apply to any room used for the accommodation of guests of a hotel, as defined in section 4301.01 of the Revised Code. (3) This section does not prohibit any person who is a member of a veteran's organization, as defined in section 2915.01 of the Revised Code, from possessing a rifle in any room in any premises owned, leased, or otherwise under the control of the veteran's organization, if the rifle is not loaded with live ammunition and if the person otherwise is not prohibited by law from having the rifle. (4) This section does not apply to any person possessing or displaying firearms in any room used to

it restricts citizens from possessing a gun in a particular place, namely liquor permit premises. This regulation could pass the intermediate scrutiny test because the government has an important interest in maintaining public safety, and prohibiting firearms in liquor permit premises under these conditions is substantially related to serving that interest. However, this regulation would likely fail the strict scrutiny test because while the government has a compelling interest, the rule is not narrowly confined. It lists a general prohibition and then excepts certain classes of people, such as law enforcement officers, hotel guests, members of veterans associations, and persons using a weapon for self-defense.[158] Undoubtedly, the statute could except other classes of people and still achieve the goal of preserving public safety. Therefore, this type of regulation could survive under an intermediate standard of review, but not under traditional strict scrutiny. This example demonstrates how a strict scrutiny standard could be fatal for many state gun control statutes, while these reasonable restrictions could survive under the proposed method. For these reasons, the Supreme Court should recognize that the Second Amendment is a qualified fundamental right. Consequently, courts should review time, place, and manner restrictions under intermediate scrutiny and apply strict scrutiny review to all regulations that do not impose such restrictions.

IV. CONCLUSION

After over sixty years of silence, the Supreme Court must definitively rule on issues relating to the Second Amendment. The right to bear arms is a fundamental individual right. Following this declaration, the Court should

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exhibit unloaded firearms for sale or trade in a soldiers' memorial established pursuant to Chapter 345. of the Revised Code, in a convention center, or in any other public meeting place, if the person is an exhibitor, trader, purchaser, or seller of firearms and is not otherwise prohibited by law from possessing, trading, purchasing, or selling the firearms. (C) It is an affirmative defense to a charge under this section of illegal possession of a firearm in liquor permit premises, that the actor was not otherwise prohibited by law from having the firearm, and that any of the following apply: (1) The firearm was carried or kept ready at hand by the actor for defensive purposes, while the actor was engaged in or was going to or from the actor's lawful business or occupation, which business or occupation was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent person in going armed. (2) The firearm was carried or kept ready at hand by the actor for defensive purposes, while the actor was engaged in a lawful activity, and had reasonable cause to fear a criminal attack upon the actor or a member of the actor's family, or upon the actor's home, such as would justify a prudent person in going armed. (D) Whoever violates this section is guilty of illegal possession of a firearm in liquor permit premises, a felony of the fifth degree.

Id.

[158] *Id.*

apply the right to bear arms to the states through the Due Process clause of the Fourteenth Amendment. The Second Amendment satisfies the modern test for incorporation because it is part of American tradition. Further, current state laws and the continuing need for the right to bear arms for self-preservation render the Second Amendment fundamental to the American scheme of justice today. Dicta from early and recent Supreme Court cases further support incorporation.

Upon incorporation, the Court should recognize that the right to bear arms is a qualified right. Thus, similar to the standard of judicial review for other qualified rights, the Court should apply intermediate scrutiny to time, place, and manner restrictions and reserve strict scrutiny for regulations outside these restrictions. Adoption of this standard of review would allow the Court to clarify the fundamental nature of the Second Amendment while keeping modern gun regulation schemes intact.