

HELLER'S MYOPIA: REREADING THE SECOND AMENDMENT IN CONTEXT

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ABSTRACT

One of the most contentious issues in recent Supreme Court jurisprudence is the scope of an individual's right to bear arms. The Court ruled in *District of Columbia v. Heller* that individual gun ownership for self-defense is a fundamental right protected by the Second Amendment. In *Heller*, the Court defined the scope of this right by focusing on the Second Amendment in isolation. However, a more appropriate reading of the Second Amendment requires consideration of how the right to gun ownership is impacted by other constitutional guarantees, including the right to life found in the Due Process Clauses of the Fifth and Fourteenth Amendments, the protections offered to citizens by the Privileges or Immunities Clause, and the rights reserved to the states under the Tenth Amendment.

INTRODUCTION

The United States faces an undeniable crisis of gun violence. In the nearly 15 years since the Supreme Court's landmark decisions in *District of Columbia v. Heller*¹ and *McDonald v. Chicago*,² the number of guns and the number of gun-related deaths have increased by 30 percent and 17 percent, respectively.³ The number of firearm-related deaths in 2020 surpassed motor vehicle crashes, making gun violence the leading cause of death among children and adolescents.⁴ In that same year, a record-breaking 45,222 Americans died from gun-related injuries,⁵ and in 2021, that record was broken again when gun-related injuries killed 48,830 Americans.⁶ Finally, in

¹ 554 U.S. 570 (2008).

² 561 U.S. 742 (2010).

³ AMERICAN ENLIGHTENMENT PROJECT, Guns: A Problem Becomes Epidemic <https://americanenlightenmentproject.org/guns-a-problem-becomes-epidemic/> (last visited Feb. 14, 2023).

⁴ THE NEW ENGLAND JOURNAL OF MEDICINE, Current Causes of Death in Children and Adolescents in the United States (last updated May 19, 2022) <https://www.nejm.org/doi/full/10.1056/nejmc2201761> (last visited Feb. 14, 2023).

⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, Fast Facts: Firearm Violence Prevention (last updated May 4, 2022) <https://www.cdc.gov/violenceprevention/firearms/fastfact.html> (last visited Feb. 14, 2023).

⁶ CENTERS FOR DISEASE CONTROL AND PREVENTION, National Center for Health Statistics (last updated February 1, 2023) <https://www.cdc.gov/nchs/fastats/injury.htm> (last visited Feb. 14, 2023).

the first two months of 2023 alone, there have been more than one mass shooting per day.⁷

The large amount of gun violence in America has led many to call for increased legislative action to restrict gun ownership.⁸ Such restrictions have been opposed on a number of grounds, including that they are inconsistent with the right to keep and bear arms protected by the Second Amendment.⁹ In light of the toll that gun violence continues to exact across the nation, the extent to which the federal and state governments may regulate gun ownership consistent with the Constitution is a question that, for many, literally carries life or death consequences.

In *Heller*, the Supreme Court ruled that the Second Amendment protected the right to keep and bear arms for self-

⁷ GUN VIOLENCE ARCHIVE (last updated Feb. 19, 2023) <https://www.gunviolencearchive.org/reports/mass-shooting> (last visited Feb. 19, 2023).

⁸ According to a Pew Research Center survey conducted in April 2021, 53 percent of Americans favor stricter gun laws and 49 percent believe there would be fewer mass shootings with more gun control, while 42 percent believe gun control would make no difference on mass shootings and 9 percent believe that gun control would increase mass shootings. PEW RESEARCH CENTER, Key Facts about Americans and guns (Sept. 13, 2021) <https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns/> (last visited Feb. 14, 2023).

⁹ Brief for Gun Owners of America as Amicus Curiae, p. 3, District of Columbia v. Heller, 554 U.S. 570 (2008); Todd Barnett, *Gun Control Laws Violate the Second Amendment and May Lead to Higher Crime Rates*, MISSOURI LAW REVIEW 155-193 (1998).

defense, irrespective of militia service, and in *McDonald*, extended those protections to apply to the states as well. As a result, the Court struck down state and federal statutes seeking to limit gun ownership. In subsequent cases, courts have rejected a myriad of other restrictions and expanded the Second Amendment to protect a comprehensive right to gun ownership at the expense of the state's legitimate interest in protecting the safety and welfare of its citizens.

This article argues that the Supreme Court's interpretation of the Second Amendment and the right to individual gun ownership has ignored the broader import of the Fifth, Tenth, and Fourteenth Amendments on the contours of the right to bear arms. Instead, the Supreme Court has continued to define the scope of this right by focusing on the Second Amendment in isolation. However, a more appropriate reading of the Second Amendment requires consideration of how the right to gun ownership is impacted by other constitutional guarantees, including the right to life found in the Due Process Clauses of the Fifth and Fourteenth Amendments, the protections offered to citizens by the

Privileges or Immunities Clause, and the rights reserved to the states under the Tenth Amendment.

This article proceeds in four parts. Part I discusses the Supreme Court's decisions in *Heller* and *McDonald* and how the Court has used its new interpretation of the Second Amendment to dramatically expand the right of individual gun ownership. Part II examines the implications of this new interpretation and concludes that it threatens to eliminate the ability of the federal government and the states to regulate gun ownership. Part III argues that the Second Amendment, contrary to the Supreme Court's current reading of this provision, must be reinterpreted in the context of other constitutional guarantees. Part IV concludes by arguing that a more appropriate reading of the Second Amendment would allow government actors to play a more expansive role in regulating gun ownership.

I. FINDING AN INDIVIDUAL RIGHT TO GUN OWNERSHIP

The Second Amendment provides that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be

infringed.”¹⁰ The meaning of this provision has led to significant disagreement among legal experts. Some argue that the most natural reading of the Second Amendment is that it protects the right to own firearms for militia service, while in no way restricting the government’s ability to regulate non-military use and ownership of weapons.¹¹ Others argue that the mention of a “well regulated Militia” does nothing to limit the individual right to own firearms for self-defense.¹² The Supreme Court has adopted the latter interpretation.

A. District of Columbia v. Heller

Prior to the Supreme Court’s ruling in *Heller*, the Court maintained a strict interpretation of the Second Amendment in which the clause referring to a “militia” restricted the clause referring to the “right to keep and bear arms.” In *United States v. Miller*,¹³ the Court confronted the issue of whether the

¹⁰ U.S. CONST. amend. II.

¹¹ *Heller*, 554 U.S. at 637 (Stevens, J., dissenting) (“The Second Amendment was adopted to protect the right of the people of each of the several states to maintain a well-regulated militia...Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms”).

¹² *Heller*, 554 U.S. at 628.

¹³ 307 U.S. 174 (1939).

Second Amendment protected an individual's right to own a firearm unrelated to militia service. The Court ruled that ownership of a sawed-off shotgun or other firearm that lacks a "reasonable relationship to the preservation or efficiency of a well-regulated militia" was not protected by the Second Amendment.¹⁴

However, in the early 2000s, the conservatives on the Court took advantage of their majority and seized the opportunity to redefine the Second Amendment. In two cases, *Heller* and *McDonald*, the court dramatically and drastically reversed its interpretation of the Second Amendment and applied it to the states.

Writing for the majority in *Heller*, Justice Scalia claimed to apply a historical and textual analysis of the Second Amendment, in which he split the Second Amendment into a prefatory clause and an operative clause.¹⁵ Justice Scalia first examined the operative clause of the Second Amendment and concluded that it "guarantee[s] the individual right to possess

¹⁴ *Id.* at 178.

¹⁵ *Heller*, 554 U.S. at 592 (the prefatory clause reads: "a well-regulated militia, being necessary to the security of a free State"; the operative clause reads: "the right of the people to keep and bear Arms, shall not be infringed").

and carry weapons in case of confrontation.”¹⁶ He then reviewed the prefatory clause and determined that it simply announces the purpose of the Amendment and does nothing to limit the rights outlined in the operative clause.¹⁷

Justice Scalia concluded that ordinary citizens would have understood the diction and syntax of the Second Amendment to protect the right to keep and bear arms for self-defense and hunting.¹⁸ Consequently, the Supreme Court found a fundamental, enumerated right to possess and carry firearms in case of confrontation.

B. *McDonald v. Chicago*

Only two years after greatly expanding its interpretation of the Second Amendment, the Supreme Court ruled in *McDonald* that its new interpretation of the Second Amendment not only prohibited the federal government from infringing on the fundamental right to possess and carry a

¹⁶ *Id.* at 592.

¹⁷ *Id.* at 578.

¹⁸ *Id.* at 599 (“The prefatory clause does not suggest that preserving the militia was the only reason Americans value the ancient right; most undoubtedly thought it even more important for self-defense and hunting”).

firearm but, by virtue of being incorporated into the Fourteenth Amendment, also applied to the states.

In *McDonald*, the Court confronted two questions: whether the individual right to gun ownership for self-defense is among the “privileges or immunities of citizens of the United States”¹⁹ and whether the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment’s right to bear arms.²⁰ The argument that the Privileges or Immunities Clause is the primary vehicle for incorporation – primarily supported by Justice Thomas – was rejected.²¹ However, the Court concluded that the Due Process Clause fully incorporates the Second Amendment.

Beginning in the late nineteenth and spanning the twentieth century, the Court considered a number of cases on whether the Fourteenth Amendment’s Due Process Clause applies the Bill of Rights to the states.²² The Court eventually

¹⁹ U.S. CONST. amend. XIV § I.

²⁰ *McDonald*, 561 U.S. at 753.

²¹ *Id.* at 758 (“For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges and Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding”).

²² *See, e.g.*, *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 116 U.S. 226 (1897) (the Court incorporated a specific provision of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment for the

landed on the “selective incorporation” doctrine, pursuant to which the Court proceeded to apply to the states “those guarantees of the Bill of Rights which are fundamental safeguards of liberty.”²³ The Court also ruled that the incorporated protections should be enforced against the states to the same degree that they applied to the federal government.²⁴

Writing for the majority, Justice Alito declared the right to keep and bear arms is incorporated into the concept of due process because it is a fundamental right.²⁵ To establish the fundamental nature of the right to possess and carry firearms, he explored the origins of the Second Amendment. Using the standard established in *Washington v. Glucksberg*,²⁶ Justice Alito concluded that the right to keep and bear arms was

first time and concluded that the Due Process Clause prohibited States from condemning land without just compensation).

²³ *Gideon v. Wainwright*, 372 U.S. 335 at 341 (1963) (“We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgement are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment”). *See also* *Malloy v. Hogan*, 378 U.S. 1 (1964); *Pointer v. Texas*, 380 U.S. 400 (1965); *Washington v. Texas*, 388 U.S. 14 (1967); *Benton v. Maryland*, 395 U.S. 784 (1969).

²⁴ *Malloy*, 378 U.S. at 10-11.

²⁵ *McDonald*, 561 U.S. 742 at 791.

²⁶ *Washington v. Glucksberg*, 521 U.S. 702 (1997) at 720-721 (“fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’”).

considered fundamental by the ratifiers of the Constitution and had deep roots in the American legal tradition.²⁷ Consequently, Justice Alito concluded that the Second Amendment, and its guarantee of the right to possess and carry a firearm in case of confrontation as outlined in *Heller*, is protected from state encroachment by the Due Process Clause of the Fourteenth Amendment.

II. BURDEN ON GOVERNMENT REGULATIONS

The Court's decisions in *Heller* and *McDonald* found, for the first time in 200 years, an enumerated right to carry and possess firearms for self-defense that applies to both the federal and state governments. After establishing that there was a constitutionally enumerated right to keep and bear arms for self-defense, the Court then faced the challenge of delineating its limits. Justice Scalia started this process in *Heller* but left it to future decisions to flush out the exact contours of his new interpretation of the Second Amendment.²⁸ Since then, courts

²⁷ *McDonald*, 561 U.S. 742 at 768.

²⁸ *Heller*, 554 U.S. at 626.

have construed the Second Amendment broadly in the face of government efforts to address the problem of gun violence.

A. District of Columbia v. Heller

In his opinion in *Heller*, Justice Scalia began the Court's multi-case analysis of the scope of the Second Amendment. Examining historical jurisprudence on the matter, he concluded that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."²⁹ However, this created as many questions as it answered. What weapons were permitted under this new ruling? In what manner were these weapons permitted to be carried? For what purpose were these weapons allowed to be carried?

Justice Scalia attempted to answer many of these questions in his opinion. He declared that handguns were the prototypical self-defense weapon and thus cannot be restricted by the government.³⁰ He also concluded that while Second Amendment protections extended to firearms that were not in

²⁹ *Id.*

³⁰ *Id.* at 629.

existence at the time of the founding,³¹ they did not extend to “those weapons not typically possessed by law-abiding citizens for lawful purposes” or “dangerous and unusual” weapons like machine guns.³²

In addition to answering what weapons were permitted under this ruling, Justice Scalia also addressed the purpose for and manner in which the weapons could be carried. He declared that restrictions on handguns in the home, particularly the requirement that they be kept inoperable, would undermine the primary purpose of gun ownership, which was to protect one’s family and hearth.³³

Justice Scalia then proceeded to outline various examples of state restrictions that were permitted under his reading of the Second Amendment. He held that prohibitions on carrying concealed weapons were lawful.³⁴ He also asserted that the right to keep and bear arms would not be extended to

³¹ *Id.* at 582 (“Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications...the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding”).

³² *Id.* at 625, 627.

³³ *Id.* at 629.

³⁴ *Id.* at 627

felons, the mentally ill, or persons in sensitive places, including government buildings and schools.³⁵ Lastly, he concluded that the government may still place “conditions and qualifications” on the commercial sale of firearms.³⁶

B. New York State Pistol and Rifle Association Inc. v. Bruen

In *New York State Pistol and Rifle Association Inc. v. Bruen*,³⁷ the Court considered the constitutionality of a New York law that required those applying for an unrestricted concealed-carry license to show a special need for self-defense. In striking down that law, the Court placed further restrictions on the government’s ability to regulate gun ownership and significantly expanded the right to possess firearms for self-defense.

The Court’s ruling significantly constricts the government’s ability to enact the type of regulations envisioned by Justice Scalia in four principal ways. First, the Court overruled Justice Scalia’s declaration in *Heller* that the government may prohibit the concealed carry of firearms.

³⁵ *Id.* at 626.

³⁶ *Id.* at 626-627.

³⁷ 597 U.S. _ (2022).

Second, the Court expanded the arena in which one can carry a firearm for self-defense to include non-sensitive public places.³⁸ Third, although acknowledging the legitimacy of restricting gun possession in sensitive areas, the Court narrowly construed what constitutes a sensitive area, concluding that the densely populated and violence-prone city of Manhattan does not qualify as such a location.³⁹

Finally, perhaps the Court's most extreme expansion of its interpretation of the Second Amendment was in its application of a new burden on the state when attempting to regulate gun ownership. Writing for the majority, Justice Thomas rejected means-end scrutiny – a test in which the Court weighs the severity of a restriction against the governmental interest – declaring that it is no longer sufficient to show an important interest in regulating gun ownership. Rather, the state must illustrate a tradition of such firearm regulation in the nation's history.⁴⁰ In other words, the Court refused to consider the government's interest in protecting the safety and welfare of its citizens and instead decided to

³⁸ *Id.* at 21-22.

³⁹ *Id.* at 24, 62-63.

⁴⁰ *Id.* at 8.

consider only whether the state’s regulation conforms with those restrictions that were permitted at the time of the founding.⁴¹

C. *United States v. Rahimi*

The Fifth Circuit Court of Appeals further expanded Second Amendment protections and inhibited government efforts to regulate gun ownership in *United States v. Rahimi*.⁴² In particular, the Fifth Circuit followed Justice Thomas’ lead in *Bruen* by rejecting the application of means-end scrutiny and instead considering whether the regulation at issue was rooted in historical tradition.⁴³

Applying this standard, the Fifth Circuit invalidated the prohibition on gun ownership by subjects of domestic abuse

⁴¹ In his concurring opinion, Justice Kavanaugh distinguished between “may issue” laws like the New York law and “shall issue” laws enacted by 43 other states and concluded that the majority’s decision only precluded the former (*Heller*, 554 U.S. at 1-2). Even if understood the way Justice Kavanaugh explained, the standard established by the *Bruen* decision is problematic for two additional reasons. First, it is unreasonable to insist that the state regulate modern guns to prevent modern issues of gun violence using only laws that conform to those from the 18th century. Second, the standard is logically inconsistent with Justice Scalia’s conclusion in *Heller* that it is “bordering on the frivolous” to claim only weapons in existence at the time of the ratification of the Second Amendment are protected by it (*Heller*, 554 U.S. at 582). The court fails to explain why, in interpreting the Second Amendment, it is improper to consider only the weapons in existence at the time of ratification, but proper to consider only regulations in existence at that time.

⁴² *United States v. Rahimi*, No. 21-11001 (5th Cir. 2022).

⁴³ *Id.* at 5.

restraining orders because such regulations were not in existence at the time the Constitution was ratified.⁴⁴ The decision in *Rahimi* perhaps best illustrates the challenges posed by the *Bruen* standard. At the time of the Second Amendment's ratification, women were effectively treated as their husband's chattel.⁴⁵ Unsurprisingly, there would not be a tradition of punishing and deterring domestic violence in a society where such violence was not at the forefront of the public's conscience.

If the Second Amendment prevents prohibitions on gun ownership by those who have already been found by a court to pose a significant threat to others, then it is unclear what type of gun regulations would pass scrutiny. The Fifth Circuit's ruling in *Rahimi* rests on the argument that a restraining order is insufficient to warrant a deprivation of Second Amendment rights because it is the result of a civil proceeding rather than a criminal one.⁴⁶ However, the Third Circuit Court of Appeals may be on the verge of ruling that

⁴⁴ *Id.* at 22.

⁴⁵ Kevin C. Paul, *Private/Property: A Discourse on Gender Inequality in American Law*, MINNESOTA JOURNAL OF LAW AND INEQUALITY 399-439 (1989).

⁴⁶ *Id.* at 13 ("The distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation's history").

Second Amendment protections extend even to those convicted of a criminal offense.⁴⁷ Although a panel of the Third Circuit concluded that a man convicted of fraud did not have a Second Amendment right to keep and bear arms for self-defense, the Third Circuit recently decided to rehear the case *en banc*.⁴⁸ These cases further signal that under the current understanding of the Second Amendment, the state's interest in protecting life is entitled to little if any weight.

III. REREADING THE SECOND AMENDMENT

By reading the Second Amendment in isolation, the Supreme Court has adopted an overly restrictive interpretation of this provision which, as noted in Part II, imposes a severe burden on governmental regulation of gun ownership.⁴⁹ However, the Second Amendment does not exist,

⁴⁷ *Range v. Attorney General of the United States*, No. 21-2835 (3rd Cir. 2023) (Arguments were heard on February 15, 2023. The case is currently pending a decision.).

⁴⁸ *Id.*

⁴⁹ The Supreme Court's reading of the Second Amendment, even on its own terms, is problematic. Justice Scalia's notion that the popularity and commonality of a certain weapon is the basis for determining its legality is subject to criticism (*Heller*, 554 U.S. at 627). This relativistic standard means that in the future Congress and the states will have to prohibit new firearms before they become too popular or otherwise they will fall under the protections of the Second Amendment. Additionally, asking the Court to gauge the popularity of a given firearm, an extremely subjective and undefined metric, creates opportunities for Justices to insert their own beliefs

and cannot be read, in a vacuum. Rather, as reflected by the Supreme Court's reliance on the Fourteenth Amendment to apply it to the states, both the reach and limitations of the Second Amendment must be informed by the other constitutional guarantees adopted by the framers. When the Second Amendment infringes on those other guarantees, such as the right to life protected by the Due Process Clauses of the Fifth and Fourteenth Amendments and the Privileges or Immunities Clause of the Fourteenth Amendment, then a balance must be struck between the competing provisions to ensure that each is given appropriate consideration.

The Due Process Clauses in the Fifth and Fourteenth Amendments may be interpreted as imposing an obligation on the states to take certain actions to protect their citizens' right to life. At a minimum, these clauses, as well as the Privileges or Immunities Clause, particularly when read in conjunction with the Tenth Amendment, should be read to authorize federal and state governments, to take basic steps needed to protect their

about what liberties should be protected when interpreting the amendment. These issues are beyond the scope of this article, which argues that however the Second Amendment might be read on its own terms, the Court has erred by failing to read it in the context of other applicable guarantees.

citizens' lives against the risks presented by guns notwithstanding the Second Amendment.

A. The Due Process Clauses of the Fifth and Fourteenth Amendments

The Fifth Amendment's Due Process Clause states that no person shall be "deprived of life, liberty, or property, without due process of law."⁵⁰ The Due Process Clause of the Fourteenth Amendment similarly declares that no state may "deprive any person of life, liberty, or property, without due process of law."⁵¹ The Supreme Court has interpreted these clauses to impose certain substantive guarantees, which "forbi[d] the government to infringe certain 'fundamental' liberty interests at *all*, no matter what process is provided."⁵² Furthermore, congressional debates at the time of the Fourteenth Amendment's ratification suggest that the framers' had an even more expansive view of the Due Process Clause as placing an affirmative obligation on the government to protect the lives of its citizens. Ohio Representative Bingham declared

⁵⁰U.S. CONST. amend.V.

⁵¹ U.S. CONST. amend. XIV § I.

⁵² Reno v. Flores, 507 U.S. 292, 302 (1993).

that the Fifth Amendment’s Due Process Clause which would subsequently be incorporated into the Fourteenth Amendment’s Due Process Clause guaranteed the right “of all persons to be protected in life.”⁵³ Articulating a similar positive understanding of the Due Process Clause, Iowa Representative Wilson stated that “it is the duty of the Government to protect citizens” and that “the citizen is entitled to life” by the Fifth Amendment.⁵⁴ Thus, the framers of the Fourteenth Amendment understood the Due Process Clause to require overt government action to protect the life of its citizens.

So far, the Supreme Court has rejected the framers’ view that the substantive due process rights protected by the Fifth and Fourteenth Amendments require the government to act when those rights are put in jeopardy.⁵⁵ However, consistent with the framers’ view, when the federal and state governments fail to take basic actions to restrict gun violence in the face of the current epidemic of gun-related deaths facing this country – an epidemic that is the leading cause of death for certain

⁵³ Congressional Globe, 39th Congress, 1st Session 1292 (1866)
<https://memory.loc.gov/ammem/amlaw/lwclink.html>.

⁵⁴ *Id* at 1294.

⁵⁵ *DeShaney v. Winnebago County Department of Social Services*, 489 US 189 (1989).

segments of the population – then the government has failed to carry out its duty of ensuring that no person is “deprived” of their fundamental right to life. At a minimum, the substantive right to life guaranteed by the Fifth and Fourteenth Amendments must be viewed as authorizing the government to undertake basic actions to protect the lives of its citizens when those lives are at risk. Finally, even if the guarantee of life protected by the due process clauses is viewed through a procedural lens, it may be argued that citizens are nonetheless entitled to proper legislative and administrative, as well as judicial, avenues of relief necessary to effectuate that right. Accordingly, when the Second Amendment is interpreted in a way that heightens the risk of gun violence, it conflicts with the guarantee of life, and the concomitant right to government action to protect that life, inherent in the Fifth and Fourteenth Amendments.

The Court has repeatedly found that a constitutional guarantee can be limited where it conflicts with a compelling state interest, even if that state interest is not grounded in

another constitutional provision.⁵⁶ If this is the case, then both logic and respect for the Constitution dictate that when a constitutional guarantee contravenes another constitutional guarantee, the court must harmonize the two rights so that neither right trumps the other. This means that the Second Amendment's right to bear arms cannot be interpreted and applied in isolation. Rather, it must be interpreted in a way that maximizes its protections consistent with the guarantee of life offered by the Fifth and Fourteenth Amendments.

The best way to harmonize these two competing rights is to use the undue burden standard implemented by Justice O'Connor in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵⁷ In *Casey*, Justice O'Connor declared that abortion was a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment but, nevertheless, concluded that, given the compelling interest of states to protect life, states can regulate abortion to meet their

⁵⁶ See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (the Court found that the government could restrict free speech if it presented a clear and present danger); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (the Court found that the government could mandate vaccination to promote public health).

⁵⁷ 505 U.S. 833 (1992)

interests as long as they do not place an undue burden on a woman's ability to have an abortion.⁵⁸

A provision of a law represents an undue burden if its purpose or effect creates “substantial obstacles” in the path of a person seeking to exercise a fundamental liberty.⁵⁹ Furthermore, the fact that a law has the incidental effect of making the exercise of a specific liberty more difficult or expensive is not grounds to invalidate it as long as the law serves a valid purpose and is not designed to specifically “strike at the right itself.”⁶⁰ Applying this standard to the issue of gun rights dictates that neither right may unduly burden the other. Put differently, the government’s enforcement of the Second Amendment cannot place substantial obstacles in the way of the right to life. Likewise, protecting the right to life protected by the Fifth and Fourteenth Amendments cannot place substantial obstacles in the way of the right to keep and bear arms. The task of the courts should be to harmonize the two rights as much as possible when they are in conflict. Thus far,

⁵⁸ *Id.* at 874.

⁵⁹ *Id.* at 877.

⁶⁰ *Id.* at 874.

the Court has given preeminence to the Second Amendment with little regard for the Fifth and Fourteenth Amendments.

C. Privileges or Immunities Clause

Despite the Supreme Court's errant decision to gut it in the *Slaughter-House Cases*,⁶¹ the Privileges or Immunities Clause of the Fourteenth Amendment reinforces the conclusion that the Second Amendment was not intended to foreclose government regulation of gun ownership. This constitutional provision not only provides an additional basis for concluding that the states have a right to protect the life of their citizens, but it arguably provides an additional basis for finding that they have a constitutional duty to do so.

Following the ratification of the Thirteenth Amendment, Congressional Republicans passed the Civil Rights Act of 1866, which declared that all people born in the United States were citizens and that all citizens were guaranteed certain legal protections.⁶² Fearing challenges to its constitutionality, Republicans sought to codify the Civil Rights

⁶¹ *Slaughter-House Cases*, 83 U.S. 36 (1873).

⁶² Eric Foner, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION*, Toward Equality.

Act of 1866 in the Constitution.⁶³ Thus, they used it as a template for the Fourteenth Amendment, and in particular the Privileges or Immunities Clause.⁶⁴

The Privileges or Immunities Clause declares that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁶⁵ Although it does not directly reference the right to life, it is hard to imagine a more important privilege or immunity of citizenship than the protection of one’s life by their government. Therefore, when the government enforces the Second Amendment in a way that threatens the lives of individuals by prohibiting effective gun regulations, it infringes on the Privileges or Immunities Clause.

Both the historical context in which the Amendment was ratified and statements from the ratifiers themselves offer evidence for this interpretation. First, the Fourteenth Amendment was adopted at a time when Black citizens were at risk of losing their lives through the actions of other citizens. Accordingly, when the framers were talking about privileges

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ U.S. CONST. amend. XIV § I.

and immunities, they were not just focused on abstract principles. Rather they had on their minds, first and foremost, the protection of citizens' lives. Second, many in Congress at the time articulated similar understandings of language used in the Civil Rights Act of 1866 that was subsequently reused in the Privileges or Immunities Clause. Ohio Representative Shellabarger declared that even "the lowest grade of citizenship gives the right of protection in person and property."⁶⁶ Concurring with the sentiments of Representative Shellabarger was Illinois Senator Trumbull, who argued that "American citizenship would be little worth if it did not carry protection with it."⁶⁷ The original intent and understanding of the Privileges or Immunities Clause by those who authored and ratified it also suggests an obligation on the government to protect the lives of its citizens. Once again, the congressional debates in 1866 illuminate this conclusion. Nevada Senator Stewart stated that "it is the duty of the Government to protect"⁶⁸ while Vermont Senator Morrill claimed that one of

⁶⁶ Congressional Globe, 39th Congress, 1st Session 1293 (1866)
<https://memory.loc.gov/ammem/amlaw/lwclink.html>.

⁶⁷ *Id.* at 1757.

⁶⁸ *Id.* at 2799.

the “essential elements of citizenship” is protection by the government.⁶⁹

Thus, by reviewing the debates surrounding the Civil Rights Act of 1866 that would eventually be reworked into the Privileges or Immunities Clause of the Fourteenth Amendment, it is clear that the ratifiers intended the Privileges or Immunities Clause to establish not only a fundamental right to life enjoyed by all citizens but also to establish an obligation on the government to ensure proper enjoyment of that right by its citizens. Properly understood, the Privileges or Immunities Clause can be viewed as another limit on the ability of the government to take action that threatens the lives of its citizens – in this case to enforce the Second Amendment in such a fashion that it would heighten the risk of death by gun violence.

D. The Tenth Amendment

The Tenth Amendment states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

⁶⁹ *Id.* at 570.

respectively, or to the people.”⁷⁰ Traditionally, it has been interpreted vis-à-vis the federal government’s power to levy taxes and regulate interstate commerce.⁷¹ Until the New Deal era, the Supreme Court took a limited view of what constituted interstate commerce and severely restricted federal regulation over industry.⁷² However, under threat of court packing, the Court significantly broadened its interpretation of interstate commerce and rapidly expanded the federal government’s regulatory powers via the commerce clause.⁷³

As illustrated by the long line of commerce clause cases, most of the jurisprudence relating to the Tenth Amendment relates to what may be regulated by the federal government. The Court has repeatedly reaffirmed that the federal government’s jurisdiction is not unlimited and that the Tenth

⁷⁰ U.S. CONST. amend. X.

⁷¹ *See, e.g.*, *Gibbons v. Ogden* 22 U.S. 1 (1824); *McCray v. United States* 195 U.S. 27 (1904); *Hammer v. Dagenhart* 247 U.S. 251 (1918); *Carter v. Carter Coal Company* 298 U.S. 238 (1936).

⁷² *See, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918) and *Carter v. Carter Coal Company*, 298 U.S. 238 (1936). In both cases, the Court held that Congress may not regulate the production of goods even if they will eventually be shipped across state lines because production is distinct from commerce.

⁷³ *See, e.g.*, *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937) (the Court ruled for the first time that Congress may regulate any industrial activity that had a significant direct *or indirect* effect on interstate commerce) (italics added for emphasis); *Wickard v. Filburn*, 317 U.S. 111 (1942) (the Court ruled that Congress may regulate activities with insignificant effects on interstate commerce as long as each individual activity, when considered in the aggregate, had a substantial effect on interstate commerce).

Amendment reserves certain rights to the states.⁷⁴ Presumptively, among those rights reserved to the states by the Tenth Amendment is the right to protect the lives of their citizens. At the very least, the fact that certain powers are reserved to the states should lend credence to the notion that the Court must weigh states' interests in protecting life by applying an interest-balancing approach when incorporating the Second Amendment against the states – particularly in situations where application of the Second Amendment would otherwise infringe upon the constitutional guarantee of life protected by the Fifth and Fourteenth Amendments.

IV. PRACTICAL IMPLICATIONS OF REREADING THE SECOND AMENDMENT

As explained in Part III, the Second Amendment cannot be read in isolation. Rather, the Second Amendment must be informed by other relevant constitutional guarantees that obligate or at least permit the state to act to protect the lives of its citizens. When a conflict arises, the courts should apply an

⁷⁴ *See, e.g.*, *Gibbons*, 22 U.S. 1 (1824); *Hammer*, 247 U.S. 251 (1918) ; *Carter*, 298 U.S. 238 (1936); *National Labor Relations Board*, 301 U.S. 1 (1937).

interest-balancing approach, under which the courts must seek to harmonize the competing constitutional guarantees of the right to life and the right to bear arms to the extent possible. Under such an approach, neither constitutional guarantee would be entitled to absolute protection. The following discussion provides examples of how this interest-balancing test may be applied.

A. Revisiting Past Decisions

Applying Justice O'Connor's undue burden standard to the Second Amendment means that states can enact several different types of restrictions on firearm possession that the Court has previously found to be unconstitutional. For example, properly reading the Second Amendment in the broader context of the Fifth, Tenth, and Fourteenth Amendments and applying the interest balancing test that they demand would presumably require overturning the decisions in *Bruen* and *Rahimi*.

The government would be allowed to require citizens to show cause before they receive an unrestricted concealed carry permit. Illustrating a special need to protect oneself with a

firearm does not present an undue burden on one's ability to protect themselves with a firearm because, if they were truly in need of a firearm for self-defense, they would have no trouble showing it. The fact that it may inconvenience someone and incidentally make it more difficult for them to defend themselves with a concealed firearm within the city limits of Manhattan is not enough to outweigh the state's clear and compelling interest in protecting the lives of its residents.

Additionally, the government would be allowed to restrict firearm ownership by those who are subjects of domestic violence restraining orders. Such legislation has an obvious good faith motivation of preventing those already deemed violent and threatening to others by a court from owning deadly weapons. Furthermore, in other aspects of the American legal system, perceived violations of the social contract result in the forfeiture of certain fundamental rights. For instance, the vast majority of states disenfranchise felons, including nonviolent ones.⁷⁵ Certainly if non-violent felons can

⁷⁵ THE SENTENCING PROJECT, *Locked Out 2022: Estimates of People Denied Voting Rights* (last updated Oct. 25, 2022) <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/> (last visited Feb. 25, 2023).

be stripped of constitutionally protected rights, then those committing domestic violence can as well – particularly when the rule at issue is directly correlated to their penchant for committing violent acts.

While the decisions in *Bruen* and *Rahimi* would be overturned upon applying an interest-balancing approach to the Second Amendment, the regulations struck down in *Heller* would remain unconstitutional. Outright prohibitions on the registering of self-defense weapons or requirements that weapons be kept inoperable in the home would not pass constitutional muster because they fundamentally undermine the ability of individuals to defend themselves and their homes with a firearm. Moreover, the threat to the lives of others presumably is diminished. Accordingly, in this circumstance, the Second Amendment's right to bear arms should prevail.

B. Other Gun Regulations

In addition to casting doubt on certain past decisions, reading the Second Amendment in a broader context and applying an interest-balancing approach presents several

questions about what regulations previously unaddressed by the courts would be permissible.

In *Bruen*, the Court rejected New York’s classification of the island of Manhattan as a sensitive place because there was no history of such a sensitive-place classification being applied.⁷⁶ However, under an interest-balancing rather than a history-based approach, classifying large and densely populated cities as sensitive areas would pass constitutional muster. While gun violence also plagues rural America,⁷⁷ it is an undeniable fact that urban areas in the United States consistently face high levels of gun violence.⁷⁸ Therefore, large and densely populated cities, particularly those that have traditionally experienced significant gun-related fatalities, could be classified as sensitive places where extra gun restrictions may be applied.⁷⁹

⁷⁶ *Bruen*, 597 US _ (2022) at 22.

⁷⁷ CENTER FOR AMERICAN PROGRESS, Gun Violence in Rural America (last updated Sep. 26, 2022), <https://www.americanprogress.org/article/gun-violence-in-rural-america/> (last visited Mar. 28, 2023).

⁷⁸ DREXEL UNIVERSITY URBAN HEALTH COLLABORATIVE, Gun Deaths in Big Cities (last updated September 2022) https://www.bigcitieshealth.org/wp-content/uploads/2022/09/DataBrief_GunDeaths.pdf (last visited Feb. 18, 2023).

⁷⁹ Such regulation may be open to an equal protection claim. Many of the cities that experience large amounts of gun violence have large minority populations and a case could be made that restricting guns on such a basis would unfairly infringe on minority populations’ ability to defend themselves with firearms. However, under the framework suggested here, an interest

Other issues to be addressed by the court include restrictions on gun ownership by various classes of individuals. One example is the question of whether the legal age to possess a firearm can be raised by the states. Presently, while very few do, the states are allowed to raise the minimum age requirement to purchase and possess a firearm.⁸⁰ Therefore, they would also be able to do so after the application of the undue burden standard. Indeed, raising the minimum age to purchase a firearm from 18 to 21 would burden 18- to 20-year-olds' ability to defend themselves with firearms. However, some studies show a markedly higher number of suicide deaths in states where the minimum age to purchase a firearm is 18 compared to states where the minimum age is 21 or older,⁸¹ which would potentially provide a basis for a court to conclude that the balance of interests tips in favor of a law raising the minimum purchase age.

balancing approach would again be used to balance the competing constitutional interests at stake.

⁸⁰ EVERYTOWN RESEARCH, Has the state raised the minimum age for purchasing firearms? (last updated Jan. 12, 2023)

<https://everytownresearch.org/rankings/law/minimum-age-to-purchase/> (last visited Mar. 28, 2023).

⁸¹ BRITISH MEDICAL JOURNAL, State handgun purchase age minimums in the US and adolescent suicide rates (last updated Jul. 22, 2020)

<https://www.bmj.com/content/bmj/370/bmj.m2436.full.pdf> (last visited Feb. 25, 2023).

Another group of individuals that could presumably be prohibited from purchasing and possessing firearms is drug addicts.⁸² There have been plenty of studies that illustrate the link between substance abuse and violent behavior.⁸³ Therefore, just as the government can restrict gun ownership by domestic abusers because they pose a threat of violence to others, they can also restrict gun ownership by those with a history of substance abuse because they too may pose a threat of violence to third parties.

A third group of individuals whose right to keep and bear arms could be prohibited are those convicted of violent felonies.⁸⁴ As previously discussed, the American legal system

⁸² One potential challenge in restricting gun ownership by drug addicts is the difficulty in identifying them. The most effective approach would be to prohibit the sale of firearms to those who have a drug- or alcohol-related criminal record or have been treated for substance abuse. This approach does have major drawbacks. First, it would require sharing records of treatment with law enforcement agencies. This is not totally without precedent, however, because doctors do have an ethical obligation to break doctor-patient confidentiality when the lives of others are endangered. Second, this type of regulation could be subject to an equal protection claim because of the racially disparate manner in which drug crimes are policed in the United States.

⁸³ EPIDEMIOLOGICAL REVIEWS, Drug Use Disorders and Violence: Associations with Individual Drug Categories (last updated Oct. 2, 2020) <https://doi.org/10.1093/epirev/mxaa006> (last visited Feb. 25, 2023); PSYCHIATRIC TIMES, The Link Between Substance Abuse, Violence, and Suicide (last updated Jan. 20, 2011) <https://www.psychiatristimes.com/view/link-between-substance-abuse-violence-and-suicide> (last visited Feb. 25, 2023).

⁸⁴ Such a regulation may also be subject to an equal protection claim because many felonies are policed in a racially unjust manner. However, a significant

has traditionally accepted that the government may restrict certain rights of felons. However, non-violent felons do not present a clear enough danger to others to warrant a restriction on their fundamental right to defend themselves with a firearm. Therefore, current regulations that prohibit gun ownership by all felons present an undue burden and should not be allowed under strict scrutiny. Only when an individual has committed a violent act or shows a likelihood of doing so in the future can their right to keep and bear arms for self-defense be limited and still pass muster.

CONCLUSION

The Supreme Court's interpretation of the Second Amendment in *Heller* was far too narrow. The Court must consider the protections afforded by the Second Amendment against the backdrop of other constitutional provisions authorizing or compelling the states to protect its citizens from the mayhem caused by gun violence. Doing so would allow the federal and state governments to adopt reasonable gun

portion of those felonies that unfairly impact minority populations are non-violent felonies that would be excluded from this restriction.

regulations in an effort to counter the ever-growing epidemic of gun deaths in the United States, while nonetheless preserving the fundamental right to keep and bear arms.