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# ARMING THE GOOD GUYS: SCHOOL ZONES AND THE SECOND AMENDMENT

## I. INTRODUCTION

*“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.”<sup>1</sup>*

Dick Heller, a Washington D.C. resident and security police officer, was denied a registration certificate by the District of Columbia, which would allow him to keep a handgun in his own home.<sup>2</sup> Heller, along with several other plaintiffs, sought relief by filing a claim in the U.S. District Court for the District of D.C., arguing that their Second Amendment right to keep and bear arms had been violated.<sup>3</sup> However, the district court held that there is no “individual right to bear arms separate and apart from Militia use.”<sup>4</sup> Plaintiffs appealed to the U.S. Court of Appeals for the District of Columbia which reversed the district court and held that the Second Amendment does indeed protect an individual’s right to keep and bear arms.<sup>5</sup> The city entreated the appeals court to hear the case again, and when that was denied, the city appealed to the U.S. Supreme Court, which granted *certiorari*.<sup>6</sup> Thus, *District of Columbia v. Heller* became a landmark United States Supreme Court case because it held for the first time that the Second Amendment of the U.S. Constitution protected an individual’s right to use arms in the immediate self-defense in one’s home.<sup>7</sup> However, *Heller* “deliberately and properly did not opine on the subject of incorporation . . . of the Second Amendment” because that question was not before the court.<sup>8</sup> Accordingly, whether the Second Amendment would be incorporated through the Fourteenth Amendment, and thus applicable to the States, remained a question yet to be resolved.

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<sup>1</sup> U.S. CONST. amend. II.

<sup>2</sup> *District of Columbia v. Heller*, 554 U.S. 570, 575 (2008).

<sup>3</sup> *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 103 (D.D.C. 2004) *rev’d* 478 F.3d 370 (D.C. Cir. 2007), *aff’d*, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>4</sup> *Id.* at 105.

<sup>5</sup> *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007), *aff’d*, *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

<sup>6</sup> *Heller*, 554 U.S. at 576.

<sup>7</sup> *Id.* at 635.

<sup>8</sup> *Nat’l Rifle Ass’n of Am., Inc. v. Vill. of Oak Park*, 617 F. Supp. 2d 752, 754 (N.D. Ill. 2008).

Perhaps emboldened by the decision in *Heller*, several claims were made against the City of Chicago, which had gun laws similar to Washington D.C. The claims were rolled into one, but Otis McDonald's name reached the forefront in *McDonald v. City of Chicago*.<sup>9</sup> McDonald, a resident of Chicago's south side,<sup>10</sup> desired to own a handgun for home defense, but a city ordinance effectively banned handguns for nearly all private citizens.<sup>11</sup> After the jurisdictionally applicable district and appellate level courts ruled in favor of the City of Chicago, McDonald appealed to the United States Supreme Court, which granted *certiorari*.<sup>12</sup> The Supreme Court had to decide whether the right to keep and bear arms, as contained in the Second Amendment, applied to the states through the Due Process Clause of the Fourteenth Amendment.<sup>13</sup> Not surprisingly, the Court held that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."<sup>14</sup> Thus, after *Heller* and *McDonald*, a new flood of Second Amendment litigation entered the various courtrooms of America.

Historically, the issue of gun violence seems to have haunted the right of American citizens to keep and bear arms, especially when connected with schools.<sup>15</sup> However, the issue of gun violence and schools arguably reached an increased level of interest with the infamous 1999 Columbine High School Massacre that left thirteen murdered and twenty to thirty others wounded.<sup>16</sup> One of the more recent school shootings occurred at Arapahoe High School, where one person was killed.<sup>17</sup> After several school shootings – from Columbine to the more recent Arapahoe High School shooting – the question emerges: what can be done to prevent, or at least limit the destruction and horrendous loss of life that occurs when madmen shoot at schools? The purpose of this article is to argue that the best possible solution is to try to prevent school shootings by arming the schools, since it is unconstitutional to prevent

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<sup>9</sup> *McDonald v. City of Chi., Ill.*, 561 U.S. 742 (2010).

<sup>10</sup> Mary Ham, *Meet Otis McDonald: The Man Behind the SCOTUS Chicago Gun Case*, (9:50 A.M. Mar. 2, 2010), <http://www.weeklystandard.com/blogs/meet-otis-mcdonald-man-behind-scotus-chicago-gun-case>.

<sup>11</sup> *McDonald*, 561 U.S. at 750.

<sup>12</sup> *Id.* at 753.

<sup>13</sup> *Id.* at 767.

<sup>14</sup> *Id.* at 791.

<sup>15</sup> *List of School Shootings in the United States*, WIKIPEDIA, (last visited Dec. 20, 2013), [http://en.wikipedia.org/wiki/List\\_of\\_school\\_shootings\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/List_of_school_shootings_in_the_United_States).

<sup>16</sup> Mark Obmascik, *Bloodbath Leaves 15 Dead, 28 Hurt*, DENVER POST, April 21, 1999, at A1.

<sup>17</sup> Tom Watkins & Ralph Ellis, *Colorado High School Shooting Victim Dies at Hospital*, CNN (11:10 A.M. ET, Dec. 22, 2013), <http://www.cnn.com/2013/12/21/us/colorado-arapahoe-shooting-death/>.

school shootings by attempting to disarm all of America. This article will start by analyzing the background of the Second Amendment, along with the rationale for giving individuals the right to bear arms. Then, a background into Second Amendment cases will be given followed by a review of gun-free school zones and the constitutionality of such laws. Finally, a select case study will be given on various school shootings.

## II. BACKGROUND ON THE SECOND AMENDMENT

*“A free people ought not only to be armed, but disciplined.”<sup>18</sup>*  
—George Washington

### *A. Introduction*

The thirteen American colonies that eventually united politically to rebel against the King of England were all British colonies.<sup>19</sup> Accordingly, they inherited British culture, history, and to an extent, a British way of thinking. In fact, regarding the U.S. Bill of Rights, it has been said that they “were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors.”<sup>20</sup> Thus, in order to understand the Framers’ frame of mind, one must understand the history that led to the drafting of the Second Amendment of the Bill of Rights. One must beg the question: why would the Founding Fathers include the Second Amendment at all?

### *B. Medieval England and the Glorious Revolution*

In Medieval England,<sup>21</sup> the idea of an individual being armed was, at first, a duty, not a right.<sup>22</sup> In fact, since there were no police or a standing army, English Freemen were expected to be armed in order to help keep the peace.<sup>23</sup> This duty to keep and bear arms was eventually honored as a right to keep and bear arms.<sup>24</sup> The right came about after the “Glorious

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<sup>18</sup> David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. L. & POL. 1, 26 (1987).

<sup>19</sup> Mary Moers Wenig, *Taxing Marriage*, 6 S. CAL. REV. L. & WOMEN’S STUD. 561, 564 (1997).

<sup>20</sup> *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

<sup>21</sup> Although the right to bear arms undoubtedly has roots that go much deeper than Medieval England, Medieval England is the best place to start for the purposes of this article. An in-depth research into pertinent facts prior to this time is beyond the scope of this article.

<sup>22</sup> JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 1* (1994).

<sup>23</sup> *Id.* at 2.

<sup>24</sup> Ryan Notarangelo, *Carrying the Second Amendment Outside of the Home: A Critique of the Third Circuit’s Decision in Drake v. Filko*, 64 CATH. U. L. REV. 235, 240 (2014).

Revolution of 1689, when the English replaced James II with William and Mary.”<sup>25</sup> Specifically, Parliament approved the Declaration of Rights, which included a right for Protestants to keep arms for their defense.<sup>26</sup> James II was Catholic, and after his defeat Parliament included in the Bill of Rights a list of several grievous policies that James had enacted in order to “endeavor to subvert and extirpate the protestant religion, and the laws and liberties of [the British] kingdom.”<sup>27</sup> Among other things, James II had sought to retain control over the Protestant population by disarming them.<sup>28</sup> Thus, the Protestant-controlled Parliament was quick to ensure that all Protestants would be able to defend themselves against tyranny by giving them an individual right to possess arms for defense. As noted by David Harmer:

There were three primary motivations for recognizing the right. First, the natural right of self-defense was assumed to exist almost universally (even for Catholics); but the right to defend oneself against robbers, highwaymen, cutthroats, and other malefactors would be meaningless without the corresponding right to possess effective means of defense. Second, the common defense required a militia composed of every free man as a guard against invasion. Third, and most interestingly, the universal right to have arms served as a check on royal power, and thus a guarantor of the rights and liberties of Englishmen. This third purpose was not merely hypothetical; James II’s abdication and flight resulted in no small part from the unwillingness of his armed subjects, many of whom he had attempted to disarm, to submit to his increasingly authoritarian rule.<sup>29</sup>

This third reason for the right to bear arms, specifically, to serve as a check on royal power, became increasingly important as William and Mary, and subsequent monarchs, reigned.<sup>30</sup> As citizens of Britain, the American colonists were keenly aware of their rights.<sup>31</sup> In fact, when George III started to disarm the colonists located in the more rebellious areas, colonists invoked their rights to keep arms.<sup>32</sup> In *Heller*, Justice Scalia noted that one journal article from New York in 1769 said that “[i]t is a natural right which the people have reserved to themselves,

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<sup>25</sup> David Harmer, *Securing A Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 80 (1998).

<sup>26</sup> MALCOLM, *supra* note 22, at 122.

<sup>27</sup> E. NEVILLE WILLIAMS, *THE EIGHTEENTH-CENTURY CONSTITUTION 1688 –1815: DOCUMENTS AND COMMENTARY* 26 (1960).

<sup>28</sup> *Id.* at 27.

<sup>29</sup> Harmer, *supra* note 25, at 80.

<sup>30</sup> *Id.* at 81.

<sup>31</sup> *Id.* at 82; *see also* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>32</sup> *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008).

confirmed by the Bill of Rights, to keep arms for their own defence.”<sup>33</sup> Thus, when the British policy of disarming the colonists was put into place, it exacerbated the already tense situation, and caused the American colonists to fight back.<sup>34</sup>

### *C. Interpreting the Founding Father’s Understanding of the Second Amendment*

Several sources solidify the idea that the Framers of the Constitution conceptualized and intended for the Second Amendment to protect an individual’s right to bear arms. First, there is the text of the Second Amendment itself, which can easily be interpreted as reserving the right to keep and bear arms to the people. Additionally, there are several historical facts and sources that add great weight to the “individual” interpretation of the Second Amendment.

As explained by Justice Scalia in *Heller*, it should be noted that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary, as distinguished from technical, meaning.”<sup>35</sup> Thus, the Second Amendment has two clauses: the prefatory and the operative clauses.<sup>36</sup> The prefatory clause announces a purpose of the Amendment, but in so doing, it in no way limits the right granted to individuals.<sup>37</sup> For example, A.C. Brocki<sup>38</sup> said that the Second Amendment could more clearly be rewritten, without changing the meaning, as “[b]ecause a well-regulated militia is necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.”<sup>39</sup> Also, the mention of a “free state” is a reference to a “commonly used political term of art, meaning ‘free country,’ which is to say the opposite of a despotism.”<sup>40</sup>

The operative clause is also curious in its reference to “the right of the people.”<sup>41</sup> Justice Scalia noted in *Heller* that of the three other references in the Constitution that refer to “the right of the people,” all of

<sup>33</sup> *Id.*

<sup>34</sup> Cliff Stearns, *The Heritage of Our Right to Bear Arms*, 18 ST. LOUIS U. PUB. L. REV. 13, 18 (1999).

<sup>35</sup> *United States v. Sprague*, 282 U.S. 716, 731 (1931).

<sup>36</sup> *Heller*, 554 U.S. at 577.

<sup>37</sup> *Id.*

<sup>38</sup> J. NEIL SCHULMAN, STOPPING POWER: WHY 70 MILLION AMERICANS OWN GUNS 151 (1994) (Mr. Brocki was the “Editorial Coordinator for the Office of Instruction of the Los Angeles Unified School District. Mr. Brocki taught Advanced Placement English for several years at Van Nuys High School, as well as having been a senior editor for Houghton Mifflin.”).

<sup>39</sup> *Id.* at 152; *see also Heller*, 554 U.S. at 577.

<sup>40</sup> Eugene Volokh, *Necessary to the Security of A Free State*, 83 NOTRE DAME L. REV. 1, 5 (2007).

<sup>41</sup> U.S. CONST. amend. II.

the references deal with individual rights.<sup>42</sup> Finally, the phrase “keep and bear arms” is unambiguous. “Keep” refers to “possess”<sup>43</sup> and “at the time of the founding, as now, to ‘bear’ [means] to ‘carry.’”<sup>44</sup> Accordingly, from the text itself, Americans can deduce that the Second Amendment, as written by the Founding Fathers and ratified by the states, was intended to protect the natural right of an individual to possess and carry firearms. The militia, which is comprised of individuals that own firearms, would help ensure that the nation would remain free from government oppression and thus be a “free state.”

In addition to the text itself, several historical sources support the viewpoint that the Second Amendment protects an individual’s right to own weapons. First, after independence and while pending ratification of the U.S. Bill of Rights, four states adopted State Constitutions which granted to individuals the right to keep and bear arms.<sup>45</sup> For example, Pennsylvania and Vermont both wrote an analogous right to bear arms that was completely unconnected with military service.<sup>46</sup> In addition to the four states that codified the right to bear arms prior to the ratification of the Bill of Rights, many statutes of the Colonial period *required* individual citizens to carry arms in order to maintain public safety.<sup>47</sup> For example, a 1770 colonial law in Georgia required men that were qualified for militia service to carry firearms “to places of public worship.”<sup>48</sup> Thus, prior to the ratification of the Second Amendment, it seemed to be understood that public safety and a free state demanded an armed citizenry.

Even after ratification of the Second Amendment, nine additional states included Second Amendment-esque texts to their respective state constitutions.<sup>49</sup> Thus, by 1820, of the total twenty-three US states, more than half (thirteen), had state constitutional provisions that granted an individual right to bear arms.<sup>50</sup> Of those thirteen, “at least seven unequivocally protected an individual citizen’s right to self-defense [which] is strong evidence that *that* is how the founding generation conceived of the right.”<sup>51</sup>

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<sup>42</sup> *Heller*, 554 U.S. at 579.

<sup>43</sup> *Id.* at 587.

<sup>44</sup> *Id.* at 584.

<sup>45</sup> *Id.* at 600–01.

<sup>46</sup> *Id.* at 601.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 602.

<sup>50</sup> See generally Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 191 (2006).

<sup>51</sup> *Heller*, 554 U.S. at 603 (emphasis added).

*D. Second Amendment Interpretations and Commentaries Post-Ratification*

In *Heller*, Justice Scalia talked about three important founding-era legal scholars' interpretation of the Second Amendment; specifically, St. George Tucker, William Rawle, and Joseph Story.<sup>52</sup> After the Revolutionary War, St. George Tucker became a prominent legal scholar and judge, and was even appointed by James Madison as judge of the U.S. District Court in 1813.<sup>53</sup> Tucker created his own version of William Blackstone's oft-cited *Commentaries on the Laws of England*.<sup>54</sup> Accordingly, Tucker's Blackstone "soon became the leading American law text of the day."<sup>55</sup> In note D, section 12, part 8 of his book, Tucker cites the Second Amendment and afterwards gives this insightful comment:

[The Second Amendment] may be considered as the true palladium<sup>56</sup> of liberty The right to self defence (sic) is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour (sic) or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.<sup>57</sup>

William Rawle's 1825 *A View of the Constitution of the United States of America* supplanted Tucker's additions to Blackstone's *Commentaries* as the lead U.S. constitutional treatise.<sup>58</sup> Rawle's book was used in several places, including the famous U.S. Military Academy at West Point.<sup>59</sup> Rawle, who was a distinguished attorney and served in the Pennsylvania legislature, declined several offers made by George Washington to serve as the nation's first Attorney General, but eventually did accept Washington's appointment to serve as the U.S. Attorney for Pennsylvania.<sup>60</sup> Rawle described the Second Amendment in strikingly clear detail:

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<sup>52</sup> *Id.* at 605.

<sup>53</sup> Charles F. Hobson, *St. George Tucker's Law Papers*, 47 WM. & MARY L. REV. 1245, 1246 (2006).

<sup>54</sup> *Id.* at 1246–47.

<sup>55</sup> *Id.* at 1247.

<sup>56</sup> Palladium is a rare element, silvery-white in color, and considered a precious metal similar to platinum.

<sup>57</sup> ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, 300 (1803); (ellipsis in original) (footnote added)

<sup>58</sup> David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1384 (1998).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

The prohibition [of the Second Amendment] is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a [villainous] attempt could only be made under some general pretence (sic) by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.<sup>61</sup>

Last, but certainly not least, there is Justice Joseph Story. Story was nominated by the “Father of the Constitution,” President James Madison,<sup>62</sup> and confirmed by the U.S. Senate as an Associate Justice of the U.S. Supreme Court in 1811.<sup>63</sup> While working as a Professor of Law at Harvard University, Story wrote the next major treatise on the U.S. Constitution in 1833 titled *Commentaries on the Constitution of the United States*.<sup>64</sup> In his book, Story compared the English Bill of Rights’ provision allowing Protestants the right to bear arms with the Second Amendment.<sup>65</sup> Justice Scalia notes in *Heller*, that “[t]his comparison to the Declaration of Right would not make sense if the Second Amendment right was the right to use a gun in a militia, which was plainly not what the English right protected.”<sup>66</sup> Additionally, Story also noted that:

One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.<sup>67</sup>

### *E. Summary of the Background of the Second Amendment*

On top of these three distinguished scholars’ interpretations of the Second Amendment, Justice Scalia cited several other sources, including pre-Civil War case law, post-Civil War legislation, and post-Civil War commentaries, which all supported the idea that the Second Amendment

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<sup>61</sup> WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 125–26 (2d ed. 1829).

<sup>62</sup> IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787–1800, 155 (1950).

<sup>63</sup> Kopel, *supra* note 58 at 1389

<sup>64</sup> *Id.* at 1388–89.

<sup>65</sup> *District of Columbia v. Heller*, 554 U.S. 570, 608 (2008).

<sup>66</sup> *Id.*; see also *Andrews v. State*, 50 Tenn. 165, 183–84 (Tenn. 1871).

<sup>67</sup> JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (reprinted 1893).

protects an individual's right to keep and bear arms.<sup>68</sup> In summary, there is ample evidence and a strong presumption, based on English history, the text of the Second Amendment, and commentaries and interpretations of the Second Amendment, that the Amendment does indeed protect individuals. Even though it is impossible to ask each framer of the U.S. Constitution to personally provide an interpretation to the Second Amendment, it is possible to understand their intentions and the actual meaning they included in the Amendment.

### III. SECOND AMENDMENT CASES

Prior to *McDonald* and *Heller*, there were a select number of state and federal cases that dealt with interpreting the Second Amendment. The various state cases either directly, or in passing, dealt with interpreting the Second Amendment. In *Heller*, Justice Scalia reviewed most, if not all, of the cases that involved or were at least tangential to the Second Amendment. A brief review of these cases will help clarify the boundaries of the Second Amendment and add more weight to the individual-right interpretation.

#### A. Selected State Cases

Justice Scalia cited many state cases in *Heller* to show how the Second Amendment was thought to apply to the citizens of the United States. The state cases that deal with the Second Amendment, whether pronounced in dictum or by direct interpretation, are all fairly consistent. For example, in the Michigan Supreme Court case of *United States v. Sheldon*,<sup>69</sup> the main issue before the Court involved freedom of the press.<sup>70</sup> In making a point about the freedom of the press, the Court compared it to the Second Amendment and stated that:

The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose.<sup>71</sup>

Although easily considered dicta, the point is once again clear that the Second Amendment was thought to protect an individual's *lawful* right to bear arms.

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<sup>68</sup> *Heller*, 554 U.S. at 610–19.

<sup>69</sup> *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 337 (Mich. 1829).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 346.

In another state Supreme Court case, the Georgia Court had to review the constitutionality of a law that banned carrying certain weapons in *Nunn v. State*.<sup>72</sup> In *Nunn*, a Georgia Act passed in 1837 banned citizens from carrying, *inter alia*, pistols on their person, unless the pistol was “known and used as [a] horseman’s pistol.”<sup>73</sup> Hawkins Nunn plead not guilty after being charged with breaking the law when he openly carried a pistol.<sup>74</sup> The Georgia Supreme Court held that the law was valid if it meant to prohibit concealed carrying of pistols but not valid against prohibitions of bearing arms openly.<sup>75</sup> In interpreting the operative clause of the Second Amendment, the court noted that:

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.<sup>76</sup>

In *State v. Chandler*,<sup>77</sup> the Louisiana Supreme Court dealt tangentially with the Second Amendment. In *Chandler*, a defendant charged with murder claimed he stabbed the deceased in self-defense because his life was threatened as his head was being repeatedly slammed against a brick wall.<sup>78</sup> The defendant sought to have the jury instructed that the law making it illegal to carry concealed weapons was in violation of the constitution.<sup>79</sup> In supporting the law’s prohibition, the court found that the law “interfered with no man’s right to carry arms (to use its words) ‘in full open view,’ which places men upon an equality. This is the right guaranteed by the Constitution of the United States.”<sup>80</sup> Again, although mentioned in passing, *Chandler* also makes it clear that the Second Amendment protects an individual’s right to bear arms.

## B. Federal Cases

### 1. Indirect decisions on the Second Amendment

One of the first cases that dealt indirectly with the Second

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<sup>72</sup> *Nunn v. State*, 1 Ga. 243 (1846).

<sup>73</sup> *Id.* at 246.

<sup>74</sup> *Id.* at 245.

<sup>75</sup> *Id.* at 251.

<sup>76</sup> *Id.*

<sup>77</sup> *State v. Chandler*, 5 La. Ann. 489 (1850).

<sup>78</sup> *Id.* at 491.

<sup>79</sup> *Id.* at 489.

<sup>80</sup> *Id.* at 490.

Amendment was *Houston v. Moore*.<sup>81</sup> In *Houston*, a Pennsylvania law was passed that listed certain penalties that could be meted out to members of the militia who failed to serve when called upon by a federal order.<sup>82</sup> A soldier neglected to meet up with his detachment, after being ordered to do so by Pennsylvania's Governor in accordance with a Presidential order.<sup>83</sup> Thus, the soldier of the Pennsylvania militia was found to have violated the statute and was fined.<sup>84</sup> The soldier appealed claiming that his constitutional rights had been violated, but the Pennsylvania Supreme Court held that his rights were not violated and affirmed the order of the lower court which issued the fine.<sup>85</sup> The soldier appealed to the U.S. Supreme Court which heard the case.<sup>86</sup> Among other things, the Supreme Court affirmed the decision of the Pennsylvania courts, holding that the State held concurrent authority to enforce the federal law.<sup>87</sup> However, Justice Story provided interesting insight on the Second Amendment in his dissent. Regarding the Second Amendment, Story said that it "may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested."<sup>88</sup> Thus, as Justice Scalia pointed out in *Heller*, if the decision merely protected the ability of the States to maintain a militia, then the Second Amendment would have had an "important bearing" on the decision.<sup>89</sup> However, "the Court and Story derived the States' power over the militia from the nonexclusive nature of federal power, not from the Second Amendment."<sup>90</sup> Thus, *Houston* makes it clear, albeit indirectly, that the Second Amendment's precatory clause in no way limits the Amendment to the militia.

Another case that dealt a little more directly with the Second Amendment was decided by Justice Henry Baldwin who was an Associate Justice of the US Supreme Court from 1830 to 1844.<sup>91</sup> In 1833, Baldwin sat as the Circuit Judge for the Circuit Court of the Eastern District of Pennsylvania when deciding *Johnson v. Thompkins*.<sup>92</sup> *Johnson* involved a slave owner from New Jersey who came to Pennsylvania to

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<sup>81</sup> *Houston v. Moore*, 18 U.S. 1 (1820).

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.* at 3.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 4.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 32.

<sup>88</sup> *Id.* at 52–53 (Story, J., dissenting).

<sup>89</sup> *District of Columbia v. Heller*, 554 U.S. 570, 610 (2008).

<sup>90</sup> *Id.*

<sup>91</sup> Henry Baldwin, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, [http://www.oyez.org/justices/henry\\_baldwin](http://www.oyez.org/justices/henry_baldwin) (last visited December 30, 2013).

<sup>92</sup> *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833).

capture a runaway slave.<sup>93</sup> The slave owner was arrested and acquitted on all charges of kidnapping and afterwards sued the defendants that prevented him by force from capturing his slave.<sup>94</sup> Justice Baldwin cited many constitutional rights, including the Second Amendment.<sup>95</sup> Then Baldwin reviewed the actions of the slave owner to ensure that his actions were done in conformity with the laws of the time and the constitution.<sup>96</sup> During this review Baldwin noted that the slave owner “had a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either.”<sup>97</sup> While it is abhorrent that a citizen was ever allowed to own slaves and use arms in his efforts to capture a runaway slave, *Johnson* evidences that the Second Amendment’s scope covered an individual’s right to keep and bear arms.

Finally, in *Robertson v. Baldwin*,<sup>98</sup> the Supreme Court very briefly mentioned an interpretation of the Second Amendment in a dictum statement. *Robertson* involved a claim by seaman that their contracts violated the Thirteenth Amendment’s prohibition against involuntary servitude.<sup>99</sup> The Court, in making a point about the Thirteenth Amendment, stated that “the right of the people to keep and bear arms. . . is not infringed by laws prohibiting the carrying of concealed weapons.”<sup>100</sup> Although this statement was made in passing to prove a point, it once again adds weight to the interpretation that the Second Amendment protects an individual right.

## 2. Direct decisions on the Second Amendment

The U.S. Supreme Court first directly dealt with the Second Amendment in *United States v. Cruikshank*.<sup>101</sup> After the American Civil War, several white defendants in *Cruikshank* had banded together to harass blacks in various ways including preventing them from keeping and bearing arms.<sup>102</sup> The men were convicted on several counts, including preventing blacks from exercising their “right to keep and bear arms for a lawful purpose.”<sup>103</sup> The Court reviewed the charges, and in

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 850–51.

<sup>96</sup> *Id.* at 851–55.

<sup>97</sup> *Id.* at 852.

<sup>98</sup> *Robertson v. Baldwin*, 165 U.S. 275 (1897).

<sup>99</sup> *Id.* at 277.

<sup>100</sup> *Id.* at 281–82.

<sup>101</sup> *United States v. Cruikshank*, 92 U.S. 542 (1875).

<sup>102</sup> *Id.* at 544–45.

<sup>103</sup> *Id.* at 545–46.

regard to the count of preventing exercising the people's right to bear arms for a lawful purpose, the Court held that it "was not a right granted by the constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress."<sup>104</sup> When carefully read, this language supports the idea that individuals have a right to bear arms, because the Court emphasizes that such a right is not dependent upon the Constitution, but rather that the Constitution prevents Congress from infringing upon the right of the people to bear arms. Therefore the men who infringed on the other people's right were acquitted of the charge, and the Court explained that people must seek protection of this right from the state.<sup>105</sup> As Justice Scalia pointed out in *Heller*, the whole "discussion makes little sense if [the Second Amendment] is only a right to bear arms in a state militia."<sup>106</sup>

Next, the U.S. Supreme Court dealt with the Second Amendment in *Presser v. Illinois*.<sup>107</sup> In *Presser*, the commander of a paramilitary organization was charged with violating an Illinois law that prohibited a group of men, if they were not affiliated with the official militia or authorized by the governor, from parading down the streets with arms in any city in Illinois.<sup>108</sup> Although the commander plead "not guilty" to the charges, he was convicted in a bench trial and the decision was affirmed by the Illinois Supreme Court.<sup>109</sup> The commander appealed to the U.S. Supreme Court and claimed that the Illinois law violated his Second Amendment right.<sup>110</sup> The Court ruled that the Illinois law banning paramilitary units did not violate the Second Amendment.<sup>111</sup> The Court further reemphasized the ruling in *Cruikshank* and stated that the amendment was a prohibition specific to Congress and not to the states.<sup>112</sup>

Prior to *Heller*, the last Supreme Court decision that involved the Second Amendment was a 1939 case called *United States v. Miller*.<sup>113</sup> In *Miller*, two men were charged with violating the National Firearms Act when they transported through interstate commerce a sawed off, double-

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<sup>104</sup> *Id.* at 553.

<sup>105</sup> *Id.*

<sup>106</sup> *District of Columbia v. Heller*, 554 U.S. 570, 620 (2008).

<sup>107</sup> *Presser v. People of State of Ill.*, 116 U.S. 252 (1886).

<sup>108</sup> *Id.* at 253–54.

<sup>109</sup> *Id.* at 254.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 264–65.

<sup>112</sup> *Id.* at 265.

<sup>113</sup> *United States v. Miller*, 307 U.S. 174 (1939).

barrel shotgun.<sup>114</sup> The defendants objected to the charge and claimed that the law violated their Second Amendment right to bear arms.<sup>115</sup> The district court agreed and ruled in favor of the defendants and the appeal to the Supreme Court followed.<sup>116</sup> First, the Supreme Court talked about the particular weapon involved (the sawed off shotgun), and said that without evidence showing that such a weapon had a “reasonable relationship to preservation or efficiency of a well-regulated militia, [the Court could not] say that the Second Amendment guarantees the right to keep and bear such an instrument.”<sup>117</sup> As Justice Scalia noted in *Heller*, the holding in *Miller* “positively suggests, that the Second Amendment confers an individual right to keep and bear arms ([but] only arms that ‘have some reasonable relationship. . . [to the militia]’).”<sup>118</sup> Thus, *Miller* only supports the idea that the Second Amendment is applicable towards specific kinds of weapons.<sup>119</sup> Furthermore, the decision in *Heller* narrowed *Miller* by interpreting it to mean that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”<sup>120</sup>

The discussion of direct decisions on the Second Amendment ends where this article started, with *Heller* and *McDonald*.<sup>121</sup> As previously mentioned, *Heller* held as unconstitutional a law that effectively banned handgun possession in one’s own home.<sup>122</sup> *McDonald* effectively overruled the portions of *Cruikshank* and *Presser* which held that the Second Amendment only applied to the Federal government. *McDonald* was able to do this because *Cruikshank*, *Presser*, and even *Miller* never delved into whether the Fourteenth Amendment’s Due Process Clause incorporates the Second Amendment and thus makes it applicable to the States.<sup>123</sup> However, *Heller* and *McDonald* did not end the debate on gun control. In fact, Justice Scalia even said in *Heller* that:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places *such as schools* and government buildings, or laws imposing conditions and

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<sup>114</sup> *Id.* at 175.

<sup>115</sup> *Id.* at 176.

<sup>116</sup> *Id.* at 177.

<sup>117</sup> *Id.* at 178.

<sup>118</sup> *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008).

<sup>119</sup> *Id.* at 623.

<sup>120</sup> *Id.* at 625.

<sup>121</sup> *See supra* Part I.

<sup>122</sup> *Heller*, 554 U.S. at 635.

<sup>123</sup> *McDonald v. City of Chi., Ill.*, 561 U.S. 742, 758–59 (2010).

qualifications on the commercial sale of arms.<sup>124</sup> We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.<sup>125</sup>

Thus, specific questions on gun control are still open for debate and court consideration. Arguably though, Justice Scalia's wording may have foreclosed the debate on whether school zone gun laws are unconstitutional under the Second Amendment. Still, such questions of law will most likely be hashed out in lower federal courts and the various state courts. But one thing is certain: thanks to the Court giving us *Heller* "the race is not over."<sup>126</sup>

#### IV. ANALYZING THE CONSTITUTIONALITY OF GUN-FREE SCHOOL ZONE LAWS

##### *A. Pre-Heller and the Gun-Free School Zones Act of 1990*

The United States Code (U.S.C.) is "the codification by subject matter of the general and permanent laws of the United States."<sup>127</sup> Title 18 deals with crimes and criminal procedure.<sup>128</sup> Under Part I (Crimes), chapter 44 deals with firearms.<sup>129</sup> Finally, section 922 codifies all related unlawful acts.<sup>130</sup> One such unlawful act came to be known as the Gun-Free School Zone Act of 1990.<sup>131</sup> When first passed, the act made it a "federal offense for any individual knowingly to possess [a] firearm at [a] place that [the] individual knows or has reasonable cause to believe is [a] school zone."<sup>132</sup> In *United States v. Lopez*, a Texas high school student concealed a handgun, brought it with him to school, and subsequently was caught and charged with violating the federal law.<sup>133</sup> The case was eventually appealed to the U.S. Supreme Court and the Court held that the law violated the Constitution by exceeding Congress' authority under the commerce clause.<sup>134</sup> Accordingly, the law was rewritten by Congress and currently says that "It shall be unlawful for

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<sup>124</sup> *Heller*, 554 U.S. at 626–27 (emphasis added).

<sup>125</sup> *Id.* at n.26.

<sup>126</sup> BEN HUR (Metro-Goldwyn-Mayer 1959).

<sup>127</sup> *States Code*, U.S. GOVERNMENT PUBLISHING OFFICE, <http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE> (last visited Dec. 31, 2013).

<sup>128</sup> 18 U.S.C. (2014).

<sup>129</sup> 18 U.S.C. Pt. I, Ch. 44 (2014).

<sup>130</sup> 18 U.S.C. § 922 (2014).

<sup>131</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.”<sup>135</sup>

Since the re-wording of the statute, some challenges were made against the law as unconstitutional and decisions in regards to the law’s constitutionality have been made in some U.S. circuit courts of appeal. For example, the Court of Appeals for the Eighth Circuit addressed the issue in 1999.<sup>136</sup> The Eighth Circuit Court held that the re-worded statute was constitutional and within Congress’s power under the commerce clause.<sup>137</sup> A similar decision was made in the Ninth Circuit.<sup>138</sup> 18 U.S.C. § 922 was also challenged in the First Circuit as being unconstitutional under the due process clause for being too vague, but this argument, like the commerce clause argument, failed.<sup>139</sup> It should be noted that, as per the statute, § 922 does not apply to a person who has a concealed carry permit issued by the appropriate state in which the school is located.<sup>140</sup> As can be seen from this brief review of cases, the avenue of approach for overturning the Federal Gun-Free School Zone law under the commerce clause is a dead end.

### *B. Post-Heller/McDonald and Gun-Free School Zone Laws*

In *United States v. Lewis*, a defendant allegedly carried a firearm within 1,000 feet of a school zone in violation of 18 U.S.C. § 922.<sup>141</sup> The defendant sought to dismiss the indictment by claiming that the law violated his Second Amendment right by placing an unreasonable restriction on his right to carry a firearm.<sup>142</sup> After analyzing *Heller*, and in particular the quote about sensitive places,<sup>143</sup> the District Court of the Virgin Islands concluded that there was no need to apply any level of scrutiny to the case at bar because *Heller* “expressly held up prohibitions on firearms ‘in sensitive places such as schools’ as an example of a lawful regulation.”<sup>144</sup> Thus, although the District Court of the Virgin Islands is by no means the final say on the matter, its reasoning may be typical of any other district or appellate level court if confronted with the same matter. Furthermore, the district court seems to have appropriately

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<sup>135</sup> 18 U.S.C. § 922 (2014).

<sup>136</sup> *United States v. Danks*, 221 F.3d 1037 (8th Cir. 1999).

<sup>137</sup> *Id.* at 1039.

<sup>138</sup> *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005).

<sup>139</sup> *United States v. Nieves-Castano*, 480 F.3d 597, 603 (1st Cir. 2007).

<sup>140</sup> 18 U.S.C. § 922; *see also* *United States v. Tait*, 202 F.3d 1320 (11th Cir. 2000).

<sup>141</sup> *United States v. Lewis*, CRIM. 2008–45, 2008 WL 5412013 (D.V.I. Dec. 24, 2008).

<sup>142</sup> *Id.* at \*1.

<sup>143</sup> *See supra* notes 124–25 and accompanying text.

<sup>144</sup> *Lewis*, WL 5412013 at \*2.

captured the spirit of *Heller*, thus, it seems probable that the matter concerning the federal law on the Gun-Free School Zone and the Second Amendment is closed.

In addition to the federal law, every state has something different to say about the law on guns in schools and school zones.<sup>145</sup> Due to *Heller* and *McDonald*, new attempts to test restrictive Gun-Free School Zone laws have recently entered a few state courtrooms. For example, in the district court case of *Hall v. Garcia*, one San Francisco resident challenged a California Gun-Free School Zone Act claiming that the act violated his Second Amendment right.<sup>146</sup> The resident's domicile was within 1,000 feet of a school and he applied for an exception to the law so that he could openly carry a handgun within the school zone.<sup>147</sup> The superintendent denied the exception and the resident filed suit.<sup>148</sup> The district court was quick to note the various exceptions listed under the state law, one of which included an exception to homes within 1,000 feet of a school.<sup>149</sup> The court also noted that *Heller* failed to give guidance as to which level of scrutiny to apply to Second Amendment cases, and merely stated that the law at issue in *Heller* would violate any of the standards of scrutiny previously applied in various Supreme Court cases.<sup>150</sup> The court then held that the state law would be constitutionally permissible under any level of scrutiny.<sup>151</sup> The court also noted the legitimate government interest of keeping children safe and concluded that that interest, combined with the various exceptions to the law, made it so that the resident's Second Amendment right was not violated.<sup>152</sup>

Also, a Wisconsin group filed a complaint in 2010 against the City of Milwaukee because the police confiscated a resident's handgun at his residence because the handgun had allegedly been brought to a gas station which was located within 1,000 feet of a school in violation of a Wisconsin law.<sup>153</sup> However, the case was "likely rendered moot. . . [after the Wisconsin Legislature] erased the 1000-foot gun-free perimeter around state schools for licensed carriers."<sup>154</sup> Considering that many

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<sup>145</sup> See Bryan L. Ciyou, *Reciprocity and Gun Laws Quick Reference Guide*, GUN LAWS BY STATE: 2015 EDITION, (2015), available at <http://www.gunlawsbystate.com/#!/home/terms-of-access-and-use/>.

<sup>146</sup> *Hall v. Garcia*, C 10-03799 RS, 2011 WL 995933 (N.D. Cal. Mar. 17, 2011).

<sup>147</sup> *Id.* at \*1.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at \*3.

<sup>151</sup> *Id.* at \*4.

<sup>152</sup> *Id.* at \*5.

<sup>153</sup> Amended Complaint at 4–5, *Wis. Carry, Inc. v. City of Milwaukee*, No. 2:10-CV-9-CNC (E.D. Wis. 2010) available at [http://www.lawreport.org/pdf/03\\_GFSZ\\_Complaint\\_A2.pdf](http://www.lawreport.org/pdf/03_GFSZ_Complaint_A2.pdf).

<sup>154</sup> Amy Hetzner, *Where Angels Tread: Gun-Free School Zone Laws and an Individual*

states have an exception at school zones for concealed carrying permit holders, perhaps the best angle of approach for those wishing to challenge Gun-Free School Zone laws is attack laws that do not have such an exception. After all, the resident in *Hall v. Garcia* acting *pro se* did not try to attack the law from this angle.

## V. A SELECTED CASE STUDY OF SCHOOL SHOOTINGS

Those in favor of more gun control and those in favor of less gun control both have the same goal – to end gun violence. Unfortunately, the approaches of both groups to reaching that goal are diametrically opposed. However, since *Heller* and *McDonald*, one option has been foreclosed to the people – it is no longer a constitutional option to disarm Americans, especially if they are in defense of hearth and home.<sup>155</sup> Accordingly, since, at least constitutionally speaking, firearms are now guaranteed to be a part of American lives, it behooves the American people to start thinking of solutions to the problem that do not involve trying to disarm law-abiding citizens. To this end, a brief case study of various school shooting incidents will be instructive.

### A. *The University of Texas 1966*

On 1 August 1966, Charles Whitman entered the administrative building of the University of Texas (located in the city of Austin).<sup>156</sup> Whitman posed as a research assistant and acted like he was making a delivery to make his way to the observation deck of the of the university tower.<sup>157</sup> Whitman gained control of the tower by brutally bludgeoning the secretary at the observation deck, and after barricading himself in, his killing spree officially began.<sup>158</sup> In the terrible aftermath that ensued, Whitman was able to kill 14 people as well as wound 31 others.<sup>159</sup> Officer Martinez, who was instrumental in putting an end to the massacre, later said the following:

I was and am still upset that more recognition has not been given to the citizens who pulled out their hunting rifles and returned the Sniper's fire. The City of Austin and the State of Texas should be forever thankful and grateful to them because of the many lives they saved that

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*Right to Bear Arms*, 95 MARQ. L. REV. 359, 382 (2011).

<sup>155</sup> District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

<sup>156</sup> CHRIS McNAB, DEADLY FORCE: FIREARMS AND AMERICAN LAW ENFORCEMENT 152 (2009).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 153.

day. The sniper did a lot of damage when he could fire freely, but when the armed citizens began to return fire the sniper had to take cover.<sup>160</sup>

Bill Helmer was a graduate student at the time of the shooting and recalled the following about seeing several citizens grab rifles and return fire at the shooter:

I remember thinking, “All we need is a bunch of idiots running around with rifles.” But what they did turned out to be brilliant. Once he could no longer lean over the edge and fire, he was much more limited in what he could do. He had to shoot through those drain spouts, or he had to pop up real fast and then dive down again. That’s why he did most of his damage in the first twenty minutes.<sup>161</sup>

It should be noted that Whitman violated Texas law that said “pistols and other weapons were not allowed to be carried on or about the person.”<sup>162</sup>

### *B. Columbine High School 1999*

On the morning of 20 April 1999, Dylan Klebold and Eric Harris rigged a decoy bomb up in a field and set it to explode at 11:14 in the morning.<sup>163</sup> Then they drove separately to Columbine High School and deployed more propane bombs inside the school’s cafeteria.<sup>164</sup> The original plan of the shooters was to have the bombs go off and then shoot students as they attempted to leave the building. Fortunately, the cafeteria bombs never went off, and the decoy bomb only partially exploded.<sup>165</sup> Seeing that their bombs failed to explode, the shooters decided to proceed on foot and yelled “go, go” to kick off the mayhem at 11:19.<sup>166</sup> The shooters fired and killed indiscriminately and the carnage ended with their suicide at about 12:08.<sup>167</sup> There was one armed deputy assigned to the high school that day, but he was outside the building eating lunch when the shooting began and was not even notified until sometime before 11:23.<sup>168</sup> The officer on duty returned fire with one of

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<sup>160</sup> *Id.*

<sup>161</sup> Pamela Colloff, *96 Minutes*, TEXAS MONTHLY (August 2006), <http://www.texasmonthly.com/story/96-minutes?fullpage=1>.

<sup>162</sup> Robert G. Newman, *A Farewell to Arms?—an Analysis of Texas Handgun Control Law*, 13 ST. MARY’S L.J. 601, 603 (1982).

<sup>163</sup> DAVE CULLEN, COLUMBINE 41 (2009).

<sup>164</sup> *The Columbine High School Shootings: Narrative Timeline of Events*, CNN, <http://www.cnn.com/SPECIALS/2000/columbine.cd/Pages/NARRATIVE.Time.Line.htm> (last visited Jan. 1, 2014).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Deputies on the Scene*, CNN, [http://www.cnn.com/SPECIALS/2000/columbine.cd/Pages/DEPUTIES\\_TEXT.htm](http://www.cnn.com/SPECIALS/2000/columbine.cd/Pages/DEPUTIES_TEXT.htm) (last visited Jan. 1, 2014).

the shooters, but he was about sixty to seventy yards away and was not wearing his prescription glasses while on duty.<sup>169</sup> All of the exchanges of fire that happened between the police and the shooters occurred with the police outside from several yards away and with the shooters being inside the building.<sup>170</sup> The Columbine shooters broke several laws in preparing and planning the attack which include, but are not limited to:

[1] the unlawful possession of a firearm on school property; [2] the unlawful manufacture of a “sawed-off” rifle or shotgun; [3] the unlawful possession of a “sawed-off” shotgun or rifle; [4] the unlawful possession of a handgun or handgun ammunition by a person under age 18; [5] the use of a firearm to commit murder; [6] the use of a firearm in attempted murder.<sup>171</sup>

### C. *Virginia Tech 2007*

On 16 April 2007, Cho Seung-hui<sup>172</sup> decided to murder his fellow students and professors.<sup>173</sup> He shot at least two people around 7:15 in the morning, and then proceeded to run some errands before chaining the doors of Norris Hall, where the next round of shooting took place.<sup>174</sup> Cho began firing at 9:40, when he walked into several classrooms and shot people at random.<sup>175</sup> After the first shots in Norris Hall were fired, police arrived within three minutes of the emergency call, however, they were unable to enter the building and their attempts to shoot open the chained doors failed.<sup>176</sup> At 9:50, police shot open a fourth entrance into the building, which Cho had not chained, with a shotgun.<sup>177</sup> Cho shot himself at 9:51 as the police reached the second floor and it is believed that “the police shotgun blast alerted Cho to the arrival of the police.”<sup>178</sup> In total, before committing suicide, Cho was able to fire 174 rounds, kill thirty-two people, and wound around seventeen others.<sup>179</sup> Aside from the two

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<sup>169</sup> Trent Seibert, *Columbine: Deputy's Eyesight in Question*, DENVER POST (Nov. 23, 2000), <http://extras.denverpost.com/news/coll1123b.htm>.

<sup>170</sup> CNN, *supra* note 164.

<sup>171</sup> GUN OWNERS OF AMERICA, *The Failure of Gun Control Exposed - Two Dozen Laws Can't Prevent Colorado Tragedy*, (Sep. 29, 2008) <http://gunowners.org/nws9906.htm>.

<sup>172</sup> In Korean, last names are said first, so Seung-hui is the shooter's first name and Cho is his last name.

<sup>173</sup> Virginia Tech Review Panel, *Mass Shootings at Virginia Tech*, 25 (Apr. 16, 2007) available at <http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/904>.

<sup>174</sup> *Id.* at 26.

<sup>175</sup> *Id.* at 27–28.

<sup>176</sup> *Id.* at 27.

<sup>177</sup> *Id.* at 28.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 26–28.

killed at first, Cho was able to kill thirty people in only eleven minutes.<sup>180</sup> At the time, Virginia Tech, along with many other American colleges, was a gun-free zone.<sup>181</sup>

#### *D. Sandy Hook Elementary School 2012*

Around 9:30 in the morning, on 14 December 2012, Adam Lanza drove to Sandy Hook Elementary School with a rifle, two handguns, and several rounds of ammunition.<sup>182</sup> The doors to the elementary school were locked at 9:30 every morning so Lanza shot open the doors to gain entry.<sup>183</sup> One witnesses reported hearing noises and glass breaking at around 9:35. The first emergency phone call was placed shortly thereafter, and the first police officer arrived at 9:39.<sup>184</sup> After gaining entry, the shooter proceeded to fire at people randomly, and entered various classrooms killing teachers and children.<sup>185</sup> The carnage lasted around five minutes and 28 people lost their lives in the shocking tragedy.<sup>186</sup> There were no shots exchanged between the shooter and the police, but it can be argued that the killer did notice the oncoming presence of the law enforcement since he killed himself less than a minute before the police arrived at 9:39.<sup>187</sup> Sandy Hook was also a gun-free zone as it is a class D felony in Connecticut to possess a weapon on school grounds.<sup>188</sup>

#### *E. Arapahoe High School 2013*

On 13 December 2013, Karl Pierson, armed with a shotgun, several rounds of ammunition, and Molotov cocktails, entered Arapahoe High School through a door that was supposed to be locked.<sup>189</sup> The shooting only lasted a minute and twenty seconds and in that time the shooter killed one victim and started a fire with a Molotov cocktail before taking

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<sup>180</sup> *Id.* at 28.

<sup>181</sup> David B. Kopel, Op-Ed, *Gun-Free Zones*, WALL ST. J., April 18, 2007, available at <http://online.wsj.com/news/articles/SB117686668935873725>.

<sup>182</sup> Stephen J. Sedensky III, *Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012*, 9 (2013), available at [http://www.ct.gov/csao/lib/csao/Sandy\\_Hook\\_Final\\_Report.pdf](http://www.ct.gov/csao/lib/csao/Sandy_Hook_Final_Report.pdf).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 9, 11.

<sup>185</sup> *Id.* at 9–10.

<sup>186</sup> *Id.* at 10–12.

<sup>187</sup> *Id.* at 12.

<sup>188</sup> CONN. GEN. STAT. § 53a-217b.

<sup>189</sup> Will C. Holden & Dave Young, *Arapahoe High School Shooting Lasted Less than 90 Seconds*, FOX31 DENVER (8:47 AM, Dec. 30, 2013), <http://kdvr.com/2013/12/30/new-details-about-arapahoe-high-school-shooting-expected-monday/>.

his own life.<sup>190</sup> It seems apparent that the shooter intended to cause a lot more harm to as many people as he could, and even had numbers written on his arm which corresponded to classrooms located near the library.<sup>191</sup> Fortunately, the killer was foiled in his plot by an armed deputy police officer who was stationed inside the school and quickly confronted the shooter.<sup>192</sup> The local sheriff “praised the deputy’s response as ‘a critical element to the shooter’s decision’ to kill himself.”<sup>193</sup> The shooter violated a Colorado law that prohibited a person from carrying a “deadly weapon . . . in or on . . . any public . . . high . . . school.”<sup>194</sup>

## VI. CONCLUSION

The Second Amendment was essentially an inheritance from Great Britain. King James attempted to disarm Protestants and paid for it dearly by losing the kingdom. As philosopher George Santayana taught, “[t]hose who cannot remember the past are condemned to repeat it.”<sup>195</sup> Despite the historical lesson that an armed citizenry is the last check on governmental power, some Americans have tried for a long time to disarm law abiding citizens. Fortunately for all of America, *Heller* and *McDonald* have preserved the Second Amendment by correctly interpreting the original intention of the founding fathers; namely, that the Second Amendment protects an individual’s right to keep and bear arms.

The Second Amendment does not seem to be limited by much of the case law that came before *Heller* or *McDonald*. Most of the state law cases that interpreted the Second Amendment prior to *Heller* agree with the conclusion that *Heller* reached. *Cruikshank* held that individuals who violate other people’s constitutional rights are to be punished by the state. *Presser* allowed states to regulate the Second Amendment right, and it can be inferred that the Second Amendment does not grant groups the freedom to form para-military units. *Miller* suggests that the Second Amendment right can be weapon specific, in particular weapons that have a reasonable relationship to the militia. However, a better reading of *Miller* is that weapons not used by law-abiding citizens for lawful

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<sup>190</sup> *Id.*

<sup>191</sup> Sadie Gurman, *Arapahoe High School Door Should Have Been Locked, Sheriff Says*, THE DENVER POST (12/30/ 2013, 8:24 AM MST), [http://www.denverpost.com/news/ci\\_24815543/news-conference-planned-about-arapahoe-high-school-shooting](http://www.denverpost.com/news/ci_24815543/news-conference-planned-about-arapahoe-high-school-shooting).

<sup>192</sup> Tom Watkins & Ana Cabrera, *Colorado’s School Shooting – Over in 80 Seconds*, CNN (2:33 PM ET, Dec. 15, 2013), <http://www.cnn.com/2013/12/14/us/colorado-school-shooting/>.

<sup>193</sup> *Id.*

<sup>194</sup> COLO. REV. STAT. § 18-12-105.5.

<sup>195</sup> GEORGE SANTAYANA, THE LIFE OF REASON 82 (Prometheus Books 1998).

purposes are not protected by the Second Amendment. From *Heller*, we learn that an individual's right to defense of hearth and home is covered by the Second Amendment. However, *Heller* also emphasized that the Second Amendment right is still subject to regulation, especially by classes of people, and also by sensitive places. Finally, *McDonald* applied the Second Amendment to the states through the due process clause of the Fourteenth Amendment. Thus, the Second Amendment, contrary to anything said in *Cruikshank*, *Presser*, or *Miller*, is applicable to the States. Thanks to *Heller* and *McDonald*, many gun control laws will be and are being tested in the lower courts. Time will most likely give us more case law on the Second Amendment as the scope continues to be refined and interpreted.

Although once unconstitutional as a violation of the commerce clause, as currently written, the federal Gun-Free School Zone law as listed in 18 U.S.C. section 922 is valid law. Challenging this law under either the commerce clause or the Second Amendment will most likely never be successful. This is especially true with the Second Amendment because of the wording in *Heller* that seems to condone regulating sensitive places, such as schools. Many state laws also follow suit with the federal law and provide punishment for bringing weapons into school zones. Though, citizens opposed to gun control laws might see success in challenging their state's gun-free school zone law if a concealed carry permit holder challenges the law. However, that case has not been presented to any court. Also, lower courts will probably struggle with finding an answer because they do not know which level of scrutiny applies to Second Amendment challenges.

Regarding gun violence in schools, it is probably safe to say that every law abiding citizen would like to see a permanent end to the horrible tragedies that come about from school shootings. It is also safe to say that everyone wants to prevent such tragedies from ever occurring. For this worthy goal, many Americans support gun control laws. However, one must consider the best approach, which may not be the easiest one. Because of *Heller*, it is impossible to disarm all of America with gun control laws. The only way to do this would be to pass a constitutional amendment that repealed the Second Amendment, a course of action that would could possibly ignite American Civil War II. Hence, effectively, the route of disarming americans through gun control laws is not a viable option. Guns will always be for sale and citizens will always be able to buy them. Therefore, citizens who want to do harm to other people will almost certainly always have an avenue to obtain guns. Even if you could somehow prevent all would-be school shooters from legally purchasing firearms, they could still find a way to purchase the weapons

*illegally*. Put simply, the point is that evil “finds a way.”<sup>196</sup> In addition, gun-free school zones only create laws that law-abiding citizens keep. As noted in the selected case studies, all of the school shooters violated the law and most of them, if not all, probably *knew* that they were violating the law. Yet having a law on the books does not prevent a madman bent on mass murder from committing such atrocities, especially when, in the end, they plan on committing suicide.

Since it is impossible to disarm America and since evil will find a way, it is imperative that Americans start to consider alternative measures to prevent school shootings. America must consider the *best* option given the situation and in light of the Second Amendment. Arguably, there will always be some senseless citizen waiting to top the last mass murderer. Schools that are “gun-free” are probably very attractive to such cowards because they know they will not face any resistance. That’s why the question must be asked: would shooters change their mind if they knew they would meet resistance or, at least, if they knew they were likely to meet resistance? In the school shooting that happened at Arapahoe High School, the shooting lasted one minute and twenty seconds. Regrettably, one precious soul was lost. However, the loss of life at Arapahoe was substantially less compared to the five minutes in Sandy Hook where twenty-eight people were massacred. What made the difference? Surely it was that fact that an *armed* guard was on duty and was able to confront the shooter, thus leading to the shooter’s decision to commit suicide before more lives could be taken. However, improvements can still be made from Arapahoe.

In Utah, citizens that have been issued concealed handgun permits are allowed to carry weapons at any public school (including elementary schools) as well as any state college system.<sup>197</sup> This means that teachers with concealed permits would be allowed to carry handguns into the schools where they teach and, for state college campuses, students can also join in the ranks of armed citizens at the school. Some may feel that this idea is a terrible one, however, such persons should consider the following facts:

The data from Utah campuses reveal no incidents of the slightest misuse of a firearm by a person with a legal permit. Nor is there any record of misuse of a firearm by a permit holder in a K–12 school anywhere in Utah. There have been no instances of attempted mass murders at any school in Utah.<sup>198</sup>

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<sup>196</sup> JURASSIC PARK (Amblin Entertainment 1993).

<sup>197</sup> UTAH CODE § 76-10-505.5; see also David B. Kopel, *Pretend “Gun-Free” School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 527 (2009).

<sup>198</sup> Kopel, *supra* note 197, at 529.

If Utah has had no mass murder attempts at any of its schools, and yet guns are permitted to be carried into the schools by concealed permit holders, this provides strong evidence that deterrence can be provided by arming the good guys rather than by disarming them. Imagine if each teacher at every school had a concealed permit and carried a handgun to school. Perhaps all school shooting tragedies could be prevented, and if not, perhaps the loss of life and injuries could be significantly lowered.

If people want something to change, they have got to do something different. Brooks Brown considered himself a friend to both of the Columbine Shooters.<sup>199</sup> In Brown's book, appropriately titled *No Easy Answers*, Brown said the following after considering whether stricter gun laws would have made a difference:

Existing laws already state that guns cannot be sold to youths under eighteen, and [the shooters] found a way around that. . . No matter how strict the gun laws were, [the shooters] were determined to find a way around them. If people want to buy weapons illegally, it's only a matter of time before they succeed.<sup>200</sup>

As with most things, the ideas brought up in this paper and the ideas advocated by gun-law enthusiasts really only argue about the best way to attack symptoms. There are no easy answers to tough problems like school shootings. The real solution would be to cure the "disease," that is, treating the individual and helping them before they make terrible choices. That being said, the unfortunate reality is that for every person effectively treated, there might be five more people struggling with suicidal thoughts and mass murder tendencies. Many times people slip through because no one is even aware that they are struggling. There may be no possible way to prevent all would be mass murderers. Thus, the *best* solution to the symptom must also be sought after in combination with the effort of trying to cure the disease. After school shooting tragedies, the quick and easy response is to yell at lawmakers to make more laws that ban guns. Politicians often respond favorably to the outcry. But the response is merely a political tool used by legislators to show voters that they are addressing the problem. The much more difficult option is to sway public opinion and get laws passed that would arm law-abiding citizens. However, most people do not want to talk about handing out firearms when murderers have used firearms to destroy precious lives. Yet, what would the victims not have given to have been armed themselves in the very moment they were staring death

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<sup>199</sup> BROOKS BROWN & ROB MERRITT, NO EASY ANSWERS: THE TRUTH BEHIND DEATH AT COLUMBINE, 2, 4 (2002).

<sup>200</sup> *Id.* at 18–19.

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in the face? Empowering people to defend themselves against evil is the heart of the Second Amendment, and that right should be sustained.

*Grant Arnold*