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# Monkey See, Monkey Do?

## THE ESTABLISHMENT CLAUSE AS POSSIBLY ILLUSTRATIVE OF THE SECOND AMENDMENT'S INCORPORATION

### I. INTRODUCTION

Despite the issue's dormancy for nearly a century, the question of whether the Second Amendment<sup>1</sup> confers an individual right, separate from any connection with the militia, recently reached near hysterical fervor.<sup>2</sup> The militia-based position states that the Second Amendment "protects only the right to possess and carry a firearm in connection with militia service."<sup>3</sup> On the other hand, the individual right proposition "argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."<sup>4</sup> Federal courts were split in their analysis of the issue,<sup>5</sup> and in 2008 the Second

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<sup>1</sup> The language of the Second Amendment reads, "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." U.S. CONST. amend. II.

<sup>2</sup> See, e.g., David A. Lieber, Comment, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court's Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1081 (2005) ("Recent developments . . . have catapulted the individual right approach to the forefront of the Second Amendment debate."); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 104 (2000) (describing the issue as one with a "charged atmosphere"); Koren Wai Wong-Ervin, Note, *The Second Amendment and the Incorporation Conundrum: Towards a Workable Jurisprudence*, 50 HASTINGS L.J. 177, 178 (1998) ("Indeed, the Second Amendment is the source of much modern-day controversy in both political and academic circles."); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 589 (2000) ("A fierce debate about the Second Amendment has been percolating in academia for two decades, and has now bubbled through to the courts.").

<sup>3</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008).

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

<sup>5</sup> Previously, only two federal Circuit Courts held that the Second Amendment confers an individual right to bear arms. See *Parker v. District of Columbia*, 478 F.3d 370, 373 (D.C. Cir. 2007), *aff'd*, 128 S. Ct. 2783 (2008) (becoming the first federal appellate court to strike down a gun control law); *United States v. Emerson*, 270 F.3d 203, 260, 264 (5th Cir. 2001) (holding that the Second Amendment does not confer a collective state right tied to the militia).

The more numerous federal Circuit Court cases, which expressly rejected the view that the Second Amendment protects the right to keep and use arms for solely private purposes, include: *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2003); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997), *opinion vacated in part by* 133 F.3d 1412 (11th Cir. 1998); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United*

Amendment debate culminated in the landmark case of *District of Columbia v. Heller*.<sup>6</sup> The *Heller* Court confirmed that the Second Amendment enshrines an individual right to possess and use arms for non-militia purposes and declared portions of the District of Columbia gun control law unconstitutional.<sup>7</sup>

As a result of this escalating debate and significant Supreme Court decision, a second question naturally emerges from the fray: Does the Second Amendment also serve as a limitation on state action over an individual's right to bear arms through incorporation by the Fourteenth Amendment?<sup>8</sup> If the Second Amendment were applicable to the states, any state or local gun control law would be subject to review under the federal Constitution. Many scholars allege that if the Second Amendment confers an individual right there would be little to prevent incorporation if the Supreme Court then declares that the right is fundamental.<sup>9</sup> Despite the Court's pronouncement that it bestows an individual right, however, because the history and Framers' intent concerning the Second

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States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); Cases v. United States, 131 F.2d 916, 921-23 (1st Cir. 1942).

<sup>6</sup> After lower federal courts ripened the question for Supreme Court review, on November 20, 2007, the Supreme Court granted certiorari in *Parker v. District of Columbia* to decide whether the District of Columbia's gun control laws violate the Second Amendment. 478 F.3d 370 (D.C. Cir. 2007), cert. granted, 128 S. Ct. 645 (2007), and aff'd, 128 S. Ct. 2783 (2008). The Court limited the question presented to "[w]hether . . . [three of the District of Columbia's gun control provisions] violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes." Supreme Court Docket No. 07-290, <http://www.supremecourtus.gov/docket/07-290.htm> (last visited Jan. 21, 2008). The Court's decision only concerned restrictions on federal gun laws and not limitations on state firearm regulations. See *Heller*, 128 S. Ct. at 2813 n.23 (noting the question of incorporation was not presented by the case); see also Linda Greenhouse, *Justices to Decide on Right to Keep Handgun*, N.Y. TIMES, Nov. 21, 2007, at A1, available at <http://www.nytimes.com/2007/11/21/us/21scotus.html?pagewanted=print> ("The justices evidently decided that this case was not the proper vehicle for exploring [the incorporation] issue, because as a nonstate, the District of Columbia is not in a position to argue it one way or another."). Therefore, regardless of the Supreme Court's decision, the question of incorporation remains undetermined, and the Amendment's history must be reconciled to analyze the incorporation issue.

<sup>7</sup> *Heller*, 128 S. Ct. at 2817, 2821-22. Specifically, the majority held the ban on handgun possession in the home and prohibition against operable firearms in the home violated the Second Amendment. *Id.* at 2821-22.

<sup>8</sup> Incorporation is defined as "[t]he process of applying the provisions of the Bill of Rights to the states by interpreting the 14th Amendment's Due Process Clause as encompassing those provisions." BLACK'S LAW DICTIONARY 349 (3d Pocket ed. 2006). The Supreme Court adheres to the selective incorporation theory as set forth in Justice Benjamin Cardozo's opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969). This standard states that "specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." *Id.* at 324-25 (footnote omitted). Cardozo also suggested that rights protected from state interference are those that are "so rooted in the traditions and conscience of our people as to be ranked as *fundamental*." *Id.* at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (emphasis added) (internal quotations omitted). Thus, only carefully reviewed and tested portions of the Bill of Rights are incorporated against the states. Since *Palko* the Supreme Court has similarly considered whether the right is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>9</sup> See Lieber, *supra* note 2, at 1083 ("The nature of the right conferred by the Second Amendment is inextricably intertwined with the issue of its incorporation against the states.").

Amendment suggest that it was ratified, at least in part, as a means to protect the states from federal encroachment,<sup>10</sup> to limit the states would be contrary to the Amendment's original purpose. Thus, regardless of the right's force as applied to federal law, those determining whether the Second Amendment should be incorporated must consider and reconcile the right's federalist history. Similarly, much like the history of the Second Amendment, the Framers enacted the First Amendment's Establishment Clause<sup>11</sup> to protect the states from federal imposition of religion.<sup>12</sup> Nevertheless, despite the federalism concerns at the heart of the Establishment Clause, the Supreme Court incorporated this First Amendment clause to apply as a restriction on state action.<sup>13</sup>

This Note argues that a historical comparison of the ratification of the Establishment Clause and the Second Amendment, and the Supreme Court's later incorporation of the former right, could foretell grounds for the Second Amendment's eventual incorporation. Part II of this Note analyzes the federalist history surrounding ratification of the Second Amendment and the proposition that it was largely intended to protect the states from federal tyranny. Further, Part II discusses the various case law and scholarly articles, which suggest that due to the Second Amendment's fundamental federalist purposes, it has not been incorporated to limit state action. Part III of this Note details the similar federalist history surrounding ratification of the Establishment Clause, as well as its surprising incorporation as a check on state action despite these federalist underpinnings. Finally, in Part IV this Note investigates whether the Establishment Clause's incorporation sheds light on the possibility of the Second Amendment's incorporation.<sup>14</sup> It argues that the Second Amendment, despite its intended role at ratification, may limit

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<sup>10</sup> See, e.g., *Heller*, 128 S. Ct. at 2827 (Stevens, J., dissenting) (“[T]he ultimate purpose of the Amendment was to protect the States’ share of the divided sovereignty created by the Constitution.”); *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 230 (D.D.C. 2004) (“[I]t is apparent that the phrase ‘a well regulated militia’ . . . refers to the maintenance of an effective state fighting force, which was specifically included by the drafters of the Bill of Rights to protect the states against a potentially oppressive federal government.”), *aff’d in part and rev’d in part*, *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005); see also *infra* Part II.A (detailing the Second Amendment’s ratification). Indeed, Justice Scalia admits in the *Heller* majority opinion that “the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right . . . was codified in a written Constitution.” *Heller*, 128 S. Ct. at 2801. Justice Scalia emphasizes that the Second Amendment was *codified* to protect militias. *Id.* Yet to support his individual right formulation, he argues that the right to self defense was a “central component” of this right, even if it was not an overriding codification concern. *Id.*

<sup>11</sup> The text of the Establishment Clause reads, “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST. amend. I.

<sup>12</sup> See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157-59 (1991).

<sup>13</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

<sup>14</sup> Indeed, one scholar has noted that such a study might be worthy of such attention. Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 653 n.80 (1989). Discussing incorporation of the Second Amendment, Professor Levinson states, “[o]ne may wonder whether the interpretive history of the establishment clause might have any lessons for the interpretation of the Second Amendment.” *Id.*

state action given the Court's incorporation of the Establishment Clause. Despite the Supreme Court's adherence to selective incorporation and the principle that a Bill of Rights Amendment may only be incorporated if it involves a fundamental right, the Court was willing to overlook this standard during incorporation of the Establishment Clause.<sup>15</sup> Thus, this Note demonstrates that because the Court was willing to rephrase the history and purpose behind the Establishment Clause, it is entirely plausible that the same methodology can be used to incorporate the Second Amendment, regardless of its original purpose.

## II. THE SECOND AMENDMENT: ITS FOUNDATIONS AND THE ENSUING FAILURE TO INCORPORATE

The history surrounding the Second Amendment's emergence and its ultimate ratification reflects the prevailing struggle inherent in the creation of this nation's government.<sup>16</sup> Following the Revolutionary War and the failed Articles of Confederation, two political groups emerged with opposing viewpoints. The Federalists, led by Framers such as James Madison, John Jay, and Alexander Hamilton sought a strong centralized federal government.<sup>17</sup> Contrastingly, the Anti-Federalists argued that authority be left in the hands of the individual states.<sup>18</sup> This fundamental divergence spurred the Second Amendment debate, and its ultimate adoption reflected a compromise between the two ideologies concerning state and federal powers.<sup>19</sup> Thus, arguably because the founding fathers enacted the Second Amendment as an essential means to preserve state sovereignty, the Supreme Court has not incorporated the right through the Fourteenth Amendment to serve as a limitation on state action.<sup>20</sup>

### A. *The History Behind the Second Amendment's Ratification*

To determine the Second Amendment's role as a limitation on states' rights, the history of its creation and ratification should be analyzed. This history suggests that the Framers intended the Second Amendment to act as a stalwart against federal tyranny over the

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<sup>15</sup> See *infra* Part III.B.

<sup>16</sup> Lieber, *supra* note 2, at 1107 ("The singular thrust during the debate over the Constitution at the Constitutional Convention and the Bill of Rights in the House of Representatives was the relationship between state and federal power." (footnote omitted)).

<sup>17</sup> See SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 47 (2006).

<sup>18</sup> See Paul Finkelman, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 196 (2000); see also Amar, *The Bill of Rights as a Constitution*, *supra* note 12, at 1140 (contending that the Anti-Federalists believed that "because of the attenuated chain of representation, Congress would be far less trustworthy than state legislatures.").

<sup>19</sup> See *infra* Part II.A.

<sup>20</sup> See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

individual states.<sup>21</sup> The Framers' fear of an overly powerful and oppressive government was rooted in the impetus for the nation's founding—specifically, the break from repressive English monarchical rule during the Revolutionary War.<sup>22</sup> The founders articulated this concern in the Declaration of Independence, which stated that England “has kept among us, in times of peace, Standing Armies without the Consent of our legislatures,”<sup>23</sup> and that it “has affected to render the Military independent of and superior to the Civil power.”<sup>24</sup> Additionally, driven by the events of Shays's Rebellion, slave revolts, and attacks by Indians and foreign nations, during the early stages of this nation's creation, the founding fathers also feared possible anarchy.<sup>25</sup> It was against this backdrop that the Framers sought to set forth a government that could not only protect its citizens from external and internal harm and influence, but also keep the states safe from domination by the centralized government.<sup>26</sup> Thus, the stage was set for a showdown between the Federalists and the Anti-Federalists to create a governing body of law for the new nation after the weak Articles of Confederation proved a failure.<sup>27</sup>

The main point of contention between the Federalists and the Anti-Federalists in drafting the Constitution at the Philadelphia Constitutional Convention was whether individual state militias or a nationalistic standing army should protect the country.<sup>28</sup> In reaction to the Federalists' proposition of a national army, the Anti-Federalists feared an overly powerful federal government.<sup>29</sup> Specifically, the Anti-Federalists distrusted a national government with the ability to wield a standing army and undermine the States' ability to keep it in check.<sup>30</sup> Therefore the contention can be summarized as follows: “[T]he arguments over the meaning of the right to bear arms and the militia became embroiled in the larger dispute over federalism. Control of the militia became a crucial

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<sup>21</sup> See, e.g., *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 229-30 (D.D.C. 2004), *aff'd in part and rev'd in part*, *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005); accord *Lieber*, *supra* note 2, at 1098 (“The addendum of a Bill of Rights reflected a profound and enduring belief among Anti-Federalists that the Constitution itself failed to provide sufficient checks on federal power.”).

<sup>22</sup> See *Finkelman*, *supra* note 18, at 195.

<sup>23</sup> THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

<sup>24</sup> *Id.* at para. 14.

<sup>25</sup> CORNELL, *supra* note 17, at 39. The events of Shays's Rebellion culminated with a violent uprising by a group of Western Massachusetts farmers in armed protest against the state's imposition of high taxes. *Id.* at 31. The founders were also uneasy about the multitudes of enslaved Africans in the South and the possibility of a coordinated upheaval. *Id.* at 39. Additionally, Spanish, British, and Indian occupation at the colonial borders drove safety concerns. *Id.*

<sup>26</sup> See *Finkelman*, *supra* note 18, at 195-96.

<sup>27</sup> See CORNELL, *supra* note 17, at 39-41.

<sup>28</sup> *Id.* at 40-41.

<sup>29</sup> *Id.* at 40.

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

issue in defining the future balance of power between the states and the new national government.”<sup>31</sup>

Ultimately, the convention produced a proposed Constitution that reflected a series of compromises between the various competing concerns.<sup>32</sup> Included in this compromise were some answers to the question of control over national security.<sup>33</sup> In regards to the militia, the federal government was given the authority “to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,”<sup>34</sup> and to “organiz[e], arm[], and disciplin[e]” this force.<sup>35</sup> The states retained power over the “Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”<sup>36</sup> Congress, however, was also granted the power to “declare War,”<sup>37</sup> “raise and support Armies,”<sup>38</sup> “maintain a Navy,”<sup>39</sup> and “make Rules for the Government and Regulation of the land and naval Forces.”<sup>40</sup> The states were expressly forbidden from “keep[ing] Troops, or Ships of War in time of Peace.”<sup>41</sup> Moreover, the President was declared the “Commander in Chief of the Army and Navy” and “of the Militia of the several States, when called into the actual Service of the United States.”<sup>42</sup> Accordingly, to the dismay of the Anti-Federalists, the Constitution granted the federal government a great deal of power over national protection and expressly reserved only a small role for the states. In a last minute effort before the Constitution was sent to the Continental Congress for approval, the less numerous Anti-Federalists sought a series of declarations of rights.<sup>43</sup> The Federalists ultimately rejected these amendments, and the more nationalistic Constitution was approved by the Congress and sent to the states for ratification.<sup>44</sup>

One incident in particular during the Constitution’s ratification process demonstrates that the Anti-Federalists were greatly concerned with protecting the states from the federal government but believed the most ideal way to achieve this balance was through state control rather

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<sup>31</sup> *Id.* at 41.

<sup>32</sup> *Id.* at 42.

<sup>33</sup> *Id.* at 43.

<sup>34</sup> U.S. CONST. art. 1, § 8, cl. 15.

<sup>35</sup> *Id.* at art. 1 § 8, cl. 16.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at art. 1 § 8, cl. 11.

<sup>38</sup> *Id.* at art. 1 § 8, cl. 12.

<sup>39</sup> *Id.* at art. 1 § 8, cl. 13.

<sup>40</sup> *Id.* at art. 1 § 8, cl. 14.

<sup>41</sup> *Id.* at art. 1 § 10, cl. 3.

<sup>42</sup> *Id.* at art. 2 § 2, cl. 1.

<sup>43</sup> CORNELL, *supra* note 17, at 43.

<sup>44</sup> *Id.* at 43-44. Article VII of the proposed Constitution stated that “[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” U.S. CONST. art. VII.

than the exclusive empowerment of individuals against the federal government. In Carlisle, Pennsylvania, authorities jailed a group of radical Anti-Federalists after their brawl with Federalists over the state's adoption of the Constitution.<sup>45</sup> Rather than post bail, the jailed Anti-Federalists sought escape by efforts from a local militia, which acted without state approval.<sup>46</sup> These radical actions highlighted the divide between mainstream Anti-Federalists, who sought a strong role for the state, and a minority group of radical Anti-Federalists, who fought for the rights of local communities and individuals.<sup>47</sup> In fact, their extremism pushed the more moderate and numerous Anti-Federalists to strongly reaffirm that the Second Amendment should correspond with *state-sponsored* checks against the federal government.<sup>48</sup> Indeed, following the Carlisle riot, Pennsylvania's Anti-Federalists drafted a list of proposed constitutional amendments rather than insisting on a new constitutional convention.<sup>49</sup> Thus, the possibility of an anti-constitutional movement in Pennsylvania failed to the dismay of the radical Anti-Federalists.

Arguably the Federalists also understood that the right to bear arms was firmly rooted in a conflict between the states and the federal government, rather than one solely between individuals and the federal government.<sup>50</sup> Throughout the heated public debate over ratification of the Constitution, John Jay, Alexander Hamilton, and James Madison wrote a series of newspaper articles called *The Federalist*, which advocated for the implementation of a strong national government.<sup>51</sup> Using the pen name Publius,<sup>52</sup> the authors accepted that in the unlikely chance the nation erupted into civil war, the states could call forth their militias against the federal government for protection.<sup>53</sup> As one scholar suggests, "while Publius conceded that in extreme situations the states might have recourse to use their militias against the national government in the defense of liberty, he denied that individuals or localities were ever justified in a resort to arms."<sup>54</sup> To demonstrate the chaos that would result from an unfettered individual right to protect the people from government tyranny, Publius compared what would be organized militia efforts under state rule with the hectic and disorderly efforts individuals

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<sup>45</sup> CORNELL, *supra* note 17, at 55-56.

<sup>46</sup> *Id.* at 56.

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

<sup>48</sup> *See id.* at 57-58 ("While elites on both sides of the constitutional struggle were divided on many issues, leading Anti-Federalists and Federalists were accord on one thing: the conception of the militia defended by [radical Anti-Federalists] led to Shaysism and anarchy.").

<sup>49</sup> *See id.* at 56-58.

<sup>50</sup> *See id.* at 49.

<sup>51</sup> *Id.* at 47-48.

<sup>52</sup> *See* THE FEDERALIST NO. 28, at 139 (Alexander Hamilton) (Carey & McClellan ed., 2001).

<sup>53</sup> *See id.* ("It may safely be received as an axiom in our political system, that the state governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.").

<sup>54</sup> CORNELL, *supra* note 17, at 49.

would generate against the federal government.<sup>55</sup> Thus, the alarm presented by leading Federalists illustrates that the concern regarding the right to bear arms was tied to the need for *state* protection against the centralized government.<sup>56</sup> An unchecked individual right to bear arms for protection against federal tyranny most certainly raised fears in the Federalists' minds.<sup>57</sup> Thus, when they adopted the Bill of Rights, these fears likely influenced the Framers' impression of the Second Amendment's role.

After conceding a great deal of militia control to the Federalists during the drafting of the Constitution,<sup>58</sup> the Anti-Federalists continued to advocate in state ratification conventions against accepting the Constitution without a separate bill of rights to protect the states from federal tyranny.<sup>59</sup> In July 1788, this fight finally ended when New Hampshire became the ninth state to adopt the Constitution.<sup>60</sup> Despite this loss, the Anti-Federalists successfully convinced several state conventions to add amendments to the ratification documents.<sup>61</sup> Because most of the suggested amendments were intended to decentralize the federal government with structural changes rather than protect individual rights, the Anti-Federalists' overriding concern for states' rights was apparent.<sup>62</sup> Indeed, several of the proposed amendments spurred by the

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<sup>55</sup> THE FEDERALIST NO. 28, at 139 (Alexander Hamilton) (Carey & McClellan ed., 2001). Publius explained:

Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information; they can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different states; and unite their common forces, for the protection of their common liberty.

*Id.*

<sup>56</sup> Akhil Reed Amar also alleges that Federalist Alexander Hamilton understood that “[e]ven if armed, unorganized citizens would face an uphill struggle when confronting a disciplined and professional standing army,” and that state governments were the means to organize against federal tyranny. Amar, *The Bill of Rights as a Constitution*, *supra* note 12, at 1165.

<sup>57</sup> As one scholar points out, individual rights proponents fail to account for the fact that neither the Anti-Federalists nor the Federalists argued the Second Amendment related to anything but the militia and the powers of the states and federal government. Rakove, *supra* note 2, at 161. Rakove states, “As the records from the Constitutional Convention, the ensuing ratification campaign, and the debates in the First Congress of 1789 all demonstrate, the issue under discussion was always the militia, and that issue was posed primarily as a matter of defining the respective powers of two levels of government.” *Id.*

<sup>58</sup> See *supra* notes 32-44 and accompanying text.

<sup>59</sup> Finkelman, *supra* note 18, at 197.

<sup>60</sup> *Id.* at 198.

<sup>61</sup> *Id.* at 199-200 (listing Massachusetts, South Carolina, New Hampshire, Virginia, New York). The Anti-Federalists designed their own amendments in Pennsylvania and Maryland. *Id.* at 200.

<sup>62</sup> See *id.* at 200. Finkelman notes that the Virginia delegates wrote a series of proposals that “would have hamstrung the operations of the national government, weakened all three branches of the government, and rendered the system more cumbersome.” *Id.* at 201. For example, Virginia Anti-Federalists sought super-majority support for several Congressional decisions. *Id.*

Anti-Federalists were intended to erode the powers granted to the federal government and strengthen state control at the expense of individual citizens' rights.<sup>63</sup> During state ratification, the Anti-Federalists were particularly concerned with numerous constitutional controls granted to the federal government over state militias and the government's apparent ability to prevent the states from arming their militias.<sup>64</sup> Anti-Federalist George Mason stated at the Virginia ratifying convention that

[t]he militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them . . . . Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.<sup>65</sup>

In this vein, the Second Amendment and the right to bear arms was caught in the midst of a battle over the structure of the emerging government and the states' ability to protect themselves from the federal government.<sup>66</sup>

When the requisite number of states had ratified the Constitution, the First Federal Congress appointed James Madison to sort through the various amendments proposed by the states.<sup>67</sup> Although the Anti-Federalists were soundly defeated in the state conventions, “[t]he most politically savvy Federalists realized that amendments were necessary to assuage moderate Anti-Federalists and help broaden support for the Constitution.”<sup>68</sup> Accordingly, Madison's first draft of the right to bear arms read:

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.<sup>69</sup>

Although Madison's draft seemed to focus on the protection of the nation as a whole, Congress did not ultimately accept this language.<sup>70</sup> The House of Representatives eventually reworked this first draft of the

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<sup>63</sup> See *id.* at 201-03. For example, among other structural changes, New York Anti-Federalists proposed amendments that “limited federal diversity jurisdiction only to cases involving land grants, prohibited any federal treaty from operating against a state constitution (thus undermining the Supremacy Clause), and proscribed Congress from granting monopolies.” *Id.* at 202.

<sup>64</sup> See Lieber, *supra* note 2, at 1107.

<sup>65</sup> THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 193 (Neil H. Cogan ed., Oxford Univ. Press 1997) [hereinafter THE COMPLETE BILL].

<sup>66</sup> See Finkelman, *supra* note 18, at 203.

<sup>67</sup> CORNELL, *supra* note 17, at 59.

<sup>68</sup> *Id.*

<sup>69</sup> THE COMPLETE BILL, *supra* note 65, at 169.

<sup>70</sup> CORNELL, *supra* note 17, at 60.

Amendment.<sup>71</sup> Before submitting it to the Senate, the House moved the militia clause before the rights of the people and added “composed of the body of the people” to describe the composition of the militia.<sup>72</sup> Presumably unhappy with the clause stating that the militia was to provide for the common defense and fearful that it would in effect concede state control to the federal government, Anti-Federalists in the Senate had the clause deleted.<sup>73</sup> The final version of the Second Amendment ultimately adopted by the states read: “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>74</sup>

To determine the Framers’ intent regarding the Second Amendment, acknowledging the proposed amendments the First Congress refused to adopt is as helpful as analyzing those they ultimately implemented.<sup>75</sup> The Framers’ concern with preserving state sovereignty is evident both in the proposed amendments the First Congress refused to adopt as well as in the amendments it eventually adopted. After the defeat at the Pennsylvania Ratifying Convention, the Pennsylvanian Anti-Federalists composed a list of amendments called their “Reasons for Dissent.”<sup>76</sup> Several of the proposals dealt with individual rights and were later copied almost verbatim into the Bill of Rights.<sup>77</sup> The Anti-Federalists, however, also included right to bear arms provisions that acknowledged both state and individual protections. For instance, one of the proposed amendments declared:

[T]he people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and governed by the civil power.<sup>78</sup>

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

<sup>72</sup> THE COMPLETE BILL, *supra* note 65, at 170.

<sup>73</sup> CORNELL, *supra* note 17, at 61-62. There are no records of the Senate debates over the language of the Second Amendment. *Id.* at 61. Cornell notes, however, that a letter written by Virginian John Randolph sheds light on the Senate proceedings: Randolph contended, “the Senate [was] for not allowing the militia arms” and stated the Federalists feared armed citizens who could “stop their full Career to Tyranny & Oppression.” *Id.* at 62. Thus, Cornell concludes, “[a] well-armed militia controlled by the states was necessary to provide the states the ultimate check on potential federal despotism.” *Id.*

<sup>74</sup> U.S. CONST. amend. II.

<sup>75</sup> See Finkelman, *supra* note 18, at 207-08.

<sup>76</sup> *Id.* at 206.

<sup>77</sup> *Id.* at 206-07 (“The essence, and in some places the exact language, of the Free Exercise Clause and the Free Press and Speech Clauses of the First Amendment are found in these fourteen proposals, as are the essence and language of the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. Elements of the Tenth Amendment are also found in the proposals.”).

<sup>78</sup> THE COMPLETE BILL, *supra* note 65, at 182.

The First Congress proved unwilling to adopt the obvious individualistic right to bear arms provisions that did not advance state interests.<sup>79</sup> This decision lends credence to the argument that the Framers believed the Second Amendment was principally tied to federalism and states' rights rather than solely focused on the individual right to protection through the right to bear arms.<sup>80</sup> Hence, the First Congress sought to avoid framing the Second Amendment with an emphasis on an individual's ability to protect her or himself. Moreover, because the Framers were willing to fully adopt other individual right suggestions,<sup>81</sup> the failure to affirm the right to bear arms proposals is another indication that the Second Amendment was predominantly linked with federalism concerns.<sup>82</sup>

In sum, ratification of the Second Amendment can be viewed as a way to placate the Anti-Federalist's fears of a standing army. In addition, it served as a compromise between those who advocated for a strong national government and those who championed states' rights as a means to protect the states from federal tyranny. Although the Anti-Federalists sought a more decentralized federal government, the Second Amendment was one battle they won on the federalism front. The Second Amendment emerged during the great conflict over the structure of the new nation and was intimately tied to the Anti-Federalist's platform that the states must be able to protect themselves from a strong federal government.<sup>83</sup> Thus, at the nation's founding, the Framers viewed the Second Amendment as an important way to equalize the balance of power between the states and the federal government.<sup>84</sup> Ultimately, the people were given the right to bear arms, but the states were granted the right to oversee and control the extent of this right.

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<sup>79</sup> See Finkelman, *supra* note 18, at 208.

<sup>80</sup> As one Second Amendment scholar aptly states:

[T]hose who framed and ratified the Second Amendment were seeking not to enshrine some generalized right of Americans to revolt against government, nor to empower individuals or small groups of disaffected citizens to take up arms against the established order. Rather, they sought to protect a specific set of institutions—organized, state-based militia—that they saw as playing a crucial, liberty-protecting role in their new government structure.

Yassky, *supra* note 2, at 628.

<sup>81</sup> For instance, the Free Exercise Clause and the Free Press and Speech Clauses of the First Amendment, as well as the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. Finkelman, *supra* note 18, at 206-07.

<sup>82</sup> See *id.* at 208.

<sup>83</sup> Lieber, *supra* note 2, at 1107 (“The singular thrust during the debate over the Constitution at the Constitutional Convention and the Bill of Rights in the House of Representatives was the relationship between state and federal power.” (footnote omitted)).

<sup>84</sup> See Yassky, *supra* note 2, at 599 (“[T]he Founders reached a complex and ingenious compromise in which both the federal army and the states’ militia were assigned carefully delineated roles. The purpose of the Second Amendment was to protect that compromise.”).

*B. The Second Amendment as a Limitation Solely on the Federal Government: The Resolution Against Incorporation*

The Second Amendment was historically intended as a means to protect federalism.<sup>85</sup> Accordingly, the Supreme Court has never declared that the Second Amendment limits state action<sup>86</sup> and has not determined whether it should be incorporated through the Fourteenth Amendment.<sup>87</sup> Indeed, this Note asserts that in light of its history, it would make little sense to hold that the Second Amendment, even though it confers an individual right without limitation to militia affiliation,<sup>88</sup> can restrict the states' actions given that it was created to ensure their protection. The Second Amendment guaranteed the states the ability to arm their people, and therefore, if a state wishes to curtail this right, it may constitutionally do so. As this Note later discusses, the Supreme Court was willing to overlook the Establishment Clause's history during incorporation, however, and therefore could likewise disregard the history of the Second Amendment in considering its incorporation.<sup>89</sup>

The Supreme Court's first opportunity to discuss application of the Second Amendment to the states was the 1875 case of *United States v. Cruikshank*.<sup>90</sup> The defendants in *Cruikshank* were convicted under the Enforcement Act of 1870<sup>91</sup> and accused of depriving two African American males of their right to bear arms.<sup>92</sup> The Court stated:

The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government . . . .<sup>93</sup>

Thus, the Court unambiguously held that the Second Amendment is merely a restriction on federal action and does not apply equally to the states.

The Supreme Court reaffirmed this Second Amendment limitation eleven years later in *Presser v. Illinois*.<sup>94</sup> The petitioner,

<sup>85</sup> See *supra* Part II.A.

<sup>86</sup> See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

<sup>87</sup> See *infra* notes 102-106 and accompanying text. The Supreme Court did not consider the question of incorporation in its most recent Second Amendment decision. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008).

<sup>88</sup> See *Heller*, 128 S. Ct. at 2821-22.

<sup>89</sup> See *infra* Part III.B, Part IV.

<sup>90</sup> 92 U.S. 542 (1875).

<sup>91</sup> The Act made it a crime when "two or more persons shall band or conspire together . . . with intent to . . . injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution . . ." *Id.* at 548.

<sup>92</sup> See *id.* at 544-45.

<sup>93</sup> *Id.* at 553.

<sup>94</sup> 116 U.S. 252 (1886).

Herman Presser, was indicted for violation of the Illinois Military Code.<sup>95</sup> The indictment alleged that Presser paraded in Chicago armed, without a license, and without belonging to an authorized state or federal militia.<sup>96</sup> The petitioner challenged the state's restriction of his right to bear arms in violation of the Second Amendment.<sup>97</sup> In *Presser*, the Court relied on *Cruikshank* to find that “a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States.”<sup>98</sup> In upholding the state's Military Code, there was no question that the Court believed that the Second Amendment is not a restriction on state action.

In 1894, the Court again definitively stated in its final direct ruling on the incorporation question that the right to bear arms only curtails federal action.<sup>99</sup> In *Miller v. Texas*, the defendant alleged that a Texas law “forbidding the carrying of weapons, and authorizing the arrest without warrant of any person violating such law” violated the Second Amendment.<sup>100</sup> The Court, however, for a third unequivocal time, held that the Second Amendment does not limit the states' authority to regulate and was therefore constitutionally acceptable.<sup>101</sup>

In more recent years, the Supreme Court has declined three separate times to reexamine the incorporation of the Second Amendment. Arguably, the Court displayed its continued belief that the Second Amendment does not apply to the states when it denied *certiorari* in *Burton v. Sillis*,<sup>102</sup> *Quilici v. Village of Morton Grove*,<sup>103</sup> and *Silveira v. Lockyer*.<sup>104</sup> Proponents of incorporation could argue that the Second Amendment has not been extended to the states because the Court has not had the opportunity to deal with the issue since it began to selectively incorporate the Bill of Rights against the states.<sup>105</sup> It would seem,

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<sup>95</sup> *Id.* at 253. The Code stated that:

It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city, or town, of this State . . . .

*Id.*

<sup>96</sup> *Id.* at 254.

<sup>97</sup> *Id.* at 260.

<sup>98</sup> *Id.* at 265.

<sup>99</sup> *Miller v. Texas*, 153 U.S. 535, 538 (1894).

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* (“[I]t is well settled that the restrictions of [the Second Amendment] operate only upon the Federal power, and have no reference whatever to proceedings in state courts.”).

<sup>102</sup> 248 A.2d 521 (N.J. 1968) (state gun control statute).

<sup>103</sup> 695 F.2d 261 (7th Cir. 1982) (village gun control ordinance).

<sup>104</sup> 312 F.3d 1052 (9th Cir. 2003) (state gun control statute).

<sup>105</sup> Sanford Levinson notes that the Court's incorporation cases pre-date the start of incorporation of the Bill of Rights. Levinson, *supra* note 14, at 653. Levinson also acknowledges the Court's opportunities to address the issue and argues “[t]he Supreme Court has almost shamelessly refused to discuss the issue, but that need not stop the rest of us.” *Id.* at 653-54 (footnote omitted).

however, that if the Court believed the Second Amendment should be a restriction on state action as well, it would have taken the opportunity in *Sillis*, *Quilici*, or *Silveira* to address the issue.<sup>106</sup> Therefore, the Court's inaction reflects an apparent silent reaffirmation that the Second Amendment is not incorporated through the Fourteenth Amendment.

Following the Supreme Court's lead, most lower federal and state courts have also held that the Second Amendment is not incorporated, and that it was created, at least in part, to protect the states from the federal government.<sup>107</sup> Recently, the Ninth Circuit Court closely analyzed the continued viability of the Second Amendment as a sole restriction on the federal government in light of the increased debate surrounding this amendment.<sup>108</sup> In *Silveira v. Lockyer*, the Ninth Circuit undertook a historical and textual look at the nature and scope of the Second Amendment.<sup>109</sup> The *Lockyer* court confirmed that "the Second Amendment imposes no limitation on California's ability to enact legislation regulating or prohibiting the possession or use of firearms."<sup>110</sup> The Circuit Court also found that the First Congress adopted the amendment as a way to "protect the people from the threat of federal tyranny by preserving the right of the states to arm their militias"<sup>111</sup> and highlighted the compromise reached to placate Anti-Federalist fears that the federal government could disarm the people by inaction.<sup>112</sup> Therefore, in accordance with the Ninth Circuit Court's reasoning in *Silveira*, a state may constitutionally regulate arms as it sees fit.

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<sup>106</sup> See Lieber, *supra* note 2, at 1105-06. As one writer asserts:

While individual right adherents view the failure to incorporate the Second Amendment as an abdication of responsibility, the more plausible explanation is that it merely reflects the Court's enduring belief that the Second Amendment does not confer an individual right to keep and bear arms, and thus would not constrain state gun regulations targeting individual possession and ownership.

*Id.*

<sup>107</sup> See, e.g., *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995) ("The Second Amendment does not apply to the states."); *accord Hickman v. Block* 81 F.3d 98, 102 (9th Cir. 1996) ("Because the Second Amendment guarantees the right of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed."); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942) ("Whatever rights in this respect the people may have depend upon local legislation; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right."); *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987) ("[The Second Amendment] protects a state's right to raise and regulate a militia by prohibiting Congress from enacting legislation that will interfere with that right. [It] says nothing that would prohibit a state . . . from restricting the use or possession of weapons . . .").

<sup>108</sup> *Silveira*, 312 F.3d at 1067-87.

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

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

<sup>111</sup> *Id.* at 1086-87.

<sup>112</sup> *Id.* at 1085.

### III. THE ESTABLISHMENT CLAUSE: ITS HISTORY AND EVENTUAL INCORPORATION

Much like the history of the Second Amendment's ratification,<sup>113</sup> the Framers' intent and public opinion supporting the Establishment Clause suggest that the Framers intended this clause of the First Amendment to protect the *states* from federal encroachment.<sup>114</sup> Thus, the same federalist concerns that permeated the Second Amendment debates were echoed in the ratification of the Establishment Clause.<sup>115</sup> Just as the Second Amendment provided the states with a means of protection against federal tyranny,<sup>116</sup> the Establishment Clause prevented the federal government from interfering with state religious establishments.<sup>117</sup> Despite the fact that the Framers and states ratified the Establishment Clause solely to restrict federal activity, however, the Supreme Court incorporated this part of the First Amendment to limit state action as well.<sup>118</sup> During incorporation of the Establishment Clause, the Supreme Court relied upon the Framers' intent at ratification but limited its analysis to the beliefs of Thomas Jefferson and James Madison.<sup>119</sup> Many scholars, however, have criticized the Court's reliance as misplaced and misguided.<sup>120</sup> Instead, scholars note that the proper focus is better

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<sup>113</sup> See *supra* Part II.A.

<sup>114</sup> See, e.g., Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1703 (1992) [hereinafter *Rethinking the Incorporation*] ("Specifically, the Establishment Clause was intended to prevent Congress from interfering with the established state churches and with state efforts to accommodate religion."); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1193 (1990) ("[T]he establishment clause, both as originally conceived and as understood during the Reconstruction, was meant to be applied *only* against the national government."); Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 66 (1962) ("[The establishment clause's] inclusion was intended as an implied grant of power over religion to the states as it affirmatively denied the federal government power to make any law respecting a state establishment.").

<sup>115</sup> Ultimately, the First Amendment was created to serve a dual role: first, to protect the states from implementation of a national religion through the Establishment Clause and second, to grant individuals the right to the free exercise of religion through the free exercise provision. See Kruse, *supra* note 114, at 66.

<sup>116</sup> See *supra* Part II.A.

<sup>117</sup> See *infra* Part III.A.

<sup>118</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("The establishment of religion clause of the First Amendment means at least this: Neither a *state* nor the Federal Government can set up a church. *Neither* can pass laws which aid one religion, aid all religions, or prefer one religion over another." (internal quotations omitted) (emphasis added)).

<sup>119</sup> *Everson*, 330 U.S. at 11-16.

<sup>120</sup> See Lietzau, *supra* note 114, at 1199-2000 (arguing that there was not one particular theory adopted); see also Kruse, *supra* note 114, at 72-73 (stating that Madison's views on the separation of church and state were not adopted as the basis of the Establishment Clause). Kruse argues that although Madison was outspokenly against state support of religion in his home state of Virginia, all of his religion amendments were either modified or not accepted by the First Congress. *Id.* Most tellingly, Madison sought specific amendments to restrict state activity, but these were explicitly rejected. *Id.* at 73.

directed on the debates of the First Congress and the language of the accepted amendment.<sup>121</sup>

A. *The History Surrounding Ratification of the Establishment Clause*

The Framers' fear of a centralized federal government with the ability to assert control over religion and religious practices was rooted in the religious suffering and persecution the early settlers faced from European governments.<sup>122</sup> Indeed, in large part, settlers seeking to escape religious persecution were among those who founded this country.<sup>123</sup> These highly religious people, however, did not entirely renounce state-established religion in the new world.<sup>124</sup> This is evidenced by the fact that "[a]t the beginning of the revolution, eight colonies had established churches."<sup>125</sup> Moreover, although many colonial charters contained provisions similar to the Free Exercise Clause, "no state constitution mandated church/state separation."<sup>126</sup> In fact, state establishment of religion continued up through the time that the Constitution and Bill of Rights were adopted.<sup>127</sup>

After the Anti-Federalists failed to defeat the Constitution's ratification, the party sought a Bill of Rights to curtail the federal government's power.<sup>128</sup> Although many of the ratified amendments served chiefly to protect individual rights from federal encroachment,<sup>129</sup> the Establishment Clause did not.<sup>130</sup> The Framers adopted this clause to

<sup>121</sup> Lietzau, *supra* note 114, at 1200.

<sup>122</sup> See Kruse, *supra* note 114, at 83 ("Perhaps it was knowledge of this history that led the delegates, religious men, to the theory that the national government which they were establishing should keep hands off religion." (footnote omitted)).

<sup>123</sup> See, e.g., Lietzau, *supra* note 114, at 1195-96; see also *Everson*, 330 U.S. at 8 ("A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches.").

<sup>124</sup> Lietzau, *supra* note 114, at 1196.

<sup>125</sup> *Id.* at 1197; see generally LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 1-24* (1986) (detailing the colonial establishments of religion prior to the Revolution).

<sup>126</sup> Lietzau, *supra* note 114, at 1196-97.

<sup>127</sup> Kruse, *supra* note 114, at 106 ("[T]he Constitutions of Massachusetts, Maine, New Hampshire, Vermont, Maryland, South Carolina, New Jersey, and Connecticut provided for some regulation of religion by their respective governments. Discriminatory tests were required for office holders in North Carolina and Delaware.").

<sup>128</sup> See *supra* notes 58-66 and accompanying text; see also *Rethinking the Incorporation*, *supra* note 114, at 1704 ("[T]he entire Bill of Rights was concerned with federalism. Because it was adopted to assuage the fear of centralized power in a national government, none of its provisions originally applied to the states . . . [T]he entire Bill of Rights as originally enacted was coated with a veneer of federalism.").

<sup>129</sup> For example, the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." U.S. CONST. amend. IV. Similarly, the Fifth Amendment protects several individual rights, including a right to indictment by a grand jury, a right against double jeopardy, and a right to refuse testifying as a witness against oneself. U.S. CONST. amend. V.

<sup>130</sup> See Amar, *The Bill of Rights as a Constitution*, *supra* note 12, at 1157-59.

ensure the states were protected from any federal action that “tended either to establish or disestablish a state church.”<sup>131</sup> The Establishment Clause’s strong federalist purpose can be gleaned from the ratification debates and the text the Framers ultimately adopted.

The call for an explicit restriction on the federal government’s ability to pass religious legislation began during state ratification of the Constitution.<sup>132</sup> Supporters of the Constitution argued that a bill of rights was not necessary because the federal government was one of enumerated powers and was not granted the specific power to infringe religious freedom.<sup>133</sup> This fact, however, did not placate those who sought to protect the states from federal imposition.<sup>134</sup> As a result, during state ratification the Federalists were forced to assure the requisite number of states that the Congress would enact a bill of rights following ratification of the Constitution.<sup>135</sup> After New Hampshire became the final required state to ratify the Constitution,<sup>136</sup> James Madison drafted a proposed set of amendments for the Bill of Rights.<sup>137</sup> The original religion clauses presented to the House of Representatives read:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

. . . .

No state shall violate the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases.<sup>138</sup>

Thus, because Madison explicitly stated how the individual states should be restricted in the “equal rights of conscience” clause, it appears that he intended that the Establishment Clause prohibit only the federal government.<sup>139</sup>

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<sup>131</sup> Lietzau, *supra* note 114, at 1199.

<sup>132</sup> See Kevin D. Evans, *Beyond Neutralism: A Suggested Historically Justifiable Approach to Establishment Clause Analysis*, 64 ST. JOHN’S L. REV. 41, 44 (1989); see also MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 3-4 (1978) (detailing state proposals for religious amendments to be included in the Bill of Rights).

<sup>133</sup> *Rethinking the Incorporation*, *supra* note 114, 1705; see also THE COMPLETE BILL, *supra* note 65, at 55 (providing an excerpt of Madison’s remarks to the House).

<sup>134</sup> *Rethinking the Incorporation*, *supra* note 114, at 1705-06.

<sup>135</sup> See Evans, *supra* note 132, at 44.

<sup>136</sup> Finkelman, *supra* note 18, at 198.

<sup>137</sup> Evans, *supra* note 132, at 44-45.

<sup>138</sup> 1 ANNALS OF CONG. 451-52 (Gales ed., Gales & Seaton 1834).

<sup>139</sup> See MALBIN, *supra* note 132, at 4; Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 384 (1954). Snee states that Madison clearly thought it was necessary to limit the states from infringing religious rights, but he did not believe this was to be done by preventing states from establishing religion. *Id.* Rather, Snee argues that Madison intended that the amendment “encroach upon the reserved power of the states only to the extent necessary to protect the equal rights of conscience; he would leave it to the individual states to adopt such measures in the field of religion as they saw fit, provided only that they did not thereby infringe

Madison's draft proposal was referred to the Committee of the Whole House, which recommended the "equal right of conscience" provision and amended the provision limiting congressional action.<sup>140</sup> Accordingly, the revised provision read, "no religion shall be established by law, nor shall the equal rights of conscious be infringed."<sup>141</sup> Debate in the House concerning this alteration focused on how the exact language should read rather than on whom the Establishment Clause would limit.<sup>142</sup>

Anti-Federalist Samuel Livermore suggested the next version of the religion clauses, which read: "Congress shall make no laws touching religion, or infringing the rights of conscience."<sup>143</sup> Additionally, another Anti-Federalist delegate Elbridge Gerry, was particularly concerned with the relationship between federal and state governments and supported Livermore's proposal, which removed Madison's "national" language.<sup>144</sup> Gerry believed Livermore's proposal went further than the Committee's in assuring that a state's right regarding religion would not be infringed.<sup>145</sup> In particular, Gerry believed the word "national" "implied that the Constitution created one nation, with a national government, instead of a union of states ruled by a federal government with limited powers."<sup>146</sup> The definitive "touching" language of Livermore's proposal ensured that the federal government was significantly curtailed and that the states retained full ability to support religion.<sup>147</sup> Livermore's alteration defeated the Committee's proposal, which was silent regarding the nation/state debate.<sup>148</sup>

The House amended the religious clause a final time before sending it to the Senate, and this amendment reflected a compromise between the Federalists and Anti-Federalists.<sup>149</sup> The final proposal stated, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."<sup>150</sup> The "nation" language that concerned the Anti-Federalists was not reinstated, but the

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those rights." *Id.* Thus, Madison's "establishment clause" and "equal rights of conscious clause" did not serve the same purpose.

<sup>140</sup> MALBIN, *supra* note 132, at 4-5. Again, the fact that the Committee also approved of two separate religious clauses, only one of which was specifically aimed at state limitation, evidences the fact that the Establishment Clause applied only to the federal government.

<sup>141</sup> 1 ANNALS OF CONG. 757 (Gales ed., Gales & Seaton 1834).

<sup>142</sup> MALBIN, *supra* note 132, at 9 (alleging that debate concerned the clause's language and all delegates agreed that the provision would limit the national government).

<sup>143</sup> 1 ANNALS OF CONG. 759 (Gales ed., Gales & Seaton 1834).

<sup>144</sup> MALBIN, *supra* note 132, at 10.

<sup>145</sup> *See id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 11. Malbin argues that Anti-Federalists were particularly concerned with the Necessary and Proper Clause, because "as long as Congress was trying to achieve something it had the power to accomplish," it could pass laws affecting state establishments. *Id.* at 16. Thus, Livermore's proposal would have prevented the Congress from such action. *Id.*

<sup>149</sup> *Id.* at 11.

<sup>150</sup> 1 ANNALS OF CONGRESS 795-96 (Gales ed., Gales & Seaton 1834).

strong language preventing Congress from “touching” religion was removed.<sup>151</sup> Subsequently, the religion amendment passed through a series of revisions within the Senate,<sup>152</sup> and ultimately the Senate sent the House a more limited version.<sup>153</sup> The Senate’s revision read, “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.”<sup>154</sup> The House refused to accept the Senate’s proposal and asked that a conference be gathered to consider the issue.<sup>155</sup> The Committee ultimately adopted the final language of the First Amendment, which states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>156</sup>

The Establishment Clause’s “respecting” language was meant to serve a dual function.<sup>157</sup> First, it prohibits Congress from passing any law that establishes a religion.<sup>158</sup> Second, it also quelled federalism concerns present during ratification<sup>159</sup> by prohibiting Congress from passing legislation “with respect to an establishment of religion.”<sup>160</sup> Thus, the Establishment Clause prevents Congress from interfering with state religious establishments.<sup>161</sup> This conclusion is supported by the fact that Massachusetts did not end its religious establishment until 1833, and Connecticut, Georgia, Massachusetts, New Hampshire, New Jersey, North Carolina, and South Carolina still exercised some control over religion at the time of ratification.<sup>162</sup> Accordingly, these states would not have approved the First Amendment had they believed it would preclude them from religious control.

Ultimately, the Anti-Federalists sought to avoid empowering what they believed to be an already overly powerful central government with vast religious control.<sup>163</sup> They feared that without an Amendment to

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<sup>151</sup> See *id.*; see also MALBIN, *supra* note 132, at 11.

<sup>152</sup> MALBIN, *supra* note 132, at 12-13. The Senate debates over the religion amendment were kept secret but Malbin suggests that “the succession of amendments offered makes it clear that both the wording of the establishment clause and the very presence of the free exercise clause were being debated.” *Id.* at 13.

<sup>153</sup> See *id.* at 13.

<sup>154</sup> JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (Gales & Seaton 1820).

<sup>155</sup> Evans, *supra* note 132, at 47. It is likely that the House believed that the Senate’s proposal was too restrictive and did not sufficiently limit the federal government. See MALBIN, *supra* note 132, at 13.

<sup>156</sup> U.S. CONST. amend. I.

<sup>157</sup> See MALBIN, *supra* note 132, at 15.

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

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

<sup>160</sup> *Id.* (internal quotation marks omitted).

<sup>161</sup> See *id.* These federalism concerns have been described as “the overriding issue throughout the Congress. There should be no surprise, therefore, about its importance [with the Establishment Clause].” *Id.* at 15-16 (emphasis in original).

<sup>162</sup> Evans, *supra* note 132, at 48.

<sup>163</sup> Many feared that the Constitution’s Necessary and Proper Clause, “which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it,” would allow the federal government to make laws which would establish a national religion. *Id.* at 46.

explicitly limit the federal government, there would be no way to keep the centralized government from imposing its religious will.<sup>164</sup> Because several ratifying states maintained established religions, however, it is clear that the Framers and the states did not believe the Establishment Clause would extend beyond the federal government.<sup>165</sup> This idea is well summarized by constitutional scholar Akhil Reed Amar:

The possibility of national control over a powerful intermediate association self-consciously trying to influence citizens' world views, shape their behavior, and cultivate their habits obviously struck fear in the hearts of Anti-Federalists. Yet local control over such intermediate organizations seemed far less threatening, less distant, less aristocratic, less monopolistic—just as local banks were far less threatening than a national one, and local militias less dangerous than a national standard army.<sup>166</sup>

Thus, the fundamental purpose of the Establishment Clause is best described as a means to limit federal power over the states and prevent interference with the states' authority over religious establishments.

### *B. The Surprising Incorporation of the Establishment Clause*

Because the Framers adapted the Establishment Clause as a means to protect the states from the federal government,<sup>167</sup> it would make little sense to incorporate it as a limitation on state action.<sup>168</sup> Indeed, a mere cursory reading confirms that the language unambiguously limits only *congressional* action. In 1984, however, the Supreme Court extended the Establishment Clause to curtail state action in *Everson v. Board of Education*.<sup>169</sup> In *Everson*, Justice Black, writing for the majority, held that the Establishment Clause applies equally as a restraint on the federal and state governments.<sup>170</sup> Black reached this conclusion after first describing the religious persecution suffered by those who settled in America and the continuation of such practices in the colonies.<sup>171</sup> Black argued that this climate “aroused the sentiment that

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<sup>164</sup> See Lietzau, *supra* note 114, at 1199 (“The establishment clause was an explicit restriction on the federal government’s power to meddle in the religious establishments that then existed.”).

<sup>165</sup> *Id.* at 1201 (“All the states with established churches ratified the amendment without any expressed concern.”).

<sup>166</sup> Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1, 14 (1996).

<sup>167</sup> See *supra* Part III.A.

<sup>168</sup> See Evans, *supra* note 132, at 67 (arguing that holding that “the establishment clause applies to the states produce[s] an ironic result: an amendment supported by the states as a means to protect their sovereignty was applied to the states as a means to limit their power”).

<sup>169</sup> 330 U.S. 1, 15 (1947).

<sup>170</sup> *Id.* (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

<sup>171</sup> *Id.* at 8-11. Specifically Black detailed the persecution that occurred in Europe amongst Catholics, Protestants, and Jews. *Id.* at 8-9. Moreover, Black described how this intolerance continued in the new world between Catholics, Quakers, Baptists, and Protestants. *Id.* at 10-11.

culminated in adoption of the Bills of Rights' provisions embracing religious liberty."<sup>172</sup> Specifically, Black focused on the beliefs of James Madison and Thomas Jefferson, two people who played a large role in the new nation's development.<sup>173</sup> Accordingly, Black concluded that the Establishment Clause was included in an Amendment that protects an "individual's religious freedom."<sup>174</sup> Interestingly (and perhaps tellingly), Justice Black did not analyze the Establishment Clause under the *Palko* incorporation test<sup>175</sup> to determine whether the clause confers a fundamental right.<sup>176</sup> Without great explanation, Justice Black held that because the Supreme Court had already incorporated the Free Exercise Clause, "there is every reason to give the same application and broad interpretation to the 'establishment of religion' clause."<sup>177</sup> Thus, the Court found that the Establishment Clause limits state action in the same manner as Congressional action.

Later Supreme Court cases did not attempt to amend or challenge the Court's *Everson* reasoning. For instance, a year after the *Everson* decision, the Court held that a state practice that permitted religious instruction in public schools was a First Amendment violation.<sup>178</sup> The Court did not address the state's argument that the Establishment Clause should not be applicable to the states,<sup>179</sup> and reiterated *Everson*'s holding that "the First Amendment has erected a wall between Church and State which must be kept high and impregnable."<sup>180</sup> Additionally, in *Engle v. Vitale*, the Court struck down

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<sup>172</sup> *Id.* at 11.

<sup>173</sup> Many scholars have criticized the Court's focus on Madison and Jefferson's intent. *See supra* note 120 and accompanying text. Because the amendment ultimately ratified was altered several times before its final form, it is more appropriate to study the intent of the entire First Congress and the ratifying states. *See supra* Part.III.A; *see also Rethinking the Incorporation, supra* note 114, at 1704-05 (arguing that even though Madison and Jefferson may have supported a separation of church and state in Virginia, it should not be assumed that they therefore "supported a federally-imposed requirement of separation of church and state").

<sup>174</sup> *Everson*, 330 U.S. at 15 (emphasis added). Justice Black concluded with this oft-cited phrase: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18. The Court quoted this language from *Reynolds v. United States*, 98 U.S. 145, 164 (1879), which borrowed the quote from Thomas Jefferson. *Everson*, 330 U.S. at 16. Incidentally, in *Wallace v. Jaffree*, Justice Rehnquist pointed out that Jefferson made this statement fourteen years after the Amendments were ratified and therefore "he would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." 472 U.S. 38, 92 (1985).

<sup>175</sup> *See supra* note 8. Thus, the Court did not explicitly determine that the Establishment Clause conferred a right that is "implicit in the concept of ordered liberty" and is "so rooted in the traditions and conscious of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937).

<sup>176</sup> *See Rethinking the Incorporation, supra* note 114, at 1702 ("*Everson* is devoid of any analysis justifying the incorporation of the Establishment Clause under *Palko*'s selective incorporation test.").

<sup>177</sup> *Everson*, 330 U.S. at 15.

<sup>178</sup> *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

<sup>179</sup> *Id.* at 211.

<sup>180</sup> *Id.* at 212.

a New York law mandating daily recitation of prayer in public schools as a violation of the Establishment Clause.<sup>181</sup> The Court, per Justice Black, agreed with the petitioners that a law requiring prayer in public schools “breaches the constitutional wall of separation between Church and State” and again upheld the *Everson* reasoning.<sup>182</sup>

A year later in *School District of Abington Township v. Schempp*, Justice Brennan attempted to square incorporation of the Establishment Clause with its federalist underpinnings.<sup>183</sup> In *Schempp*, Justice Brennan alleged, “[i]t has been suggested, with some support in history, that absorption of the [Establishment Clause] . . . is conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches.”<sup>184</sup> Brennan responded to this concern by holding that despite what may have been relevant during ratification,

it is clear on the record of history that the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the [Fourteenth Amendment].<sup>185</sup>

Hence, it appears that Justice Brennan would argue that state religious establishments are extinct, and therefore the underlying reasons for non-incorporation are effectively null.

To refute the allegation that the Establishment Clause does not protect an individual liberty or freedom, Justice Brennan asserted that, “[t]he fallacy in this contention . . . is that it underestimates the role of the Establishment Clause as a co-guarantor, with the Free Exercise Clause, of religious liberty.”<sup>186</sup> Unfortunately, this conclusory statement fails to adequately explain how the Establishment Clause, as distinguished from the Free Exercise Clause, solely guards an individual right if it was originally intended to protect the states. Perhaps it could again be argued that because all states have abolished their religious establishments, the federalist basis for the Establishment Clause is no longer necessary or valid. That reasoning, however, fails to take into consideration that the states might seek to regulate religion through means other than state establishments.

A recent controversial challenge to the Establishment Clause’s incorporation came in the 1983 case of *Jaffree v. Board of School*

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<sup>181</sup> 370 U.S. 421, 424 (1962).

<sup>182</sup> *Id.* at 425.

<sup>183</sup> 374 U.S. 203, 254 (1963) (Brennan, J., concurring) (footnote omitted).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 254-55 (footnote omitted). A possible criticism of Brennan’s reasoning is that it ignores the fact that although state religious establishments were ended by 1833, many states continued to exert some control over religion. See *Rethinking the Incorporation*, *supra* note 114, at 1710.

<sup>186</sup> *Schempp*, 374 U.S. at 256 (Brennan J., concurring).

*Commissioners*.<sup>187</sup> In *Jaffree*, Chief Judge Hand of United States District Court for the Southern District of Alabama held that the Establishment Clause does not limit state action.<sup>188</sup> *Jaffree* presented three holdings based on his detailed historical review of the Establishment Clause's ratification.<sup>189</sup> First, the Establishment Clause was only intended as a restriction on the federal government.<sup>190</sup> Second, the Establishment Clause was an express guarantee to the states that the federal government would not interfere with state religious establishments.<sup>191</sup> Third, the Establishment Clause was not incorporated through the Fourteenth Amendment.<sup>192</sup> Without addressing the historical analysis presented by Judge Hand, the Supreme Court upheld the Eleventh Circuit's decision to overrule the District Court on the basis that the First Amendment chiefly protects an individual right to religious freedom.<sup>193</sup> The Court stated that when the Fourteenth Amendment was enacted, the fundamental individual liberty protected by the Establishment Clause was extended as a restriction on state action.<sup>194</sup> Again, noticeably absent from the Court's reasoning is a discussion to rebut the contention that the Establishment Clause was in fact originally rooted in federalism concerns. Rather, the Court simply assumed that the clause safeguards an individual right.

The Supreme Court has arguably failed to reconcile the true purpose of the Establishment Clause with incorporation. Without strong support, the Court held that because of its placement within the First Amendment, the Establishment Clause mainly protects a fundamental individual right.<sup>195</sup> Thus, when the Fourteenth Amendment was ratified, the clause became a viable part of the Bill of Rights for incorporation. Unfortunately, this reasoning skirts a threshold incorporation question: Is the right concerned solely with an *individual* rather than state interest? Additionally, even if the right does advance some degree of individual right, how does this square with the federalist history of the

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<sup>187</sup> 554 F. Supp. 1104 (S.D. Ala. 1983), *rev'd sub nom*, *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>188</sup> *Id.* at 1128-29.

<sup>189</sup> *See Jaffree*, 554 F. Supp at 1113-19.

<sup>190</sup> *Id.* at 1114 ("The establishment clause was intended to apply only to the federal government.").

<sup>191</sup> *Id.* at 1115 ("The first amendment in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791.").

<sup>192</sup> *Id.* at 1118-19 ("The historical record clearly establishes that when the fourteenth amendment was ratified in 1868 that its ratification did not incorporate the first amendment against the states.").

<sup>193</sup> *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985) ("As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience."). The Court also strongly stated, "[o]ur unanimous affirmance of the Court of Appeals' judgment . . . makes it unnecessary to comment at length on the District Court's *remarkable* conclusion . . ." *Id.* (emphasis added).

<sup>194</sup> *Id.* at 49.

<sup>195</sup> *See supra* notes 170-177 and accompanying text.

Establishment Clause? Despite these unanswered questions, the Court has firmly stated that the Establishment Clause, regardless of its history, is part of an individual right of religious freedom, and thereby acts as a limitation on the states.<sup>196</sup>

#### IV. DOES INCORPORATION OF THE ESTABLISHMENT CLAUSE SHED LIGHT ON INCORPORATION OF THE SECOND AMENDMENT?

Acknowledging that federalism concerns are intricately connected with ratification of both the Establishment Clause<sup>197</sup> and the Second Amendment,<sup>198</sup> and that the former was later incorporated against the states,<sup>199</sup> does this indicate anything about the future of the Second Amendment as a limitation on state action? Despite the current debate over the nature and scope of the right to bear arms, the Framers at least partially intended that the Second Amendment serve as a means to protect the states from federal tyranny.<sup>200</sup> Likewise, the Establishment Clause was originally expected to limit only federal action in an effort to protect state control over religion.<sup>201</sup> This Note argues that if the Court was willing to overlook the federalist underpinnings of the Establishment Clause and incorporate the provision,<sup>202</sup> similarly, the Second Amendment's chief federalist foundations may not bear weight today. Indeed, there may be comparable reasons to incorporate the Second Amendment. Thus, although the Supreme Court's decision that the Second Amendment confers an individual right without limitation to militia service does not inevitably foretell incorporation, its incorporation may be likely.<sup>203</sup>

##### A. *Incorporation of the Second Amendment: The Possibility of Entirely Avoiding the Incorporation Standard*

Typically, before incorporating a Bill of Rights provision, the Supreme Court will consider whether the provision protects a right that is "implicit in the concept of ordered liberty" and is "so rooted in the

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<sup>196</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

<sup>197</sup> *See supra* Part III.A.

<sup>198</sup> *See supra* Part II.A.

<sup>199</sup> *See supra* Part III.B.

<sup>200</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008) ("[T]he threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right . . . was codified in a written Constitution."); *see also supra* Part II.A (detailing the Second Amendment's ratification).

<sup>201</sup> *See supra* Part III.A.

<sup>202</sup> *See supra* Part III.B.

<sup>203</sup> *But see* Wong-Ervin, *supra* note 2, at 180 (arguing that if the Supreme Court holds that the Second Amendment confers a collective militia based right, "then discussion of whether the right should be incorporated becomes nonsensical"). Wong-Ervin, however, neglects to account for incorporation of the Establishment Clause and the Court's failure to justify incorporation of a right arguably linked to federalist concerns.

traditions and conscious of our people as to be ranked as fundamental” under the *Palko* incorporation test.<sup>204</sup> In light of this incorporation standard, many scholars argue that the Supreme Court should not have incorporated the Establishment Clause because of its original federalist purpose.<sup>205</sup> Arguably, “[b]ecause the Establishment Clause is animated by the principle of federalism, its incorporation against the states under the *Palko* theory of selective incorporation is logically impossible.”<sup>206</sup> Accordingly, if the right were drafted to protect the states from the federal government, it would make little sense to even consider the right fit for incorporation or deem it “fundamental” to the individual. Nonetheless, the Supreme Court entirely avoided discussing whether the Establishment Clause should be considered a “fundamental” right or “implicit in the concept of ordered liberty.”<sup>207</sup> Instead, the Court gave the impression that merely because the Free Exercise Clause had previously been incorporated, the Establishment Clause should be as well.<sup>208</sup>

Thus, this Note suggests that even if it is illogical to apply the incorporation standard to the Second Amendment due to its federalist foundation, like the Establishment Clause, it could be incorporated without application of the *Palko* test. Perhaps, however, the Establishment Clause can be distinguished from the Second Amendment,

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<sup>204</sup> *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937); see also *supra* note 8 (discussing incorporation). For an example of the Court’s application of this test, see, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding the Sixth Amendment right to a jury trial in serious criminal cases is a fundamental right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding the Sixth Amendment’s guarantee of counsel is a fundamental right).

Since *Palko* the Court has chiefly relied on the *Duncan* incorporation formulation, which determines whether the right is “fundamental to the American scheme of justice.” 391 U.S. at 149. This similar test, however, was adopted after *Everson* and therefore not applied therein. The Supreme Court could also rely on the *Duncan* standard if it were to assess incorporation of the Second Amendment. See, e.g., Lieber, *supra* note 2, at 1124 (“Under the factors enumerated in *Duncan*, the Second Amendment is clearly not ripe for incorporation, and it is a particularly unlikely candidate for incorporation in the future.”).

<sup>205</sup> See Amar, *The Bill of Rights as a Constitution*, *supra* note 12, at 1157-58 (“[T]he nature of the state’s establishment clause right against federal dis-establishment makes it quite awkward to ‘incorporate’ the clause against the states via the Fourteenth Amendment. . . . [T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right explicitly confirmed by the establishment clause itself!”); see also *Rethinking the Incorporation*, *supra* note 114, at 1709 (“Given the federalist nature of the Establishment Clause, such translation is impossible. . . . [T]he Establishment Clause prevented the federal government from interfering with state authority over religion. However, incorporation achieves the opposite result—the elimination of such authority.”).

Constitutional scholar Amar also argues that the First Amendment’s religious clauses serve a dual role and the Free Exercise Clause alone protects an individual right. Thus, “[t]he Fourteenth Amendment might best be read as incorporating free exercise, but not establishment, principles against state governments. Like the Speech, Press, Assembly and Petition Clauses, the Free Exercise Clause was pragmatically about citizens’ rights, not states’ rights: it thus invites incorporation.” Amar, *Some Notes on the Establishment Clause*, *supra* note 166, at 4.

<sup>206</sup> *Rethinking the Incorporation*, *supra* note 114, at 1708.

<sup>207</sup> *Palko*, 302 U.S. at 324-25.

<sup>208</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). Since it had previously interpreted the First Amendment broadly and found it protected an individual’s “religious freedom,” the Court argued “[t]here is every reason to give the same application and broad interpretation to the ‘establishment of religion’ clause.” *Id.*

and therefore the Court would not repeat its disregard of the incorporation standard. If the Second Amendment's fundamental purpose concerned solely the individual without regard to a state's interest in protection from the federal government, the analogy to the Establishment Clause is unsuitable and the incorporation analysis appears logically applicable. As discussed, however, the Second Amendment has a similar history to the Establishment Clause,<sup>209</sup> and the *Everson* Court relied heavily on the Free Exercise Clause's incorporation as lending credence to incorporation of the Establishment Clause.<sup>210</sup> Does the Second Amendment also include this possibility of bootstrapping an individual purpose with a federalist one? If so, this Note argues that this aspect of the Court's reasoning in *Everson* may be illustrative of the Second Amendment's future.

Indeed, while the Second Amendment is generally not understood as extending two distinct rights,<sup>211</sup> some recent interpretations by individual rights proponents illustrate that there may be dual purposes to the Amendment.<sup>212</sup> Essentially, the argument follows that because the Framers intended that the Second Amendment protect both the states and the people from federal encroachment and other outside threats, the most effective way to do so was by conferring an individual the right to bear arms.<sup>213</sup> For instance, in *Parker v. District of Columbia*, after a thorough analysis of the text and history of the Second Amendment, the Circuit Court concluded that the individual right to bear arms adopted by the Framers was "premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad)."<sup>214</sup> The Court acknowledged that federalist concerns related to the militia were present during ratification, but held the "individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called

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<sup>209</sup> See *supra* Parts II.A, III.A.

<sup>210</sup> See *supra* note 177 and accompanying text.

<sup>211</sup> See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1075 (2002) ("[As] evident from the structure of the Second Amendment, the first clause explains the purpose of the more substantive clause that follows, or . . . it explains the reason necessitating or warranting the enactment of the substantive provision.").

<sup>212</sup> See Amar, *The Bill of Rights as a Constitution*, *supra* note 12, at 1162 ("[T]he text of the Second Amendment is broad enough to protect rights of discrete individuals . . . but the Amendment's core concerns are populism and federalism."). Amar argues, however, that despite federalism concern inherent to both, the Second Amendment is distinguishable from the Establishment Clause because certain aspects of the Second Amendment shift the focus away from the federalism concerns present at ratification. See *id.* at 1165-68.

<sup>213</sup> See Christopher J. Schmidt, *An International Human Right to Keep and Bear Arms*, 15 WM. & MARY BILL RTS. J. 983, 989 (2007). Schmidt argues that the Second Amendment was enacted to serve two roles, which include "the right of the people to resist government tyranny" and "the means for the people to ensure the right to individual self-defense." *Id.*

<sup>214</sup> 478 F.3d 370, 395 (2007).

forth for militia duty.”<sup>215</sup> Accordingly, the Second Amendment might be read to furnish an individual the means to keep arms as well as the states’ ability to preserve a militia for self-protection.

Similarly, Justice Scalia presented a “dual” purpose argument in *District of Columbia v. Heller*. In his discussion of the relationship between the prefatory<sup>216</sup> and operative clauses of the Second Amendment,<sup>217</sup> Justice Scalia noted that it is “entirely sensible that the . . . prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia,” but argues that most Americans cherished the right because of its importance for “self-defense and hunting.”<sup>218</sup> Accordingly, Justice Scalia argued that the Second Amendment was codified for one reason but *valued* for another. Although this Second Amendment dual formulation does not map exactly onto the Free Exercise and Establishment Clause analysis noted above,<sup>219</sup> the same argument is apposite. Because it is sensible to incorporate the Amendment for one of its purposes, a Court might again ignore the federalist purpose in its incorporation analysis.

Therefore, it could be broadly argued that the Second Amendment, like the Establishment Clause, serves a dual function and was enacted to protect both the state and the individual. Thus, perhaps the Supreme Court will again overlook the incorporation test and extend the Second Amendment’s limitations to state action regardless of the Amendment’s federalist underpinnings. Although the Court has not incorporated the “individual” clause of the Second Amendment as it had done with the Free Exercise Clause at the time of the *Everson*, the same reasoning may still apply. On the other hand, the *Everson* Court also believed it was important that “[t]he meaning and scope of the First Amendment . . . in light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth.”<sup>220</sup> Arguably, this same case history does not support the Second Amendment and may provide a means to distinguish incorporation of the Establishment Clause.<sup>221</sup>

Along those same lines, the Second Amendment (or more correctly, its “individual” clause) may be distinguished from the Establishment Clause on other grounds. The Establishment Clause is

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<sup>215</sup> *Id. But see* United States v. Emerson, 270 F.3d 203, 260 (2001) (concluding that the Second Amendment only confers an individual right and does not confer any rights to the states relating to the militia).

<sup>216</sup> “A well regulated Militia, being necessary to the security of a free State . . .” U.S. CONST. amend. II.

<sup>217</sup> “[T]he right of the people to keep and bear arms, shall not be infringed.” *Id.*

<sup>218</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008).

<sup>219</sup> *See supra* notes 208-210 and accompanying text.

<sup>220</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 14-15 (1947).

<sup>221</sup> *See supra* Part II.B.

included within the First Amendment, arguably one of the most venerated protections. Perhaps the exalted nature of the First Amendment propelled the Establishment Clause toward incorporation. Because the Second Amendment does not hold the same weight and importance as the protections afforded and values underlying the First Amendment, incorporation may not be as likely.<sup>222</sup> The most significant fact to be gleaned from incorporation of the Establishment Clause, however, is the proposition that even if a Bill of Rights provision appears to have a fundamental federalist purpose, if there is a means to bootstrap the federalist component with an individualistic provision, incorporation is possible. Accordingly, this Note suggests that because the Supreme Court has read the Second Amendment to protect an individual right,<sup>223</sup> incorporation may not be unlikely, regardless of the Amendment's federalist roots.

*B. Religious Establishments, Militias, and the Framers of the Fourteenth Amendment*

Many scholars and several members of the Court have argued that incorporation of a Bill of Rights Amendment should focus on the intent of the Fourteenth Amendment's Framers rather than on those who created the Bill of Rights.<sup>224</sup> Thus, the Court's inquiry should focus on whether the right in question was one the Fourteenth Amendment's Framers considered "fundamental" or "implicit in the concept of ordered liberty."<sup>225</sup> Concededly, this approach logically applies to portions of the Bill of Rights that protect purely individual rights, because doing so does not change the true nature of the right. For instance, the Fifth<sup>226</sup> and Sixth

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<sup>222</sup> In light of Justice Scalia's strong language in *District of Columbia v. Heller*, this argument stands on more dubious grounds. See 128 S. Ct. 2783, 2797-99 (2008). Justice Scalia notes, "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." *Id.* at 2797. Justice Scalia traced the history of the right to the English Bill of Rights, which Protestants demanded as protection from disarmament by the crown. *Id.* at 2798.

<sup>223</sup> See *supra* note 7 and accompanying text.

<sup>224</sup> See, e.g., Yassky, *supra* note 2, at 629 (arguing "that the Fourteenth Amendment should be read to abrogate the constitutional commitment to preservation of the states' militia"). As discussed above, Justice Brennan argued in his concurring opinion in *Schempp* that the focus regarding incorporation of the Establishment Clause should be on circumstances present during ratification of the Fourteenth Amendment. See *supra* notes 183-185 and accompanying text. Aside from this mention by Brennan, which was made in a case that did not utilize the incorporation standard, the Court has failed to specify which time period is of crucial import in the incorporation analysis. See Wong-Ervin, *supra* note 2, at 201.

<sup>225</sup> *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937).

<sup>226</sup> The Fifth Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . .

Amendments<sup>227</sup> were originally intended to protect the individual from oppressive federal conduct and only became a limitation on state action through the Fourteenth Amendment.<sup>228</sup> Therefore, incorporation of these individual rights merely expanded their ensured protections to state action. This Note contends, however, that neither the structure of the rights conferred by the Establishment Clause, nor the Second Amendment, fits appropriately into the Fourteenth Amendment's language. This incongruity is due to their federalist roots and their function as protectorates of the states from federal encroachment. In actuality, holding that the Establishment Clause and the Second Amendment limit state action does not merely change the focus or strength of the amendments, but rather alters their true nature and structure.<sup>229</sup> Hence, each provision morphs from one that prevents the federal government from trampling state rights to one that precludes the states from carrying out the powers inherently granted to them under the Amendment.<sup>230</sup>

Despite the irrationality of extending the same reasoning for incorporation of the individualistic provisions like the Fifth and Sixth Amendments to incorporation of the Establishment Clause, the Supreme Court did just so in *Everson v. Board of Education*.<sup>231</sup> Perhaps recognizing the inherent differences between the Establishment Clause and other Bill of Rights provisions, Justice Brennan attempted to justify applying the Establishment Clause against state action in *School District of Abington Township v. Schempp*.<sup>232</sup> Justice Brennan argued that regardless of the circumstances at ratification of the Second Amendment,

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U.S. CONST. amend. V.

<sup>227</sup> The Sixth Amendment reads:

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

U.S. CONST. amend. VI.

<sup>228</sup> For instance, the Fifth Amendment's double jeopardy clause was incorporated in *Benton v. Maryland*, 395 U.S. 784 (1969), and the Sixth Amendment's trial by impartial jury clause was incorporated in *Duncan v. Louisiana*, 391 U.S. 145 (1968). The indictment of a grand jury provision of the Fifth Amendment is the only provision of that Amendment that has *not* been incorporated. *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>229</sup> See Kruse, *supra* note 114, at 126 (“[The Establishment Clause] cases suggest an answer to the issue whether a power expressly reserved to the states can become atrophied by a later amendment.”); *Rethinking the Incorporation*, *supra* note 114, at 1708 (“The function of the incorporation doctrine is to locate those fundamental liberties found in the Bill of Rights and extend their application from the federal government to the states. But incorporation theory does not seek to *change* the nature of the right at issue.”).

<sup>230</sup> For example, because the Establishment Clause originally protected a state's right to control religion, see *supra* Part III.A, incorporation strips the state of the ability to do so. See, e.g., *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

<sup>231</sup> 330 U.S. 1, 15 (1947).

<sup>232</sup> 374 U.S. 203 (1963).

state religious establishments no longer existed at the time of the Fourteenth Amendment's ratification.<sup>233</sup> Justice Brennan found it significant that "the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments."<sup>234</sup> In effect, Justice Brennan argued that regardless of the nature of the right conferred by the Establishment Clause at ratification, the inquiry should focus on whether the nature of the right had changed by the time of the Fourteenth Amendment's ratification and whether the right continued to serve the same purpose.

Justice Brennan's reasoning in *Schempp* may prove particularly illustrative for incorporation of the Second Amendment because the Framers of the Fourteenth Amendment may not have supported state organized militias,<sup>235</sup> and today such organizations have "faded into insignificance."<sup>236</sup> When the Framers ratified the Fourteenth Amendment, the prevailing view was no longer that the federal government was the only governmental entity capable of tyranny.<sup>237</sup> Second Amendment scholar David Yassky states that "[t]o the men who framed and ratified the Fourteenth Amendment, it was manifestly the states, not the federal government, that had perpetrated the most horrible deprivations of liberty in the nation's history."<sup>238</sup> Yassky is, of course, referring to the Civil War and the nation's violent divide. This uprising was fueled in great part by the rebellious states' ability to raise an army against the government.<sup>239</sup> For the Second Amendment Framers, however, the states were to prevent and protect against "federal overreaching."<sup>240</sup> It was simply assumed that the federal government would be the "wrongful aggressor" and the states would serve as the "defenders of liberty."<sup>241</sup> Thus, it was with this dissimilar understanding and distrust of state power that the Framers passed the Fourteenth Amendment to restrict state rights and thereby alter the governmental structure. The states were no longer trusted with unfettered control of the populace for purposes of armed resistance.<sup>242</sup>

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<sup>233</sup> *Id.* at 254-55.

<sup>234</sup> *Id.* at 255.

<sup>235</sup> See Yassky, *supra* note 2, at 647.

<sup>236</sup> *Parker v. District of Columbia*, 478 F.3d 370, 386 (D.C. Cir. 2007), *aff'd*, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (noting the District of Columbia's argument that the Framers' idea of an organized militia no longer exists).

<sup>237</sup> Yassky, *supra* note 2, at 647.

<sup>238</sup> *Id.*

<sup>239</sup> See *id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> See Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 910 (2001) ("Although the Fourteenth Amendment's text did not explicitly rewrite the Founders' elaborate rules about militias and armies, the simple fact of the amendment itself invites a new understanding in which local militias are no longer the unambiguous heroes, and the Union's army is no longer the presumed villain, of American's epic constitutional narrative.").

Therefore, this Note suggests that perhaps the focus and prominent interpretation of the Second Amendment had changed before ratification of the Fourteenth Amendment. Conceivably, like the Establishment Clause, regardless of its original purpose, the Second Amendment may have morphed from a right intended to protect a state's ability to prevent federal tyranny to one that now concerned solely an *individual's* right to defend against all potential government overreaching.

The idea that the Second Amendment has changed in nature since the time of ratification is further bolstered because, like establishments of religion, state militias largely ceased to exist after the nineteenth century.<sup>243</sup> During the Second Amendment's ratification, "[a] group of men did not constitute a 'militia' until they were organized by the state to serve the common defense."<sup>244</sup> These state sponsored organizations, however, are no longer operational.<sup>245</sup> Today, the closest substitute for a state militia is the National Guard,<sup>246</sup> but this institution is "fully equipped" by the federal government and serves national purposes.<sup>247</sup> Indeed, because the National Guard is a federally controlled association, it arguably does not serve individual state interests.<sup>248</sup> Thus, control of state militias has seemingly passed from state to national authority, and as a result, the significant change to this tradition perhaps undermined the original purpose of the Second Amendment.

This Note contends that if the Second Amendment was ratified as a means to ensure the states were afforded some degree of protection from the federal government<sup>249</sup> and the states have ceded the means to exercise that right,<sup>250</sup> that privilege may no longer be necessary. Like the Establishment Clause and the end of state religious establishments, it could be argued that the federalist principles underlying the Second Amendment have eroded, and there is support for the assertion that the

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<sup>243</sup> Yassky, *supra* note 2, at 628. Arguably this occurred with the passing of The Militia Act of 1903, which organized the various state militias into the current National Guard framework. See Act of Jan. 21, 1903, ch. 196, 32 Stat. 775, 775-80 (1903).

For another way to interpret the Militia Clause, see Amar, *The Bill of Rights as a Constitution*, *supra* note 12, at 1165-66. Amar argues that militia "had a very different meaning 200 years ago than in ordinary conversation today." *Id.* Although today many consider the National Guard as a possible state militia, "200 years ago, any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been . . . viewed . . . as little better than a standing army. In 1789 . . . 'the militia' referred to all Citizens capable of bearing arms." *Id.* at 1166. Thus, today the word militia invokes thoughts of an organized select body whereas the Framers' vision of militia was far more unorganized. This same argument was adopted by the *Parker* court. *Parker v. District of Columbia*, 478 F.3d 370, 389 (D.C. Cir. 2007), *aff'd*, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) ("[T]he 'well regulated Militia' was not an elite or select body." (quoting U.S. CONST. amend. II)). This view can be criticized on the ground that it ignores the clarifying phrase, "well regulated," which precedes militia. See Yassky, *supra* note 2, at 627.

<sup>244</sup> Yassky, *supra* note 2, at 627.

<sup>245</sup> *Id.* at 628.

<sup>246</sup> Amar, *The Bill of Rights as a Constitution*, *supra* note 12, at 1166.

<sup>247</sup> *Parker*, 478 F.3d at 379.

<sup>248</sup> See Wong-Ervin, *supra* note 2, at 185.

<sup>249</sup> See *supra* Part II.A.

<sup>250</sup> See *supra* notes 243-248 and accompanying text.

nature of the right was altered when the Fourteenth Amendment was ratified. Therefore, this Note suggests that the *Schempp* reasoning used to justify incorporation of the Establishment Clause could feasibly extend to the Second Amendment.

If the Supreme Court decides to incorporate the Second Amendment, the resulting effect might be great. State and federal courts would be constitutionally required to strike down state and local gun control laws that infringe upon the right to bear arms. Of course, if the Second Amendment is incorporated against the states, judicial review of state gun control laws will turn on the appropriate level of judicial scrutiny.<sup>251</sup> In *District of Columbia v. Heller*, however, the Supreme Court failed to establish a level of scrutiny for use in determining the constitutionality of a federal firearm regulation.<sup>252</sup> Justice Scalia merely held that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights,” the handgun ban and prohibition against operable firearms in the home are unconstitutional.<sup>253</sup> Thus, it is unclear how federal gun control laws should be examined in the future, and therefore it is also difficult to predict the appropriate standard of review for state laws if the Supreme Court incorporates the Second Amendment.<sup>254</sup>

In any event, after incorporation, any state or city attempt to curb gun violence and regulate firearms may be tested under federal law.<sup>255</sup> An example of a regulation at the mercy of judicial review is Chicago’s gun control law, which bans possession of handguns acquired after 1983 and requires registration every two years for guns obtained prior to 1983.<sup>256</sup> Another illustration is New York City’s regulation that allows handgun

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<sup>251</sup> See Janice Baker, Comment, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms in the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35, 54-59 (2002).

<sup>252</sup> See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817-18, 2821 (2008). Justice Scalia defends his failure to set forth a test and states, “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . .” *Id.* at 2821.

<sup>253</sup> *Id.* at 2817-18.

<sup>254</sup> According to the United States government’s current position, the Second Amendment does not confer an absolute right and is “subject to reasonable restrictions designed to prevent . . . criminal misuse.” Brief for the United States in Opposition to Petition for Certiorari at 19 n.3, *United States v. Emerson*, 536 U.S. 907 (2002) (No. 01-8780), available at <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf>. Consequently, if the Supreme Court adopts this standard, state gun control laws would likely be subject to the same criterion. Therefore, incorporation would not result in a total ban on state gun control laws. Likewise, even if state gun control laws were subject to the strict scrutiny test applied to fundamental rights, see Baker, *supra* note 251, at 59, many state laws could survive. Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearm Regulation, and the Lessons of History*, 17 STAN. L. & POL’Y REV. 571, 596 (2006). Accordingly, Saul believes “the academic debate about the meaning of the Second Amendment may turn out to be moot.” *Id.*

<sup>255</sup> For one analysis of the effects of incorporation on gun control regulations, see Baker, *supra* note 251, at 54-60 (describing “The Effect of Incorporation and Judicial Standards of Review on State and Local Gun Control Legislation”).

<sup>256</sup> Linda Greenhouse, *Justices to Decide on Right to Keep Handgun*, N.Y. TIMES, Nov. 21, 2007, at A1.

possession as long as the owner obtains a permit from a Police Department.<sup>257</sup> If the Supreme Court determines that the Second Amendment should be incorporated, these regulations will be open to constitutional challenge regardless of the inherent wisdom behind their passage.

## V. CONCLUSION

In reality, the benefit of comparing the Second Amendment with the Establishment Clause depends on what path the Court eventually decides to take. A review of the history behind the Establishment Clause and Second Amendment's ratification, however, highlights that the provisions reflect the very same concerns and questions regarding the proper role of and relationship between the federal and state governments.

Ultimately, both the Establishment Clause and the Second Amendment emerged as part of a larger compromise between those who sought to leave power with the individual states and those who believed power should be lodged in a centralized government.<sup>258</sup> The Second Amendment provided a means for the states to arm its people and protect themselves against the possibility of federal tyranny.<sup>259</sup> The Establishment Clause initially prevented the federal government from both imposing its religious will and acting to destroy state religious control.<sup>260</sup> The Court was willing to overlook the federalist underpinnings during incorporation of the Establishment Clause, however, and surprisingly held that the provision is also a limitation on state action over the individual.<sup>261</sup> This Note should shed at least some light on the reasons for or against incorporation of these Bill of Rights provisions.

Thus far, the Court has not been disposed to incorporate the Second Amendment against the states, conceivably because it has impliedly recognized the Amendment's underlying purpose.<sup>262</sup> Whether or not the Second Amendment's federalist history will be set aside remains a question to be determined, but perhaps in the meantime the Establishment Clause can tell us a little something about that possibility.

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<sup>257</sup> *Id.*

<sup>258</sup> *See supra* Parts II.A & III.A.

<sup>259</sup> *See supra* Part II.A.

<sup>260</sup> *See supra* Part III.B.

<sup>261</sup> *See supra* Part III.B.

<sup>262</sup> *See supra* Part II.B.

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