

# TOP GUN: THE SECOND AMENDMENT, SELF-DEFENSE, AND PRIVATE PROPERTY EXCLUSION

## INTRODUCTION

Few issues are as hotly contested in America as the Second Amendment to the Constitution.<sup>1</sup> Recently, the Supreme Court examined this issue in-depth due to a complete ban on handgun possession by private individuals within Washington D.C.<sup>2</sup> The regulation of firearms by different localities is nothing new in the United States,<sup>3</sup> and although there have been Supreme Court cases dealing with the Second Amendment, the Supreme Court has remained mostly silent on the issue of textual interpretation and legal meaning, touching on the Second Amendment as briefly as possible before moving on to its general analysis or holding in each case.<sup>4</sup> The Court never performed a detailed analysis until the recent decision and holding in *District of Columbia v. Heller*.<sup>5</sup> The *Heller* Court's in-depth analysis of the history of the Second Amendment and the individual right it protects is almost certain to have a ripple effect in future legislation and court cases, despite the dicta of the Court claiming that this decision will not upset years of judicial precedent.<sup>6</sup> That ripple effect was felt by the City of Chicago when the Court struck down its ban on firearms that was similar to the one in *Heller*.<sup>7</sup>

With the right of citizens to keep arms within the home upheld as a constitutional right for the first time by the Supreme Court, it begs inquiry and discussion regarding how state legislatures, Congress, and the courts will begin to examine the second phrase of that well-known Second Amendment clause, “to keep *and bear* arms.”<sup>8</sup> Several states have gone beyond the protection of an individual's right to keep arms in the home and have begun passing laws preventing various private

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

<sup>2</sup> *District of Columbia v. Heller*, 554 U.S. 570, 573–75 (2008).

<sup>3</sup> *See id.* at 626–27 (noting that a majority of courts have upheld state-imposed firearm regulations); *State Laws*, NRA-ILA INST. FOR LEGIS. ACTION, <http://www.nra-ila.org/gun-laws/state-laws.aspx> (last visited Mar. 31, 2014).

<sup>4</sup> *See, e.g.*, *United States v. Miller*, 307 U.S. 174, 178, 182 (1939); *Presser v. Illinois*, 116 U.S. 252, 257–58 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

<sup>5</sup> *Heller*, 554 U.S. at 576–78, 635 (holding that the Second Amendment protects an individual's right to bear arms for the purpose of self-defense).

<sup>6</sup> *Id.* at 626–27.

<sup>7</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026, 3050 (2010) (holding that the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment).

<sup>8</sup> U.S. CONST. amend. II (emphasis added).

property owners from forbidding the storage of firearms within parked cars on their property.<sup>9</sup> This Note will look at the possible ramifications of these laws in three parts.

Part I of this Note examines the holding of the Court in *Heller* to determine precisely what right is protected, explicitly and implicitly, by the Second Amendment. Within the examination of *Heller*, it also surveys the Supreme Court decisions that led up to *Heller*, including *United States v. Cruickshank*,<sup>10</sup> *Presser v. Illinois*,<sup>11</sup> and *United States v. Miller*.<sup>12</sup> The extension of *Heller* to the states in *McDonald v. City of Chicago* is also briefly examined for any nuggets that can help predict the future of legislation and judicial interpretation in this arena.

Part II briefly examines various state laws regarding the “bearing” of arms on public property in the form of concealed and open carry of handguns. The heart of this section reviews the laws of nineteen states that specifically purport to protect the ability of individuals to possess firearms through the passing of various *parking lot laws*, which allow individuals to store firearms in parked cars.

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<sup>9</sup> ALASKA STAT. § 18.65.800(a) (LEXIS through 2013 Reg. Sess.); ARIZ. REV. STAT. ANN. § 12-781(A) (Westlaw through 2013 Reg. Sess. & Spec. Sess.); FLA. STAT. ANN. § 790.251(4)(a) (Westlaw through 2013 1st Reg. Sess.), *invalidated by Fla. Retail Fed’n, Inc. v. Attorney Gen. of Fla. (Fla. Retail Fed’n ID)*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008) (holding that the part of the statute applying to customers’ right to bear arms on private property was unconstitutional, but finding that the state could statutorily protect employees’ right to keep guns in their cars); GA. CODE ANN. § 16-11-135(a) (LEXIS through 2013 Reg. Sess.) (protecting employees who keep firearms in their vehicle); 430 ILL. COMP. STAT. 66/65(b) (Westlaw through P.A. 98-627, 2014 Reg. Sess.); IND. CODE ANN. § 34-28-7-2(a) (Westlaw through 2013 Reg. Sess.); KAN. STAT. ANN. § 75-7c10(b)(1) (Westlaw through 2013 Reg. & Spec. Sess.) (protecting employees who keep firearms in their vehicle); KY. REV. STAT. ANN. § 237.106(1) (Westlaw through 2013 Reg. Sess. & 2013 Extraordinary Sess.); LA. REV. STAT. ANN. § 32:292.1(C) (LEXIS through 2013 Reg. Sess.); ME. REV. STAT. tit. 26, § 600(1) (Westlaw through 2013 1st Reg. Sess. & 1st Spec. Sess.) (protecting employees who keep firearms in their vehicle); MINN. STAT. ANN. § 624.714, Subd. 17(c) (Westlaw through 2013 1st Spec. Sess.); MISS. CODE ANN. § 45-9-55(1) (LEXIS through 2013 Reg. Sess. & 2d Extraordinary Sess.) (protecting employees who keep firearms in their vehicle); N.D. CENT. CODE § 62.1-02-13(1)(a) (LEXIS through 2013 Reg. Legis. Sess.); OKLA. STAT. tit. 21, §§ 1289.7a, 1290.22(B) (Westlaw through 2013 1st Extraordinary Sess.); TEX. LAB. CODE ANN. §§ 52.061, 52.063(a) (Westlaw through 2013 3d Called Sess.) (protecting employees who keep firearms in their vehicle); UTAH CODE ANN. § 34-45-103(1) (LEXIS through 2013 2d Spec. Sess.); *see also* N.C. GEN. STAT. § 120-32.1(c1) (LEXIS through 2013 Reg. Sess.) (granting parking facility privileges for state legislators); VA. CODE ANN. § 15.2-915(A) (LEXIS through 2013 Reg. Sess. & 2013 Spec. Sess.) (prohibiting localities from restricting employees from storing firearms in vehicles); WIS. STAT. ANN. § 175.60(16)(b)(1) (Westlaw through 2013 Wis. Act 116) (granting licensees the privilege of keeping weapons in cars parked at government buildings).

<sup>10</sup> 92 U.S. 542 (1875).

<sup>11</sup> 116 U.S. 252 (1886).

<sup>12</sup> 307 U.S. 174 (1939).

Lastly, Part III looks to the future of such legislation and discusses the constitutionality of preventing private property owners from excluding the possession of firearms on their property. At the time of this writing there have been few legal challenges to these laws, and none have gone to the Supreme Court. This Article, therefore, will look at how the Supreme Court has weighed other constitutionally protected rights against the rights of property owners to exclude, specifically when dealing with freedom of speech and expression. Because most United States citizens currently live in urban areas<sup>13</sup> and must venture out of their homes in order to gain the basic necessities for living,<sup>14</sup> several questions must be asked. If the bearing of arms, not just the keeping, is a fundamental right guaranteed by the Constitution, can any one individual, corporation, or other entity effectively prevent a the public from exercising this right outside of their homes when the government cannot? It is unlikely that a right the government is unable to infringe upon can summarily be denied to individuals who merely set foot upon specific private properties. Further, though case law strongly supports the ability of states to expand constitutional rights, is it proper under the Fourteenth Amendment for the federal government to enjoin the states from enforcing private rules regarding the exclusion of firearms?

#### I. THE SUPREME COURT: RECOGNITION OF AN INDIVIDUAL RIGHT

##### A. D.C. v. Heller: *Tracing the Path of the Second Amendment Through History and the Courts*

The case that brought the Second Amendment into the limelight of the Supreme Court was *District of Columbia v. Heller*.<sup>15</sup> Dick Heller sued the District of Columbia to prevent the city from enforcing an administrative ban on the registration of handguns, the prohibition on carrying a firearm in the home, and the requirement that any firearm in the home must have a trigger lock to render it non-functional.<sup>16</sup> At that time in Washington, D.C., it was a crime to possess an unregistered handgun, and the registration of handguns was prohibited.<sup>17</sup> The district court dismissed his claim, but the U.S. Court of Appeals for the District of Columbia reversed, holding that the total handgun ban was

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<sup>13</sup> *2010 Census Urban Area Facts*, U.S. CENSUS BUREAU, <http://www.census.gov/geo/reference/ua/uafacts.html> (last updated Mar. 31, 2014) (stating that 80.7% of the U.S. population lives in urban areas).

<sup>14</sup> See *Demographics*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/oecaagct/ag101/demographics.html> (last updated Apr. 14, 2013).

<sup>15</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>16</sup> *Id.* at 575–76.

<sup>17</sup> *Id.* at 574–75.

unconstitutional.<sup>18</sup> That court also held that a prohibition on keeping an operable firearm in the home was acceptable except for instances where an individual would need to carry such a firearm about the home for necessary and imminent self-defense.<sup>19</sup>

The Supreme Court granted certiorari and examined the Second Amendment in extreme detail, starting with the language of the Amendment as it is split into two sections: the prefatory and the operative clauses.<sup>20</sup> This detailed examination of the language was important because the City and the dissenting Justices of the Court believed that the Second Amendment “protects only the right to possess and carry a firearm in connection with militia service,”<sup>21</sup> while Heller (and eventually the majority) maintained 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>22</sup> These are two very different interpretations of the Second Amendment, and as such, the majority needed to justify its holding fully. The prefatory clause does not limit the operative clause, “but rather announces a purpose.”<sup>23</sup> Because a purpose without a command does not make sense logically or grammatically, the Court first examined the operative clause in order to determine what is actually commanded by the Second Amendment.<sup>24</sup>

Through a textual analysis of the words “the people” within the Constitution and other amendments, the Court determined that the “right of the people” refers specifically to individuals, not to a specific subset of the community.<sup>25</sup> Every other time this particular phrase appears, it is in relation to “all members of the political community, not an unspecified subset.”<sup>26</sup> The phrase “the people” is contrasted within the Second Amendment with the term “militia” in the prefatory clause, where “the militia” speaks definitively of a particular subset, able-bodied males within a certain age range.<sup>27</sup> The framers could have used “the militia” to describe who the amendment applied to, but chose instead to apply it to “the people.” Therefore, it does not make sense that the term “the people” would have been understood to mean “the militia” at the

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<sup>18</sup> *Id.* at 576.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 576–77.

<sup>21</sup> *Id.* at 577.

<sup>22</sup> *Id.*

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

<sup>24</sup> *Id.* at 577–78.

<sup>25</sup> *Id.* at 579–80.

<sup>26</sup> *Id.* at 580.

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

time it was applied.<sup>28</sup> The Court then presumed that the Second Amendment was meant to apply to “the people” rather than “the militia” subset, and therefore, was an individual right.<sup>29</sup>

Continuing its dissection of the Amendment, the Court moved its focus onto the phrase “keep and bear arms.”<sup>30</sup> The term “arms” applies to many weapons, not all of which are used or designed for use in the military.<sup>31</sup> At the time of ratification, the term “[k]eep arms” was simply a common way of referring to possessing arms, for militiamen *and everyone else*.<sup>32</sup> To “bear arms” was unambiguously used to refer to the carrying of weapons outside of an organized militia.<sup>33</sup> Over the next several pages of the majority opinion, Justice Scalia discussed and refuted claims that this phrase was a military term of art applying only to soldiers.<sup>34</sup> The Court clearly stated that the operative clause of the Second Amendment, “the right of the people to keep and bear arms shall not be infringed,”<sup>35</sup> is a “guarantee [of] the individual right to possess and carry weapons in case of confrontation.”<sup>36</sup> The Court was quick to qualify that while there is “no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. . . . [T]he right was not unlimited.”<sup>37</sup> A relatively brief examination of the prefatory clause led the Court to conclude that the “well regulated Militia”<sup>38</sup> clause signifies a body already in existence<sup>39</sup> that has proper discipline and training, not a body created by the states or Congress.<sup>40</sup> While this section of the Court’s decision is dicta, it would certainly seem to support the contention that the bearing of arms, not just the keeping, is an individual right.

The Court next examined the purpose for the individual right to bear arms by analyzing how the prefatory clause fit with the operative clause, having determined that the Second Amendment was not intended to create a military body as the prefatory clause could

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<sup>28</sup> *Id.* at 580–81.

<sup>29</sup> *Id.* at 581.

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

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

<sup>32</sup> *Id.* at 582–83.

<sup>33</sup> *Id.* at 584.

<sup>34</sup> *Id.* at 585–92.

<sup>35</sup> U.S. CONST. amend. II.

<sup>36</sup> *Heller*, 554 U.S. at 592.

<sup>37</sup> *Id.* at 595.

<sup>38</sup> U.S. CONST. amend. II.

<sup>39</sup> *See Heller*, 554 U.S. at 595–96.

<sup>40</sup> *Id.* at 596–97.

insinuate.<sup>41</sup> To determine this purpose, the Court looked to the history and political climate that shaped the founders' writings.<sup>42</sup> The founders had a historical fear of a standing army, or "select militia" made up solely of men hand-picked by a tyrant.<sup>43</sup> Such a ruler would impose his will, not by eliminating the "militia" (the subset of society consisting of all able-bodied males), but by denying the general populace the right to bear arms, thereby allowing his special militia, or standing army, to carry out his will.<sup>44</sup> Therefore, the prefatory clause merely states "the purpose for which the [Second Amendment] right was *codified*: to prevent elimination of the militia."<sup>45</sup> While this preventive measure was the reason for the right's codification, the "*central component* of the right itself" is self-defense.<sup>46</sup> Many states, such as Pennsylvania and Vermont, had adopted provisions stating unequivocally that the people had a right to bear arms "*for the defence of themselves*."<sup>47</sup> Along with such provisions, post-ratification commentary on the Second Amendment further explicates that the purpose of bearing arms is found in the right to self-defense. St. George Tucker, in a commentary on the Constitution, wrote:

This may be considered as the true palladium of liberty . . . . The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.<sup>48</sup>

The Court noted, furthermore, that this was not the only commentary to hold that the right to bear arms has a close connection with the right to self-defense.<sup>49</sup> In fact, the Court found only one early nineteenth-century commentator who limited this right to service within a militia.<sup>50</sup> For the next several pages, the Court produced multiple cases and pre- and post-civil war commentaries affirming that the Second Amendment applied to

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<sup>41</sup> See *id.* at 598.

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

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

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

<sup>45</sup> *Id.* at 599 (emphasis added).

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

<sup>47</sup> *Id.* at 601.

<sup>48</sup> *Id.* at 606 (alteration in original) (quoting St. George Tucker, *View of the Constitution of the United States*, in 1 BLACKSTONE'S COMMENTARIES at ed. app. D, 300 (St. George Tucker ed., Rothman Reprints, Inc. 1969) (1803)).

<sup>49</sup> *Id.* at 607–10.

<sup>50</sup> *Id.* at 610.

individuals and that the right to self-defense is intrinsically found within this Amendment.<sup>51</sup>

### 1. Supreme Court Precedents

The Supreme Court next examined the Second Amendment precedent it set over the last two hundred years by looking at *United States v. Cruikshank*, *Presser v. Illinois*, and *United States v. Miller*.<sup>52</sup>

#### (a) *Cruikshank: No Right Guaranteed by the Constitution?*

The first case to come before the Supreme Court on the grounds of a possible violation of Second Amendment rights was brought in 1875.<sup>53</sup> The background facts of the case are not clearly laid out within the case and only appear sporadically to allow the Court to dismiss charges associated with them.<sup>54</sup> The *Heller* decision concisely states that the case involved “members of a white mob . . . depriving blacks of their right to keep and bear arms.”<sup>55</sup> The case rises out of the Colfax Massacre, where a number of free blacks violently clashed with a group of armed white men following a contested election.<sup>56</sup> “Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men,” and many prisoners were marched through the streets and then summarily executed.<sup>57</sup> Following the massacre, ninety-seven men were indicted, and three of the nine who went to trial were convicted of depriving these black men of their rights.<sup>58</sup> The Supreme Court reversed the convictions, holding that the right to bear arms was neither “a right granted by the Constitution” nor “in any manner dependent upon that instrument for its existence.”<sup>59</sup> Rather, the Second Amendment “has no other effect than to restrict the powers of the national government.”<sup>60</sup> The *Heller* Court expounded that *Cruikshank* supports the claim that the Second Amendment was describing an individual right by stating “the people [must] look for their protection against any violation by their fellow-citizens of the rights it recognizes’ to the States’ police power,” and that

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<sup>51</sup> *Id.* at 610–19.

<sup>52</sup> *Id.* at 619–25.

<sup>53</sup> *United States v. Cruikshank*, 92 U.S. 542, 545 (1875).

<sup>54</sup> *Id.* at 544–45, 548, 551, 553–54.

<sup>55</sup> *Heller*, 554 U.S. at 619.

<sup>56</sup> Pratheepan Gulasekaram, “*The People*” of the Second Amendment: *Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1555 (2010).

<sup>57</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030 (2010).

<sup>58</sup> *Id.*

<sup>59</sup> *Cruikshank*, 92 U.S. at 553.

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

such a conclusion would not make sense if the right applied only to a state militia.<sup>61</sup>

(b) *Presser: Prohibiting Private Paramilitary Parades*

Next, the Court looked to the precedent set in the case of *Presser v. Illinois*.<sup>62</sup> The State of Illinois had passed a law prohibiting private militias from “drill[ing] or parad[ing] with arms in any city, or town, of [the] State, without the license of the Governor.”<sup>63</sup> The plaintiff in error was convicted of drilling and parading in public with a “body of men with arms” in the City of Chicago,<sup>64</sup> and he challenged the constitutionality of the law that prohibited this conduct.<sup>65</sup> The primary focus, both of the plaintiff’s case and the Court’s decision, was whether the State of Illinois could, by law, limit the Illinois State Militia to a certain group of individuals and prevent everyone else in the state from being a part of the “militia.”<sup>66</sup> The Court held that the Second Amendment does not prohibit states from restricting the militia in such a way.<sup>67</sup> Because the *Presser* Court was concerned only with a contention regarding the context of the militia, it did not say anything about the Second Amendment’s “meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.”<sup>68</sup>

(c) *Miller: Only Military Weapons Allowed?*

Lastly, the *Heller* Court examined the most recent Supreme Court decision that concerned the Second Amendment, *United States v. Miller*, decided in 1939.<sup>69</sup> In *Miller*, two men were charged with possession of a “shotgun having a barrel less than [eighteen] inches in length” in violation of the National Firearms Act of 1934.<sup>70</sup> In its nine-page opinion, the Court briefly and succinctly stated that the Second Amendment does not “guarantee[] the right to keep and bear such an instrument” because it is “not within judicial notice that this weapon is any part of the

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<sup>61</sup> District of Columbia v. Heller, 554 U.S. 570, 620 (2008) (alteration in original) (quoting *Cruikshank*, 92 U.S. at 553).

<sup>62</sup> 116 U.S. 252 (1886).

<sup>63</sup> *Id.* at 253.

<sup>64</sup> *Id.* at 254.

<sup>65</sup> *Id.* at 256–57.

<sup>66</sup> *Id.* at 262–64.

<sup>67</sup> *Id.* at 265.

<sup>68</sup> District of Columbia v. Heller, 554 U.S. 570, 621 (2008).

<sup>69</sup> 307 U.S. 174, 175 (1939).

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



ordinary military equipment or that its use could contribute to the common defense.”<sup>71</sup>

The Court in *Heller* correctly concludes that this ruling was purely in relation to a certain type of weapon being possessed and not the possession itself.<sup>72</sup> The majority points out that “[h]ad the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen.”<sup>73</sup> The *Heller* Court is then quick to point out that, contrary to asserting that only military weapons are protected (which would be a “startling reading of the opinion, since it would mean that the National Firearms Act’s restrictions on machineguns . . . might be unconstitutional, machineguns being useful in warfare in 1939”),<sup>74</sup> the *Miller* Court’s cursory examination of the Second Amendment supported the idea that the members of a traditional militia were armed with weapons “‘in common use at the time’ for lawful purposes like self-defense.”<sup>75</sup> *Miller* only concluded that the Second Amendment does not protect weapons “not typically possessed by law-abiding citizens for lawful purposes.”<sup>76</sup> However, it is interesting to note that the *Miller* Court did not seem to have a foundation or source for determining precisely what a military weapon was or what types of weapons would be in common use by citizens.<sup>77</sup>

## 2. The *Heller* Court’s Conclusion

Following this exhaustive review of the Second Amendment’s words, meaning, history, and legislative intent, the *Heller* Court proceeded to examine the question the case brought before it, namely, whether an absolute ban on handguns is constitutional.<sup>78</sup> The Court found that the “American people have considered the handgun to be the quintessential self-defense weapon” for many reasons, including ease of storage, ease of use, and the ability to manipulate other instruments (like a phone) while using it.<sup>79</sup> Thus, a complete ban on the possession of a handgun within the home is unconstitutional.<sup>80</sup> Further, the District of Columbia’s

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<sup>71</sup> *Id.* at 178.

<sup>72</sup> *Heller*, 554 U.S. at 622–23.

<sup>73</sup> *Id.* at 622.

<sup>74</sup> *Id.* at 624.

<sup>75</sup> *Id.* at 624 (quoting *Miller*, 307 U.S. at 179).

<sup>76</sup> *Id.* at 625.

<sup>77</sup> See *United States v. Miller*, 307 U.S. 174 (1939).

<sup>78</sup> *Heller*, 554 U.S. at 628.

<sup>79</sup> *Id.* at 629.

<sup>80</sup> *Id.* at 635.

requirement that any firearms in the home must be inoperable is also unconstitutional insofar as it prevents the use of a legally possessed firearm for self-defense.<sup>81</sup> The Court refused to apply an interest-balancing test to determine whether a prohibition on the possession of handguns might be constitutional in certain areas of the country because no other Constitutional right is subjected to such a test.<sup>82</sup>

In doing so, the Court clearly established that the Second Amendment applies to individuals for the primary purpose of self-defense.<sup>83</sup> The government is forbidden by the Second Amendment from removing the right of people to defend themselves with firearms.<sup>84</sup> If a duly elected body, made up of representatives of the people, is unable to quash this individual right, does it logically follow that private entities can do what is forbidden to the government? This would seem to be an incongruous result.

*B. McDonald v. City of Chicago: The Second Amendment Applies to the States*

Following the Court's decision in *Heller*, the petitioners in *McDonald* brought an action challenging Chicago's decades-old ban on handguns, similar to the unconstitutional ban in *Heller*.<sup>85</sup> *McDonald* came before the Supreme Court on appeal from the Seventh Circuit, which had upheld the ban and refused to predict whether the Supreme Court would consider the Second Amendment to be incorporated.<sup>86</sup>

This case is primarily one of incorporation; therefore, it is necessary to examine the portions of the majority opinion that further describe the right protected under the Second Amendment.<sup>87</sup> Incorporation is the determination of whether rights guaranteed by the Federal Constitution are protected against state infringement by the Fourteenth Amendment's Due Process Clause.<sup>88</sup> Through the process of "selective incorporation," the Supreme Court examines particular rights individually to determine whether a "Bill of Rights guarantee is fundamental to [the American] scheme of ordered liberty and system of

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

<sup>82</sup> *Id.* at 634–35.

<sup>83</sup> *Id.* at 635.

<sup>84</sup> *See id.*

<sup>85</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

<sup>86</sup> *Id.* at 3027.

<sup>87</sup> *See id.* at 3028, 3030–31, 3036–48.

<sup>88</sup> *See id.* at 3030–31.

justice.”<sup>89</sup> If the guarantee is found to be fundamental, it is protected under the Due Process Clause.<sup>90</sup>

In making this determination the Court, once again, examined the history of the Second Amendment, and came to the same conclusions as the *Heller* Court, namely that “[s]elf-defense is a basic right” and “that individual self-defense is ‘the *central component*’ of the Second Amendment right.”<sup>91</sup> That this right presents “controversial public safety implications” does not indicate that it is not incorporated by the Fourteenth Amendment.<sup>92</sup> Several other rights, like the exclusionary rule, that “impose restrictions on law enforcement and on the prosecution of crimes” do not find their constitutionality within a narrow framework of public safety implications.<sup>93</sup> Further, the incorporation of this right limits, but does not eliminate, the ability of the states to experiment with “reasonable firearms regulations.”<sup>94</sup> Last, the Court again explicitly held that the right’s incorporation is not subject to an interest-balancing test, but protects the right of an individual to possess a handgun in the home for self-defense.<sup>95</sup>

## II. STATE APPROACHES TO THE SECOND AMENDMENT

### *A. Parking Lot Laws: Private Property Owners Cannot Forbid What the Constitution Protects?*

As of 2013, all states have some provision for permitting citizens to carry concealed firearms legally for self-defense.<sup>96</sup> Five states allow the lawful carrying of a concealed handgun without any permit required.<sup>97</sup> Thirty-five states grant *shall issue* permits to citizens that meet certain criteria such as passing a background check and taking a safety course.<sup>98</sup> *Shall issue* states require that the permit be granted to individuals who

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<sup>89</sup> *Id.* at 3034.

<sup>90</sup> *Id.* at 3034, 3036.

<sup>91</sup> *Id.* at 3036 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

<sup>92</sup> *Id.* at 3045.

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

<sup>94</sup> *Id.* at 3046.

<sup>95</sup> *Id.* at 3050.

<sup>96</sup> *See Illinois: Veto of Gun Provisions Fails*, N.Y. TIMES, July 9, 2013, <http://www.nytimes.com/2013/07/10/us/illinois-veto-of-gun-provisions-fails.html> (stating that “Illinois became the last state to allow public possession of concealed guns”).

<sup>97</sup> NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 21 (2012).

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

meet the enumerated criteria.<sup>99</sup> In response to Illinois' ban on concealed carry being found unconstitutional,<sup>100</sup> Illinois passed a law to become a *shall issue* state.<sup>101</sup> Nine states have a *may issue* system of permit licensing, whereby the licensing authority has broad discretion in issuing permits, even to individuals with clean records.<sup>102</sup> Further, many states allow individuals to openly carry a non-concealed handgun either in conjunction with a concealed weapons permit or with no permit required.<sup>103</sup> Forty-four of the fifty states have a state constitutional right to arms, with thirty-seven states explicitly guaranteeing the right to self-defense, though it is often enumerated separately from the right to arms.<sup>104</sup> The large majority of states with constitutions protecting the bearing of firearms indicate a strong state interest in the preservation of this right.

Several states that have *concealed carry* laws giving people the right to carry a concealed firearm for self-defense<sup>105</sup> do not expand that right into the right to carry onto another's private property if the owner decides to prohibit the carrying of firearms.<sup>106</sup> In some states this prohibition can automatically have the effect of law,<sup>107</sup> whereas in others it ripens into a common trespass if an individual carrying a firearm refuses to leave after being told to leave by the owner or the owner's agent.<sup>108</sup> This is where a difficulty arises. The Second Amendment clearly protects the right of individuals to possess firearms, against government intrusion, within their homes for the purpose of self-defense,<sup>109</sup> but what about when people must leave their homes? While

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<sup>99</sup> *Id.*; see also ALA. CODE § 13A-11-75 (Westlaw through Act 2014-137, 2014 Reg. Sess.) (granting law enforcement great discretion in the issuing of permits because of a "justifiable concern for public safety").

<sup>100</sup> *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

<sup>101</sup> H. 0183, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) (enacted).

<sup>102</sup> JOHNSON ET AL., *supra* note 97, at 21 (stating that Connecticut, a *may issue* state, functions as a *shall issue* state because law enforcement applies guidelines similar to those of *shall issue* states).

<sup>103</sup> See *id.* at 260–61.

<sup>104</sup> *Id.* at 26; see also *id.* at 27–36 (reprinting the state constitutional provisions relating to the right to arms and self-defense).

<sup>105</sup> See *id.* at 260–61. The term *concealed carry* typically refers to the carrying of a concealed firearm for the purposes of self-defense or the defense of others. See *id.* Laws permitting such conduct are referred to in this Note as *concealed carry* laws.

<sup>106</sup> See, e.g., OHIO REV. CODE ANN. § 2923.126(C)(3) (LEXIS through File 47, 130th Gen. Assemb.).

<sup>107</sup> *Id.* (knowingly carrying a firearm onto property with the appropriately placed and sized sign is a criminal trespass).

<sup>108</sup> See, e.g., N.J. STAT. ANN. § 2A:63-1 (Westlaw through L. 2013, Ch. 181).

<sup>109</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

the focus of the *Heller* Court was on a government prohibition of handguns within the home, the Court's far-reaching historical analysis did not neglect to touch on the ever important concept of "bearing" arms, as part of the key phrase "to keep and bear arms."<sup>110</sup> While the Court's decision focused on the "keep" portion of the Amendment, the rationale surrounding the "to bear arms" argument is also enlightening.<sup>111</sup>

The majority opinion devotes four pages to a dissection of the word "bear": discussing what it meant at the time of ratification and what it means now.<sup>112</sup> Looking at the time of the drafting of the Second Amendment, the Court finds that, "as now, to 'bear', meant to 'carry.'"<sup>113</sup> When the words "to bear" were combined with the term "arms," the "meaning [then] refers to carrying for a particular purpose—confrontation."<sup>114</sup> The majority opinion quotes and affirms Justice Ginsberg's definition, where she quotes from Black's Law Dictionary: "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"<sup>115</sup> The majority opinion goes on to elaborate that in neither the historical context, nor the modern one, does the concept of "bearing arms" refer to carrying weapons only within a militia context.<sup>116</sup> "Although the phrase implies that the carrying of the weapon is for the purpose of 'offensive or defensive action,' it in no way connotes participation in a structured military organization."<sup>117</sup> The Supreme Court has held that the Second Amendment's words "to keep" indicate that an individual has a right to self-defense with a firearm, so perhaps this right continues on to the right "[to] bear" a firearm for the purpose of self-defense.<sup>118</sup> While the Supreme Court has not explicitly addressed the right of individuals to carry firearms outside of the home, the Seventh Circuit has recently done just that.<sup>119</sup> In *Moore v. Madigan*, the Seventh Circuit struck down an Illinois state law that, for all intents and purposes, created an effective ban on the carrying of firearms by the

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<sup>110</sup> *Id.* at 582–87; *see also* U.S. CONST. amend. II.

<sup>111</sup> *Heller*, 554 U.S. at 582–88.

<sup>112</sup> *Id.* at 584–87.

<sup>113</sup> *Id.* at 584.

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

<sup>115</sup> *Id.* at 584 (alteration in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

<sup>116</sup> *Id.* at 584–85.

<sup>117</sup> *Id.* at 584.

<sup>118</sup> *Supra* text accompanying notes 110–11.

<sup>119</sup> *Moore v. Madigan*, 702 F.3d 933, 935, 939 (7th Cir. 2012).

majority of citizens in Illinois.<sup>120</sup> The court relied heavily on the *Heller* analysis, stating that, while “‘the need for defense of self, family, and property is *most* acute’ in the home, . . . that doesn’t mean it is not acute outside the home.”<sup>121</sup> The court states that an individual

is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the [thirty-fifth] floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside.<sup>122</sup>

Finally, the court states that “[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.”<sup>123</sup> If this is the case, the stage is set for a likely confrontation between the traditional rights of property owners to exclude from their property and the right of individuals to protect themselves with firearms. Enter the relatively new form of legislation adopted by several states typically known as *parking lot laws*.

#### B. Overview of Parking Lot Laws

At the time of this writing there are nineteen states that currently have a law relating to the possession or storage of firearms in motor vehicles on property belonging to another.<sup>124</sup> These laws differ greatly in their construction and application, ranging from an absolute prohibition on *anyone* creating rules that might limit the ability of people to store firearms in their vehicles,<sup>125</sup> to the most convoluted morass of prohibitions and exceptions applying only to certain people and certain government-possession property.<sup>126</sup> While not every state has described the purpose for such laws, Florida provides a very clear and definitive answer: “to codify the long-standing legislative policy of the state that individual citizens have a constitutional right to keep and bear arms,” and that “these rights are not abrogated by virtue of a citizen becoming a customer, employee, or invitee of a business entity.”<sup>127</sup> Further, “[t]he Legislature . . . [found] that no citizen *can or should* be required to waive or abrogate his or her right.”<sup>128</sup> The Florida legislature clearly passed

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<sup>120</sup> *Id.* at 934, 942.

<sup>121</sup> *Id.* at 935 (quoting *Heller*, 554 U.S. at 628).

<sup>122</sup> *Id.* at 937.

<sup>123</sup> *Id.*

<sup>124</sup> See *supra* note 9 and accompanying text.

<sup>125</sup> ALASKA STAT. § 18.65.800(a) (LEXIS through 2013 Reg. Sess.).

<sup>126</sup> N.C. GEN. STAT. § 120-32.1(c1) (LEXIS through 2013 Reg. Sess.).

<sup>127</sup> FLA. STAT. ANN. § 790.251(3) (Westlaw through 2013 1st Reg. Sess.), *invalidated by Fla. Retail Fed’n II*, 576 F. Supp. 2d 1301, 1302 (N.D. Fla. 2008).

<sup>128</sup> *Id.* (emphasis added).

this law in an effort to protect the rights of individuals in the bearing of arms for the purpose of self-defense, and recognized that allowing a private entity to strip individuals of this right should not be tolerated.<sup>129</sup> In the conflict between a citizen's right to self-defense with a firearm and a property owner's right to exclude, it seems that the right to self-defense is gaining ground in these nineteen states.<sup>130</sup> Currently, there are four general categories that these statutes fall into: (1) No person may prohibit, (2) no employer may prohibit, (3) no employer may prohibit employees with permits, and (4) miscellaneous laws.

### 1. No Person May Prohibit

The first category is the most expansive in protecting the right of an individual to keep a firearm in a car on private property. Currently, seven states have a variation of the *no person may prohibit* legislation protecting this right.<sup>131</sup> These states prohibit by law the ability of *anyone* to forbid firearms in cars legally parked on his or her property.<sup>132</sup> In some states the legislature has specifically removed any liability for the misuse of such firearms from the property owner,<sup>133</sup> though others neglect to add this important feature.<sup>134</sup> Protecting the ability of individuals to defend themselves is very important, but by overriding the rights of property owners to exclude certain conduct (the storing of firearms in a vehicle), it is necessary that the legislature recognize and clarify that property owners bear no responsibility for this conduct. It would be unfair to hold a property owner liable for anything resulting from state-mandated activity.

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<sup>129</sup> *Id.*

<sup>130</sup> As there are still thirty-one states with no such provisions, and some of the current state provisions are quite restrictive, it is clear that the right of citizens to defend themselves with a firearm outside their homes still has a long way to go before it is recognized by a majority of the states.

<sup>131</sup> ALASKA STAT. § 18.65.800(a) (LEXIS through 2013 Reg. Sess.); ARIZ. REV. STAT. ANN. § 12-781(A) (Westlaw through 2013 Reg. Sess. & Spec. Sess.); 430 ILL. COMP. STAT. ANN. 66/65 (Westlaw through P.A. 98-627, 2014 Reg. Sess.) (allowing prohibition of firearms in parking lots of nuclear energy, storage, weapons or development sites and federally prohibited areas); KY. REV. STAT. ANN. § 237.106(1) (Westlaw through 2013 Reg. Sess. & 2013 Extraordinary Sess.); LA. REV. STAT. ANN. § 32:292.1(C) (LEXIS through 2013 Reg. Sess.); OKLA. STAT. tit. 21, §§ 1289.7a(A), 1290.22(B) (Westlaw through 2013 1st Extraordinary Sess.); UTAH CODE ANN. § 34-45-103(1) (LEXIS through 2013 2d Spec. Sess.).

<sup>132</sup> See statutes cited *supra* note 131.

<sup>133</sup> ALASKA STAT. § 18.65.800(c) (LEXIS); OKLA. STAT. tit. 21, §§ 1289.7a(B), 1290.22(E) (Westlaw); UTAH CODE ANN. §§ 34-45-104 (LEXIS).

<sup>134</sup> ARIZ. REV. STAT. ANN. § 12-781 (Westlaw); KY. REV. STAT. ANN. § 237.106 (Westlaw); LA. REV. STAT. ANN. § 32:292.1 (LEXIS).

Some states, such as Utah and Arizona, have certain exceptions to these laws.<sup>135</sup> For example, in Arizona the statute does not apply if property owners provide

a parking lot, parking garage or other area designated for parking motor vehicles, that:

- a) Is secured by a fence or other physical barrier[.]
- b) Limits access by a guard or other security measure[, and]
- c) Provides temporary and secure firearm storage. The storage shall be monitored and readily accessible on entry into the premises and allow for the immediate retrieval of the firearm on exit from the premises.<sup>136</sup>

In Utah, certain specific entities and properties are exempted, including “[o]wner-occupied single family detached residential units and tenant-occupied single family detached residential units.”<sup>137</sup>

Last, several of these states specifically grant the right to a civil remedy for anyone who was prevented from storing a firearm in his or her car by any such rules or regulations.<sup>138</sup> While these states adequately facilitate the possession of firearms by individuals, these laws can be overbroad in scope. Prohibiting the owner of a house or other inherently private land put to purely private use from forbidding firearms is going too far, much a like a law preventing such property owners from excluding certain types of speech on their property.

## 2. No Employer Generally May Prohibit

The second category of these laws applies only to those who employ workers. Currently, seven states have *parking lot laws* that apply only to the property rights of employers rather than all individuals throughout the state.<sup>139</sup> These laws are less expansive than those that prohibit anyone from preventing the storage of firearms on his or her private property, but they still can be effective at protecting the rights of

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<sup>135</sup> ARIZ. REV. STAT. ANN. § 12-781(C) (Westlaw); UTAH CODE ANN. § 34-45-107 (LEXIS).

<sup>136</sup> ARIZ. REV. STAT. ANN. § 12-781(C)(3) (Westlaw).

<sup>137</sup> UTAH CODE ANN. § 34-45-107(4) (LEXIS).

<sup>138</sup> KY. REV. STAT. ANN. § 237.106(4) (Westlaw) (employers liable to employees); OKLA. STAT. tit. 21, §§ 1289.7a(C) (Westlaw); UTAH CODE ANN. § 34-45-105 (LEXIS).

<sup>139</sup> FLA. STAT. ANN. § 790.251(4) (Westlaw through 2013 1st Reg. Sess.), *invalidated by Fla. Retail Fed'n II*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008); IND. CODE ANN. § 34-28-7-2(a) (Westlaw through 2013 Reg. Sess.); KAN. STAT. ANN. § 75-7c10(b)(1) (Westlaw through 2013 Reg. Sess.); ME. REV. STAT. tit. 26, § 600(1) (Westlaw through 2013 1st Reg. Sess. & 1st Spec. Sess.); MINN. STAT. ANN. § 624.714, Subd. 18(c) (Westlaw through 2013 1st Spec. Sess.); MISS. CODE ANN. § 45-9-55 (LEXIS through 2013 Reg. Sess. & 2d Extraordinary Sess.); N.D. CENT. CODE § 62.1-02-13(1)(a) (LEXIS through 2013 Reg. Legis. Sess.).



individuals to bear arms in their defense, though in most cases these protections only apply to employees of such employers.<sup>140</sup>

The Florida law mentioned above<sup>141</sup> is one of the more expansive and carefully crafted of the *no employer* statutes because it prevents any “public or private employer” from prohibiting either employees or customers from lawfully storing a firearm in a vehicle.<sup>142</sup> This is a very well-conceived and well-drafted law because it protects the “Second Amendment right”<sup>143</sup> of both customers and employees from infringement while at work or frequenting a business establishment, but significantly does *not* prevent strictly private individuals from excluding firearms, and those who carry them, from bringing them onto their private property.<sup>144</sup> This statute, however, was found to be partially unconstitutional to the extent that it required some, but not all, businesses to allow customers to be armed on their property.<sup>145</sup>

Any attempt to protect the right of citizens to defend themselves through the use of a firearm should be carefully tailored to avoid restrictions on *purely* private property, as opposed to private property put to public use. The Court has correctly recognized that there is a significant difference between private property put to private use and private property opened to the public.<sup>146</sup> The Florida law automatically “exempts” private residences and dwellings without needing to resort to listing specific exemptions, qualifications, and definitions like those provided in the Utah law.<sup>147</sup> The Florida law, as altered by the federal injunction, protects employees by forbidding employers from making inquiries regarding whether an individual has a legally possessed firearm within his or her vehicle,<sup>148</sup> thus avoiding any possible repercussions that an employer might take against an employee who possess a firearm within his or her vehicle. North Dakota has followed

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<sup>140</sup> IND. CODE ANN. § 34-28-7-2(a) (Westlaw); KAN. STAT. ANN. § 75-7c10(b)(1) (Westlaw); ME. REV. STAT. tit. 26, § 600(1) (Westlaw); MISS. CODE ANN. § 45-9-55 (LEXIS).

<sup>141</sup> See *supra* notes 127–29 and accompanying text.

<sup>142</sup> FLA. STAT. ANN. § 790.251(4)(a) (Westlaw).

<sup>143</sup> While the Second Amendment right to keep arms is only guaranteed against the government, the purpose of this Note is to examine whether individuals can abrogate a right where the government cannot. The passage of these *parking lot laws* indicates that several states do not believe this is appropriate and have taken steps to insure individuals cannot abrogate this right. The concept of such a right that cannot be nullified by the government or individuals is referred to in this Note as a “Second Amendment right.”

<sup>144</sup> FLA. STAT. ANN. § 790.251(4)(a) (Westlaw), *invalidated by Fla. Retail Fed’n II*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008).

<sup>145</sup> *Fla. Retail Fed’n II*, 576 F. Supp. 2d 1301, 1303 (N.D. Fla. 2008).

<sup>146</sup> See *infra* Part III.B.2.

<sup>147</sup> UTAH CODE ANN. §§ 34-45-103 to -105, -107 (LEXIS through 2013 2d Spec. Sess.).

<sup>148</sup> FLA. STAT. ANN. § 790.251(4)(b) (Westlaw).

Florida's lead in crafting its *parking lot law* by preventing public and private employers from prohibiting "customer[s], employee[s], or invitee[s]" from keeping a lawfully possessed firearm in their cars.<sup>149</sup> The North Dakota law also has similar "do not ask" language forbidding employers from seeking to determine if there are legally possessed and stored firearms in the parking lot.<sup>150</sup> North Dakota law goes a bit further than the Florida law by specifically permitting a civil remedy to be sought by anyone who was adversely affected by an employer in this regard.<sup>151</sup> Both Florida and North Dakota have liability clauses that protect employers in case of mishap or misuse of such firearms on their property.<sup>152</sup>

While Florida and North Dakota laws are shining examples of expansive laws protecting the rights of all individuals that come onto a business's property, the majority of *no employer* laws are much more tightly constrained.<sup>153</sup> These laws focus only on the employees by protecting their right to keep a firearm in the car while neglecting to protect the rights of any customers or guests who come onto the employer's property.<sup>154</sup> Focusing only on employees leads to inconsistencies regarding how the "Second Amendment rights"<sup>155</sup> of individuals interact with the property rights of employers in these states. For example, a mall cannot prevent an employee from legally storing a firearm in the parking lot, but it *can* prevent the hundreds or thousands of customers who stop there every day from doing the same. Of the *no employer* states, only Maine and Mississippi have included language removing liability from employers who are in compliance with the law.<sup>156</sup> Once again, it is important to remove the liability of property owners for any abuses or accidents on their property pursuant to these laws, so it would be advisable for those states without such provisions to add them to their laws. Finally, each state has its own exceptions, such

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<sup>149</sup> N.D. CENT. CODE § 62.1-02-13(1)(a) (LEXIS through 2013 Reg. Legis. Sess.).

<sup>150</sup> *Id.* § 62.1-02-13(1)(b) (LEXIS).

<sup>151</sup> *Id.* § 62.1-02-13(5) (LEXIS).

<sup>152</sup> FLA. STAT. ANN. § 790.251(5)(b) (Westlaw); N.D. CENT. CODE § 62.1-02-13(3) (LEXIS).

<sup>153</sup> *See* IND. CODE ANN. § 34-28-7-2(a)(2) (Westlaw through 2013 Reg. Sess.); KAN. STAT. ANN. § 75-7c10(b)(1) (Westlaw through 2013 Reg. Sess.); ME. REV. STAT. tit. 26, § 600(1) (Westlaw through 2013 1st Reg. Sess. & 1st Spec. Sess.); MINN. STAT. ANN. § 624.714, Subd. 18(c) (Westlaw through 2013 1st Spec. Sess.); MISS. CODE ANN. § 45-9-55(1) (LEXIS through 2013 Reg. Sess. & 2d Extraordinary Sess.).

<sup>154</sup> IND. CODE ANN. § 34-28-7-2(a)(2) (Westlaw); KAN. STAT. ANN. § 75-7c10(b)(1), (d) (Westlaw); ME. REV. STAT. tit. 26, § 600(1) (Westlaw); MINN. STAT. ANN. § 624.714, Subd. 18(c) (Westlaw).

<sup>155</sup> *See supra* note 143 and accompanying text.

<sup>156</sup> ME. REV. STAT. tit. 26, § 600(2) (Westlaw); MISS. CODE ANN. § 45-9-55(5) (LEXIS).

as in Mississippi where an “employer may prohibit an employee from . . . storing a firearm in a vehicle” if the employer provides a limited access parking lot to the employees.<sup>157</sup>

### 3. No Employer May Prohibit Employee with Permit

Moving down into the more limited *parking lot laws*, there are some states that will allow an employer to forbid any employee who does not have a state concealed weapons permit from storing firearms in their locked vehicles.<sup>158</sup> The language of these states’ statutes is similar to that found in the *no employer generally* states, and these laws offer the same unequal protection of rights that those states do, with the notable difference being that even more people lose their “Second Amendment rights” when they conflict with the exclusionary rights of private property owners. A distinction is drawn between individuals who possess state-issued concealed weapons permits and those who do not, and might bring up the possible issue of bearing arms absent specific state legislation.<sup>159</sup> All three of these states limit the employer’s liability regarding the misuse of these firearms.<sup>160</sup> Georgia and Wisconsin remove all liability,<sup>161</sup> while Texas removes liability in all cases except those of gross negligence.<sup>162</sup>

### 4. Miscellaneous Laws

North Carolina and Virginia fall into a general “miscellaneous” category as their laws do not really reflect any other state laws. Both states have laws that only apply to state and local governments, so they do not apply to private employers at all.<sup>163</sup> Virginia’s law is the simpler of the two, and prevents any local government from implementing a rule that prevents government employees from storing lawfully-owned firearms and ammunition in their cars on state property.<sup>164</sup>

The North Carolina laws, by contrast, seem to be designed more to get people thrown into jail than to be an effective protection of their

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<sup>157</sup> MISS. CODE ANN. § 45-9-55(2) (LEXIS).

<sup>158</sup> GA. CODE ANN. § 16-11-135(b) (LEXIS through 2013 Reg. Sess.); TEX. LAB. CODE ANN. § 52.061 (Westlaw through 2013 3d Called Sess.); WIS. STAT. ANN. § 175.60(15m)(a)–(b) (Westlaw through 2013 Wis. Act 116).

<sup>159</sup> See statutes cited *supra* note 158 and accompanying text.

<sup>160</sup> GA. CODE ANN. § 16-11-135(e) (LEXIS); TEX. LAB. CODE ANN. § 52.063(a) (Westlaw); WIS. STAT. ANN. § 175.60(21) (Westlaw).

<sup>161</sup> GA. CODE ANN. § 16-11-135(e) (LEXIS); WIS. STAT. ANN. § 175.60(21) (Westlaw).

<sup>162</sup> TEX. LAB. CODE ANN. § 52.063(a) (Westlaw).

<sup>163</sup> N.C. GEN. STAT. § 120-32.1(c1) (LEXIS through 2013 Reg. Sess.); VA. CODE ANN. § 15.2-915(A) (LEXIS through 2013 Reg. Sess. & Spec. Sess. I).

<sup>164</sup> VA. CODE ANN. § 15.2-915(A) (LEXIS).

“Second Amendment rights.”<sup>165</sup> The law is far from clear and, even after many readings, it is unlikely that an individual will know precisely where he can and cannot keep a firearm in his vehicle. The law starts by stating that no rule can be adopted that would prevent the transportation or storage of a firearm in a locked vehicle on “State legislative buildings and grounds.”<sup>166</sup> This law is apparently particularly protective of legislators and legislative employees, as they are specifically mentioned, though the protection of their right to store a firearm does not seem to be any more expansive than the general provision initially granted.<sup>167</sup> The law then goes on to describe, in excruciating and confusing detail, what precisely is meant by “State legislative buildings and grounds” including such places as “[t]he bridge between the State Legislative Building and the Halifax Street Mall.”<sup>168</sup> Thanks to these descriptions and qualifications, it is highly likely that no individual, at any given time, will be 100% certain that he is following the law.

The law in a separate section makes a special parking lot exception for “[d]etention personnel or correctional officers” to store firearms in their cars while in the course of their duties.<sup>169</sup> In yet another section, the law forbids the possession of firearms on the grounds of the “State Capitol Building, the Executive Mansion, the Western Residence of the Governor” or “in any building housing any court of the General Court of Justice.”<sup>170</sup> It would appear, then, that the *parking lot laws* of North Carolina are more of an afterthought in legislation that do not protect the “Second Amendment rights” of individuals—even on “legislative building” grounds.

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<sup>165</sup> See N.C. GEN. STAT. § 120-32.1(b) (LEXIS through 2013 Reg. Sess.).

<sup>166</sup> *Id.* § 120-32.1(a)(1), (c1) (LEXIS).

<sup>167</sup> *Id.* § 120-32.1(c1) (LEXIS).

<sup>168</sup> *Id.* § 120-32.1(d)(1)(d)–(e) (LEXIS).

A portion of the brick sidewalk surface area of the Halifax Street Mall, described as follows: beginning at the northeast corner of the Legislative Office Building, thence east across the brick sidewalk to the inner edge of the sidewalk adjacent to the grassy area of the Mall, thence south along the inner edge of the sidewalk to the southwest outer corner of the grassy area of the Mall, thence east along the inner edge of the sidewalk adjacent to the southern outer edge of the grassy area of the Mall to a point north of the northeast corner of the pedestrian surface of the Lane Street pedestrian bridge, thence south from that point to the northeast corner of the pedestrian surface of the bridge, thence west along the southern edge of the brick sidewalk area of the Mall to the southeast corner of the Legislative Office Building, thence north along the east wall of the Legislative Office Building . . .

*Id.* § 120-32.1(d)(1)(e) (LEXIS).

<sup>169</sup> N.C. GEN. STAT. § 14-269(4c) (LEXIS through 2013 Reg. Sess.).

<sup>170</sup> *Id.* § 14-269.4 (LEXIS).

### C. The Parking Lot and Beyond

The *parking lot laws* are certainly a big step in protecting the “Second Amendment right” to self-defense that the Federal Constitution implicates.<sup>171</sup> With the relatively recent decision in *Heller* explicitly confirming that the Second Amendment protects the right to self-defense with a firearm, it is likely that this right will face significant challenges as it expands out of the home and begins butting up against the property rights of others. While the *Heller* Court only explicitly held that the right of individuals to possess a working handgun in their homes for self-defense was protected,<sup>172</sup> it is clear from the Court’s examination and discussion of the “keep and bear arms” clause that it is unlikely that the right extends *only* to the ability to keep a firearm at home.<sup>173</sup> Logically, if the Second Amendment’s “*central component*” is self-defense,<sup>174</sup> then this right will follow individuals outside of their homes into the areas where they are more likely to need protection.

### III. JUDICIAL RESPONSE: CHALLENGING THESE LAWS AND SUPREME COURT PRECEDENT

Unsurprisingly, due to the contested nature of the Second Amendment and the fact that this right has only recently been expounded and held to be incorporated by the Supreme Court, there have been challenges to some of the *parking lot laws*.<sup>175</sup> As of this writing there have been two cases (under three names) challenging this legislation.<sup>176</sup> The first case came out of Oklahoma and initially struck down the *parking lot legislation*,<sup>177</sup> but on appeal to the Tenth Circuit, the legislation was upheld.<sup>178</sup> The second case came out of Florida, where the district court struck out a very specific portion of the legislation allowing the vast majority of the law to survive.<sup>179</sup>

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<sup>171</sup> See *supra* Part I.A.

<sup>172</sup> District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

<sup>173</sup> *Id.* at 632–33; see *supra* Part II.C.

<sup>174</sup> *Heller*, 554 U.S. at 599.

<sup>175</sup> ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282 (N.D. Okla. 2007), *rev’d sub nom.* Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009); *Fla. Retail Fed’n II*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008).

<sup>176</sup> *Ramsey Winch Inc.*, 555 F.3d 1199; *ConocoPhillips Co.*, 520 F. Supp. 2d 1282; *Fla. Retail Fed’n II*, 576 F. Supp. 2d 1301.

<sup>177</sup> *ConocoPhillips Co.*, 520 F. Supp. 2d at 1340.

<sup>178</sup> *Ramsey Winch Inc.*, 555 F.3d at 1202, 1211.

<sup>179</sup> *Fla. Retail Fed’n II*, 576 F. Supp. 2d at 1302.

### A. Recent Challenges

In Oklahoma, several corporations with policies banning their employees or guests from bringing firearms onto their property brought a pre-enforcement challenge against the law, seeking an injunction to prevent the enforcement of the legislation.<sup>180</sup> In *ConocoPhillips Co. v. Henry*, the district court examined all of the relevant history of the legislation, and determined that the legislation was criminal in nature and that the plaintiffs had standing to bring the case.<sup>181</sup> The court then proceeded to examine the case brought before it in regard to the injury to property rights caused by the parking lot statutes and the due process challenges that might arise under a government takings analysis and concluded, despite the court's misgivings, that these laws did not constitute a taking under the frameworks laid out by the Supreme Court in *Lucas v. South Carolina Coastal Council*, *Loretto v. Teleprompter Manhattan CATV Corp.*, or *Penn Central Transportation Co. v. City of New York*.<sup>182</sup> While the court was extremely skeptical of the State's argument that allowing individuals to keep firearms within their cars on private property might deter crime, it did not conclude that these laws, passed with this purpose in mind fail the "rational basis standard" the court is required to apply.<sup>183</sup>

The court instead struck down the law under the federally promoted and passed Occupational Safety and Health Act ("OSHA").<sup>184</sup> OSHA was passed to "promote safe and healthful working conditions, to preserve human resources, and to encourage employers to institute programs and policies aimed at increasing workplace safety."<sup>185</sup> While there is not a specific firearms provision, the court finds it in the general duty clause, which states that an "employer owes a duty of reasonable care to protect his employees from recognized hazards that are likely to cause death or serious bodily injury."<sup>186</sup> Claiming that violence with firearms in the workplace is such a recognized hazard, the court concludes that these laws will prevent employers from complying with OSHA and therefore,

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<sup>180</sup> *ConocoPhillips Co.*, 520 F. Supp. 2d at 1286–87.

<sup>181</sup> *Id.* at 1287–97.

<sup>182</sup> *Id.* at 1307–22 (citing *Lucas*, 505 U.S. 1003 (1992); *Loretto*, 458 U.S. 419 (1982); *Penn Cent. Transp. Co.*, 438 U.S. 104 (1978)).

<sup>183</sup> *Id.* at 1322.

<sup>184</sup> *Id.* at 1340.

<sup>185</sup> *Id.* at 1323.

<sup>186</sup> *Id.* at 1324 (quoting *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984)).

under the Supremacy Clause, they are preempted and must be struck down.<sup>187</sup>

However, on appeal the Tenth Circuit reversed this decision in *Ramsey Winch Inc. v. Henry*.<sup>188</sup> Ramsey Winch was one of the coplaintiffs along with ConocoPhillips.<sup>189</sup> The appeals court first examined the district court's ruling on OSHA preemption and found it lacking.<sup>190</sup> This *parking lot law* was clearly an exercise of state police powers, and such powers are not to be superseded by federal laws "unless that was the clear and manifest purpose of Congress."<sup>191</sup> Therefore, it was necessary to examine the purpose of OSHA and specifically the purpose of the general duty clause.<sup>192</sup> OSHA was passed to protect workers from the "danger surrounding traditional work-related hazards."<sup>193</sup> Significantly, absent from this Act is "any specific OSHA standard on workplace violence."<sup>194</sup> Further, in finding preemption, the district court had "held that gun-related workplace-violence was a 'recognized hazard' under the general duty clause" which indicates that any employer that *allows* firearms on their property may violate OSHA.<sup>195</sup> The Occupational Safety and Health Administration has specifically declined to promulgate a standard banning firearms, so a ban cannot be found under the general duty clause because this clause was designed to cover "unanticipated hazard[s]."<sup>196</sup> In a very brief re-examination of whether such laws constitute a taking, the court held unequivocally that this law does not,<sup>197</sup> thereby soundly refuting and reversing the district court that had struck down the law.<sup>198</sup>

Following the passage of the Florida "guns-at-work" law, the plaintiffs in *Florida Retail Federation, Inc. v. Attorney General of Florida* moved for an injunction to prevent its enforcement.<sup>199</sup> The court held

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<sup>187</sup> *Id.* at 1340.

<sup>188</sup> *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1202 (10th Cir. 2009), *rev'g sub nom. ConocoPhillips Co.*, 520 F. Supp. 2d 1282.

<sup>189</sup> *Id.* at 1199.

<sup>190</sup> *Id.* at 1204–08.

<sup>191</sup> *Id.* at 1204 (quoting *Altria Group, Inc. v. Good*, 120 S. Ct. 538, 543 (2008)).

<sup>192</sup> *Id.* at 1205–08.

<sup>193</sup> *Id.* at 1205.

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

<sup>195</sup> *Id.* 1205–06.

<sup>196</sup> *Id.* at 1206 (citing *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984)).

<sup>197</sup> *Id.* at 1208–10.

<sup>198</sup> *Id.* at 1211.

<sup>199</sup> *Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla. (Fla. Retail Fed'n I)*, 576 F. Supp. 2d 1281, 1284–85 (N.D. Fla.), *converted to perm. injunction by Fla. Retail Fed'n II*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008).

that the state could compel a business to allow a worker to store a firearm in his vehicle, but struck down the portion of the law that compelled “some businesses but not others—with no rational basis for the distinction—to allow a *customer* to secure a gun in a vehicle.”<sup>200</sup> It is quite possible that, were this law to be amended in such a way as to eliminate such distinctions or to provide a rational framework for determining exempt businesses, this portion of the law could be reinstated.

*B. “He is Exercising His Right on My Property!”—The Supreme Court Weighs in*

Any first or second year law student can see that there have been hundreds of cases decided by the Supreme Court examining and defining the various rights protected in the Bill of Rights. The question brought about by these *parking lot laws* is this: “What right trumps the other when the two are in conflict?” The Fifth Amendment clearly protects property and prevents the uncompensated taking of property by the government.<sup>201</sup> And now it is clear that the Second Amendment protects the right of possession of handguns within the home for the purpose of self-defense.<sup>202</sup> Several states have recognized the logical expansion of this right into carrying a firearm for self-defense outside of the home.<sup>203</sup> Thus, is it constitutionally proper, under current jurisprudence, for states to pass laws that will prevent property owners from forbidding the possession of firearms on their property? The Supreme Court has not yet heard a case on these *parking lot laws*, but there have been several cases in the last half-century where the Court examined the tension between property owners’ rights and the First Amendment right to freedom of expression.<sup>204</sup> While not directly on point, the handling of these cases by the Court illuminates the manner in which property rights have historically been examined against other constitutionally protected rights.

1. *Marsh v. Alabama*: Property Interests Alone Do Not Settle the Question

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<sup>200</sup> *Id.* at 1285.

<sup>201</sup> U.S. CONST. amend. V.

<sup>202</sup> U.S. CONST. amend. II.; *see also supra* Part I.A.

<sup>203</sup> *See supra* Part II.A–B.

<sup>204</sup> *See generally* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946).



In *Marsh v. Alabama*, the entire town of Chickasaw, Alabama, was owned by a private corporation.<sup>205</sup> The appellant, a Jehovah's Witness, stood on a sidewalk and distributed "religious literature" despite a complete prohibition on such activity without a permit.<sup>206</sup> Further, the appellant was made aware of the fact that no such permit would be given to her.<sup>207</sup> The appellant was arrested, charged with "remain[ing] on the premises of another after having been warned not to do so," and was convicted.<sup>208</sup> An appeal to the Supreme Court followed after certiorari was denied by the state supreme court.<sup>209</sup>

In examining the issue, the Court first noted that had Chickasaw belonged to a municipal corporation and had the appellant been distributing such material on a municipal public street or sidewalk in violation of a municipal ordinance, the conviction would have to be reversed.<sup>210</sup> The people of a town could not set up a municipal government with the authority to bar the distribution of religious material on sidewalks.<sup>211</sup> The question then arose: can a company do what an elected municipal government cannot?<sup>212</sup> "Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?"<sup>213</sup> The Court emphatically disagreed with this proposition and stated clearly that "property interests [do not] settle the question" regarding the "abridge[ment] [of] these freedoms."<sup>214</sup> The right of property owners to regulate conduct is not always equivalent to that of a homeowner regulating his guests.<sup>215</sup> "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."<sup>216</sup> Privately owned property, used for commercial gain as a

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<sup>205</sup> *Marsh*, 326 U.S. at 502–04.

<sup>206</sup> *Id.* at 503.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 503–04.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 505.

<sup>212</sup> *Id.* If the government is forbidden from completely banning the carrying of firearms for the purpose of self-defense, as indicated by the Seventh Circuit in *Moore v. Madison*, 702 F.3d 933, 942 (7th Cir. 2012), can a company or private property owner do what an elected government cannot? A policy forbidding the storage of firearms in vehicles effectively bans individuals from carrying a firearm to or from such property. See *supra* notes 119–23 and accompanying text.

<sup>213</sup> *Marsh*, 326 U.S. at 505.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 506.

<sup>216</sup> *Id.*

benefit to the public, cannot be as freely regulated as other private properties.<sup>217</sup> The Court finally held that “the right to exercise the liberties safeguarded by the First Amendment ‘lies at the foundation of free government by free men,’”<sup>218</sup> and a state cannot use state power to “permit[] a corporation to govern a community of citizens so as to restrict their fundamental liberties.”<sup>219</sup> Therefore, it is possible for the state to restrict the property rights of a corporation in certain situations when such rights are used to deprive citizens of other rights. A few years after this opinion, the Supreme Court held, in *Shelley v. Kraemer*, that state enforcement of private covenants was prohibited if those covenants deprived individuals of rights guaranteed under the Fourteenth Amendment.<sup>220</sup> Perhaps the decision in *Shelley* can be seen as one which reinforces the *Marsh* Court’s conclusion that the state is forbidden from enforcing private regulations that abridge rights guaranteed under the Fourteenth Amendment.

*2. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.: Private Property Owners Can Be Required to Allow Even Adversarial Speech on Their Property*

The next case dealing with the rights of property owners to suppress the freedom of expression involved the members of a union picketing a supermarket that was part of a shopping center.<sup>221</sup> The union picketed the supermarket because the store did not employ union workers, and it carried on the picketing “within the confines of the shopping center.”<sup>222</sup> The supermarket and the shopping center sought, and were granted, an injunction against the union requiring any picketing to take place on public roads, off shopping plaza property.<sup>223</sup> The Union appealed and the Pennsylvania Supreme Court affirmed the injunction.<sup>224</sup>

The Supreme Court first made clear that peaceful picketing is a protected activity under the First Amendment.<sup>225</sup> In examining *Marsh*, the Court was careful to tailor the holding by stating “that under some circumstances property that is privately owned may, at least for First

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 509 (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)).

<sup>219</sup> *Id.*

<sup>220</sup> *Shelley v. Kraemer*, 334 U.S. 1, 4, 23 (1948).

<sup>221</sup> *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 311–12 (1968).

<sup>222</sup> *Id.* at 311–13.

<sup>223</sup> *Id.* at 312.

<sup>224</sup> *Id.* at 313.

<sup>225</sup> *Id.*

Amendment purposes, be treated as though it were publicly held.”<sup>226</sup> The Court then placed special importance on the fact that the issue in *Marsh* arose within the “business district of Chickasaw.”<sup>227</sup> Since picketing was not forbidden on the roads surrounding the shopping center (unlike the broad, all-encompassing prohibition power in *Marsh*), it was necessary to examine whether this fact alone would allow a property owner to forbid the picketing.

The *Logan Valley* Court found the shopping center to be the “functional equivalent of the business district of Chickasaw” because both were open to the public, much like the “commercial center of a normal town.”<sup>228</sup> The Court acknowledged that the exercise of First Amendment rights “may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access.”<sup>229</sup> In this case, there was no indication that the picketing was “significantly interfering with the use to which the mall property was being put,” so there was no basis for analogizing the injunction with public property First Amendment regulation.<sup>230</sup> While stating that “where property is not ordinarily open to the public, . . . access to it for the purpose of exercising First Amendment rights may be denied altogether,”<sup>231</sup> the Court held that the *Marsh* analysis between purely private property and “‘property for use by the public in general’” was sound and that the owners of property used for this public purpose could not forbid citizens from using their freedom of speech on such property.<sup>232</sup>

### 3. *Lloyd* and *Hudgens*: “We Made a Mistake in *Logan Valley*”

The next two cases in the freedom-of-expression saga are *Lloyd Corporation v. Tanner*<sup>233</sup> and *Hudgens v. NLRB*.<sup>234</sup> These cases are joined for the purposes of this review because the legally significant facts are similar and, together, the Court uses them to overrule *Logan Valley*, decided just a few years earlier.

In *Lloyd*, several individuals entered an enclosed shopping mall and proceeded to distribute handbills within the mall, in violation of a

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<sup>226</sup> *Id.* at 316.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 318–19.

<sup>229</sup> *Id.* at 320–21.

<sup>230</sup> *Id.* at 323.

<sup>231</sup> *Id.* at 320.

<sup>232</sup> *Id.* at 325 (quoting *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)).

<sup>233</sup> 407 U.S. 551 (1972).

<sup>234</sup> 424 U.S. 507 (1976).

general policy prohibiting the distribution of handbills.<sup>235</sup> Security guards in the employ of the Center (the Lloyd Corporation shopping center) confronted these individuals and informed them that they could not distribute handbills within the mall, and, if they persisted in doing so, they would be arrested.<sup>236</sup> They subsequently left the mall, presumably to avoid arrest, and instituted a legal action seeking an injunction against the Center's policy.<sup>237</sup> The district court found the policy forbidding handbilling to violate the First Amendment rights of the petitioners, and this decision was upheld by the court of appeals, citing the cases previously described: *Marsh* and *Logan Valley*.<sup>238</sup>

Through a bit of legal contortion the Court in this case held that the instant circumstances were distinguishable from those of *Logan Valley* because in that case "the First Amendment activity was related to the shopping center's operations."<sup>239</sup> Because the handbilling in the instant case was not related to the shopping Center, the Court stated that this was a different manner of free speech than that upheld in *Logan Valley* and that the *Logan Valley* decision did not apply.<sup>240</sup> While the Court spent most of the decision analyzing how to distinguish the present case from *Logan Valley*, practically no time was spent distinguishing it from *Marsh*.<sup>241</sup> Further, nowhere does the Court explain why the First Amendment right of free speech on private property must be related to the operations of the property.<sup>242</sup> The *Marsh* decision had nothing to do with the use of the property, and focused instead on the fact that private property owners who have opened up their land to the public in some regard cannot strip the First Amendment rights from all who come onto that land.<sup>243</sup> In fact, the individual in *Marsh* was distributing religious literature, and it would be hard to find that this activity was in any way connected to the purpose of the company in running the town of Chickasaw.<sup>244</sup>

Despite holding that the petitioners had no First Amendment right to distribute handbills in the Center, there is some important dictum in the *Lloyd* decision. The Court mentions that, in cases where private property rights conflict with other rights, "[t]here may be situations

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<sup>235</sup> *Lloyd*, 407 U.S. at 552, 556.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 556–57.

<sup>239</sup> *Id.* at 562.

<sup>240</sup> *Id.* at 562–64.

<sup>241</sup> *See Lloyd*, 407 U.S. 551.

<sup>242</sup> *Id.*

<sup>243</sup> *Marsh v. Alabama*, 326 U.S. 501, 506–09 (1946).

<sup>244</sup> *Id.* at 503.

where [there will be] accommodations between them, and the drawing of lines to assure due protection of both.”<sup>245</sup> In other words, property rights do not always trump other constitutionally granted rights. The Court also mentioned, in attempting to square this decision with *Logan Valley*, that “[i]t would be an unwarranted infringement of property rights to require [the Center] to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.”<sup>246</sup> The Court here was speaking of the fact that, in *Logan Valley*, the forcible removal of the picketers would have “deprived [them] of all reasonable opportunity to convey their message.”<sup>247</sup> Read logically, this would seem to indicate that property rights yield to other constitutionally protected rights when failure to do so would render those other rights completely ineffective. In comparing property rights to “Second Amendment rights,” a complete prohibition of firearms on a property would render the right of self-defense with a firearm completely ineffective. *Parking lot laws*, in allowing people to have a firearm with them at least on the way to and from such properties, provide the minimum protection for such a right.

*Hudgens* involved a similarly enclosed shopping center where a union attempted to picket a store within the center.<sup>248</sup> In that case, the Court was unable to square its reasoning in *Lloyd* (in attempting to square with *Logan Valley*), distinguishing speech that directly related to the purpose of the property and soundly overturning its decision in *Logan Valley* after just six years.<sup>249</sup> The *Hudgens* Court approached this decision from the jurisprudential standpoint of previous union and labor relations cases, so their holding had more to do with various labor legislation than the conflict directly between the First Amendment and property rights.<sup>250</sup> It is important to note within the Court’s First Amendment analysis, the Court holds that the Constitution guarantees rights “against abridgement by government, federal or state,” not against private entities.<sup>251</sup> However, the Court goes on to say that there might be situations where “statutory or common law may . . . extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others.”<sup>252</sup> So, a statutory or even

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<sup>245</sup> *Lloyd*, 407 U.S. at 570.

<sup>246</sup> *Id.* at 567.

<sup>247</sup> *Id.* at 566.

<sup>248</sup> *Hudgens v. NLRB*, 424 U.S. 507, 509 (1976).

<sup>249</sup> *Id.* at 518.

<sup>250</sup> *See id.* at 521–23.

<sup>251</sup> *Id.* at 513.

<sup>252</sup> *Id.*

common law, extension of the right of free expression could be found, again, to trump the property rights of private corporations. This logic applied to the current *parking lot legislation* indicates that these laws would certainly survive constitutional judicial scrutiny.

#### 4. *PruneYard*: The Constitution Might Not Protect It, but States Can Make That Happen

Despite the apparent set-backs to the freedom of expression found in the *Lloyd* and *Hudgens* decisions, the saga ends on a more positive note in *PruneYard Shopping Center v. Robbins*.<sup>253</sup> Very much like the situation in *Lloyd*, the facts in this case revolve around a large, self-contained shopping mall with a strict policy against any “publicly expressive activity . . . not directly related to its commercial purposes.”<sup>254</sup> In this case, students were soliciting signatures for a petition within the mall when security guards informed them they were violating the Center’s (the PruneYard Shopping Center) policy and would have to leave.<sup>255</sup> The students then sued to enjoin the Center from denying them the ability to circulate petitions within the mall.<sup>256</sup> The California Superior Court denied the injunction and the California Court of Appeals upheld that denial, but the California Supreme Court reversed holding that speech, “reasonably exercised,” is protected by the California constitution even on property that is privately owned.<sup>257</sup> The Supreme Court then affirmed the decision of the California Supreme Court.<sup>258</sup> The Court examined its prior holdings in *Lloyd* and *Hudgens* briefly, affirmed that those decisions were still applicable, and then immediately proceeded to hold that while the First Amendment of the United States Constitution does not protect the free speech rights of the public on such private property, individual states have the “right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution.”<sup>259</sup> The Court further expounded that requiring the Center to allow such expression on their property does not amount to a constitutional taking as “[t]here is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a

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<sup>253</sup> 447 U.S. 74 (1980).

<sup>254</sup> *Id.* at 77.

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

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 78.

<sup>258</sup> *Id.* at 78–79.

<sup>259</sup> *Id.* at 80–81 (citing *Cooper v. California*, 386 U.S. 58, 62 (1967)).

shopping center.”<sup>260</sup> The Court further pointed out that it is important to note that the owners of the shopping center purposely did not limit it to the “personal use of [the owners]”<sup>261</sup> and that “[i]t bears repeated emphasis that . . . the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment” are not those being considered.<sup>262</sup> The Court, like the California Supreme Court, apparently found it persuasive that the property rights of larger commercial corporations might be limited more readily than those of individuals. This line of reasoning squares perfectly with the *Marsh* Court, which held that “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”<sup>263</sup> It would seem that the Court allows for the property rights of large corporations, to the extent that property is open to the public, to be limited when they conflict with certain individual rights, whether granted by the United States Constitution or a single state’s constitution.

#### 5. How Will the Supreme Court Rule?

Despite the fact that there have been few litigation challenges to these laws, it is important to look at what the Supreme Court might say if such a case ever were raised to that level.<sup>264</sup> In examining the previous Supreme Court cases, it is important to note that the Court does *not* hold property rights to be an automatic trump over any other constitutionally protected rights.<sup>265</sup> While *Lloyd* and *Hudgens* would indicate that the Court is not willing to extend First Amendment protections to those exercising their freedom of expression on private commercial property under the First Amendment alone,<sup>266</sup> the Court never overruled the original decision in *Marsh*, so there still is precedent indicating that property rights can be forced to accommodate other protected rights by the federal government. The *Marsh* Court obviously tailored their decision specifically to the First Amendment, but the broader dicta would indicate that the Court might consider other constitutionally guaranteed rights to hold a preferred position over the rights of property

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<sup>260</sup> *Id.* at 83.

<sup>261</sup> *Id.* at 87.

<sup>262</sup> *Id.* at 78 (quoting the California Supreme Court in *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (1979)).

<sup>263</sup> *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

<sup>264</sup> *See supra* Part III.

<sup>265</sup> *See supra* Part III.B.1.

<sup>266</sup> *See supra* Part III.B.3.

owners. This holds especially true regarding property open to the general public for the benefit of the owner.<sup>267</sup> It is further worth noting that the Court in the recent *Heller* decision, in its brief examination of the term “bear” in the Second Amendment, compared proper limitations on the Second Amendment to proper limitations on the First.<sup>268</sup> Therefore, it might be likely that the Court would properly use the aforementioned cases as a measure for laws, such as these *parking lot laws*, which extend a preferential position to the Second Amendment over private property rights.

If the Court were to take this route, how would it hold in a case involving a conflict between *parking lot laws* and the right to exclude under the Federal Constitution? The *Lloyd* and *Hudgens* decisions seem to indicate that the Court would hold property rights to be supreme over “Second Amendment rights,” but a conflict between the peaceful and covert storage of firearms in a car, for the purpose of self-defense, can be significantly distinguished from actively passing out pamphlets or picketing and would comport with the reasoning behind the *Marsh* decision. In *Logan Valley*, *Lloyd*, and *Hudgens*, the various shopping centers had policies in place to avoid actively disturbing customers that came on the property for the purpose of shopping there. In *Logan Valley* and *Hudgens*, the individuals picketing were actually there to discourage people from utilizing the property as the owner purposed.<sup>269</sup> While in *Lloyd* the Center simply had a “no-handbilling” policy, ostensibly to avoid bothering customers and creating litter which the Center would need to clean up.<sup>270</sup> In all three cases, the property owners were looking to avoid deterring customers through disturbing conduct. Individuals storing firearms in vehicles would in no way be disturbing other customers or seeking to prevent the property owner from realizing the benefits of his property. Due to the fact that this activity has almost no impact on an owner’s use of property, it is difficult to imagine the Supreme Court would favor property rights so lopsidedly in the “drawing of lines to assure due protection of both”<sup>271</sup> as to hold a total ban to be appropriate.

Even if the Supreme Court would be more likely to favor property rights under a bare examination of the Second Amendment, there would necessarily be an analysis of whether the state in question had extended a statutory or constitutional protection to the bearing of arms beyond the

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<sup>267</sup> See *Marsh*, 326 U.S. at 506.

<sup>268</sup> District of Columbia v. *Heller*, 554 U.S. 570, 595 (2008).

<sup>269</sup> See *supra* Part III.B.3.

<sup>270</sup> *Lloyd Corp. v. Tanner*, 407 U.S. 551, 581–82 (1972) (Marshall, J., dissenting).

<sup>271</sup> *Id.* at 570.



Second Amendment. The *Hudgens* Court clearly acknowledged that “statutory or common law may in some situations extend protection or provide redress against a private corporation.”<sup>272</sup> A plain reading of this phrase indicates that these *parking lot laws* could be seen as a state seeking to extend protection of “Second Amendment rights” through statute. The Court in *PruneYard* clearly acknowledged the right of the State of California to extend its constitutional protection of free speech such that the right could not be suppressed on certain private property open to the public.<sup>273</sup> If states extend protections of the Second Amendment, either statutorily or through their separate constitutions, to include the right to store a firearm in a personal vehicle on private property, it is unlikely that the Court will hold property rights to be supreme and trump firearm rights under the *Marsh*, *Hudgens*, and *PruneYard* precedents.

While it is clear under a constitutional analysis of First Amendment jurisprudence that states have the right to extend constitutional protections through statutory law, such as the *parking lot legislation*. What is not clear is precisely what standard the Court might follow in approaching the development of Second Amendment issues regarding the bearing of arms. The standard laid down by *Marsh* has not been explicitly overruled, though the *Marsh* Court’s reasoning was riddled with holes by the *Hudgens* holding that invalidated *Logan Valley*. Therefore, it is more likely that the Court will rely on decisions, such as *PruneYard*, that allow states to extend protections not found directly in the Federal Constitution. Perhaps a more interesting question for another time would be whether the Constitution might *prevent* the State from enforcing property laws allowing property owners to exclude the bearing of firearms.

The iconic case of *Shelley v. Kramer*<sup>274</sup> held that state action “in enforcing a substantive common-law rule formulated by [state] courts[] may result in the denial of rights guaranteed by the Fourteenth Amendment.”<sup>275</sup> When state courts enforce a private right, they make “the full coercive power of government” available to these private individuals and if that action “den[ies] rights subject to the protection of the Fourteenth Amendment,” then such state action can be forbidden.<sup>276</sup> The state enforcement of a private right to exclude the carrying of firearms on private property might be improper under a *Shelley*

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<sup>272</sup> *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

<sup>273</sup> *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

<sup>274</sup> 334 U.S. 1 (1948).

<sup>275</sup> *Id.* at 17.

<sup>276</sup> *Id.* at 19–20.

analysis, even absent any specific state laws prohibiting such exclusion. It would seem that, under the combined precedents of *Marsh* and *Shelley*, a state government would be prevented from enforcing a private property restriction that would be unenforceable on government owned public property. Unfortunately, a thorough examination of this possibility cannot be approached in this Note.

#### CONCLUSION

Violent crime continues to be a problem in the United States. According to a National Crime Victimization Survey, there were an estimated 4.3 million violent crimes in 2009.<sup>277</sup> According to a Center for Disease Control report, there were 18,361 homicides in 2007.<sup>278</sup> There have also been numerous high-profile attacks injuring or killing many people, such as that in Aurora, Colorado, on July 20, 2012. Twelve people were killed and fifty-eight were injured.<sup>279</sup> Notable about many of these events, including the Aurora shooting, is the fact that the property owners forbade the carrying of firearms (even by individuals who had state issued permits to do so) on their properties, effectively depriving all employees and customers of their ability to protect themselves with a firearm.<sup>280</sup> In modern American society, it is not easy for people to live on self-sustaining ranches. An Environmental Protection Agency Agricultural Census Report puts the number of farmers at less than 1% of the American population.<sup>281</sup> According to the United States Census Bureau's American Community Survey, only 4.3% of workers in 2010 worked from home on a regular basis.<sup>282</sup> It would seem clear that average Americans must leave the protection of their property in order to survive and often their jobs and food are found on the private property of others. If the owners of such properties decide to exclude firearms,

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<sup>277</sup> JENNIFER L. TRUMAN & MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY, 2009, at 1 (2010), available at <http://www.bjs.gov/content/pub/pdf/cv09.pdf>.

<sup>278</sup> Joseph E. Logan, et al., *Homicides—United States, 2007 and 2009*, MORBIDITY & MORTALITY WKLY. REP., Nov. 22, 2013, at 164, 165, available at <http://www.cdc.gov/mmwr/pdf/other/su6203.pdf>.

<sup>279</sup> Aimee Kaloyares, Note, *Annie, Get Your Gun? An Analysis of Reactionary Gun Control Laws and Their Utter Failure to Protect Americans from Violent Gun Crimes*, 40 S.U. L. REV. 319, 357 (2013).

<sup>280</sup> William Perry Pendley, 'Gun Free Zones' Never Gun Free, USA TODAY (July 21, 2012, 6:06 PM), <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-07-21/Aurora-shooting-Batman-Pendley-mountain-states-concealed-carry/56394526/1>.

<sup>281</sup> *Demographics*, *supra* note 14.

<sup>282</sup> PETER J. MATEYKA ET AL., HOME-BASED WORKERS IN THE UNITED STATES: 2010, at 4 tbl.1 (2012), available at <http://www.census.gov/hhes/commuting/files/2012/Home-based%20Workers%20in%20the%20United%20States-Paper.pdf>.

they can effectively remove the right of citizens to bear arms outside their homes. *Concealed carry* laws and *parking lot laws* show that several states have taken steps to allow people to possess firearms outside of their homes, even while visiting places that would otherwise prohibit the carrying of firearms on their properties. This is clearly constitutional, and perhaps states should consider taking the further step of preventing the owners of such “public” private property, as was found in *PruneYard*, from depriving citizens of the right to defend themselves with a firearm concealed on their person. Such legislation could take the form of “public place” legislation following the rationale of the Court in *Marsh*: “The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”<sup>283</sup> Such legislation would prevent the owners of “public” private property from doing what the government is forbidden to do: disarm citizens without cause.

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<sup>283</sup> *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

\* Special thanks to my always supportive family and to the tireless efforts of the staff and board of the Regent University Law Review.