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## The Doctor Will See You Now: An Argument for Amending the Licensing Process for Handguns in New York City

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# The Doctor Will See You Now: An Argument for Amending the Licensing Process for Handguns in New York City

Cover Page Footnote

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**THE DOCTOR WILL SEE YOU NOW:  
AN ARGUMENT FOR AMENDING THE LICENSING PROCESS  
FOR HANDGUNS IN NEW YORK CITY**

*Alexander C. DePalo\**

**I. INTRODUCTION**

With events such as the 2007 Virginia Tech Massacre,<sup>1</sup> the 2011 shooting of Congresswoman Gabrielle Giffords,<sup>2</sup> and the more recent shootings at the Empire State Building,<sup>3</sup> in Aurora, Colorado,<sup>4</sup> and at Sandy Hook Elementary,<sup>5</sup> gun control is often thrust into the limelight.<sup>6</sup> Much debate and discussion ensues, but until recently, very little action has ever taken place.<sup>7</sup> In 2010, an estimated 14,748

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<sup>1</sup> Leon Rubinstein, *NO GUNS, NO MASSACRE. SIMPLE*, PALM BEACH POST (Apr. 29, 2007), available at 2007 WLNR 8119296.

<sup>2</sup> *The Shooting of Gabrielle Giffords: The Tears of Tucson*, THE ECONOMIST (Jan. 15, 2011), available at 2011 WLNR 786611.

<sup>3</sup> Abby Rogers, *Jeffrey Johnson Used a Gun Brought to NYC Illegally To Shoot Ex-Co-Worker Five Times*, THE BUSINESS INSIDER (Aug. 25, 2012), available at 2012 WLNR 18137075.

<sup>4</sup> Alison Campsie, *Mayor Calls for Gun Law Reform Views*, HERALD (July 21, 2012), available at 2012 WLNR 15285499.

<sup>5</sup> Mark Pazniokas & Arielle Levin Becker, *Panel Will Examine Shooting Gun Control, Mental Health Under Review*, NORWICH BULLETIN (Jan. 6, 2013), available at 2013 WLNR 1232094.

<sup>6</sup> Abby Rogers, *How the Denver Shooting Will Shape the Debate on Gun Control*, THE BUSINESS INSIDER (July 20, 2012), available at 2012 WLNR 15254638.

<sup>7</sup> Alexandra Jaffe, *Gun-Control Debate Heats Up, But There's Little Consensus*, NATIONAL JOURNAL ONLINE (July 22, 2012), available at 2012 WLNR 15674161. On Janu-

homicides occurred in the United States with 68% of those committed with a firearm.<sup>8</sup> In New York City alone, there were 515 homicides in 2011; 61% were committed with a firearm.<sup>9</sup> New York City boasts some of the most restrictive gun laws in the country, many of which have come under strict scrutiny as to their constitutionality.<sup>10</sup> But are the laws effective in preventing individuals who are not legally permitted to possess a firearm from owning one? Can a person in New York City, who is mentally unstable, apply for a handgun license and obtain one?

Individuals with a severe mental illness commit approximately 10% of all homicides and 50% of all mass killings.<sup>11</sup> This number equates to roughly 1,400 deaths per year.<sup>12</sup> An estimated 319,000 Americans with untreated mental disease are currently incarcerated, comprising 16% of the total inmate population.<sup>13</sup> The United States General Accounting Office approximates that only half of the three million possible medical records indicating mental disease have been

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ary 15, 2013, New York passed the New York Secure Ammunition and Firearms Enforcement Act of 2013 (NY SAFE) in response to the Sandy Hook Tragedy. NYSENATE.GOV, <http://open.nysenate.gov/legislation/bill/s2230-2013> (last visited Apr. 20, 2013). The Act bans possession of any high-capacity magazines regardless of when they were made or sold. *Id.* Only clips able to hold up to seven rounds can be sold in the state. *Id.* Furthermore, the Act requires ammunition dealers to do background checks, similar to those for gun buyers, as well as the creation of a registry of assault weapons. *Id.* Those New Yorkers who already own such weapons would be required to register assault weapons with the state. *Id.* The Act also requires any therapist who believes a mental health patient made a credible threat of harming others to report the threat to a mental health director, who would then have to report serious threats to the state Department of Criminal Justice Services. NYSENATE.GOV, <http://open.nysenate.gov/legislation/bill/s2230-2013> (last visited Apr. 20, 2013). Lastly, it requires background checks for all gun sales, including by private dealers—except for sales to members of the seller's immediate family. *Id.* On April 17, 2013, the Senate rejected “a bipartisan compromise to expand background checks for gun buyers, a ban on assault weapons and a ban on high-capacity gun magazines.” Jonathan Weisman, *Senate Blocks Drive for Gun Control*, N.Y. TIMES (Apr. 17, 2013), available at [http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all&_r=0).

<sup>8</sup> 2012 NATIONAL CRIME VICTIMS' RIGHTS WEEK (NCVRW) RESOURCE GUIDE, [https://www.ncjrs.gov/ovc\\_archives/ncvrw/2012/pdf/2012ResourceGuide.pdf](https://www.ncjrs.gov/ovc_archives/ncvrw/2012/pdf/2012ResourceGuide.pdf) (last visited May 1, 2013).

<sup>9</sup> MURDER IN NEW YORK CITY 2011 REPORT, [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/2011\\_murder\\_in\\_nyc.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2011_murder_in_nyc.pdf) (last visited on May 5, 2013).

<sup>10</sup> Thomas Kaplan, *Gun Rights Backers, Stung By Cuomo's Law, Push to Undo It*, N.Y. TIMES (Jan. 29, 2013), available at <http://www.nytimes.com/2013/01/30/nyregion/activists-seek-repeal-of-new-yorks-gun-control-laws.html>.

<sup>11</sup> *Fast Facts*, TREATMENT ADVOCACY CENTER, <http://www.treatmentadvocacycenter.org/problem/fast-facts> (last visited May 5, 2013).

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

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

filed with the Federal Bureau of Investigation, the agency trusted with performing background checks.<sup>14</sup> Those records are included in the National Instant Criminal Background Check System (“NICS”), which is cross-referenced during a background check.<sup>15</sup> These background checks are a mandatory requirement within federal law under the Brady Handgun Violence Prevention Act.<sup>16</sup> Therefore, people who are legally ineligible to purchase a handgun may be able to do so simply because their medical history does not appear in the NICS.

This Comment will explore the history of the Second Amendment and the radical changes case law has imposed on the Amendment in the last five years. These changes have called into question whether New York City’s licensing scheme is constitutional, and whether the scheme is an effective tool in preventing crime. New York City has placed very stringent restrictions on an individual’s right and ability to obtain a license to possess a handgun.<sup>17</sup> Case law in New York indicates that a license to possess a handgun is a privilege, not a right, which is in stark contrast to recent Supreme Court holdings.<sup>18</sup>

New York City, through its license application, attempts to keep weapons out of the hands of those individuals who are a danger

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<sup>14</sup> *Mental Health Reporting Policy Summary*, LAW CENTER TO PREVENT GUN VIOLENCE (May 21, 2012), available at <http://smartgunlaws.org/mental-health-reporting-policy-summary/>.

<sup>15</sup> Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as 18 U.S.C. § 922(q)-(t) (1994)) BRADY HANDGUN VIOLENCE PREVENTION ACT; BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/legislation/backgroundchecks/bradylaw> (last visited Feb. 5, 2013).

<sup>16</sup> *Id.*

<sup>17</sup> N.Y. PENAL Law § 400.00 (McKinney 2013) (requiring applicants to show that no good cause exists for the denial of the license in addition to being twenty-one years of age, of good moral character, without a felony conviction, and without any history of mental illness); N.Y.C. ADMIN. CODE § 10-131 (2012) (requiring applicants to pay a \$340 licensing fee).

<sup>18</sup> *In re Papaioannou v. Kelly*, 788 N.Y.S.2d 378 (App. Div. 1st Dep’t 2005) (holding that possession of a handgun license is a privilege, not a right, which is subject to broad discretion of the New York City Police Commissioner, and the Commissioner, by statute has been delegated extraordinary power in such matters); *In re Kaplan v. Bratton*, 673 N.Y.S.2d 66 (App. Div. 1st Dep’t 1998) (finding that issuing a pistol license is not a right, but a privilege subject to reasonable regulation); *In re Williams v. Bratton*, 656 N.Y.S.2d 626 (App. Div. 1st Dep’t 1997); *In re Tartaglia v. Kelly*, 626 N.Y.S.2d 156 (App. Div. 1st Dep’t 1995) (finding that possessing a handgun license is a privilege, not a right); *Cf.* *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding the Second Amendment is an individual right, not a collective right); *McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010) (holding the Second Amendment is applicable to the states through the Fourteenth Amendment).

to both themselves and society.<sup>19</sup> News sources indicate that mentally ill individuals committed the shootings at the Empire State Building and at Sandy Hook Elementary.<sup>20</sup> In other words, if stronger guidelines were implemented, these tragedies could have been avoided. Unfortunately, if these individuals did not have a known history of mental illness on record or if their medical records were not reported to NICS, then a background check—which is part of the license application—would never reveal a problem.<sup>21</sup> This anomaly would render the New York City licensing scheme ineffective. An examination of foreign countries' licensing structures and their correlating crime rates can assist state and city legislators in making an effective change. A simple amendment to the license application that requires an applicant to undergo a psychological evaluation would rectify this alarming problem and ensure that those licensed to carry a handgun in New York City are legally competent to do so.<sup>22</sup>

In this Comment, Section II will focus on the evolution of the Second Amendment within the Supreme Court, and analyze how the Court interpreted the Second Amendment to grant an individual, as opposed to a collective, right to bear arms. A doctrinal, textual, and consequential study of the Amendment will assist with this endeavor. Section III will examine the New York State and New York City licensing schemes. This Section will explore the jurisprudence of these schemes, constitutional challenges, and their overall effectiveness. Section IV will evaluate the proper scrutiny courts utilize when evaluating possible Second Amendment violations. Lastly, Section V

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<sup>19</sup> *Kachalsky v. Cacace*, 817 F. Supp. 2d 235 (S.D.N.Y. 2011).

<sup>20</sup> Dr. Keith Ablow, *Prediction—Mental Illness May Have Prompted Empire State Building Shooting*, FOXNEWS.COM (Aug. 24 2012), <http://www.foxnews.com/opinion/2012/08/24/prediction-empire-state-building-shooter-will-turn-out-to-be-mentally-ill/>; Kevin Fobbs, *'Three Strike' Mental Illness Violence Law May Have Prevented Adam Lanza Slaughter*, RENEWAMERICA (Dec. 23, 2012), <http://www.renewamerica.com/columns/fobbs/121223>.

<sup>21</sup> *Fatal Gaps: How Missing Records in the Federal Background Check System Put Guns in the Hands of Killers*, MAYORS AGAINST ILLEGAL GUNS, Nov. 2011, [http://www.mayorsagainstillegalguns.org/downloads/pdf/maig\\_mimeo\\_revb.pdf](http://www.mayorsagainstillegalguns.org/downloads/pdf/maig_mimeo_revb.pdf) (last visited Feb. 3, 2012).

<sup>22</sup> Regrettably, even the most rigorous background checks cannot prevent all mentally ill individuals from illegally obtaining a weapon. Adam Lanza, the perpetrator in the Sandy Hook shooting, stole the weapons he used from his mother. If background checks were combined with stringent limitations on gun possession, this dangerous scenario might be further reduced. Jim Fitzgerald et al., *How It Happened . . . Adam Lanza Killed His Mother, Took Her Guns and Killed 26 People at The School*, JACKSON FREE PRESS (Dec. 14, 2012, 10:19 PM), <http://www.jacksonfreepress.com/news/2012/dec/14/how-it-happened-adam-lanza-killed-his-mother-took/>.

will propose an additional provision requiring a mental examination for each applicant prior to the issuance of any handgun license and will analyze whether such an amendment would pass constitutional muster. This proposal is not a restriction on an individual's right to bear arms, but rather a strong compromise between gun-right advocates and gun-control lobbyists. The overall goal of this amendment is to reduce the danger of guns by limiting access to firearms by mentally ill persons, which both sides agree is a worthwhile enterprise.

## II. BRINGING THE SECOND AMENDMENT INTO THE TWENTY-FIRST CENTURY

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>23</sup> This phrase is embedded in our popular culture, appearing both in magazines and presidential debates.<sup>24</sup> The National Rifle Association is arguably the most well known gun rights advocate and is routinely involved in litigation fighting for an individual's right to bear arms.<sup>25</sup> Until recently, the Supreme Court had not explained how the Founding Fathers intended these twenty-seven words to apply.<sup>26</sup> Scholars have examined many different aspects to determine the appropriate interpretation of the Second Amendment including the actual text, the history behind the Amendment, our governmental structure, doctrinal law, and possible consequential effects.<sup>27</sup> A limited discussion of this background is necessary to understand how the Second Amendment functions in modern society.

### A. Doctrinal

Unlike other amendments to the Constitution, the Second

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<sup>23</sup> U.S. CONST. amend. II.

<sup>24</sup> Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 641-42 (1989); Patrick Jonsson, *Obama vs. Romney 101: 4 Ways They Compare on Gun Control*, THE CHRISTIAN SCIENCE MONITOR, <http://www.csmonitor.com/USA/DC-Decoder/2012/0909/Obama-vs.-Romney-101-4-ways-they-compare-on-gun-control/Second-Amendment>.

<sup>25</sup> Nat'l Rifle Ass'n v. Magaw, 132 F.3d 272 (6th Cir. 1997); Nat'l Rifle Ass'n v. City of Chi., 393 F. App'x. 390 (7th Cir. 2010); Nat'l Rifle Ass'n v. Fed. Election Comm'n, 854 F.2d 1330; 761 F.2d 509 (D.C. Cir. 1988); Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n, 761 F.2d 509 (8th Cir. 1985).

<sup>26</sup> *Heller*, 554 U.S. at 616; *McDonald*, 130 S. Ct. at 3050.

<sup>27</sup> Levinson, *supra* note 24, at 643.

Amendment is not specifically interpreted in a plethora of case law.<sup>28</sup> In the 236-year history of our nation, the Supreme Court did not make any broad-reaching determinations on the application or scope of the Amendment until 2008.<sup>29</sup> In that year, the Court explicitly stated that the right to bear arms is an individual right,<sup>30</sup> which extends to the several states through the Fourteenth Amendment.<sup>31</sup> This created an influx of litigation challenging state licensing schemes and forced many states, including New York, to review their requirements to determine whether local handgun laws are in fact constitutional.<sup>32</sup>

The first noteworthy case in which the Supreme Court directly addressed how the Second Amendment applied to state governments under the then newly adopted Fourteenth Amendment was *United States v. Cruikshank*.<sup>33</sup> In 1873, members of a white militia attacked a Louisiana courthouse defended by black Republican freedmen.<sup>34</sup> Members of the white militia were charged under the Enforcement Act of 1870 for conspiring to prevent African Americans from exercising their right to bear arms.<sup>35</sup> This federal law made it a felony for two or more people, as part of a conspiracy, to

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<sup>28</sup> *Id.* at 640-41.

<sup>29</sup> See generally *Heller*, 554 U.S. 570 (2008).

<sup>30</sup> *Id.* at 595.

<sup>31</sup> *McDonald*, 130 S. Ct. at 3026.

<sup>32</sup> *Kachalsky*, 817 F. Supp. 2d 235 (holding New York's licensing scheme did not completely ban the carrying of firearms and therefore did not violate the Second Amendment); *Jackson v. City and Cnty. of S.F.*, No. C 09-2143 RS, 2012 WL 3580525, at \*1 (N.D. Cal. Aug. 17, 2012) (denying the plaintiffs' motion for partial judgment on the pleadings in a challenge to San Francisco firearms ordinances); *Hightower v. City of Bos.*, 693 F.3d 61, 65 (1st Cir. 2012) (rejecting facial and as-applied challenges to Massachusetts' concealed carry licensing scheme).

<sup>33</sup> 92 U.S. 542 (1875).

<sup>34</sup> *Colfax Massacre: Blacks Slaughtered By White Supremacists*, NEWS IN HISTORY.COM: A CHRONICLE OF AMERICA'S PAST (Apr. 13, 2012, 12:45 PM), <http://www.newsinhistory.com/blog/colfax-massacre-blacks-slaughtered-white-supremacists>. The attack occurred in the wake of a heated election for the governor of Louisiana. *Id.* The Republican candidate secured the seat. *Id.* The party's goal was to ensure black suffrage and incorporate blacks into the political system. *Id.* Fearing retaliation from local Democrats, a group of freedmen and state militia attempted to protect the Grant Parish Courthouse in Colfax from a possible assault. *Id.* Armed with rifles and small cannon, white supremacists attacked the courthouse. *Colfax Massacre: Blacks Slaughtered By White Supremacists*, NEWS IN HISTORY.COM: A CHRONICLE OF AMERICA'S PAST (Apr. 13, 2012, 12:45 PM), <http://www.newsinhistory.com/blog/colfax-massacre-blacks-slaughtered-white-supremacists>. The particular number of casualties as a result of the attack was never determined as many bodies were thrown into the Red River. *Id.*

<sup>35</sup> *Cruikshank*, 92 U.S. at 544-45.



deprive an individual of his or her constitutional rights.<sup>36</sup> The Court dismissed the charges, holding that the Bill of Rights only restricted governmental powers and had no authority over private individuals or the states.<sup>37</sup> The Court stated that “[t]he Second Amendment . . . has no other effect than to restrict the powers of the national government.”<sup>38</sup> In essence, because *Cruikshank* involved actions between individuals, and not state action, the Fourteenth Amendment was not applicable.<sup>39</sup> At that time, the Fourteenth Amendment did not confer any rights granted by the Bill of Rights on the several states, and the *Cruikshank* holding restricted the application of the Second Amendment only to the federal government.<sup>40</sup> Therefore, this would allow any state to enact legislation to regulate guns in any way practicable.

*Cruikshank*'s language and holding were reaffirmed in *Presser v. Illinois*.<sup>41</sup> The defendant led a group of 400 men in a parade through the streets of Chicago.<sup>42</sup> These men were trained and drilled with military weapons.<sup>43</sup> The defendant was charged with violating a state statute, which made it unlawful for individuals, other than “the regular organized volunteer militia,” to organize and gather “as a military company or organization . . . without the license of the governor.”<sup>44</sup> The defendant argued that the state statute in question violated his Second Amendment right to bear arms.<sup>45</sup> The Supreme Court disagreed and reaffirmed *Cruikshank*, holding that because the Second Amendment is only binding on the federal government, the State of Illinois could enact legislation restricting the rights of individuals to bear arms.<sup>46</sup> This decision upheld a state's authority to regulate the militia and was commonly cited to provide justification for state and local municipalities to pass laws that regulate guns.<sup>47</sup>

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

<sup>37</sup> *Id.* at 553.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* At the time *Cruikshank* was decided, the incorporation doctrine was not yet developed. Therefore, no rights embodied in the Bill of Rights were incorporated in the due process clause of the Fourteenth Amendment. JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW CASES AND MATERIALS 548-50 (Robert C. Clark et al. eds., 13th ed. 2009).

<sup>40</sup> *Cruikshank*, 92 U.S. at 553.

<sup>41</sup> 6 S. Ct. 580 (1886).

<sup>42</sup> *Id.* at 581.

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

<sup>44</sup> *Id.* at 580.

<sup>45</sup> *Id.* at 581-82.

<sup>46</sup> *Presser*, 6 S. Ct. at 584.

<sup>47</sup> *Id.* at 585.

In another landmark case, *United States v. Miller*,<sup>48</sup> the Supreme Court stated that an individual had a right to possess a weapon so long as the weapon bore a reasonable relationship to a well-regulated militia and was currently in common use.<sup>49</sup> The defendants in *Miller* attempted to transport a short-barreled shotgun across state lines.<sup>50</sup> They were charged with violating the 1934 National Firearms Act, which regulated and taxed the transfer of certain types of firearms, and required the registration of such arms.<sup>51</sup> The defendants argued that the statute violated their Second Amendment right by restricting their ability to keep and bear arms.<sup>52</sup> The Court concluded:

In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>53</sup>

Therefore, if a weapon could contribute to the efficiency of a well-regulated militia, then an individual could possess such a weapon. The Court never specifically articulated that the defendants were required to belong to a well-regulated militia to legally possess such a weapon, nor did it state that the weapon had to be used for military purposes. However, many lobbyists have taken expansive views of the *Miller* decision to both extremes.<sup>54</sup> Gun-control advocates claim *Miller* restricted the Second Amendment to apply only to individuals who were members of a state militia acting as part of the common defense,<sup>55</sup> whereas gun-right advocates allege *Miller* expanded the Se-

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<sup>48</sup> 307 U.S. 174 (1939).

<sup>49</sup> *Id.* at 178.

<sup>50</sup> *Id.* at 175.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 176.

<sup>53</sup> *Miller*, 307 U.S. at 178.

<sup>54</sup> Dr. Michael S. Brown, *The Strange Case of United States v. Miller, KEEP AND BEAR ARMS.COM*, <http://www.keepandbeararms.com/information/XcIBViewItem.asp?ID=2337>; David Kopel, *Why United States v. Miller Was So Badly Written, THE VOLOKH CONSPIRACY* (Feb. 27, 2010, 4:00 PM), <http://www.volokh.com/2010/02/27/united-states-v-miller/>.

<sup>55</sup> *Id.* at 3.

cond Amendment to protect any weapon that is part of ordinary military equipment.<sup>56</sup> With these clearly conflicting views, it was not until 2008 that the Supreme Court clarified how the Second Amendment would apply, turning gun control upside down.<sup>57</sup>

In 2008, the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms in *District of Columbia v. Heller*.<sup>58</sup> In *Heller*, the defendant was a Washington, D.C. special police officer who applied for a registration certificate for a handgun that he wished to keep in his home.<sup>59</sup> At that time, the gun laws in the District of Columbia made it a crime to carry an unregistered firearm, and yet prohibited the registration of handguns.<sup>60</sup> The defendant's certificate application was denied and in turn he challenged the law as an unconstitutional restraint on his Second Amendment right to keep and bear arms.<sup>61</sup> In a 5-4 decision, the Supreme Court, for the first time in its history, held that "there seems to us no doubt, on the basis of both the text and history, that the Second Amendment conferred an individual right to keep and bear arms."<sup>62</sup> However, because the District of Columbia is under federal jurisdiction, the Court left open the question of whether the Second Amendment only applied to the federal government or whether it was also applicable to the states.<sup>63</sup> The *Heller* ruling was a turning point for gun-rights advocates and allowed for new litigation to challenge the constitutionality of state regulations restricting an individual's right to keep and bear arms.<sup>64</sup>

Finally, in 2010, the Supreme Court, in *McDonald v. City of Chicago*,<sup>65</sup> held that the Second Amendment is fully applicable to the states through the Fourteenth Amendment.<sup>66</sup> The defendants, residents of the City of Chicago, challenged the constitutionality of a state statute that made it unlawful for an individual to possess a

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

<sup>57</sup> *Heller*, 554 U.S. 570.

<sup>58</sup> 554 U.S. 570 (2008).

<sup>59</sup> *Id.* at 575.

<sup>60</sup> *Id.* at 576.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 595.

<sup>63</sup> Christopher Keleher, *District of Columbia v. Heller: The Death Knell for Illinois Handgun Bans?*, 96 ILL. B.J. 402, 405 (2008).

<sup>64</sup> Lindsey Craven, *Where Do We Go From Here? Handgun Regulation In A Post-Heller World*, 18 WM. & MARY BILL RTS. J. 831, 844-55 (2010).

<sup>65</sup> 130 S. Ct. 3020 (2010).

<sup>66</sup> *Id.* at 3050.

handgun without a valid registration.<sup>67</sup> The statute also made it unlawful to register most handguns, effectively banning handgun possession by most private citizens.<sup>68</sup> The defendants argued that the statute was a violation of their Second Amendment rights and left them without a means of self-protection.<sup>69</sup>

Until this time, the Supreme Court had not extended the Second Amendment to the states and allowed the several states to restrict firearms in any way practicable.<sup>70</sup> The Court concluded that even though the Fourteenth Amendment may have been enacted to prevent state discrimination, it is generally understood to “protect constitutionally enumerated rights, including the right to keep and bear arms.”<sup>71</sup> Both *Heller* and *McDonald* expanded the Second Amendment to its broadest application to date.<sup>72</sup> The Second Amendment now applies to individuals for either self-defense or in a military setting, and is fully incorporated to apply to the states through the Fourteenth Amendment.<sup>73</sup>

## B. Textual Interpretation

The specific words that create an amendment often shed light on how the amendment should be interpreted within modern society.<sup>74</sup> There are two main arguments on either side of the discussion in terms of the text of the Second Amendment. Pro-gun activists argue that the Second Amendment provides an individual right, which is applicable in areas of self-defense and self-preservation.<sup>75</sup> Gun-control activists argue that the Amendment merely confers a collective right for the people and does not apply outside the scope of the military.<sup>76</sup> The Supreme Court settled this issue with its holding

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<sup>67</sup> *Id.* at 3026.

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

<sup>69</sup> *Id.* at 3027.

<sup>70</sup> *See Presser*, 116 U.S. 252; *Cruikshank*, 92 U.S. 542.

<sup>71</sup> *McDonald*, 130 S. Ct. at 3077.

<sup>72</sup> *See generally* Marcia Coyle, *Post-Newtown Gun Legislation Will Hinge on ‘Heller’*, THE NATIONAL LAW JOURNAL (Dec. 17, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202581822870&PostNewtown\\_gun\\_legislation\\_will\\_hinge\\_on\\_Heller&slreturn=20130110003954](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202581822870&PostNewtown_gun_legislation_will_hinge_on_Heller&slreturn=20130110003954).

<sup>73</sup> *See Heller*, 554 U.S. 570; *McDonald*, 130 S. Ct. 3020.

<sup>74</sup> *See* Thomas J. Walsh, *The Limits and Possibilities of Gun Control*, 23 CAP. U.L. REV. 639, 642 (1994); *Heller*, 554 U.S. at 577-78.

<sup>75</sup> *Heller*, 554 U.S. at 577.

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

in *Heller* by analyzing the text of the Amendment.<sup>77</sup>

In order to perform a proper textual analysis, it is necessary to divide the Second Amendment into two parts.<sup>78</sup> Justice Scalia, in his majority opinion in *Heller*, called these “parts” the prefatory clause and operative clause.<sup>79</sup> Standing alone, the prefatory clause—well regulated militia and security of a free State—allows the basic interpretation that the Second Amendment grants a collective right.<sup>80</sup> A militia is a body of citizens enrolled for military service, called out periodically for drill, but serves full time only in emergencies<sup>81</sup> and is “comprised of all males physically capable of acting in concert for the common defense.”<sup>82</sup> “Well regulated” can imply a method of training.<sup>83</sup> Clearly, if the government were to provide training, then the Amendment only applies to the collective and not the individual. However, New York required that “every able-bodied Male Person . . . provide himself, at his own Expense, with a good Musket or Firelock” to participate in the militia.<sup>84</sup> The issue then turns on whether these weapons were stored at an individual’s home or in a communal location. Logically, if an individual could keep the weapon at his home, the right is individualistic; however, if the weapon had to be stored at a common place, then the right is enjoyed only by the collective.

In the second phrase of the prefatory clause, the word “State” has profound meaning.<sup>85</sup> The word appears several times in the Constitution to refer to either the individual states or the nation as a whole.<sup>86</sup> Examining other parts of the Constitution, when the word “state” implies the several states individually, modifiers such as “each,” “several,” “any,” “particular,” or “one” are used to set off its meaning.<sup>87</sup> However, in the Second Amendment the word “State” is not modified, indicating that it refers to the several states in a collec-

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

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

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

<sup>80</sup> Levinson, *supra* note 24, at 644.

<sup>81</sup> *See generally* *Perpich v. Dep’t of Def.*, 496 U.S. 334 (1990).

<sup>82</sup> *Miller*, 307 U.S. at 179.

<sup>83</sup> *Heller*, 554 U.S. at 597.

<sup>84</sup> Walsh, *supra* note 74, at 653 (emphasis added).

<sup>85</sup> *Heller*, 554 U.S. at 597.

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

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

tive sense.<sup>88</sup> Most likely, the Founding Fathers intended the word “State” to apply to the whole, not just the part, as a free and independent nation.<sup>89</sup> Furthermore, this interpretation allows the militia to become a triple threat—repelling invasions from foreign nations, preventing domestic insurrection, and resisting tyranny, all of which are collective concerns.<sup>90</sup>

On the other hand, the operative clause, which consists of “right of the people” and “keep and bear arms,” can easily be understood as granting an individual right.<sup>91</sup> The first phrase turns on the meaning of the word “people.” This term is used several times in the Constitution, including the First, Fourth, and Tenth Amendments.<sup>92</sup> In the First and Fourth Amendments, the Constitution grants an individual freedom of speech, press, assembly, religion, and against unreasonable searches and seizures.<sup>93</sup> On the contrary, the Tenth Amendment grants authority to the people for matters not reserved to the Federal Government or the several states.<sup>94</sup> Justice Scalia, in *Heller*, bridges this gap by concluding that because the Second Amendment deals with a right and not a reserved power granted by the Constitution, the right must be enjoyed individually.<sup>95</sup>

The term “keep and bear Arms” is an ambiguous phrase.<sup>96</sup> As alluded to earlier, the word “keep” implies that an individual could store arms in a home instead of a public communal place.<sup>97</sup> This would mean that individuals, not just a collective group, could gain access to weapons. “Arms” may carry a multitude of different meanings, but in general it is understood to indicate a weapon.<sup>98</sup> However, the intended use of such weapon offers great insight into the purpose behind the Amendment. If the weapon is to be used solely for the na-

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<sup>88</sup> *Id.*

<sup>89</sup> Sanjay Sanghoo, *Gun Control: It's Time to Challenge the Second Amendment*, HUFFINGTON POST (Aug. 9, 2012, 11:44 AM), [http://www.huffingtonpost.com/sanjay-sanghoo/gun-control-its-time-to-c\\_b\\_1759542.html](http://www.huffingtonpost.com/sanjay-sanghoo/gun-control-its-time-to-c_b_1759542.html) (“As for the security of a ‘free State,’ the Founding Fathers likely meant the most imminent threat against the newly formed United States at that time, namely a foreign power, and not our own government.”).

<sup>90</sup> *Heller*, 554 U.S. at 597.

<sup>91</sup> U.S. CONST. amend. II.

<sup>92</sup> U.S. CONST. amend. I; U.S. CONST. amend. IV; U.S. CONST. amend. X.

<sup>93</sup> U.S. CONST. amend. I; U.S. CONST. amend. IV.

<sup>94</sup> U.S. CONST. amend. X.

<sup>95</sup> *Heller*, 554 U.S. at 579-81.

<sup>96</sup> *Id.* at 582-86.

<sup>97</sup> *See supra* Part II.B.

<sup>98</sup> *Heller*, 554 U.S. at 581-82.

tion's defense, then it is difficult to argue that the Amendment grants anything other than a collective right.<sup>99</sup> However, if the weapon could be used for self-defense and self-preservation, then an individual right would be more appropriate.<sup>100</sup> Several state constitutions have incorporated this clarification and allow individuals to carry weapons for the protection of the state and their person.<sup>101</sup> It has also been generally understood that individuals may hunt and participate in target shooting events for both survival purposes and leisure.<sup>102</sup> Under the collective view, these events are clearly outside the scope of the military for which the Second Amendment theoretically should apply.

The operative and prefatory clauses can appear to be at odds because one seems to grant an individual right while the other grants a collective right.<sup>103</sup> However, it is important to take the text in its entirety to determine its application today.<sup>104</sup> If one is to interpret the Second Amendment as granting a collective right, then the purpose behind the Amendment could be destroyed.<sup>105</sup> Many scholars agree that tyranny, which caused the American Revolution, was a major concern when drafting the Constitution.<sup>106</sup> Accordingly, built into our structure of government are checks and balances to ensure that no one branch becomes more powerful than another branch of government.<sup>107</sup> Checks on the federal government by the several states are found embedded in the Tenth Amendment.<sup>108</sup> The people are also empowered to revolt and protest against tyrannical government.<sup>109</sup> It reasonably follows that part of this revolt includes the ability to take up arms against the government.<sup>110</sup>

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<sup>99</sup> *Miller*, 307 U.S. at 178.

<sup>100</sup> *Heller*, 554 U.S. at 594.

<sup>101</sup> *Id.* at 600-01.

<sup>102</sup> *McDonald*, 130 S. Ct. at 3036 (citing *Heller*, 554 U.S. at 599, 628-29); *id.* at 3108-09 (Stevens, J., dissenting).

<sup>103</sup> *See supra* Part II.B.

<sup>104</sup> *Heller*, 554 U.S. at 598-600.

<sup>105</sup> *Id.* at 599.

<sup>106</sup> *Id.* at 597-98; Levinson, *supra* note 24, at 651.

<sup>107</sup> *See generally* *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing judicial review).

<sup>108</sup> U.S. CONST. amend. X.

<sup>109</sup> U.S. CONST. amend. I.

<sup>110</sup> *Heller*, 554 U.S. at 598 (“[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”). The Court is unclear as to whether tyranny refers to an external or an internal force. *See id.* However, this determination seems to be irrelevant because both can threaten the security of a free state, as demonstrated by the

If the government were allowed to disarm its citizens and the militia, then the built-in protection against tyranny offered by the Second Amendment is lost.<sup>111</sup> Granted, this is an antiquated way to interpret the Second Amendment because the fear that the national government would disarm the general public subsided by the 1850s.<sup>112</sup> In colonial times, the idea that the general public could wage war against their government was feasible as evidenced by the American and French Revolutions. However, the possibility that the general public today could engage in a realistic war against our modern army seems unlikely. If the government committed its forces against a modern-day domestic revolt, mass casualties would ensue for both sides, with the people, much more likely than not, on the losing end.

Nevertheless, the fear that gun laws will become so restrictive as to prevent self-defense is a credible concern. More importantly, when looking at the *text* of an amendment, the Framers' intent is paramount.<sup>113</sup> Self-defense and preservation cannot be readily read into the Second Amendment without looking at the historical context.<sup>114</sup> At the time the Amendment was adopted, hunting and shooting game were a common activity.<sup>115</sup> Moreover, the idea that an individual had a right to protect his castle from all who threatened it was inherent in English common law.<sup>116</sup> Therefore, it logically follows under the concept of liberty within the Constitution that self-protection and self-preservation are built into the Second Amendment. Regardless of a person's political view on gun control, the Supreme Court has ruled on this issue and has unequivocally stated that the right to bear arms is an individual right, which can be asserted outside the scope of the military for self-defense and sporting purposes.<sup>117</sup> Yet, this individual right is not without restrictions, and in order to maintain a civi-

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Oklahoma City Bombing in 1995 and the more recent Boston Marathon Bombing in 2013. *Terror Hits Home: The Oklahoma City Bombing*, FBI.GOV, <http://www.fbi.gov/about-us/history/famous-cases/oklahoma-city-bombing>; Josh Levs, *Boy, 8, One of 3 Killed in Bombings at Boston Marathon; Scores Wounded*, CNN (Apr. 18, 2013, 10:25 AM), <http://www.cnn.com/2013/04/15/us/boston-marathon-explosions>.

<sup>111</sup> *Id.*

<sup>112</sup> *McDonald*, 130 S. Ct. at 3038.

<sup>113</sup> *See* Walsh, *supra* note 74, at 642, 643-44 (internal citations omitted).

<sup>114</sup> *Heller*, 554 U.S. at 640 (Stevens, J., dissenting).

<sup>115</sup> *Id.* at 599.

<sup>116</sup> Christopher Reinhart, *Castle Doctrine and Self-Defense*, OLR RESEARCH REPORT (Jan. 17, 2007), <http://www.cga.ct.gov/2007/rpt/2007-r-0052.htm>.

<sup>117</sup> *See generally Heller*, 554 U.S. 570.



lized society, it is important to incorporate these restrictions within the confines of the law.<sup>118</sup>

### C. Consequential Results

Now that the Supreme Court has conferred an individual right to bear arms through the Second Amendment, made applicable to the states through the Fourteenth Amendment, it is hard to ignore the elephant in the room. The harsh reality is that the Second Amendment creates “extraordinary social cost with little, if any, compensating social advantage.”<sup>119</sup> For example, in 2010, an estimated 14,748 homicides occurred in the United States with 68% of those committed through the use of guns.<sup>120</sup> Unfortunately, in New York City, similar statistics show that in 2011, 61% of all murders involved a gun.<sup>121</sup> Clearly, these alarming statistics were not the Framers’ intent when constructing the Second Amendment.

In contrast, a recent study conducted by the United Nations Office on Drugs and Crime (“UNODC”) found that England, a country with strict gun-control laws, had only forty-one deaths by firearms throughout the entire country in 2011.<sup>122</sup> That equates to 6.6% of all homicides.<sup>123</sup> Japan, an industrialized democracy, “has some of the strictest gun control laws” in the world and requires that applicants receive a mental health examination before obtaining a license.<sup>124</sup> Through legislation, Japan has created a virtual ban on private handgun ownership.<sup>125</sup> The same UNODC study indicates that there were eleven homicides by firearms throughout the nation.<sup>126</sup> That is 1.8% of all homicides in the country.<sup>127</sup> Lastly, Australia heavily regulates the issuance of handgun licenses and usually only permits licenses for “business owners for security” purposes and for “gun clubs for target

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<sup>118</sup> *Id.* at 595.

<sup>119</sup> Levinson, *supra* note 24, at 655.

<sup>120</sup> See *2012 National Crime Victims’ Rights Week Resource Guide*, *supra* note 8.

<sup>121</sup> See *Murder in New York City 2011 Report*, *supra* note 9, at 2-3.

<sup>122</sup> *Gun Homicides and Gun Ownership Listed by Country*, THE GUARDIAN (July 22, 2012, 8:01 PM), <http://www.guardian.co.uk/news/datablog/2012/jul/22/gun-homicides-ownership-world-list#data>.

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

<sup>124</sup> Walsh, *supra* note 74, at 660, 661.

<sup>125</sup> *Id.* at 660.

<sup>126</sup> See *Gun Homicides and Gun Ownership*, *supra* note 122.

<sup>127</sup> *Id.*

shooting.”<sup>128</sup> As a result of this regulation, handguns were responsible for the death of only thirty people on the entire continent.<sup>129</sup> Why does the United States handgun homicide percentage compare to that of more turbulent countries like Colombia and Mexico as opposed to the less violent countries cited above?<sup>130</sup> Is it because Americans are more prone to violent behavior or is it because those countries have more stringent regulations on deadly weapons? Gun-rights activists argue that these differences are because of cultural and societal norms within those cited peaceful countries.<sup>131</sup> That may very well be true. However, given the known dangers guns pose in the United States, reasonable regulation to prevent future violence is imperative.

Working under the confines of the law, an absolute ban on handguns would not only be impractical—weapons would become the contraband of modern society similar to drugs or alcohol during the prohibition era—but also, unconstitutional.<sup>132</sup> An absolute ban would keep guns out of the hands of law-abiding citizens, while criminals and delinquents would maintain access through illegal means. Furthermore, there are an extraordinary number of guns already on the streets of the United States. Nearly 88% of all Americans own some form of a firearm and removing these weapons from private possession would be nearly impossible.<sup>133</sup> The only realistic solution to curtail this epidemic is to regulate firearms through legislation. If the old adage “guns don’t kill people, people kill people”<sup>134</sup> holds true, then those “people” should be limited in their ability to possess a deadly weapon. As Justice Scalia stated in *Heller*, the Second Amendment right to bear arms is not absolute and can be subject to reasonable restrictions.<sup>135</sup> It is necessary to tackle these tricky endeavors not only to curb the dire societal cost cited above, but also to ensure that those who possess a handgun license are competent to

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<sup>128</sup> Walsh, *supra* note 74, at 660.

<sup>129</sup> See *Gun Homicides and Gun Ownership*, *supra* note 122.

<sup>130</sup> *Id.*

<sup>131</sup> David B. Kopel, *Japanese Gun Control*, 2 ASIA PAC. L. REV. 26, 41 (1993), available at <http://www.guncite.com/journals/dkjc.html>.

<sup>132</sup> See U.S. CONST. amend. XVIII, *repealed by*; U.S. CONST. amend. XXI.

<sup>133</sup> See *Gun Homicides and Gun Ownership*, *supra* note 122., at 3.

<sup>134</sup> William Saletan, *Goon Control*, SLATE MAG. (Jan. 11, 2013), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2013/01/guns\\_don\\_t\\_kill\\_people\\_people\\_kill\\_people\\_so\\_keep\\_dangerous\\_people\\_away.html](http://www.slate.com/articles/health_and_science/human_nature/2013/01/guns_don_t_kill_people_people_kill_people_so_keep_dangerous_people_away.html).

<sup>135</sup> The term “reasonable restrictions” has not been defined, but will depend on the level of scrutiny applied.

do so.

### III. NEW YORK CITY'S LICENSING SCHEME

#### A. Generally

New York attempts to regulate the use and possession of handguns through Articles 265.00 and 400.00 of its Penal Code.<sup>136</sup> Article 265.00 creates a general ban on the possession of firearms subject to a few exceptions.<sup>137</sup> The major exception allows an individual to obtain a license to legally possess a handgun.<sup>138</sup> Article 400.00 is the “exclusive statutory mechanism for the licensing of firearms in New York State.”<sup>139</sup> Licenses may only be obtained by individuals who are over the age of twenty-one.<sup>140</sup> The applicant must be in good moral standing as evidenced through peer recommendations.<sup>141</sup> The individual must not have been convicted of a felony or other serious offense and must not have a history of mental disease.<sup>142</sup>

The licensing process is handled principally on the local level and begins with a licensing officer.<sup>143</sup> Every county has a different licensing form; yet each form must comply with certain statutory standards.<sup>144</sup> These standards require the applicant to state his or her “full name, date of birth, residenc[y],” and occupation, as well as submit a photo taken in the last thirty days and present the application in person.<sup>145</sup> The submission of an application triggers an investigation.<sup>146</sup> This investigation entails local police exploring “the applicant’s mental health history, criminal history, moral character, and, in the case of a carry license, representations of proper cause.”<sup>147</sup>

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<sup>136</sup> N.Y. PENAL LAW § 400.00 (McKinney 2013); N.Y. PENAL LAW § 265.00 (McKinney 2013).

<sup>137</sup> N.Y. PENAL LAW § 265.01 (McKinney 2013).

<sup>138</sup> N.Y. PENAL LAW § 265.20 (McKinney 2013).

<sup>139</sup> O’Connor v. Scarpino, 638 N.E.2d 950, 951 (N.Y. 1994).

<sup>140</sup> N.Y. PENAL LAW § 400.00 (McKinney 2013).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> N.Y. PENAL LAW § 400.00 (McKinney 2013).

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

<sup>147</sup> Osterweil v. Bartlett, 819 F. Supp. 2d 72, 78 (N.D.N.Y. 2011).

In New York City, the License Division of the New York City Police Department (“NYPD”) is charged with performing these investigations and issuing handgun licenses.<sup>148</sup> The NYPD takes an applicant’s fingerprints and cross checks those prints against the databases of the New York State Division of Criminal Justice Services, the Federal Bureau of Investigation, and the NICS to ensure statutory eligibility.<sup>149</sup> The NYPD charges an applicant \$340 as a processing fee and \$91.50 as a fingerprint fee to perform these checks.<sup>150</sup> Rights granted to the holder of the license vary according to the type of license issued and “expire on the first day of the second January after the date of issuance.”<sup>151</sup>

Furthermore, under N.Y.C. Administration Code Section 10-131,<sup>152</sup> the Police Commissioner, who is deemed the licensing officer in New York City, is given great discretion to deny an application, especially with respect to carry licenses when applicants fail to prove proper cause.<sup>153</sup> Specifically, under the New York State statute, the police commissioner may not approve an application if “good cause exists for the denial of the license.”<sup>154</sup> Proper cause is not expressly defined within the statute. However, it has been interpreted by New York state courts to mean “a special need for self-protection distinguishable from that of the general community . . . .”<sup>155</sup> A decision by the Police Commissioner to deny a license application will not be overturned unless that decision was deemed to be “arbitrary and capricious.”<sup>156</sup>

In sum, New York is considered a “may issue” state in which local authorities are granted the discretion to accept or deny a handgun license application.<sup>157</sup> In contrast, Kentucky is a “shall issue”

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<sup>148</sup> NYC.GOV, [http://www.nyc.gov/html/nypd/html/permits/handgun\\_licensing\\_application.shtml](http://www.nyc.gov/html/nypd/html/permits/handgun_licensing_application.shtml) (follow “Click here to download License Application guide, Handgun License Application form” hyperlink to download Handgun License Application form).

<sup>149</sup> N. Y. STATE DIV. OF CRIMINAL JUSTICE SERVS: 2011 ANNUAL PERFORMANCE REPORT (Sept. 2012), available at <http://criminaljustice.state.ny.us/pio/annualreport/2011-annual-dcjs-performance-report.pdf>.

<sup>150</sup> See NYC.GOV, *supra* note 148.

<sup>151</sup> N.Y.C. ADMIN. CODE § 10-131 (2012).

<sup>152</sup> *Id.*

<sup>153</sup> *In re Papaioannou*, 788 N.Y.S.2d at 378-79.

<sup>154</sup> N.Y. PENAL LAW § 400.00(1)(g).

<sup>155</sup> *Bando v. Sullivan*, 735 N.Y.S.2d 660, 662 (App. Div. 3d Dep’t 2002) (internal quotation marks and citations omitted).

<sup>156</sup> *In re Kaplan*, 673 N.Y.S.2d at 68.

<sup>157</sup> *Shall Issue, May Issue, No Issue, and Unrestricted States*, BUCKEYE FIREARMS ASS’N,

state in which local authorities issue licenses unless explicit facts surface that compel the denial of the application.<sup>158</sup> There is no doubt that the process in New York State is tedious and time-consuming as compared to other states and it may take three to six months before an application is approved.<sup>159</sup> Ultimately, if an individual seeks to exercise his or her right under the Second Amendment and possess a handgun in New York City, the means to do so are legally in place. Time and paperwork are small prices to pay to ensure that those who receive a license in New York City are competent, law-abiding citizens.

### B. Is The Licensing Scheme Effective?

The simple and short answer to this question is no. Fatal gaps exist in the system, which allow persons who are afflicted with mental diseases or defects to apply and obtain a handgun license.<sup>160</sup> Without question, over the last five years, New York has made great strides to ensure that medical records are submitted to the NICS in a timely manner.<sup>161</sup> Roughly 271,837 background checks were performed in New York State in 2011.<sup>162</sup> More specifically, in New York City between the period of 2004 to 2006, 858 premise license handgun applications were submitted and 620 licenses were granted.<sup>163</sup> This indicates a grant rate of 72%. Within City limits, a common misnomer persists that applications for handgun licenses are denied more often than not; however, the statistics tell another story.

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<http://www.buckeyefirearms.org/node/6744> (last visited Mar. 1, 2013).

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

<sup>159</sup> *Getting a NYC Handgun Permit*, N.Y.C. GUNS, <http://newyorkcityguns.com/getting-a-nyc-handgun-permit/> (last visited Mar. 1, 2012).

<sup>160</sup> *Fatal Gaps: How Missing Records in the Federal Background Check System Puts Guns in the Hands of Killers*, MAYORS AGAINST ILLEGAL GUNS, at 3, [http://www.mayorsagainstillegalguns.org/downloads/pdf/maig\\_mimeo\\_revb.pdf](http://www.mayorsagainstillegalguns.org/downloads/pdf/maig_mimeo_revb.pdf) (last visited Apr. 20, 2013).

<sup>161</sup> *Fatal Gaps: Can Dangerous People Buy Guns in Your State?*, DEMAND ACTION TO END GUN VIOLENCE, <http://www.demandaction.org/FatalGaps> (click on the map of the United States to see statistics for the respective States) (last visited Apr. 20, 2013).

<sup>162</sup> *Id.*

<sup>163</sup> *United States v. Decastro*, 682 F.3d 160, 162 (2d Cir. 2012). A Premises License is a restricted type of license. *See* NYC.GOV, *supra* note 148. It is issued for a residence or business. *Id.* The licensee may possess a handgun only on the premises of the address indicated on the front of the license. *Id.* Licensees may also transport their handguns and ammunition in separate locked containers, directly to and from an authorized range, or hunting location. *Id.* Handguns must be unloaded while being transported. *Id.*

To assist the effectiveness of the background checks required by law, New York also submitted 186,999 medical records to NICS, which places the State within the top seven in the country for reporting.<sup>164</sup> This action allows licensing officers to crosscheck the NICS database when investigating an application to ensure that those requesting a handgun license are mentally stable.<sup>165</sup> This appears to be a promising statistic, but what about those individuals who never receive treatment and, in turn, never generate a medical record to report to NICS?

A study performed in June 2004, reported in the Journal of the American Medical Association, indicates that 35-40% of serious mental disease cases go untreated.<sup>166</sup> The National Institute of Mental Health estimated that in 2010, there were approximately 3.5 million Americans who suffered from a severe mental illness, but were untreated.<sup>167</sup> This represents roughly 1.5% of the population across the country.<sup>168</sup> Accordingly, these individuals would not generate a medical file, as they are never diagnosed as mentally ill. As a result, NICS would not flag these persons as unfit licensees.

Individuals with a severe mental illness commit approximately 10% of all homicides and 50% of all mass killings,<sup>169</sup> which amounts to roughly 1,400 deaths per year.<sup>170</sup> An estimated 400,000 Americans with untreated mental disease are currently incarcerated, which is 16% of the total inmate population.<sup>171</sup> A study by Jeffrey Swanson at Duke University found that 33% of people with a serious mental illness reported past violent behavior, compared with 15% of people without a major mental disorder.<sup>172</sup> Even though it is inaccurate and unfair to characterize all individuals with a mental disease as

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<sup>164</sup> *Fatal Gaps: Can Dangerous People Buy Guns in Your State?*, *supra* note 161.

<sup>165</sup> *Fatal Gaps: How Missing Records in the Federal Background Check System Puts Guns in the Hands of Killers*, *supra* note 160, at 9.

<sup>166</sup> *Prevalence, Severity, and Unmet Need for Treatment of Mental Disorders: World Health Organization World Mental Health Surveys*, J. AM. MED. ASS'N (June 2, 2004), available at <http://jama.jamanetwork.com/article.aspx?articleid=198847#METHODS>.

<sup>167</sup> *Fast Facts*, TREATMENT ADVOCACY CTR., <http://www.treatmentadvocacycenter.org/problem/fast-facts> (last visited Mar. 1, 2013).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Michael Luo, *Gun Rights and Mental Illness: Answering Readers' Questions*, N.Y. TIMES (July 5, 2011, 12:11 PM), <http://thelede.blogs.nytimes.com/2011/07/05/gun-rights-and-mental-illness-answering-readers-questions/>.

violent, society has regrettably created a strong negative stigma toward this class of persons.<sup>173</sup> However, this attitude should not deter society from rectifying a current social problem. Just as it would be blatantly unreasonable to argue that a blind person has a right to possess a pilot's license, it would also be equally irrational to allow an individual, who may be prone to violent tendencies, to possess a handgun. Until gaps within the system are addressed and the NICS's database is complete, the risk will remain that handguns may *legally* end up in the hands of the mentally unfit.

#### IV. STANDARD OF REVIEW

Before analyzing pertinent New York case law, a discussion is warranted to determine the appropriate level of scrutiny when reviewing restrictions on Second Amendment rights. Despite lengthy opinions in both *Heller* and *McDonald*, the Supreme Court failed to articulate which level of scrutiny is appropriate if an individual claims a statute violated his or her right to bear arms. However, in those cases, the Supreme Court did eliminate two levels of scrutiny from the discussion: rational basis review and an interest-balancing approach.<sup>174</sup>

First, the rational basis review “requires a court to uphold regulation so long as it bears a ‘rational relationship’ to a ‘legitimate governmental purpose.’”<sup>175</sup> This creates a rebuttable presumption as to the constitutionality of the statute in question and the plaintiff bears the burden of showing that the law is unconstitutional.<sup>176</sup> The Supreme Court in *Heller* concluded that an enumerated right within the Constitution required a more heightened level of scrutiny.<sup>177</sup> The Court reasoned that if a rational basis review were applied, the Second Amendment would be reduced to mere words.<sup>178</sup> Under this

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<sup>173</sup> E. Fuller Torrey, *Stigma and Violence: Isn't It Time to Connect the Dots?*, OXFORD JOURNALS SCHIZOPHRENIA BULLETIN (Jun. 7, 2011), <http://schizophreniabulletin.oxfordjournals.org/content/early/2011/06/04/schbul.sbr057.full.pdf>.

<sup>174</sup> *Heller*, 554 U.S. at 628 n.27.

<sup>175</sup> *Id.* at 687-88 (Breyer, J., dissenting) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

<sup>176</sup> *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) (“State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.”); see Craven, *supra* note 64, at 838.

<sup>177</sup> *Heller*, 554 U.S. at 628 n.27.

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

slack review, a state would be able to link gun restrictions and regulation to public safety and create a virtual ban on handguns.

Second, Justice Breyer in his dissent in *Heller* proposed a novel interest-balance approach, which required a court to consider the degree to which an individual's right was burdened as compared to the governmental interest at issue.<sup>179</sup> Although the majority did not expressly reject this proposition, it held that an interest-balance approach would shift power from the people to the judiciary to determine the weight granted to an enumerated right.<sup>180</sup> In other words, because the right to bear arms is an enumerated right established by the Second Amendment, the judiciary cannot value that right over any other within the Constitution.<sup>181</sup> The very fact that the right to bear arms is enumerated provides a basis to conclude that our Founding Fathers already performed this interest-balance test and established its worth.<sup>182</sup>

This leaves strict and intermediate scrutiny as the applicable standards. Strict scrutiny mandates that the government demonstrate that the law is "narrowly tailored to achieve a compelling interest."<sup>183</sup> The phrase "narrowly tailored" simply implies that the law is the least restrictive means for achieving the compelling governmental interest and there is no reasonable alternative to achieve that goal.<sup>184</sup> Strict scrutiny is applied when a substantial burden has been placed

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<sup>179</sup> *Id.* at 689-90 (Breyer, J., dissenting) (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

<sup>180</sup> *Id.* at 634-35 (majority opinion) (citations omitted).

<sup>181</sup> *Id.*

<sup>182</sup> *Heller*, 554 U.S. at 634-35.

<sup>183</sup> *Id.* at 688 (Breyer, J., dissenting) (quoting *Abrams v. Johnson*, 521 U.S. 74, 82) (internal quotation marks omitted).

<sup>184</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring) ("[A] government practice or statute which restricts 'fundamental rights' . . . is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."); Mark Tushnet, *The Future of the Second Amendment*, 1 ALB. GOV'T L. REV. 354, 359 (2008) ("[A] 'fundamental' right [can] be limited only for 'compelling' reasons, and even then only by regulations that are pretty much guaranteed to accomplish real reductions in crime, violence, or gun violence."); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800-01 (2006) ("Narrow tailoring requires that the law capture within its reach no more activity (or less) than is necessary to advance those compelling ends. An alternative phrasing is that the law must be the 'least restrictive alternative' available to pursue those ends. This inquiry into 'fit' between the ends and the means enables courts to test the sincerity of the government's claimed objective.").



upon a fundamental right.<sup>185</sup> Alternatively, under intermediate scrutiny, the government must demonstrate that the law is reasonably related to an important governmental interest.<sup>186</sup> Intermediate scrutiny requires that a court analyze “whether the challenged law serves a substantial [governmental] interest and whether there is a reasonable fit between the objective and the law.”<sup>187</sup>

Under strict scrutiny, because a state could easily show a compelling governmental interest in public safety and preventing crime, the issue would turn on whether the regulation was narrowly tailored to that interest.<sup>188</sup> Traditionally, if a statute proves to be effective it will be deemed narrowly tailored to the purpose it purports to serve.<sup>189</sup> However, courts are generally deferential to the legislature to determine whether a regulation is necessary or effective.<sup>190</sup> Therefore, when courts apply a strict scrutiny standard, they would be forced to speculate as to the effectiveness of a regulation or “whether [a] less burdensome regulation[] would be as effective.”<sup>191</sup> Understandably, courts would prefer to base their decisions on reason, rather than speculation.

For two reasons, most states, including New York, have adopted intermediate scrutiny when examining claims of Second Amendment violations.<sup>192</sup> First, the language in *Heller* indicates that the right to bear arms is not an absolute right and can lawfully be subject to regulation.<sup>193</sup> In *Heller*, Justice Scalia unequivocally approved

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<sup>185</sup> See Kenneth A. Klukowski, *Armed By Right: The Emerging Jurisprudence of The Second Amendment*, 18 GEO. MASON U. C.R. L.J. 167, 186 (2008) (“[T]he general rule for laws burdening fundamental rights is strict scrutiny.”).

<sup>186</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[The law] must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

<sup>187</sup> *Osterweil*, 819 F. Supp. 2d at 83; *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>188</sup> *Schall v. Martin*, 467 U.S. 253, 264 (1984) (“The ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted. We have stressed that crime prevention is a ‘weighty social objective.’ ”) (citations omitted).

<sup>189</sup> *Osterweil*, 819 F. Supp. 2d at 83 (citing *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011)).

<sup>190</sup> *Kachalsky v. Cnty of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (“In making this determination [of whether regulation regarding public safety is necessary], ‘substantial deference to the predictive judgments of [the legislature]’ is warranted. The Supreme Court has long granted deference to legislative findings regarding matters that are beyond the competence of courts.” (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997))).

<sup>191</sup> *Osterweil*, 819 F. Supp. 2d at 83.

<sup>192</sup> *Id.* at 84.

<sup>193</sup> *Heller*, 554 U.S. at 688 (Breyer, J., dissenting) (“[T]he majority implicitly, and appropriately, rejects” the strict scrutiny test by approving of the constitutional restrictions on the right to bear arms placed on concealed weapons, the mentally ill, and criminals.).

certain regulations including those prohibiting firearms in certain locations, such as schools, and prohibiting the carrying of a concealed weapon.<sup>194</sup> These lawful regulations cannot be reconciled with a strict scrutiny analysis as it would be difficult to show whether these regulations are in fact narrowly tailored.<sup>195</sup>

Second, because very few regulations would substantially burden the right to bear arms, few would require strict scrutiny analysis.<sup>196</sup> Since the core right recognized in *Heller* was an individual right to possess a firearm in the home for self-defense, only a regulation that effectively creates a virtual ban on firearms could justify a strict scrutiny analysis.<sup>197</sup> This virtual ban would surely qualify as a substantial burden on a fundamental right. Because few statutes would create a virtual ban, intermediate scrutiny is appropriate for a majority of the Second Amendment inquiries.<sup>198</sup>

## V. NEW YORK'S SECOND AMENDMENT PRECEDENT

It is clear from New York's jurisprudence that possessing a handgun is a privilege, not a right, which can be subject to reasonable regulation.<sup>199</sup> As stated above, individuals inflicted with a mental illness present a special concern for the public, and the government has an interest in maintaining the safety of its citizens. Moreover, the Court in *Heller* approved of prohibitions on handgun possession by the mentally ill.<sup>200</sup> Therefore, denying an individual a handgun license because of a mental disease is reasonable, as it affects a narrow class of persons and promotes general well-being.<sup>201</sup> Specifically, New York's licensing scheme has been challenged on many fronts

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<sup>194</sup> *Id.* at 626 (majority opinion).

<sup>195</sup> *Id.* at 688 (Breyer, J., dissenting).

<sup>196</sup> *Osterweil*, 819 F. Supp. 2d at 84.

<sup>197</sup> *Id.*

<sup>198</sup> See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 687, 716, 718 (2007) (analyzing how Supreme Courts in forty-two states have adopted a standard less than strict scrutiny when evaluating gun-laws).

<sup>199</sup> *In re Papaioannou*, 788 N.Y.S.2d at 378 (holding that possession of a handgun license is a privilege, not a right which is subject to the broad discretion of the New York City Police Commissioner, and the Commissioner, by statute, has been delegated extraordinary power in such matters); *In re Kaplan*, 673 N.Y.S.2d at 66 (holding that the issuance of a pistol license is not a right, but a privilege subject to reasonable regulation); *In re Williams*, 656 N.Y.S.2d at 626 (holding the issuance of a license to carry a gun is a privilege, not a right).

<sup>200</sup> *Heller*, 554 U.S. at 626-27.

<sup>201</sup> *Id.*

since the Supreme Court's decisions in *Heller* and *McDonald*.<sup>202</sup> The arguments generally assert that the licensing scheme impermissibly infringes on an individual's right to bear arms and plaintiffs claim constitutional protections through the Second Amendment, the Due Process Clause, the Equal Protection Clause, and the Privileges and Immunities Clause.<sup>203</sup> The overarching theme is that the license requirement places an obstacle between a citizen and the right to own a gun and is thus unconstitutional.

Many states, including Alabama, Texas, and Pennsylvania, do not require a license to possess or purchase a handgun.<sup>204</sup> Furthermore, many states that do require a license are "shall issue" states, which lower the threshold to obtain a license to a dangerous level.<sup>205</sup> The challenges cited below are not without merit. However, time and time again, New York and federal courts have upheld the state and City's licensing scheme holding that the State has a compelling governmental interest in ensuring the safety of its citizens through gun regulation.<sup>206</sup> Therefore, New York can reasonably regulate through its licensing scheme without violating the Privileges and Immunities Clause, the Equal Protections Clause, or the Due Process Clause. Furthermore, New York can require a fee from an applicant to obtain a license so long as the fee defrays the administrative costs of the state and does not place an undue burden on an individual's exercise of a constitutional right.<sup>207</sup>

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<sup>202</sup> See generally *Kachalsky*, 701 F.3d 81 (challenging New York's licensing scheme on the ground that the special need requirement was a substantial burden on an individual's right to bear arms); *People v. Foster*, 915 N.Y.S.2d 449 (Crim. Ct., Kings Cnty Dec. 15, 2010) (challenging the state's licensing scheme because when combined with the criminalization of possession of a handgun without a license, a ban on handguns was created); *Osterweil*, 819 F. Supp. 72 (challenging the state's licensing scheme based on the Equal Protection Clause, Due Process Clause, and Privileges and Immunities Clause).

<sup>203</sup> *Id.*

<sup>204</sup> Gun Laws Permits Statistics—States Compared; STATEMASTER.COM, [http://www.statemaster.com/graph/gov\\_gun\\_law\\_per-government-gun-laws-permitsPage%201%20of%205](http://www.statemaster.com/graph/gov_gun_law_per-government-gun-laws-permitsPage%201%20of%205) (last visited May 3, 2013).

<sup>205</sup> *Id.* (including Indiana, Michigan, Minnesota, Missouri, North Carolina); see *Getting a NYC Handgun Permit*, *supra* note 159.

<sup>206</sup> See generally *Kachalsky*, 701 F.3d 81 (upholding New York's licensing scheme's requirement of showing a special need); *People v. Foster*, 915 N.Y.S.2d 449 (upholding state's licensing scheme because it did not create a ban on handguns); *Osterweil*, 819 F. Supp. 72 (upholding the state's licensing scheme through challenges on Equal Protection, Due Process, and Privileges and Immunities grounds).

<sup>207</sup> *Cox v. State of New Hampshire*, 312 U.S. 569 (1941) (holding that a state can place reasonable time, place, and manner restrictions on a constitutional right for public safety reasons and so long as the restrictions are not intended to generate revenue or create an undue

In *Osterweil v. Bartlett*,<sup>208</sup> the plaintiff asserted that his rights under the “United States Constitution, the New York Constitution, and the New York State Civil Rights Law” were violated when his handgun permit application was denied.<sup>209</sup> The plaintiff was a New York State resident who applied for a handgun license.<sup>210</sup> In the midst of the application and investigation process, the plaintiff moved and changed his state of residency.<sup>211</sup> The licensing officer promptly denied the application and informed the plaintiff that because he was no longer a resident of New York State, he was no longer eligible to obtain a New York State handgun license.<sup>212</sup>

At trial, the court rejected the plaintiff’s Second Amendment claim under an intermediate scrutiny standard holding that the State had a compelling governmental interest in ensuring the safety of the general public and its residency requirement was reasonably related to that interest.<sup>213</sup> The court reasoned that requiring New York to monitor applicants who live out-of-state placed an excessive burden on the State and “the State must be afforded wider latitude to combat the great social harm inflicted by gun violence.”<sup>214</sup> The court then rejected the plaintiff’s Equal Protection claim, holding that residents and non-residents are not similarly situated because New York could monitor its own residents with greater feasibility.<sup>215</sup> As such, New York could deny the application and nonresidents could not seek protection under the Equal Protection Clause.<sup>216</sup>

Lastly, the court dismissed the plaintiff’s claim under the Privileges and Immunities Clause.<sup>217</sup> The plaintiff argued the licensing scheme “penalize[d] him from travelling and spending time outside of New York.”<sup>218</sup> The court promptly rejected this argument holding a state may restrict an individual’s ability to travel if the state can show that the restriction is reasonably related to a substantial

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burden).

<sup>208</sup> 819 F. Supp. 2d 72 (N.D.N.Y. 2011).

<sup>209</sup> *Id.* at 74-75.

<sup>210</sup> *Id.* at 75.

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

<sup>212</sup> *Id.* at 76.

<sup>213</sup> *Osterweil*, 819 F. Supp. 2d at 84, 85.

<sup>214</sup> *Id.* at 86.

<sup>215</sup> *Id.* at 86-87.

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

<sup>217</sup> *Id.* at 88.

<sup>218</sup> *Osterweil*, 819 F. Supp. 2d at 87.

governmental interest.<sup>219</sup> As stated above, the court held the State had a compelling governmental interest and that interest was furthered through its licensing scheme;<sup>220</sup> therefore, the State could restrict the plaintiff's ability to change residency.<sup>221</sup>

In *Kwong v. Bloomberg*,<sup>222</sup> the plaintiffs brought a Section 1983 action against Mayor Bloomberg, the City of New York, and the State Attorney General, alleging that the \$340 application processing fee was unconstitutional because it placed a burden on their ability to possess a handgun, a right guaranteed by the Second Amendment.<sup>223</sup> The court looked to the Supreme Court's fee jurisprudence for guidance.<sup>224</sup> These cases addressed the imposition of administrative fees on constitutionally protected activities, which is analogous to the issue in *Kwong*. In *Cox v. New Hampshire*,<sup>225</sup> the Supreme Court made clear the government could not tax, for the sole purpose of generating revenue, individuals who exercised a protected constitutional activity.<sup>226</sup> However, the Supreme Court concluded a government could impose a fee in order to offset administrative and maintenance costs.<sup>227</sup>

Specifically in *Cox*, the Court upheld a state statute that required individuals exercising their First Amendment right to assemble to obtain a license and pay a fee of \$300.<sup>228</sup> The Court concluded the fee was "not a revenue tax, but one to meet the expense incident to the administration of the [right to assemble] and to the maintenance of public order in the matter licensed."<sup>229</sup> Clearly, this standard is not without limits, as evidenced by the Court's decision in *Murdoch v. Pennsylvania*.<sup>230</sup> In *Murdoch*, the Court invalidated a fee which required individuals exercising their First Amendment right of freedom of religion to pay a \$1.50 license fee before distributing lit-

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<sup>219</sup> *Id.* at 87-88.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> 876 F. Supp. 2d 246 (S.D.N.Y. 2012).

<sup>223</sup> *Id.* at 248.

<sup>224</sup> *Id.* at 253-54.

<sup>225</sup> 312 U.S. 569 (1941).

<sup>226</sup> *Id.* at 577.

<sup>227</sup> *Id.* at 576-78.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 577.

<sup>230</sup> 319 U.S. 105 (1943).

erature.<sup>231</sup> Holding the fee unconstitutional, the Court concluded this fee was “a flat tax imposed on the exercise of a privilege granted by the Bill of Rights” and not “imposed as a regulatory measure to defray the expense of policing the activities in question.”<sup>232</sup>

Applying these standards to the facts, the *Kwong* court concluded the \$340 handgun-licensing fee was constitutional.<sup>233</sup> The court reached this reasonable decision by looking at the User Cost Analysis performed by New York City’s Office of Budget Management, which calculated that the cost to the City for each handgun license was \$977.16 as of 2010.<sup>234</sup> The \$340 license fee to the applicant represents only 34.79% of the cost to the City.<sup>235</sup> Therefore, it was clear the fee was a way in which the city offset the costs it incurred to process each application. Furthermore, the fee could not reasonably be construed as a flat tax utilized to burden an individual from exercising a protected constitutional right because without passing some costs to the applicant, license applications would contribute to the financial instability of the City.

In sum, these cases indicate New York’s licensing scheme falls well within the framework set forth in *Heller* and *McDonald*, as it furthers the state’s interests of public safety. Ensuring the competence and mental stability of those individuals who can legally purchase handguns is in the best interest of the public at large. New York can reasonably regulate through its licensing scheme without violating the Privileges and Immunities Clause, the Equal Protection Clause, or the Due Process Clause. Lastly, New York can require a fee from the applicant to obtain a license, so long as the fee is intended to defray the administrative costs of the state and does not place an undue burden on an individual’s exercise of a constitutional right.

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<sup>231</sup> *Id.* at 106, 113, 116-17. The Court looks to determine the purpose behind the fee. If the fee is used to simply defray costs of administrative expenses, the fee will be constitutional. On the other hand, if the fee is nominal and only acts as a tax—or an astronomical fee, which acts as a burden on the exercise of a constitutional right—the fee will be unconstitutional. *Id.*

<sup>232</sup> *Id.* at 113-14.

<sup>233</sup> *Kwong*, 876 F. Supp. 2d at 259.

<sup>234</sup> *Id.* at 257.

<sup>235</sup> *Id.*

## VI. PROPOSED AMENDMENT TO THE NEW YORK LICENSING SCHEME

### A. The Proposal

Before any proposal to amend New York's licensing scheme can be articulated, one must determine who is in the best position to assess the mental health of an individual: a judge, a police commissioner, a licensing officer, or a mental health professional. As noted in detail above, many individuals who apply for handgun licenses are never diagnosed as mentally ill, and therefore never generate a record that a background check might discover. According to the National Alliance on Mental Illness, approximately 10% of children and adolescents suffer from mental illnesses.<sup>236</sup> Yet only 20% of this group have been diagnosed and are receiving medical care.<sup>237</sup> Specifically, of those adults who are of age to apply for a handgun license, approximately one in seventeen live with a serious mental disorder such as schizophrenia, major depression, or bipolar disorder.<sup>238</sup> Yet, less than one-third receive mental health services.<sup>239</sup> Therefore, the numbers indicate that two-thirds of adults who suffer from a significant mental disorder are neither under the care of a physician nor do they have a medical file indicating such a condition. That leaves approximately 350,000 people over the age of 18 in New York City who have an undiagnosed mental disease.<sup>240</sup> Under the current system, the licensing officer is charged with the task of determining whether an individual is mentally stable to possess a handgun based on an informal

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<sup>236</sup> National Alliance on Mental Illness, <http://www.nami.org/template.cfm?section=about-mental-illness> (last visited Mar. 4, 2013).

<sup>237</sup> Stacey McMorro & Embrey Howell, *State Mental Health Systems for Children: A Review of the Literature and Data Sources*, URBAN INSTITUTE (July 2010), [http://www.nami.org/Template.cfm?Section=child\\_and\\_teen\\_support&template=/ContentManagement/ContentDisplay.cfm&ContentID=106948](http://www.nami.org/Template.cfm?Section=child_and_teen_support&template=/ContentManagement/ContentDisplay.cfm&ContentID=106948).

<sup>238</sup> Mental Illness: Facts and Numbers, NATIONAL ALLIANCE ON MENTAL ILLNESS, *available at* [http://www.nami.org/Template.cfm?Section=About\\_Mental\\_Illness&Template=/ContentManagement/ContentDisplay.cfm&ContentID=53155](http://www.nami.org/Template.cfm?Section=About_Mental_Illness&Template=/ContentManagement/ContentDisplay.cfm&ContentID=53155).

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

<sup>240</sup> NEW YORK CITY DEPARTMENT OF PLANNING, <http://www.nyc.gov/html/dcp/html/census/popcur.shtml> (last visited May 3, 2013) (noting that the July 2011 census approximated that 8,244,910 people live in New York City); United States Census Bureau, U.S. DEPARTMENT OF COMMERCE, <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last visited May 3, 2013) (noting that 78.4% of the population in New York City is over the age of eighteen).

interview, and, occasionally, character references.<sup>241</sup> Consequently, these people would be deemed legally eligible to purchase a handgun because they would pass the background check during the licensing process.

A solution presented by those on both sides of the political aisle after the Sandy Hook shooting is to overhaul mental health services “focusing on early intervention and stigma issues related to mental illness.”<sup>242</sup> While this is a viable option, its impact would not appear for many years. It is unlikely that “early intervention” would prevent an adult from applying and receiving a handgun license *today*. Instead, preventative measures are needed to ensure that those who apply and receive a handgun license are not a danger to themselves or others in the community. A simple psychiatric screening and assessment at the time one applies for a license could eliminate any doubt from the equation.<sup>243</sup>

Some mental health professionals argue that a psychiatric screening would provide little assistance in determining whether an individual has a propensity to act violently.<sup>244</sup> Barry Rosen, a professor of psychology at Fordham University, stated that when he is called to assess the violent tendencies of a patient, he “typically [has] the benefit of a lengthy face-to-face interview, records on their criminal and mental health history, [and] a tremendous amount of information at [his] disposal that the typical mental health professional on the fly simply doesn’t have.”<sup>245</sup> Although a valid point, the psychiatric assessment proposed here is not for the purpose of determining if an individual has violent tendencies, but rather to assess an individual’s mental fitness.

This methodology is analogous to the mental health screening and coordination of care by the United States Army for soldiers de-

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<sup>241</sup> NYPD—PERMITS, [http://www.nyc.gov/html/nypd/html/permits/handgun\\_licensing\\_information.shtml](http://www.nyc.gov/html/nypd/html/permits/handgun_licensing_information.shtml) (last visited Mar. 3, 2013).

<sup>242</sup> Catherine Ho, *Sandy Hook Shooting Reshapes the Lobbying Landscape on Gun Laws, Mental Health Services*, THE WASHINGTON POST (Jan. 06, 2013), [http://articles.washingtonpost.com/2013-01-06/business/36208735\\_1\\_gun-laws-gun-control-mental-health](http://articles.washingtonpost.com/2013-01-06/business/36208735_1_gun-laws-gun-control-mental-health).

<sup>243</sup> Scott Hewitt, *Can Mental Health Treatment Help Halt Gun Violence?*, THE COLUMBIAN (Feb. 17, 2013), <http://www.columbian.com/news/2013/feb/17/can-mental-health-help-halt-mayhem/>.

<sup>244</sup> Jon Hamilton, *Mental Health Gun Laws Unlikely to Reduce Shootings*, NPR (Jan. 16, 2013, 4:28 PM), <http://www.npr.org/blogs/health/2013/01/17/169529792/mental-health-gun-laws-unlikely-to-reduce-shootings>.

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



ployed to Iraq and Afghanistan. Before deployment, each soldier undergoes a mental health screening to determine that individual's mental stability before entering combat.<sup>246</sup> These screenings caused a drastic reduction in the number of soldiers who experienced mental health problems, medical evacuations from Iraq for mental health reasons, and suicidal ideation.<sup>247</sup> The Army saw roughly 75% fewer soldiers treated for psychiatric disorders as compared to those brigades who were not pre-screened on their pre-deployment physical.<sup>248</sup> This figure indicates the effectiveness of basic mental health screenings in determining the mental stability of individuals.

In addition, every law enforcement agency in the country requires each potential candidate to undergo a mental evaluation.<sup>249</sup> Specifically in New York City, police officers undergo a mental evaluation to determine, among other things, their suitability to carry a weapon.<sup>250</sup> This process includes a questionnaire and an interview with a trained mental health professional.<sup>251</sup> In 2011, the NYPD reported only two incidents in which an officer intentionally used his weapon for an unauthorized purpose.<sup>252</sup> Admittedly, these numbers may be skewed because higher figures would reflect poorly on the Department as a whole. However, mandating mental evaluations for all prospective candidates on the NYPD emphasizes the importance of ensuring that only those mentally competent possess a firearm.

In short, the proposed amendment is quite simple and has great potential to be an effective tool. All applicants wishing to obtain a handgun license must undergo a basic psychiatric evaluation

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<sup>246</sup> Charley Keyes, *Army to Implement New Mental Health Screening Procedures*, CNN U.S. (Jan. 19, 2011, 9:27 AM), [http://articles.cnn.com/2011-01-19/us/military.mental.health\\_1\\_suicidal-ideation-predeployment-screening-process-combat-stress?\\_s=PM:US](http://articles.cnn.com/2011-01-19/us/military.mental.health_1_suicidal-ideation-predeployment-screening-process-combat-stress?_s=PM:US).

<sup>247</sup> *Effectiveness of Mental Health Screening and Coordination of In-Theater Care Prior to Deployment to Iraq: a Cohort Study*, U.S. NATIONAL LIBRARY OF MEDICINE NATIONAL INSTITUTES OF HEALTH (Jun. 2011), <http://www.ncbi.nlm.nih.gov/pubmed/21245086>.

<sup>248</sup> *Id.*

<sup>249</sup> Yossef S. Ben-Porath, et. al., *Assessing the Psychological Suitability of Candidates for Law Enforcement Positions*, THE POLICE CHIEF (Aug. 2011), [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=2448&issue\\_id=82011](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2448&issue_id=82011).

<sup>250</sup> *Psychological Exams and Standards*, AELE LAW LIBRARY OF CASE SUMMARIES: EMPLOYMENT & LABOR LAW FOR PUBLIC SAFETY AGENCIES, <http://www.aele.org/law/Digests/empl165.html> (last visited May 3, 2013).

<sup>251</sup> NYPD—APPLICATION PROCESS, [http://www.nyc.gov/html/nypd/html/careers/application\\_overview.shtml](http://www.nyc.gov/html/nypd/html/careers/application_overview.shtml) (last visited May 3, 2013).

<sup>252</sup> *New York City Police Department: Annual Firearms Discharge Report*, NYPD, 2011, available at [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/nypd\\_annual\\_firearms\\_discharge\\_report\\_2011.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/nypd_annual_firearms_discharge_report_2011.pdf).

and assessment by a trained mental health professional to determine their suitability to possess a weapon at an additional cost of \$100. This charge in combination with the statutory licensing fee would bring the total cost to \$531.50. This requirement is in addition to character statements written by colleagues and friends, as well as an interview with a licensing officer who would ask questions about the application as a whole. Although this process may seem redundant, this duplication ensures accuracy and reliability. It also places individuals who are trained to observe the warning signs of mentally unstable individuals at the forefront of the licensing process.

### B. Is The Proposed Amendment Constitutional?

The proposed amendment may confront two constitutional challenges. The first argument might involve claims that the provision places an undue burden on an individual's right to bear arms under the Second Amendment. Under this premise, an individual may claim this regulation impermissibly and arbitrarily requires citizens to jump through yet another hoop to obtain a handgun license, eliminating their ability to defend themselves. The second argument might be that the additional fee of \$100 acts as a tax and a deterrent on a constitutionally protected right which only the wealthy could overcome. Both arguments must fail as the case law indicates courts have continually given states wide latitude to regulate guns through licensing and processing schemes inasmuch as such regulation does not amount to a complete ban.<sup>253</sup>

Addressing the first argument, Justice Scalia, writing for the majority in *Heller*, stated, "Like most rights, the right secured by the Second Amendment is not unlimited."<sup>254</sup> "[T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,"<sup>255</sup> meaning the government could legally regulate the type of weapon, the type of individual, and the location in which a weapon could be carried.<sup>256</sup> Furthermore, Scalia endorses

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<sup>253</sup> See generally *Kachalsky*, 701 F.3d 81 (upholding New York's licensing scheme's requirement of showing a special need); *People v. Foster*, 915 N.Y.S.2d 449 (upholding state's licensing scheme because it did not create a ban on handguns); *Osterweil*, 819 F. Supp. 2d 72 (upholding the state's licensing scheme through challenges on Equal Protection, Due Process, and Privileges and Immunities grounds).

<sup>254</sup> *Heller*, 554 U.S. at 626.

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

<sup>256</sup> *Id.* at 626-27.

such regulation, which prohibits possession by the mentally ill.<sup>257</sup> The provision proposed clearly does not rise to the level of the statutes at issue in *Heller* or *McDonald*, as it cannot reasonably be construed to place a complete ban on handguns.<sup>258</sup> A New York City resident can still demonstrate cause and need for a handgun license, undergo a basic psychiatric evaluation, pay the required fee, and reasonably expect that a license will be granted.

Even though the Supreme Court has declined to declare the proper level of scrutiny for evaluating Second Amendment restrictions, the majority of jurisdictions have determined that intermediate scrutiny is appropriate.<sup>259</sup> Under intermediate scrutiny, this amendment to the licensing scheme will pass constitutional muster. Admittedly, Justice Alito determined the right to bear arms was “fundamental” in *McDonald*,<sup>260</sup> which in theory should trigger strict scrutiny. However, as stated earlier, only regulations that substantially burden a protected constitutional right require a heightened analysis.<sup>261</sup> Because this provision would only have a direct effect on those who are legally prohibited from possessing a gun, a relatively narrow class, it cannot be argued that this amendment places a substantial burden on every individual’s right to bear arms.<sup>262</sup> The average citizen applying for a license would be unaffected, except for having to speak to a trained mental health professional. An interview, which may last an hour at the most, should not constitute an undue burden because this amount of time is reasonable.

Under an intermediate scrutiny test, the provision should be valid because it serves substantial state interests and reasonably relates to achieving those state interests. The governmental interests at

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

<sup>258</sup> See generally *id.* at 574-75 (holding that the District of Columbia’s statute created a virtual ban on handguns because residents were unable to carry unregistered firearms and registration of firearms was prohibited); *McDonald*, 130 S. Ct. at 3036 (holding Chicago statute invalid because it criminalized the possession of firearms).

<sup>259</sup> *Osterweil*, 819 F. Supp. 2d at 84.

<sup>260</sup> *McDonald*, 130 S. Ct. at 3036-37.

<sup>261</sup> See Klukowski, *supra* note 185.

<sup>262</sup> Challenges asserting equal protection violations have not been directly addressed by case law. The logical argument is that not all individuals with a mental illness are violent and thus the amendment treats the mentally ill differently from others. However, the state has a compelling governmental interest in public safety. The class created does not have to be a perfect fit, but rather the class must substantially relate to the important governmental interest stated above. Hence, because the state has reason to believe the mentally ill pose a danger to society if allowed to possess a handgun, it can constitutionally limit their access to handguns.

hand are ensuring safety to the general public, crime prevention, and preservation of human life. The Supreme Court has deemed these interests to be not only “legitimate,”<sup>263</sup> but also “compelling.”<sup>264</sup> It is beyond dispute that these interests are deeply rooted in any civilized society as evidenced by homicide statutes, the banning of assisted-suicide, and regulations on abortion.<sup>265</sup> In fact, when the Supreme Court determined a public safety issue or a threat to human life existed, restrictions on individual liberties were deemed justified.<sup>266</sup>

More importantly, the provision reasonably relates to achieving this governmental interest. Pursuant to the Tenth Amendment, states have the police power to enact legislation to ensure the safety and welfare of its citizens.<sup>267</sup> New York has asserted this authority through the licensing scheme at issue. It is clear New York City rationally believed crime would be diminished and lives would be saved if it could ensure handguns would only be in the hands of individuals who were competent and who demonstrated a “special need.”<sup>268</sup> Therefore, it enacted its licensing scheme, which has withstood several constitutional attacks.<sup>269</sup>

Similarly, the provision suggested serves the purpose to prevent those who may be prone to violent behavior from acquiring a deadly weapon. As noted earlier, persons with mental disease fre-

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<sup>263</sup> See, e.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987) (holding federal government has “compelling interests in public safety”); *Tennessee v. Garner*, 471 U.S. 1, 25-26 (1985) (O’Connor, J., dissenting) (commenting that in the Fourth Amendment context there is an “important public interest in crime prevention and detection”); *Schall v. Martin*, 467 U.S. 253, 264 (1984) (“The ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted. We have stressed before that crime prevention is ‘a weighty social objective’ . . . .”) (internal citations omitted); See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Cruzan v. Dir., Missouri Dep’t Health*, 497 U.S. 261 (1990).

<sup>264</sup> *Salerno*, 481 U.S. at 750.

<sup>265</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (banning assisted suicide); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (restricting types of abortions).

<sup>266</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (restricting First Amendment free speech); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (restricting First Amendment religious freedom); *Brigham City v. Stuart*, 547 U.S. 398, 403-04 (2006) (restricting Fourth Amendment protection within the home); *New York v. Quarles*, 467 U.S. 649, 655 (1984) (restricting Fifth Amendment prophylactic through *Miranda*).

<sup>267</sup> U.S. CONST. amend. X.

<sup>268</sup> *Klenosky v. N.Y.C. Police Dep’t*, 428 N.Y.S.2d 256, 256 (App. Div. 1st Dep’t 1980).

<sup>269</sup> See generally *Kachalsky*, 701 F.3d 81 (upholding New York’s licensing scheme’s requirement of showing a special need); *People v. Foster*, 915 N.Y.S.2d 449 (upholding state’s licensing scheme because it did not create a ban on handguns); *Osterweil*, 819 F. Supp. 2d 72 (upholding the state’s licensing scheme through challenges on Equal Protection, Due Process, and Privileges and Immunities grounds).

quently are undiagnosed and can be prone to violent behavior.<sup>270</sup> The mental health assessment's goal is to identify these prospective unfit candidates and eliminate them from the applicant pool. By preventing these individuals from obtaining a handgun license, it will inhibit them from legally purchasing a handgun, which in turn will preclude subsequent violent acts. The interview can only have a positive effect: those who are competent will be unaffected in their pursuit of a license whereas applicants who are deemed "mentally unstable" will be denied.

The next argument may concern the imposition of an additional cost of \$100. The opposition might suggest that this cost is a tax imposed to deter individuals from exercising their constitutional right to bear arms—a tax which only the wealthy can afford. However, as stated above, the government can legally place a fee on constitutionally protected activities to offset administrative and maintenance costs.<sup>271</sup> Here, the processing cost on handgun applications for New York City is \$977.16.<sup>272</sup> On average, a psychiatrist will be compensated \$90 for a 45-minute session by insurance companies.<sup>273</sup> This would bring the total cost for the city to \$1,067.16. The \$531.50 cost to applicants accounts for roughly 50% of the cost to the City.

It cannot be reasonably argued that this cost has a purpose other than to defray administrative costs to the City. If the City did not charge a fee or kept the fee at its current level, it would lose over \$400 per application, a result which would outrage the average taxpayer. Admittedly, other jurisdictions charge less for a license; however, this does not establish that the \$440 fee at issue is excessive.<sup>274</sup> Furthermore, courts have upheld much larger fees charged for constitutionally protected activities.<sup>275</sup>

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<sup>270</sup> See *Fast Facts*, *supra* note 167.

<sup>271</sup> *Kwong*, 876 F. Supp. 2d at 259.

<sup>272</sup> *Id.* at 257.

<sup>273</sup> Gardiner Harris, *Talk Doesn't Pay, So Psychiatry Turns Instead to Drug Therapy*, N.Y. TIMES (Mar. 5, 2011), [http://www.nytimes.com/2011/03/06/health/policy/06doctors.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/03/06/health/policy/06doctors.html?pagewanted=all&_r=0).

<sup>274</sup> *729, Inc. v. Kenton Cnty. Fiscal Court*, 402 F. App'x 131, 134 (6th Cir. 2010) (rejecting plaintiff's argument that the amount of the licensing fee was unreasonable because other jurisdictions charged lower fees).

<sup>275</sup> *Id.* at 135 (holding that a \$3,000 adult business licensing fee was not constitutionally excessive); *Coal for Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1324 (11th Cir. 2000) (upholding festival permit fees ranging from \$950 to \$6500).

**VII. CONCLUSION**

The recent mass shootings at Sandy Hook Elementary School and in Aurora, Colorado by mentally unstable individuals have placed gun control back into the political spotlight. Statistics indicate that the use of handguns is the leading cause of homicides in the United States. Furthermore, individuals who are mentally ill have a higher propensity to act in a violent way than those who are mentally stable. Therefore, logically, decreasing the number of handguns in the hands of mentally ill individuals will decrease the amount of violence caused by the mentally ill without violating the constitutional rights of others. New York has taken steps to close many loopholes in the NICS and done an admirable job in reporting mental health records to the agencies that perform background checks. However, more can be done to ensure safer streets.

An additional amendment to New York City's licensing scheme can assist licensing officers in identifying and distinguishing those who are legally competent to possess a handgun from those who are not. Every applicant who desires to obtain a handgun license must first go through a basic mental health assessment with a mental health professional to determine his or her eligibility. This requirement is similar to regulations within the Army, law enforcement agencies, and in Japan, which exist to confirm a person's sanity and mental clarity. Under intermediate scrutiny the amendment is constitutional because the state has a substantial governmental interest in preventing crime and the provision is substantially related to achieving that state interest. New York City has the largest population of any city in the country and it has a legitimate interest in keeping handguns out of the hands of the mentally ill, both diagnosed and undiagnosed. This proposed amendment serves that purpose effectively and does not pose any threat to those who desire to own a handgun for a legitimate purpose. The bottom line is simple: if this amendment will prevent one gun from landing in the hand of just one mentally ill person, then it is an effective and a worthwhile endeavor.