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# Looking for a Third Option: An Alternate Solution in the Gun Debate

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## Looking for a Third Option: An Alternate Solution in the Gun Debate

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(<https://ggulawreview.files.wordpress.com/2014/10/rifle-and-scope.jpg>)

scope.jpg)

We've all heard [the statistics](http://www.nij.gov/topics/crime/gun-violence/Pages/welcome.aspx) (<http://www.nij.gov/topics/crime/gun-violence/Pages/welcome.aspx>) on [gun-related crime](http://www.bjs.gov/content/guns.cfm) (<http://www.bjs.gov/content/guns.cfm>) in the United States and how it [compares to gun violence to other countries](http://abcnews.go.com/blogs/health/2013/09/19/u-s-has-more-guns-and-gun-deaths-than-any-other-country-study-finds/) (<http://abcnews.go.com/blogs/health/2013/09/19/u-s-has-more-guns-and-gun-deaths-than-any-other-country-study-finds/>). We've also heard about the [perpetual](http://abcnews.go.com/ThisWeek/video/week-panel-congress-gridlock-19662031) (<http://abcnews.go.com/ThisWeek/video/week-panel-congress-gridlock-19662031>) [gridlock](http://www.cbs.com/shows/cbs_this_morning/video/2005988615/can-congress-get-beyond-gridlock-/) ([http://www.cbs.com/shows/cbs\\_this\\_morning/video/2005988615/can-congress-get-beyond-gridlock-/](http://www.cbs.com/shows/cbs_this_morning/video/2005988615/can-congress-get-beyond-gridlock-/)) in ([Congress](http://www.nbcnews.com/politics/first-read/new-kind-gridlock-why-congress-more-broken-ever-n164776) (<http://www.nbcnews.com/politics/first-read/new-kind-gridlock-why-congress-more-broken-ever-n164776>) [Congress](http://www.usnews.com/news/articles/2012/06/15/gridlock-not-likely-to-end-with-112th-congress) (<http://www.usnews.com/news/articles/2012/06/15/gridlock-not-likely-to-end-with-112th-congress>) that has made passing new comprehensive, nationwide, gun legislation impossible. We've also seen mass shootings across the country, with calls to [arm teachers in classrooms](http://www.nbcnews.com/news/investigations/f-firearm-more-teachers-authorized-carry-weapons-classroom-n208946) (<http://www.nbcnews.com/news/investigations/f-firearm-more-teachers-authorized-carry-weapons-classroom-n208946>) or [increase regulations and restrictions on gun ownership](http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/09/new-gun-control-fight-brewing-in-the-senate/) (<http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/09/new-gun-control-fight-brewing-in-the-senate/>). The only thing that seems abundantly clear in the gun debate in the United States is that we are [anything but united in our views](http://www.pewresearch.org/key-data-points/gun-control-key-data-points-from-pew-research/) (<http://www.pewresearch.org/key-data-points/gun-control-key-data-points-from-pew-research/>) on this important issue.

There was a time when major cities were passing very strict gun control laws. But those reforms in the [District of Columbia](http://www.nraila.org/news-issues/fact-sheets/2007/the-case-for-reforming-the-district-of-columbia.aspx?s=washington+dc&st=&ps=) (<http://www.nraila.org/news-issues/fact-sheets/2007/the-case-for-reforming-the-district-of-columbia.aspx?s=washington+dc&st=&ps=>), [Chicago](http://www.chicagoguncase.com/2008/06/26/saf-files-lawsuit-challenging-chicagos-handgun-ban/) (<http://www.chicagoguncase.com/2008/06/26/saf-files-lawsuit-challenging-chicagos-handgun-ban/>), [San Francisco](http://www.sfgate.com/bayarea/article/Housing-Authority-settles-gun-lawsuit-3254376.php) (<http://www.sfgate.com/bayarea/article/Housing-Authority-settles-gun-lawsuit-3254376.php>), and other cities have all had their various gun regulations overturned by recent court decisions. On the other side of this issue, gun clubs and organizations, including most prominently National Rifle Association, advocate for [safe and responsible gun ownership](http://www.nraila.org/about-nraila.aspx) (<http://www.nraila.org/about-nraila.aspx>) as an alternative to government regulation as a means to combat gun violence. With such debate becoming entrenched, a [stalemate](http://www.slate.com/blogs/crime/2013/06/14/newtown_anniversary_after_the_school_shooting_we_vowed_to_take_gun_control.html) ([http://www.slate.com/blogs/crime/2013/06/14/newtown\\_anniversary\\_after\\_the\\_school\\_shooting\\_we\\_vowed\\_to\\_take\\_gun\\_control.html](http://www.slate.com/blogs/crime/2013/06/14/newtown_anniversary_after_the_school_shooting_we_vowed_to_take_gun_control.html)) has developed in which nothing significant can be accomplished by those [advocating for increased gun regulation](http://www.jsonline.com/news/opinion/president-barack-obama-is-right-we-should-be-ashamed-of-gun-violence-b99289918z1-262965981.html) (<http://www.jsonline.com/news/opinion/president-barack-obama-is-right-we-should-be-ashamed-of-gun-violence-b99289918z1-262965981.html>), while the current interpretation of the 2<sup>nd</sup> Amendment stands as a protection of an individual right to possess firearms and the [solutions to the gun violence epidemic which spring from that side of the debate](http://www.kansascity.com/opinion/opn-columns-blogs/lewis-diuguid/article405555/Guns-stir-great-emotions-on-both-sides-of-debate.html) (<http://www.kansascity.com/opinion/opn-columns-blogs/lewis-diuguid/article405555/Guns-stir-great-emotions-on-both-sides-of-debate.html>).

What many outside the study of law do not understand is why questions about gun ownership have become such an issue today. However, an explanation of where the expansive 2nd Amendment right to gun ownership comes from may yield an option which could present an acceptable compromise to both sides of the debate.

It took many years for the 2<sup>nd</sup> Amendment to be definitively interpreted as we understand it today. That process transformed it from a largely [powerless](https://supreme.justia.com/cases/federal/us/92/542/case.html) [provision](https://supreme.justia.com/cases/federal/us/116/252/case.html) [of the Constitution](https://supreme.justia.com/cases/federal/us/153/535/case.html), to one more in line with the NRA's interpretation of the 2<sup>nd</sup> Amendment as a [historically based individual right to own firearms](http://www.nra.org/second-amendment/the-second-amendment.aspx). In examining how this transformation occurred from a legal standpoint, we discover an alternate solution to the continuing debate over gun control, one that takes a wholly different approach than the solutions of the past.

The 14<sup>th</sup> Amendment to the United States Constitution (<http://www.law.cornell.edu/constitution/amendmentxiv>), ratified shortly after the Civil War, is the avenue through which numerous protections in the Bill of Rights [have been applied to bind the individual state governments](http://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html) as well as the federal government. The 14th Amendment has been used over time to slowly adopt the individual protections of the Bill of Rights through a process called [incorporation](http://billofrightsinsstitute.org/resources/educator-resources/americanpedia/amendments/fourteenth-amendment-general/incorporation/). Before the 14<sup>th</sup> Amendment, the Supreme Court [had previously held](https://supreme.justia.com/cases/federal/us/32/243/case.html) that various rights we recognize today only applied as limitations on the federal government and that state governments were not bound to recognize those rights. While it took some time before the Supreme Court began to use the 14<sup>th</sup> Amendment to extend the Bill of Rights to the states, the Court eventually began the long process to establish many of the Constitutional rights we recognize today. [One by one](http://billofrightsinsstitute.org/resources/educator-resources/landmark-cases/incorporation/), the Supreme Court held that the 14<sup>th</sup> Amendment's language required that the states be bound to the same Constitutional protections as the federal government; creating nationwide recognition of the freedom of speech under the 1st Amendment and a multitude of criminal procedure protections provided by the 4th, 5th, 6th and 8th Amendments. The protections of each of these Amendments were deemed to be applicable to the states as incorporated by the 14<sup>th</sup> Amendment's [due process clause](http://www.law.cornell.edu/wex/du_e_process).

After over a [century of cases to the contrary](http://americasright.com/2009/09/30/the-case-for-incorporation-of-the-second-amendment/), the latest Constitutional right to be incorporated to apply to the states is the 2<sup>nd</sup> Amendment's prohibition against restrictions on gun ownership in the 2010 decision in [McDonald v. Chicago](http://spectator.org/articles/39341/second-amendment-incorporated). This was shortly after the Court had clarified that the 2<sup>nd</sup> Amendment specifically protected an [individual's right to possess guns](http://www.washingtonpost.com/wp-dyn/content/article/2008/06/26/AR2008062600615.html).

While incorporation demonstrates the power of the Supreme Court to interpret the Constitution in such a manner as to extend its authority, there are some who have called for disincorporation of Constitutional rights related to [religion](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=martin_wishnatsky) and [criminal procedure](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6904&context=jclc). They propose that the Court should undo the extension of some Constitutional protections which were applied to the states by the incorporation doctrine. The tension between the states and the federal government in the area of criminal procedure is an area of [extensive](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=206428) [study](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3188&context=penn_law_review), which has included some [discussion](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2010&context=journal_articles) of disincorporation in academic tones. But the discussion with regard to religion has been more one of [advocacy](http://ilj.law.indiana.edu/articles/13-Gedicks.pdf), arguing for the Supreme Court to act by overturning the incorporation of the [Establishment Clause](http://www.law.cornell.edu/wex/establishment_clause).

Conversely, the dialogue regarding disincorporation of the 2<sup>nd</sup> Amendment has been sorely lacking. Could this be a possible avenue to remove the gridlock that has paralyzed our legislatures from making any movement on addressing the development of gun laws?

Given that the Court can at times be as [gridlocked](http://www.cnn.com/2013/06/29/opinion/sonenshine-politicized-court/) and contentious as the legislature, such bold action by the Justices to overturn decisions from just a few years ago seems highly improbable. However, their decision to recognize the 2<sup>nd</sup> Amendment as applying to the states rests upon the incorporation doctrine and the Court's interpretation of the language of the Constitution. If we change what is in the Constitution, we can overturn that decision and disincorporate the 2<sup>nd</sup> Amendment. There are already historical examples for making an amendment to the Constitution overturning previous language. We amended the Constitution to [outlaw slavery](http://constitution.findlaw.com/amendment13.html), which had previously been implicitly included in the Constitution. We [overturned the 18th Amendment](http://constitution.findlaw.com/amendment21.html), which had banned alcohol when we discovered that such a ban did not work out as we had imagined. We have also [repeatedly](http://constitution.findlaw.com/amendment19.html) [changed](http://constitution.findlaw.com/amendment24.html) [who](http://constitution.findlaw.com/amendment26.html) is allowed to vote.

This is not to say that passing an amendment to disincorporate the 2<sup>nd</sup> Amendment would be easy. Only 27 amendments have succeeded, out of over 11,000 proposed amendments ([http://www.senate.gov/pagelayout/reference/three\\_column\\_table/measures\\_proposed\\_to\\_amend\\_constitution.htm](http://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm)). Given that the debate over gun regulation is so contentious across the country, it would at first seem that the already difficult process of successfully amending the Constitution would fail. Perhaps counter-intuitively, there is an opportunity in this approach which is lacking from any direct attempts at a national gun policy. Given that disincorporation would allow each state to act independently with respect to gun laws within their state, this proposed solution would present an opportunity for the political establishment on both sides to present this as a win. It would free the states to liberalize or expand gun regulation, whereas at present all states are similarly restricted by the 2<sup>nd</sup> Amendment. Disincorporation could also insulate states which desire laxer gun laws from any further intrusion by the federal government into this area should the Supreme Court reverse course on their 2<sup>nd</sup> Amendment jurisprudence.

Justice Brandeis, in New State Ice Co. v. Liebmann (<https://supreme.justia.com/cases/federal/us/285/262/case.html>), described the states as laboratories, where the individual states may, if they choose, “try novel social and economic experiments without risk to the rest of the country.” The debate on how to address the issue of gun violence will continue, and that debate will continue to meet the gridlock, which will continue to prevent or significantly delay most serious attempts at gun regulation in this country. As pointed out by Justice Brandeis, the Supreme Court has the power to prevent the states from exercising such powers of experimentation, as they have done with the issue of gun control. Perhaps, if they are not willing to release the states from that restriction so they may seek other and better answers, the people may be able to free themselves through a Constitutional amendment, and then allow the states to seek their own solutions to this important issue.

Tags: Amendment, Congress, Constitution, disincorporation, gun control, gun crime, gun rights, gun violence, Incorporation, solution

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