

LAYING PRIVILEGES OR IMMUNITIES TO REST: *MCDONALD* *V. CITY OF CHICAGO*

B. AUBREY SMITH*

I. INTRODUCTION

In *District of Columbia v. Heller*, the Supreme Court held the Second Amendment prohibits the federal government from banning handguns.¹ Following *Heller*, application of the Second Amendment to state governments through the Fourteenth Amendment seemed likely. Although the Amendment's Framers largely believed it would require states to uphold the individual liberties outlined in the Bill of Rights, state governments have not been required to do so following the Supreme Court's decision in the *Slaughter-House Cases*.²

The Court's grant of certiorari in *McDonald v. City of Chicago*,³ however, could signal a departure from the *Slaughter-House* precedent.⁴ *McDonald* will consider whether the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment incorporate the right to keep and bear arms, making the right binding against state governments.⁵ If the Court applies the Second Amendment to the states through the Privileges or Immunities Clause and overturns *Slaughter-House*, the decision could throw the existing substantive due process framework into disarray because many rights would apply through both the Due Process and Privileges or Immunities clauses.⁶ The Court, however, may use

*2011 J.D. Candidate, Duke University School of Law. I would like to thank Prof. Joseph Blocher for his invaluable help in researching and drafting this comment.

1. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008).

2. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873).

3. *McDonald v. City of Chicago*, No. 08-1521 (U.S. argued Mar. 2, 2010).

4. See Randy Barnett, *Predicting McDonald*, THE VOLOKH CONSPIRACY, Nov. 19, 2009, <http://volokh.com/2009/11/18/predicting-the-mcdonald/> (discussing the implication of certiorari in *McDonald v. Chicago*).

5. Petition for Writ of Certiorari at i, *McDonald*, No. 08-1521 (U.S. Jun. 9, 2009).

6. See generally David Kopel, *Privilege or Immunity Extravaganza*, THE VOLOKH

McDonald to clarify the existing Privileges or Immunities and Due Process jurisprudence, which is presently in a state of confusion.⁷ Regardless of the specific outcome, *McDonald* will likely solidify the legacy of the post-Civil War constitutional amendments on civil liberties.

II. FACTS

Chicago introduced firearm regulations that effectively banned handguns.⁸ In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment prohibits the federal government from banning handguns kept at home.⁹ Immediately following *Heller*, Otis McDonald initiated an action challenging several long-standing Chicago ordinances that largely banned handgun possession within city limits. McDonald claimed that the Chicago ordinances violated his Second Amendment right to bear arms as applied to state and local governments by the Fourteenth Amendment.¹⁰

The United States District Court for the Northern District of Illinois¹¹ followed *Quilici v. Village of Morton Grove*, a 1982 Seventh Circuit Court of Appeals opinion that held that state and local governments are not required to recognize the right to bear arms.¹² The Seventh Circuit similarly declined to overrule its precedent in *Quilici*.¹³ The U.S. Supreme Court granted certiorari to determine

CONSPIRACY, Dec. 21, 2009, <http://volokh.com/2009/12/21/privileges-or-immunities-extravaganza/> (assessing the impact of a revived privileges or immunities clause on substantive due process).

7. See *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) (arguing that the Court should consider whether the Fourteenth Amendment's Privileges or Immunities Clause should replace substantive due process and equal protection jurisprudence given that the current form encourages courts to invent new rights).

8. See CHICAGO, ILL., CHICAGO MUNICIPAL CODE §§ 8-20-040(a), 8-20-050(c), 8-20-090(a), 8-20-200(a), 8-20-200(c) (2009) (forbidding possession of any unregistered firearm while denying registration of most handguns and denying registration of any firearm if the owner fails to annually register the firearm).

9. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008).

10. Brief for the Petitioners at 3, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Nov. 16, 2009).

11. *NRA v. City of Chicago*, 617 F. Supp.2d 752, 754 (N.D. Ill. 2008). The Seventh Circuit reviewed a district court decision with the NRA as the lead plaintiff. The Supreme Court, however, granted certiorari to Petitioner McDonald's claim, instead of the NRA's case.

12. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 271 (7th Cir. 1982) (relying on *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (holding the Second Amendment applies only to the federal government and does not subject state regulations to constitutional scrutiny)).

13. See *NRA v. City of Chicago*, 567 F.3d 856, 860 (7th Cir. 2009). The Seventh Circuit consolidated Petitioner McDonald's case with an identical case brought by the NRA, and the NRA appeared as the lead appellant below.

whether the Second Amendment right to keep and bear arms applies to the states through either the Fourteenth Amendment's Privilege or Immunities Clause or the Fourteenth Amendment's Due Process Clause.¹⁴

III. LEGAL BACKGROUND

If the Court incorporates the Second Amendment, it could do so either through the Fourteenth Amendment's Privileges or Immunities Clause or through the Amendment's Due Process Clause. In either case, the Court's consideration will be influenced by its recent decision in *Heller*.

A. Fourteenth Amendment Privileges or Immunities

Following the Civil War, proponents of equal rights sought to create federal protections for fundamental civil liberties. Before the Civil War, the Supreme Court had opined that fundamental rights enjoy no federal protection in three separate cases. *Corfield v. Coryell* held the Article IV Privileges and Immunities Clause only creates a federal cause of action where a state extends a right to its citizens while denying the right to citizens of other states.¹⁵ *Barron v. Mayor of Baltimore* held that the Bill of Rights does not apply to state governments.¹⁶ *Scott v. Sanford*, commonly referred to as the *Dred Scott* opinion, held that there are two distinct forms of citizenship in America—state and federal—and states retain discretion in extending fundamental rights to their citizens.¹⁷

After the war, Northern Republicans sought to remedy the perceived ills of *Corfield*, *Barron* and *Dred Scott* by creating a federal cause of action around individual liberties.¹⁸ To that end, Congress conditioned readmission to the Union on the southern states' ratification of the Fourteenth Amendment.¹⁹ Despite initial optimism

14. Petition for Writ of Certiorari, *supra* note 5, at i.

15. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3,230). *Corfield* considered an Article Four Privileges and Immunities challenge, *id.*, which is distinct from the Fourteenth Amendment's Privileges or Immunities Clause.

16. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

17. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 405 (1856).

18. See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 41 (1986) (stating that "perhaps the most common Republican refrain of the Thirty-Ninth Congress was that life, liberty and property of American citizens must be protected against denial by the states").

19. *Id.* at 36 (discussing the legislative history of the Fourteenth Amendment). In pertinent part, the Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or

regarding the Fourteenth Amendment's ability to safeguard individual liberties, the Supreme Court quickly decided otherwise. In the *Slaughter-House Cases*, the Court ruled the Fourteenth Amendment's Privileges or Immunities Clause only protects rights accruing under federal citizenship, which are distinct from the fundamental rights inherent in state citizenship.²⁰

In dicta, the Court in *Slaughter-House* described the federal rights codified by the Privileges or Immunities Clause as those "which owe their existence to the Federal government, its National character, its Constitution, or its laws."²¹ These include access to government, the right to run for elected office, access to seaports, and access to courts.²² This limited field of rights protected by the Clause falls short of the fundamental rights envisioned by many of the Amendment's drafters.²³

Though explicitly recognizing the historical moment in which the Reconstruction-era amendment was adopted,²⁴ *Slaughter-House* placed seemingly equal weight on the principle of textual interpretation that requires explicit language to create federal causes of action against the state governments.²⁵ Specifically, the Court explained that for an amendment to shift protection of civil rights from the States to the Federal government would require "language which expresses such a purpose too clearly to admit of doubt."²⁶ This language directly parallels the pre-Civil War *Barron* decision in which the Court held the Bill of Rights does not apply to the states.²⁷

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

20. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873).

21. *Id.* at 79.

22. *Id.*

23. Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 14, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Nov. 23, 2009) (noting most Congressional representatives understood Privileges or Immunities to encompass "protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety") (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (E.D. PA 1823) (No. 3,230)).

24. *See Slaughter-House*, 83 U.S. (16 Wall.) at 68 (stating that "those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive . . . and they determined to place this main and most valuable result in the Constitution of the restored Union . . .").

25. *Id.* at 78.

26. *Id.* at 76-78.

27. *See Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (holding that if

Following *Slaughter-House*, the Court largely reverted back to its pre-Civil War approach to federalism. In *United States v. Cruikshank*, the Court reaffirmed that neither the Second Amendment nor the Privilege or Immunities Clause of the Fourteenth Amendment limit state governments' power to regulate firearms.²⁸ As the Court later explained in *Presser v. Illinois*, a general right to bear arms is a fundamental privilege inherent in state citizenship, but the Fourteenth Amendment only creates federal protection for rights accruing to national citizenship.²⁹ Because fundamental rights predate the Constitution, they are not inherent in national citizenship, thus not protected under the Fourteenth Amendment.³⁰

For the most part, the Court has upheld a limited view of the Fourteenth Amendment's Privilege or Immunities Clause.³¹ However, the Court has recently begun to interpret the Clause as protecting some fundamental rights, perhaps indicating a departure from the *Slaughter-House* precedent. In *Saenz v. Roe*, the Court interpreted the Clause as providing federal protection for the right to travel.³² Although Justice Thomas dissented from this opinion, he agreed that the meaning of the Clause should be reconsidered in "the appropriate case."³³

B. Modern Selective Incorporation Through Due Process

Beginning in the 20th century, the Court has increasingly recognized specific, constitutional rights as binding and protected from intrusion by both the federal and state government through the Fourteenth Amendment's Due Process Clause. In *Twining v. New Jersey*, the Court recognized the Fourteenth Amendment's Due Process clause as a potential source of substantive rights: "It is possible that some of the personal rights safeguarded against National action may also be safeguarded against state action, because a denial of them would be a denial of due process."³⁴ In *Palko v. Connecticut*,³⁵

Congress had intended to apply Bill of Rights to the states "they would have declared this purpose in plain and intelligible language").

28. *United States v. Cruikshank*, 92 U.S. 542, 553–55 (1876).

29. *Presser v. Illinois*, 116 U.S. 252, 266–68 (1885).

30. *Id.* at 267.

31. *See* *Madden v. Kentucky*, 309 U.S. 83, 90–91 (1940) (stating that "[t]he privileges and immunities clause protects all citizens against abridgment by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship").

32. *Saenz v. Roe*, 526 U.S. 498, 503 (1999).

33. *Id.* at 528 (Thomas, J., dissenting).

34. *Twining v. New Jersey*, 211 U.S. 78, 99 (1908). In *Twining*, the Court held that the right to be free of self-incrimination was neither a privilege or immunity of U.S. citizens nor inherent

the Court established the “selective incorporation” test, which later provided a vehicle for applying much of the Bill of Rights to state actions:

[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be *implicit in the concept of ordered liberty*, and thus, through the Fourteenth Amendment, become valid as against the states.³⁶

Following *Palko*, the Court incorporated nearly every right embodied in the first eight Amendments.³⁷ The Court, however, later refined *Palko*’s “concept of ordered liberty” standard, now incorporating provisions of the Bill of Rights if the right is “fundamental to the American scheme of justice.”³⁸

Although *Cruikshank*’s holding that the Second Amendment does not apply to the states is specific precedent binding the lower courts, the *Cruikshank* decision was written forty-two years prior to *Twining*’s recognition that the Due Process Clause could incorporate the Bill of Rights against the states. The modern Court has yet to consider whether the Second Amendment right to keep and bear arms is fundamental right.

C. District of Columbia v. Heller

In 2008, the Court considered whether a federal law prohibiting handguns in the District of Columbia violated the Second Amendment.³⁹ The District of Columbia argued that the Second Amendment protected the right to bear arms only in connection with militia service.⁴⁰ The respondents, however, asserted that the Amendment protected an individual right unconnected to militia purposes.⁴¹ In ruling that the right to bear arms accrues to individuals regardless of militia purposes, the Court first confronted the Second

in due process and therefore could be abridged by the states. *Id.* at 113-14.

35. *Palko v. Connecticut*, 302 U.S. 319 (1937).

36. *Id.* at 324-25 (1937) (emphasis added).

37. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 653 (1989) (stating that “the obvious question, given the modern legal reality of the incorporation of almost all of the rights protected by the First, Fourth, Fifth, Sixth and Eighth Amendments, is what exactly justifies treating the Second Amendment as the great exception?”).

38. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

39. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2787-88 (2008).

40. *Id.* at 2789 (citing to Amendment’s prefatory clause as indicating purpose to guard states against federal intervention but not to create an individual right).

41. *Id.*

Amendment’s prefatory clause: “A well regulated Militia, being necessary to the security of a free State” The Court held that the prefatory clause serves a “clarifying function” but does not otherwise “limit or expand the scope of [the right announced in] the operative clause.”⁴² Using this interpretation, and after examining the Second Amendment’s historical background, the Court held that the Second Amendment protects a preexisting, individual right to bear arms unconnected with militia purposes.⁴³

After recognizing this right, the Court considered the constitutionality of the District of Columbia’s ban on handguns. The Court upheld precedent protecting a right to bear arms commonly used for lawful purposes like self-defense.⁴⁴ The Court found the D.C. law prohibiting an “entire class of ‘arms’ that is overwhelmingly chosen by American Society for [the] lawful purpose” of self-defense to be an unconstitutional violation of the Second Amendment.⁴⁵ The Court rested its decision on the popularity of the weapon at issue—a handgun—and explicitly declined to provide a standard of review for lower courts to weigh individuals’ Second Amendment rights against a state’s interest in regulating weapons to preserve safety.⁴⁶

IV. HOLDING

The Seventh Circuit held the Second Amendment is not binding on state and local governments.⁴⁷ First, the Seventh Circuit quickly dismissed the prospect of overturning the *Slaughter-House Cases* by interpreting the right to bear arms as protected by the Privileges or Immunities clause.⁴⁸ Second, the Seventh Circuit declined to hold that the Second Amendment was binding on state governments through the modern selective incorporation framework.⁴⁹ The plaintiffs acknowledged that Supreme Court precedent—*Cruikshank*, *Presser*, and *Miller*—rejects the application of the Second Amendment to

42. *Id.* at 2789.

43. *Id.* at 2822–23.

44. *See id.* at 2821–22. *See also* United States v. Miller, 307 U.S. 174, 175 (1939) (considering whether the Second Amendment contemplated the right to carry a sawed-off shotgun across state line).

45. *Heller*, 128 S. Ct. at 2818 (“It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.”).

46. *Id.* at 2821 (“[Justice Breyer] criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions A constitutional guarantee subject to future judge’s assessments of its usefulness is not constitutional guarantee at all.”).

47. *NRA v. City of Chicago*, 567 F.3d 856, 860 (7th Cir. 2009).

48. *Id.* at 857.

49. *Id.* at 860.

state governments.⁵⁰ Still, they urged the court to engage in *Palko*'s incorporation analysis and dismiss the precedent as outdated.⁵¹ The Seventh Circuit, however, rebuffed the plaintiffs' arguments for selective incorporation. In doing so the court noted it was bound to follow specific precedent regardless of whether the analysis was perceived as outdated.⁵² It noted *Cruikshank*, *Presser*, and *Miller* remain good law after *Heller*⁵³ and that the Supreme Court has not shown any intention of incorporating all the amendments by overruling *Slaughter-House*.⁵⁴

In dicta, the Seventh Circuit speculated that despite *Heller*'s characterization of the right to bear arms as an individual right, the right embodied in the Second Amendment may apply differently to state governments than to the federal government.⁵⁵ The court offered two scenarios to support its hypothesis that the right may allow state governments to act where the federal government could not. First, a state could decide private ownership of long guns, as opposed to handguns, was best suited for a public militia.⁵⁶ A state ban on handguns would therefore be permissible under the Seventh Circuit's interpretation of the *Heller* decision.⁵⁷

Second, a state could determine the public's interest in self-defense is best served by requiring potential victims to surrender and let the perpetrator face the criminal justice system rather than fight back with handguns.⁵⁸ The court explained that *Heller* created Second Amendment protection only for the "interests of law-abiding

50. *Id.* at 857.

51. *See id.* at 857 (citing *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009) (holding the Second Amendment binding against the states through the Due Process Clause)).

52. *NRA*, 567 F.3d at 857 (citing *Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions.")).

53. *Id.* at 858 (quoting *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008) ("[W]ith respect to *Cruikshank*'s continuing validity on incorporation . . . we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in [*Presser* and *Miller*], reaffirmed that the Second Amendment applies only to the Federal Government.")).

54. *Id.*

55. *Id.* at 859–60 ("One function of the second amendment is to prevent the national government from interfering with state militias. It does this by creating individual rights, *Heller* holds, but those rights may take a different shape when asserted against a state than against the national government.").

56. *Id.*

57. *Id.*

58. *Id.*

citizens.”⁵⁹ According to the Seventh Circuit, if a state banned self-defense, there would be no right to own a handgun because there would no longer be a lawful purpose for its possession.⁶⁰ Regarding the latter hypothetical, the Seventh Circuit emphasized *Heller*’s conclusion that the Second Amendment is only concerned with citizens who follow the law.⁶¹ If a state banned self-defense, there would be no right to own a handgun for purposes of self-defense.⁶²

V. ANALYSIS

In holding the Second Amendment does not apply to state governments, the Seventh Circuit correctly deferred to binding, specific Supreme Court precedent. The Supreme Court, however, will be free to overrule its earlier holdings.

In addition, the Seventh Circuit’s analysis distorts *Heller*’s description of the Second Amendment right, ignores an implicit right to self-defense, and inappropriately regards federalism principles as paramount to the right to bear arms.

A. *Specific Supreme Court Precedent.*

An alternative approach to the Seventh Circuit’s adherence to arguably outdated precedent would have been to mimic the approach taken by the Ninth Circuit in *Nordyke v. King*.⁶³ The Ninth Circuit justified a departure from precedent by recognizing that the Supreme Court has yet to address the possibility of incorporating the Second Amendment through the Due Process Clause.⁶⁴ The Ninth Circuit interpreted the Supreme Court’s silence as an opportunity to undergo its own incorporation analysis under the Due Process Clause.⁶⁵ As the Seventh Circuit noted, however, reinterpretation at the circuit court level is dubious, especially considering three Supreme Court cases directly address the issue at hand.⁶⁶

59. *Id.* at 859.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009).

64. *Id.* at 447.

65. *Id.*

66. *See NRA*, 576 F.3d at 857 (stating that “repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court’s holdings even if the reasoning in later opinions has undermined their rationale”).

B. The Right to Bear Arms May Take a Different Shape Against the States.

The Seventh Circuit's first hypothetical ignores *Heller*'s rejection of the notion that the Second Amendment is limited by its prefatory clause.⁶⁷ Indeed, the Court in *Heller* took great pains to note that the right to bear arms encompassed much more than gun possession for militia purposes.⁶⁸ As the Second Amendment protects firearms used for a variety of purposes, including hunting and self-defense, an individual state's determination of what weapons would best serve militia purposes is irrelevant. If the prefatory clause was a limitation on the right, the *Heller* respondent likely would have been denied the right to have his handgun because he did not claim its possession for militia service.⁶⁹

The Seventh Circuit's second hypothetical distorts two of *Heller*'s premises. First, *Heller* employed the "law-abiding citizen" language to define the types of weapons the Framers intended to protect in codifying the Second Amendment.⁷⁰ The Court determined the Framers contemplated the arms "'in common use at the time' for lawful purposes like self-defense."⁷¹ In defining the protected category of arms in this manner, the Court created a framework for adapting the Second Amendment right to the modern world. For example, *Heller* does not stand for the proposition that individuals have a right to own weapons of mass destruction because these weapons are not currently in common use for lawful purposes.

Nowhere in the opinion did the Court indicate the right to own a handgun is contingent on a state's self-defense laws. Although the majority noted that the ban on handguns amounted to a categorical prohibition on "an entire class of 'arms' that is overwhelmingly chosen for that lawful purpose [of self-defense],"⁷² the Court used this lawful purpose language under the assumption that a government would not and could not ban self-defense.⁷³ In determining whether

67. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2794 (2008).

68. *See id.* at 2801.

69. *See id.* at 2788.

70. *Id.* at 2815–16.

71. *Id.* at 2815.

72. *Id.* at 2817.

73. *Id.* ("As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a

the ability to “bear arms” applies outside of the militia context, the Court looked to the 18th century understanding of the term and decided that the phrase was commonly understood to include a right of self-defense.⁷⁴ The Court’s historical analysis in *Heller* of the Framers’ intent does not condition the individual right on modern, state-level legislative determinations of whether self-defense is appropriate.

C. Both Slaughter-House and Federalism Principles Should Guide the Second Amendment Incorporation

Throughout its opinion, the Seventh Circuit adhered to the principles of federalism outlined in the *Slaughter-House Cases* when deciding whether the Bill of Rights should apply to the states. Although the circuit court’s deference to Supreme Court precedent is appropriate, these principles may hold substantially less weight with the Supreme Court.

First, the Seventh Circuit’s axiom that “[f]ederalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon”⁷⁵ stands contrary to Supreme Court precedent. *Heller* emphasized the right to bear arms predates the United States and any of its associated federalism principles: “it has always been understood that the Second Amendment . . . codified a *pre-existing* right . . . [T]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”⁷⁶ Although the Seventh Circuit may be correct in asserting that the right to own a particular weapon is not “deeply rooted” in the American scheme of justice, the right to bear arms, particularly in self-defense, has long been recognized as one of the fundamental rights through which all other liberties seek their protection.⁷⁷

Beyond the Seventh Circuit’s broad federalism concerns, the court extends a level of deference to *Slaughter-House*’s limited view of the Fourteenth Amendment that may be revised or overruled at the

prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”).

74. *Id.* at 2793.

75. *NRA v. City of Chicago*, 567 F.3d 856, 860 (7th Cir. 2009).

76. *Heller*, 128 S. Ct. 2783 at 2797–98 (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)).

77. *See* Brief for Respondents The Nat’l Rifle Ass’n of Am., Inc. in Support of Petitioners at 32, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Nov. 16, 2009) (quoting *Heller*, 128 S. Ct. 2783 at 2805) (stating right to bear arms may be “true palladium of liberty”).

Supreme Court level. First, the Supreme Court's decision to consider whether Chicago's handgun ban violates the Fourteenth Amendment's Privileges or Immunities Clause indicates that the Court considers the issue undecided. Second, the Court's recent decision in *Saenz* indicates *Slaughter-House* did not completely strip the Clause of all modern relevance.⁷⁸ Justice Thomas' dissent in *Saenz*, joined by Chief Justice Rehnquist, demonstrates a desire to reevaluate the Clause's meaning.⁷⁹ Finally, in an overwhelming consensus, scholars have argued *Slaughter-House* was wrong on the day it was decided.⁸⁰ This broad coalition, made up of constitutional scholars from both ends of the political spectrum, has urged the Court to reject *Slaughter-House's* interpretation of the Clause in favor of a reading that creates a presumption of federal protection around fundamental rights.⁸¹

D. *McDonald's Argument*

In his brief, Petitioner McDonald devoted sixty-five of seventy-three pages to his argument that the Court should overrule *Slaughter-House* and hold the right to bear arms is a privilege or immunity protected under the Fourteenth Amendment.⁸² McDonald framed this argument in two stages. First, he argued historical evidence demonstrates the phrase "privileges or immunities" was commonly understood to encompass both the right to bear arms as well as many other fundamental rights.⁸³ Second, McDonald directly confronted *Slaughter-House*, calling for the Court to reject that line of cases.⁸⁴ McDonald pointed to the *Slaughter-House* Court's failure to give appropriate weight to the historical moment in which the Amendment was adopted⁸⁵ and offered a textualist interpretation of the Amendment supporting a more expansive view of the Clause.⁸⁶

After establishing that all involved parties understood the Fourteenth Amendment to create federal protection around an

78. See *Saenz v. Roe*, 526 U.S. 489, 510–11 (1999) (holding Fourteenth Amendment Privileges or Immunities Clause protects right to travel).

79. *Id.* at 527 (Thomas, J., dissenting).

80. See generally Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *supra* note 23 (representing a group of eight distinguished constitutional law professors).

81. *Id.* at 10.

82. Brief for the Petitioners, *supra* note 10.

83. *Id.* at 9–10.

84. *Id.* at 42.

85. *Id.* at 51–52.

86. *Id.* at 53–54.

expansive set of liberties, McDonald argued that *Slaughter-House* was incorrectly decided and should now be overturned. The brief focused on *Slaughter-House*'s holding that the Privileges or Immunities Clause only protects those rights inherent in federal citizenship.⁸⁷ According to McDonald, the *Slaughter-House* majority's request that Congress more clearly demonstrate an intent to shift protection of civil rights to the federal government was unnecessary following the Civil War, the Reconstruction-era amendments, and extensive Congressional debate surrounding the Fourteenth Amendment.⁸⁸ The Court's decision to rest its interpretation almost exclusively on the text—ignoring contextual evidence to the contrary—struck McDonald as particularly dubious.⁸⁹

Buttressing his historical analysis, McDonald concluded his argument for overturning *Slaughter-House* by confronting the case on textualist terms.⁹⁰ *Slaughter-House*'s crucial distinction between Article IV privileges and immunities of “citizens *in* the several states” and the Fourteenth Amendment's privileges or immunities of “citizens *of* the United States” was a difference without meaning, according to McDonald.⁹¹ McDonald points both to instances where Congress used the phrases interchangeably as well as an explicit rejection of the distinction by the Amendment's primary author.⁹² For McDonald, this interpretation of Fourteenth Amendment privileges as synonymous with Article IV rights indicates a congressional intent that the Fourteenth Amendment cloak those Article IV liberties with federal protection.⁹³

Finally, McDonald briefly suggested the Court incorporate the

87. *Id.* at 44.

88. *Id.* at 51–52.

89. *Id.* at 50. As McDonald noted, observers have been pointing out this issue since the 19th century, when William Royall wrote:

It is a little remarkable that, so far as the reports disclose, no one of the distinguished counsel who argued this great case (*the Slaughter-House Cases*), nor any of the judges who sat in it, appears to have thought it worthwhile to consult the proceedings of the Congress which proposed this amendment to ascertain what it was that they were seeking to accomplish.

William Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, S. L. REV. 558, 563 (1879), *quoted in* Brief for the Petitioners, *supra* note 10, at 50.

90. Brief for the Petitioners, *supra* note 10, at 53–54.

91. *Id.* at 53 (emphasis added).

92. *Id.* at 53–54 (“Bingham specifically rejected the construction *SlaughterHouse* [sic] placed on Article IV's alleged language. ‘There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is the privileges and immunities of citizens *of the United States* in the several States’ that it guaranties.”)(quoting CONG. GLOBE, 35th Congress, 2nd Sess. 984 (1859)).

93. *Id.*

Second Amendment against the states through its existing due process framework.⁹⁴ McDonald noted selective incorporation typically looks to the right’s “historical acceptance in our nation, its recognition by the states . . . and the nature of the interest secured by the right.”⁹⁵ To demonstrate that the right to bear arms satisfies these requirements, McDonald first pointed to the “settled” determination under English law at the time of the Constitution’s ratification that colonial subjects had a right to bear arms for self-defense.⁹⁶ Further, McDonald highlighted the states’ traditional acknowledgement of the right, emphasizing the fact that forty-four states currently codify the right to keep and bear arms in their constitutions.⁹⁷ Finally, McDonald contended the right to self-defense inherent in the Second Amendment is a fundamental aspect of the liberty interest protected under the Due Process right to privacy and personal integrity.⁹⁸

E. Chicago’s Argument

In contrast to McDonald, the City of Chicago divided its brief equally between due process and privileges or immunities.⁹⁹ Beginning with its privileges or immunities analysis, the City of Chicago urged the Court to reject McDonald’s argument for overturning *Slaughter-House*. Chicago based its argument on familiar *stare decisis* principles,¹⁰⁰ arguing the Court should uphold *Slaughter-House* because 1) the existing privileges or immunities jurisprudence is “clear and easy to apply”; 2) it is well-established case law; 3) much of the Court’s subsequent privilege or immunities and substantive due process decisions were founded on *Slaughter-House*; and 4) there has been no “erosion of legal and factual premises” underlying *Slaughter-House*.¹⁰¹ Regarding the latter contention, Chicago emphasized the legal and factual foundation of *Slaughter-House* remains unchanged.¹⁰² Although most of the Bill of Rights has been incorporated through substantive due process, Chicago points out that

94. *Id.* at 66.

95. *Id.* at 67 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

96. *Id.* at 68.

97. *Id.* at 69.

98. *Id.* at 70–72 (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), (recognizing personal autonomy in medical decisions); *Griswold v. Connecticut*, 381 U.S. 479 (1965), (recognizing right to purchase contraception as part of right of personal security); *Rochin v. California*, 342 U.S. 165 (1952), (recognizing right of bodily integrity against police searches)).

99. Brief for Respondents, *McDonald*, No. 08-1521 (U.S. Aug. 5, 2009).

100. *Id.* at 42.

101. *Id.* at 46–52.

102. *Id.* at 51–53.

the Court has repeatedly emphasized the Privileges or Immunities Clause does not apply to state governments.¹⁰³ In addition, Chicago argued the Court's historical understanding of the Congressional debate around the Fourteenth Amendment remains unchanged.¹⁰⁴

Chicago also argued the Court should decline to overturn *Slaughter-House* even if reviewing the decision *de novo*—outside of the *Cruikshank*, *Presser*, *Miller* precedent where the Court previously held the Second Amendment did not apply to state governments.¹⁰⁵ First, Chicago pointed to the Court's decision in *Barron*, in which the Court held that the term “privileges and immunities” did not apply to the states.¹⁰⁶ To Chicago, widely recognized Supreme Court precedent demonstrated that, at the time of the Fourteenth Amendment's passage, the general public did not understand the Privileges or Immunities Clause to bind the state governments.¹⁰⁷ To these same ends, Chicago reiterated *Slaughter-House*'s guiding principle that if Congress had intended to work such a fundamental change in the Clause's nature, the legislators would have explicitly done so.¹⁰⁸

Chicago started its substantive due process analysis by reminding the Court of *Barron*'s rejection of wholesale incorporation of the Bill of Rights. Chicago argued that the Court in *Palko* only intended for incorporation when a particular substantive right is “implicit in the concept of ordered liberty.”¹⁰⁹ Pointing to extensive handgun violence in urban areas like Chicago, the city argued prohibition or regulation of handguns preserves rather than hinders ordered liberty.¹¹⁰ Incorporating the Second Amendment would endanger virtually every state-level gun regulation.¹¹¹ Even if existing gun regulations were held constitutional under the Second Amendment, challenges to these laws would prove costly for states to litigate.¹¹²

To demonstrate the fundamental changes that would result from incorporation of the Second Amendment, Chicago highlighted the differences between *Heller*'s application of the Second Amendment

103. *Id.* at 52.

104. *Id.* at 52–53.

105. *Id.* at 53.

106. *Id.* at 54.

107. *Id.*

108. *Id.* at 55–57.

109. *Id.* at 8 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

110. *Id.* at 12–17.

111. *Id.* at 17–23.

112. *Id.* at 19–20 (explaining state governments would be forced to defend existing regulations against a new, federal cause of action).

to the federal government and the nature of existing gun rights embodied in state constitutions.¹¹³ In particular, Chicago emphasized *Heller*'s lack of an explicit level of review conflicts with the state-level "consensus" that any right to firearms is subject to a careful weighing of an individual's interest in gun ownership against the government's interest in preserving safety.¹¹⁴ Furthermore, state governments and local municipalities have occasionally banned handguns in certain areas while allowing possession of other firearms.¹¹⁵ This, according to Chicago, conflicts with *Heller*'s holding that the Second Amendment always protects handgun possession where other firearms are allowed.¹¹⁶

VI. DISPOSITION

Chicago's novel arguments against applying the Second Amendment to the states may eventually prove unpersuasive. First, the City misconstrues *Palko*'s "implicit in the concept of ordered liberty" standard.¹¹⁷ The Court's substantive due process precedent seeks to place federal protection around rights inherent in all free societies.¹¹⁸ While a ban on handguns could prevent violence and therefore increase "order" in Chicago's urban areas, Chicago fails to demonstrate why the right to bear arms does not advance ordered liberty.

The Court might reject Chicago's assertion that the historical record following *Barron* does not indicate a changed understanding of "privileges" and "immunities" such that the Clause now protects both fundamental rights and rights of national citizenship. The Court did not recognize a distinction between fundamental and national rights until the *Dred Scott* decision, twenty-four years after *Barron*.¹¹⁹

113. *Id.* at 24.

114. *Id.*

115. *Id.* at 26–30.

116. *Id.* at 26.

117. *Id.* at 8 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

118. See *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (noting modern substantive due process doctrine rests on "the belief that neither liberty nor justice would exist if [the incorporated rights] were sacrificed").

119. In *Scott v. Sanford*, the Court held:

[N]o State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 405 (1856).

The subsequent Civil War and explicit rejection of *Dred Scott* in the Fourteenth Amendment indicate the popular understanding of the deference extended to states' rights, including the Privileges or Immunities framework, had likely changed by the time of the Amendment's adoption.

The Court, however, might also find McDonald's argument for reviving Privileges or Immunities unpersuasive. Even if the *Slaughter-House* majority's textualist interpretation was misguided and more weight should have been given to the Fourteenth Amendment's Congressional debate and historical context, the Court might not heed the legal academy's persistent calls to overturn *Slaughter-House*.¹²⁰ Doing so would prioritize federal citizenship over state-level citizenship and fundamentally change the current federalism structure of our Nation's legal system. The Supreme Court is unlikely to adopt a holding that would radically change the federal-state balance of power. In the area of incorporation, the Court is even less likely to do so because modern, substantive due process review has extended federal protection to many fundamental rights that have not been covered by the Privileges or Immunities Clause.

The most likely outcome of *McDonald* will be incorporation of the Second Amendment under the Court's existing due process jurisprudence. The Court might also provide an interest-balancing test for state courts to evaluate Second Amendment challenges to gun regulations.¹²¹ *McDonald's* most lasting contribution might be to finally seal the fate of the Fourteenth Amendment's Privileges or Immunities Clause. The Court will likely interpret the Clause much the same as *Slaughter-House's* initial construction—as a protector solely of a very limited penumbra of rights inherent in federal citizenship. In the wake of *McDonald*, advocates for increased federal protection of fundamental rights will likely have to look outside the Privileges or Immunities Clause for their constitutional mandate.

120. See Brief of Constitutional Law Professors, *supra* note 23, at 1 (noting that there is “a remarkable scholarly consensus” that “the Privileges or Immunities Clause of the Fourteenth Amendment was intended to protect substantive, fundamental rights”).

121. Cf. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (declining to adopt a standard of review for federal gun regulations in spite of Justice Breyer's requests for a test).