## Note from the Editor:

The following two articles discuss *McDonald v. City of Chicago*, the highly publicized Supreme Court case from the October 2009 Term addressing the interaction of the Second Amendment of the U.S. Constitution with state regulation of gun ownership, and the Privileges or Immunities Clause of the Fourteenth Amendment. We chose to include both in this edition of Engage because of the extensive public interest in *McDonald* and because of the conflicting stances the authors take on the meaning and legacy of the *Slaughter-House Cases*.

# Incorporating Gun Rights: A Second Round in the Chamber for the Second Amendment

*By Kenneth A. Klukowski**

The Supreme Court's October Term 2009 will see another major gun-rights case, the second in three years. Although the first case was undisputedly a watershed, from both a constitutional law perspective and from a societal-impact perspective, this second case will likely prove more consequential than the first.

The question presented in this case, *McDonald v. City of Chicago*, is whether the Second Amendment right to keep and bear arms is applicable to the states either through the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment.[1] The lawyers bringing this case wisely took the opportunity to ask the Court to consider two alternative routes for "incorporation,"[2] creating the possibility for the Court to use this case as a vehicle to remediate aspects of incorporation doctrine and Fourteenth Amendment jurisprudence, as well as to extend to the states an important right enshrined in the Constitution's Bill of Rights.

This issue also benefits from the extraordinary caliber of circuit court judges who have developed the case law undergirding this case. Chief Judges David Sentelle, Alex Kozinski, and Frank Easterbrook, and Judges Diarmuid O'Scannlain, Laurence Silberman, Richard Posner, William Garwood, and Janice Rogers Brown, are among the jurists who have developed this issue in an exceptionally brief period of time, either since the *Heller* decision or in the years immediately preceding it. Their opinions—both regarding the nature of the right to bear arms and also on both sides of the incorporation question—have made this issue ripe for Supreme Court review, barely more than one year after the groundbreaking case that set the Second Amendment in motion in the federal judiciary.

### I. *Heller* Redux

In 2008 the Supreme Court decided the landmark case of *District of Columbia v. Heller*,[3] presenting the question of whether the Second Amendment secured a right to private individuals to keep and bear firearms, versus merely some form of aggregate "right" of the people acting collectively, such as in organized National Guard units or some other form of state-controlled public service. The Court held that the right secured by the Second Amendment is indeed an individual right, consistent with the other enumerated rights declared in the Bill of Rights.[4] Accordingly, the Court struck down the law at issue, a D.C. statute that categorically banned handguns and other readily-usable firearms, even in the home,[5] affirming Judge Silberman's opinion for the D.C. Circuit.[6]

The majority opinion, written by Justice Scalia, was for the most part a sterling example of originalism.[7] That assessment is qualified with "for the most part" because there were some statements in the opinion that are problematic from an originalist viewpoint.[8] Most of these are ably explored by Professor Nelson Lund of George Mason—likely the foremost scholar today on the Second Amendment and whose argument may have helped win the *Heller* case[9]—in a recent law review article.[10] I also discuss what I regard as several problematic statements in my own law review article,[11] where I note that the impact of these problematic statements in *Heller* could be minor in that at least some of them are *obiter dicta*.[12]

As significant as the *Heller* decision was, its holding was nonetheless narrow. The facts in *Heller* were extreme, concerning essentially an absolute ban on firearm ownership, and the Court's opinion was appropriately tailored to resolve a case involving such extreme facts.[13] The Court held the Second Amendment secures an individual right, reasoning that the Amendment's prefatory clause (referencing a militia) must only be read in a fashion that does not restrict the scope of the operative clause (referencing the right to arms).[14] Thus *Heller* merely resolved the threshold issue on the right to bear arms;[15] had it held that there was no individual right in the Second Amendment, no further questions or cases on gun rights would be forthcoming.

*Heller* had been a long time coming. For many years, the only Supreme Court precedent clearly on point was *United States v. Miller*,[16] where in 1939 the Court remanded a gun-rights case for evidentiary development,[17] accompanied by a brief opinion containing various opaque statements about the nature of the Second Amendment so difficult to navigate that all sides of the gun-rights debate claimed that *Miller* supported their view. Finally, in 2001 the Fifth Circuit became the first circuit court to adopt the view that the Second Amendment

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secures an individual right in *United States v. Emerson*,[18] where Judge Garwood's opinion for the court engaged in a very long and thorough examination of the issue.[19]

The Ninth Circuit then wrote a lengthy opinion adopting the view that the Second Amendment confers no private right whatsoever in the 2002 case *Silveira v. Lockyer*,[20] which was essentially a rebuttal to *Emerson*.[21] When the full Ninth Circuit declined to rehear the case en banc, several judges wrote opinions dissenting from the denial,[22] including one by Chief Judge Alex Kozinski.[23]

Neither of these cases went before the High Court. But the case law they created set the stage, with a thorough examination of the literature and research that had been assembled over three decades. And while this case law reached its culmination in *Heller*, it marks only the beginning of the struggle over gun rights in America. Many questions remain, such as what level of scrutiny will attend Second Amendment claims,[24] a question that did not need to be decided in *Heller*,[25] and likewise is not at issue in *McDonald*. Indeed, a case almost identical to *Heller* was dismissed by a divided panel of the D.C. Circuit for lack of standing[26] (a fate that *Heller* avoided by a single vote),[27] showing that the question of standing is a critical issue going forward that cannot be taken for granted in any gun-rights case.[28]

This may in fact have been the reason that the Court granted certiorari in *McDonald v. Chicago*, but not *NRA v. Chicago*. These two cases had been consolidated at both the district and circuit level, and the Seventh Circuit decided both cases with one opinion bearing the NRA's name. Furthermore, the National Rifle Association was the first to petition for certiorari.[29] The only clear distinction between the two cases is that the *McDonald* plaintiffs applied for permits to possess firearms within Chicago city limits, and cited the denial of that permit as their particularized injury to satisfy the Article III case-or-controversy requirement,[30] while the *NRA* plaintiffs all claimed that their right to own a firearm within Chicago was being abridged, but did not assert any injury other than that which was suffered by the public at large, which the Supreme Court has held is insufficient to present a justiciable case.[31]

But of all the questions remaining after *Heller*, perhaps none is as consequential for the right to bear arms as whether the Second Amendment is applicable to the states through the Fourteenth Amendment.[32]

## II. The Circuit Split Without a Split: When *Heller* Met *Agostini*

The Supreme Court in *Heller* had no occasion to consider whether the Second Amendment is incorporated against the states because the Bill of Rights directly applies to the District of Columbia as a federal enclave.[33] *Heller* was a test case deliberately brought in D.C. to avoid the incorporation question, so the Court expressly disclaimed the question, thus obviating the need to reconsider its precedent on the issue.[34]

In the 1876 case *United States v. Cruikshank*, the High Court held that the Second Amendment does not apply to the states through the Fourteenth Amendment.[35] This holding was then reaffirmed in *Presser v. Illinois*,[36] the 1886 precedent cited in Justice Sotomayor's per curiam decision on Second Amendment rights that was so often discussed in her confirmation hearings.[37] This proposition was reaffirmed yet again shortly thereafter in *Miller v. Texas*.[38]

The key question therefore becomes the breadth of the Court's holding in the *Cruikshank* line of cases. There are two possibilities, discussed in more detail below in Parts IV & V.

One is that *Cruikshank* and its progeny only considered whether the Second Amendment applies to the states through the Fourteenth Amendment Privileges or Immunities Clause. Even though the Court did not limit its holding to this clause, referring instead to the Fourteenth Amendment *in toto*, the 1876 decision was before the advent of substantive due process.[39] The argument therefore arises that the Court never contemplated the question of incorporating through the Due Process Clause, which would then leave that route open for applying the right to bear arms to the states. Professor Lund is the foremost advocate of this position,[40] which was also briefly adopted by the Ninth Circuit in an excellent opinion written by Judge O'Scannlain.[41]

The alternative position is that the *Cruikshank* line of cases precludes incorporation through any clause of the Fourteenth Amendment. Although it is accurate to argue that the Court's holdings in these cases were based solely on arguments involving the Privileges or Immunities Clause, such an argument is beside the point. The plain text of the Court's opinion encompassed all of the Fourteenth Amendment: the Court simply held that this amendment does not apply the right to bear arms to the states.[42] This is the position most consistent with the Supreme Court's most recent pronouncement on how inferior courts are to regard Supreme Court precedents that speak directly to an issue, but seem anachronistic.[43] Lower courts are therefore constrained to regard these precedents as foreclosing application of the Second Amendment to the states until the Supreme Court revisits the issue.[44] The Seventh Circuit recently adopted this very position, in an opinion by Chief Judge Easterbrook, written with his characteristic style.[45]

In terms of the Supreme Court, this question of the breadth of the *Cruikshank* holding determines whether stare decisis is an impediment to incorporating the Second Amendment. If *Cruikshank* is read narrowly as only concerning Privileges or Immunities, then the Court could freely incorporate the Second Amendment through the Due Process Clause while leaving those nineteenth-century precedents intact. If the Court takes the plain text of these antiquated opinions at face value and finds that they cover the entirety of the Fourteenth Amendment, then it would have to overrule all three cases to incorporate the Second Amendment.

Should the Court adopt the latter position, then it is worth noting that *Cruikshank* and its progeny are textbook examples of cases that are fit to be overruled.[46] The *Heller* Court expressly noted that *Cruikshank* also stated that the First Amendment does not apply to states, and further noted that these cases did not engage in any part of the analysis that the Court's subsequent case law requires for Fourteenth Amendment inquiries.[47] Thus the Court clearly signaled that *Cruikshank* and its progeny are deficient from a modern jurisprudential perspective.

Stare decisis requires courts to adhere to precedent absent some special justification for overruling it.[48] This principle is

predicated on the concept that, in the American common-law system, it is usually better for a rule of law to be decided, than to be decided correctly.[49] However, the Court has repeatedly held that the hurdle of stare decisis is not as difficult to clear when constitutional issues are at bar.[50] Further, the Court has held that a significant development in constitutional law can provide such a special justification.[51] Given that every Supreme Court case incorporating provisions of the Bill of Rights was decided after the *Cruikshank* trio of cases,[52] and that the entire framework of Fourteenth Amendment jurisprudence currently employed by the Court was developed in the twentieth century,[53] it seems clear that stare decisis should not impede overturning *Cruikshank*, *Presser*, and *Miller*.

But all this is beyond the purview of the circuit and district courts. The Supreme Court's precedents on this point are still controlling,[54] and the Court has recently reemphasized that inferior courts must consider themselves bound by Supreme Court precedent even when those precedents seem irreconcilable with current law, as only the High Court can overrule its own precedent.[55] Although the existence of a court split is usually a prime factor counseling in favor of granting certiorari, in the instant issue the Court should regard the lack of a split as still more compelling, as the circuits that have denied incorporation expressly claim that Supreme Court precedent forecloses the opportunity for the intermediate courts to even consider the question.

### III. Obviating the Problem of Strict Scrutiny

The reality is that perhaps the single greatest impediment to incorporating the Second Amendment is strict scrutiny. The Supreme Court has only incorporated fundamental rights into the Due Process Clause, and in so doing has only applied rights that are fundamental to the states.[56] The general test for burdens on fundamental rights is strict scrutiny.[57]

Some may argue, therefore, that whether the Court is willing to incorporate will depend on uncoupling fundamentality from strict scrutiny. This is understandable, given that strict scrutiny is a daunting standard for laws to overcome. Laws subject to strict scrutiny are presumptively invalid,[58] and are only upheld if the government can carry the burden of showing that the challenged state action is narrowly tailored to advance a compelling state interest.[59]

Opponents of gun rights can argue that the Court's promulgation of a rule that gun control laws trigger strict scrutiny would lead to deranged individuals walking through public parks with assault rifles, violent individuals taking submachine guns onto school playgrounds, and criminal defendants carrying concealed weapons into courthouses. Given that there are many thousands of firearm laws in the United States between the federal, state, and local levels, it is not difficult to conclude that some Justices might be reluctant to subject every gun control law to a test that few laws survive.

This is especially significant in light of the presumptive invalidity of actions triggering strict scrutiny. There are over 200 million firearms in the United States, possessed by perhaps 90 million individuals throughout the fifty states and U.S. territories, under a patchwork legal framework of the thousands of laws referenced above.[60] The number of permutations for possible case fact patterns is essentially infinite. Shifting the burden from the challenger to the government sets a Herculean task before the government, requiring it to satisfy that burden in the multitudinous lawsuits that could arise. Strict scrutiny is called strict for a reason—it is usually fatal to the law at issue.

But this is a false choice. Strict scrutiny is not the uniform test for burdens on fundamental rights. It is simply the general test, and this provides a route to incorporate the Second Amendment's right to bear arms while circumscribing the parade of horribles mentioned above that opponents to gun rights will trot out in an effort to persuade the Court to refuse incorporation. For example, voting is a fundamental right for which only severe burdens are subject to strict scrutiny, with the remainder being held to a standard of reasonableness.[61] Burdens on Fourth, Fifth, and Sixth Amendment rights are generally not subject to strict scrutiny. Finding the right to bear arms to be fundamental does not necessitate applying strict scrutiny to every gun law.

The Court can instead begin establishing a multi-tiered framework of review, analogous to the one employed for free speech issues.[62] Content-based speech controls are subject to strict scrutiny.[63] Viewpoint-based discrimination is even more demanding, in that the rebuttable presumption of invalidity is elevated to an irrebuttable presumption, creating a  per se rule that viewpoint discrimination is always unconstitutional.[64] In the opposite direction, content-neutral regulations on speech, such as those concerning the time, place, or manner of speech, are subject to intermediate scrutiny,[65] under which the law must be narrowly tailored to achieve a significant government interest. (This test is different, and more demanding, than intermediate scrutiny under the Equal Protection Clause.)[66] Speech on government land that is a limited public forum can be further restricted to force speech to conform to the public purposes of the forum.[67] And laws governing speech in a nonpublic forum, such as an airport, are subject to a test of mere reasonableness.[68] As the Court is presented with different forms and degrees of gun control laws, developing this multi-tier framework should satisfy public needs while upholding the right to keep and bear arms consistent with the design of both the Founding Fathers that adopted the Second Amendment and also the Framers of the Fourteenth Amendment.

Adapting the multi-tier framework employed under the Free Speech Clause is the optimal solution that satisfies all of these concerns.[69] The Court can then hold the right to bear arms to be a fundamental right and therefore applicable to the states, but without the concomitant issue of strict scrutiny mowing down every vestige of gun laws in the United States.

### IV. Incorporation through the Due Process Clause

Every right applied to the states thus far has been applied by being incorporated into the Due Process Clause as a substantive right. Most seem to overlook the fact that incorporating rights though the Due Process Clause is a form of substantive due process.

The problem with substantive due process is that it is perhaps the most pernicious doctrine ever promulgated by judicial activism. It first became ascendant in the infamous *Lochner v. New York*.[70] But although *Lochner* has long since

been overruled,[71] the substantive due process spawned by that discredited precedent refuses to die along with its creator. Instead, it resurfaced in *Griswold v. Connecticut* (although *Griswold* was predicated on "penumbras from emanations" in the Bill of Rights, not the Due Process Clause).[72] But when this doctrine became resurgent with a vengeance in *Roe v. Wade* it cast aside any pretence of these spectral penumbras or ethereal emanations.[73] Instead, the Court simply proclaimed that the Due Process Clause, a provision that by its own diction is purely procedural, somehow implicitly contains substantive rights in its utterly non-substantive verbiage. This principle was then reaffirmed in *Planned Parenthood v. Casey*[74] and stated in completely explicit terms in *Lawrence v. Texas*.[75] All this precedent can be laid at the feet of substantive due process,[76] making it a dubious vehicle at best for applying the Bill of Rights to the states.

There is an additional complication with applying the right to bear arms through the Due Process Clause. The Due Process Clause, like the Equal Protection Clause, applies to every person in the United States. Aliens can avail themselves of these protections.[77] Even illegal aliens can claim many—if not all—of these rights.[78] To incorporate the Second Amendment right into the Due Process Clause would extend gun rights to some, if not all, of these noncitizens. While most aliens are law-abiding people who have the same self-defense concerns as any other person, the inherent deadliness of firearms and the reasons explained below should give pause to empowering aliens, possibly including those in the United States illegally, with the right to demand a gun.

### V. The Privileges or Immunities Clause and the Rights of Federal Citizenship

The solution to the problems attending incorporation through the Due Process Clause is to return the application of substantive federal rights to the states to the clause of the Constitution designed for that purpose: the Privileges or Immunities Clause of the Fourteenth Amendment.

After lying dormant for many decades, the Privileges or Immunities Clause has recently reemerged in constitutional jurisprudence.[79] The Supreme Court resuscitated this provision from the Fourteenth Amendment in the 1999 case *Saenz v. Roe*.[80] Although dissenting in that case, Justice Thomas wrote for himself and the late Chief Justice Rehnquist that he would be willing to revisit Privileges or Immunities in a case that appropriately presented an opportunity to do so.[81] *McDonald v. Chicago* is such a case.

Whereas the Due Process Clause extends procedural protections against the states for all persons, by its very terms the Privileges or Immunities Clause extends such protections only to American citizens. This provision alone was designed to convey those substantive rights against the states.

Not all constitutional rights extend to every person. The most obvious example of this is voting. The Constitution specifies that voting, which is a fundamental right, is guaranteed to American citizens that are age eighteen, regardless of gender or race. Noncitizens have no right to vote, because it is a right of federal citizenship.

The Second Amendment contains two rights, one of self-defense and the other the right to keep the government in check.[82] The *Heller* Court expressly recognized the self-defense right, as this was the basis for the Court's holding.[83] The Court also suggested that it recognized the political right, referencing the right to protect oneself against public violence (in contradistinction to private violence),[84] and referencing the concern of the Framers that the government would disarm the citizenry to avoid being held to account,[85] making the Second Amendment a "safeguard against tyranny."[86]

The right to self-defense having been firmly established by *Heller*, little more need be written on that point; only the right to hold government in check by force of arms requires explication here. While *Heller* only references this right obliquely, case law from other courts delves into this issue in more depth.

The most powerful articulation of this principle comes from now-Chief Judge Alex Kozinski, dissenting from the denial of en banc in *Silveira v. Lockyer*. Chief Judge Kozinski's opinion declares that "the simple truth—born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people."[87] He continues:

> The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies seem today, facing them unprepared is a mistake a free people get to make only once.[88]

This couplet of rights—one personal and the other political—is perhaps best explained by Judge Janice Rogers Brown. As a member of the California Supreme Court, then-Justice Brown noted that "[e]xtant political writings of the [founding] period repeatedly expressed a dual concern: facilitating the natural right of self-defense and assuring an armed citizenry capable of repelling foreign invaders and quelling tyrannical leaders."[89] Such writings, taken with the voluminous works on self-defense discussed throughout the *Heller* opinion, draw a picture of the Framers guaranteeing two rights in one constitutional provision.

The Second Amendment's use of the words "the people" (as in "We the People") strongly supports the proposition that this amendment reserves a political right only to citizens, and would have been understood as such in the 1790s when the Bill of Rights was adopted.[90] The term "the people" was also often used by Congress to refer to the American citizenry in the 1860s, when the Fourteenth Amendment was adopted.[91] Although this point can be confusing, given that "the people" is used in several places in the Bill of Rights for rights that all persons within the United States enjoy regardless of citizenship,[92] the Declaration of Independence and the Constitution also use the term in a way that clearly concerns only citizens.[93] The Second Amendment employs this term in the latter sense.[94]

## VI. Incorporating through Privileges or Immunities Without Overruling the *Slaughter-House Cases*

Many would say that incorporating the Second Amendment through the Privileges or Immunities Clause is precluded by the *Slaughter-House Cases*.[95] Therefore, this argument goes, *Slaughter-House* would have to be overruled.[96]

This argument is incorrect.[97] It is difficult to think of any case where what the Court did is so profoundly different from what scholars say the Court did as the *Slaughter-House Cases*.[98] But the Court is not bound by any post-hoc gloss imposed on its precedent by the legal academy, and thus can freely remedy the situation.

In *Slaughter-House*, a group of Louisiana butchers challenged a state law granting a monopoly for the slaughtering of animals within city limits, alleging that this statute violated the "privileges or immunities" guaranteed by the Fourteenth Amendment.[99] The Court rejected this argument,[100] noting that states exercise police power to regulate public health.[101] The Court held that the Privileges or Immunities Clause secures rights derived from the U.S. Constitution,[102] and held that no such federal right was implicated in this case.[103]

For the Supreme Court to have held to the contrary would have been gross judicial activism. The Constitution is silent over butchering animals; there is no constitutional provision that invalidates state laws regulating the butchering trade within dense population centers. The plaintiffs in *Slaughter-House* were asking the Court to judicially invent a right out of the ether, and to use it to strike down an important public health law adopted by the people's elected legislators. The Court simply declined this invitation to open Pandora's Box; it did not eviscerate the Privileges or Immunities Clause.[104]

To the contrary, the Court in *Slaughter-House* articulated the test that the Privileges or Immunities Clause only applies to the states rights that inhere in federal citizenship.[105] The Court went on to comment in dicta that it was not defining those rights in that case,[106] but cited First Amendment rights of free assembly and seeking redress, as well as habeas corpus, as possibly among such rights.[107]

The Court's holding was thus quite narrow,[108] and unless the Court is again faced with a case where the petitioner seeks to have the Court find an implied fundamental right to be free of economic monopolies and strike down a law granting such a monopoly, *Slaughter-House* need not be overruled.

We saw this same phenomenon in connection with the Second Amendment. As noted above, for almost seven decades the only Supreme Court precedent on point was *United States v. Miller*. Both those supporting the proposition that the Second Amendment secured an individual right and those opposing it cited *Miller* as their authority. Many wondered what the Court could do with the Second Amendment without overruling *Miller*. Yet, in *Heller*, the Court relegated *Miller* to a legal footnote without discarding it (though Justice Kennedy derogated it with the comment that as a precedent it was "deficient"[109]), simply holding that *Miller* stands merely for the proposition that the Second Amendment extends to almost all firearms that can be carried by a person.[110]

*Slaughter-House* can in that regard become the new *Miller*. Although there is no need to call it deficient, its holding can instead be clarified to articulate this test of federal citizenship. Then, for the reasons discussed above and discussed in my law review article in much greater detail, the Court can simply hold that the right to bear arms is a right inhering in federal citizenship, and apply that right to the states through the Privileges or Immunities Clause while preserving *Slaughter-House*.[111]

There are three precedents that would have to be overruled to incorporate the Second Amendment: *Cruikshank*, *Presser*, and *Miller v. Texas* (not to be confused with *United States v. Miller*). While space constraints preclude discussing those cases in detail, for the reasons cited in Part II, it is sufficient to note that the Court has jettisoned the entire rationale underlying those cases, and that these precedents should be overruled.

But the talismanic *Slaughter-House* is not among them. The Second Amendment right to bear arms can be extended to the states without overruling the *Slaughter-House Cases*.

## VII. The Risk in Overruling the *Slaughter-House Cases*

Some libertarians believe that the *Slaughter-House Cases* should be overruled. They argue that people should be able to challenge state and local employment and business laws in federal court. They welcome the opportunity to employ the federal judiciary to recognize economic rights devoid of textual support in the Constitution, urging courts to employ such rights to strike down onerous laws.

Conservatives disagree, and with good reason. There are reasons to preserve the *Slaughter-House Cases*. The law must rest on the application of neutral principles.[112] Judicial restraint requires not only that the courts not impose a liberal agenda or allow federal intrusions beyond the Constitution's enumerated powers, but, beyond that, to not impose any agenda, nor declare rights that are not enumerated. Conservative giants have propounded this principle, delineating the limited role of unelected judges in our democratic republic.[113] The *United States Reports* are likewise replete with these warnings from the Supreme Court, often quoting the Federalist Society's iconic figure, James Madison.[114] The states are the laboratories of democracy.[115] It is an unfortunate fact that the Constitution does not forbid states from passing stupid legislation. Should the Court invalidate state and local economic laws through the constitutionalizing of unenumerated economic rights, one of the critical remaining aspects of federalism will be forever abolished. Those calling for the overruling of *Slaughter-House* evidently fail to see this titanic downside risk, or ill-advisedly believe that they can control this genie to only arrive at "correct" results, once it is released from its bottle.

There is a reason that many calling for *Slaughter-House* to be overturned are squarely in the liberal camp. They see it as a cornucopia to accomplish through the courts everything they fail to achieve through the ballot box. It would facilitate a future Supreme Court declaring as among the "privileges or immunities" of U.S. citizenship the rights to healthcare, college education, "decent" housing, and a clean environment, attended by orders to enact everything from government-run healthcare to cap-and-trade. Many on the left are already laying

the predicate for such holdings.[116] As Justice Scalia cautioned when writing of rights that may be implicit in the Constitution, the lack of constitutional codification means that they should be debated and decided by the people's elected leaders; courts are not entitled to cite such rights to override the policy judgments of officials answerable to the electorate.[117]

Finally, some advance the argument that the Second Amendment right to bear arms should be incorporated through Privileges or Immunities, but extend to every person in America. They argue that self-defense is a human right, and that although it finds its locus in the Privileges or Immunities Clause, it can be extended to noncitizens.

This argument is a classic *non sequitur*, and a patently absurd one at that. The Privileges or Immunities Clause, by its own terms, applies only to citizens. The Court has recently reaffirmed as much.[118] The record is explicit. Only rights incorporated through the Due Process Clause extend to (almost) everyone. If it is a "privilege or immunity" of citizenship, then it only extends to citizens. Although individual states should grant generous gun rights to resident aliens to enable them to enjoy a means of self-defense, any such right must be a statutory right, not a constitutional right. An originalist interpretation of the Privileges or Immunities Clause will not allow extending the rights of citizenship to noncitizens as a constitutional entitlement. To argue otherwise is to sacrifice the neutral principle of historically-defensible originalism on the altar of results-oriented expediency, in derogation of the rule of law.

### VIII. Conclusion

In some respects, whether to incorporate through the Privileges or Immunities Clause versus the Due Process Clause is a choice between stare decisis versus first principles. The Court has always applied federal rights to the states through the Due Process Clause, and it may opt to cleave to that approach.

But there are significant complications that arise from pursuing this substantive due process route when it comes to firearms, and the Court's entire Fourteenth Amendment jurisprudence has suffered as a result of its redirecting matters intended for the Privileges or Immunities Clause to the Due Process Clause instead.[119]

The Supreme Court should therefore take this historic opportunity to apply the Second Amendment right to bear arms to the states through the Privileges or Immunities Clause. Such a holding would be a bold step forward for originalism, as it would fulfill the designs both of the Founding Fathers who adopted the Second Amendment, and also the Framers of the Fourteenth Amendment who endeavored to extend the right to bear arms to the states.[120]

### Endnotes

1 Petition for Writ of Certiorari at i, McDonald v. City of Chi. (No. 08–1521).

2 Strictly speaking, the term "incorporation" means to incorporate a provision of the Bill of Rights as a substantive right into the Due Process Clause of the Fourteenth Amendment. However, it has become the legal term of art for applying any federal right to the states through any provision of the Fourteenth Amendment, and it is used in that fashion in this article.

3 128 S. Ct. 2783 (2008).

4 *Id.* at 2799.

5 *Id.* at 2821–22.

6 *See* Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007) (opinion of Silberman, J.).

7 *See* Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. Rev. 195, 201 (2009).

8 It is possible that it was Justice Kennedy who insisted that these statements, largely caveats that the Court was not calling into question laws that restricted certain firearms or prohibited them in certain places or for certain people, be inserted into the opinion. Another possibility is that Chief Justice Roberts wanted a clear majority opinion, rather than a fractured Court, so that it would be clear that the rule being promulgated was a holding of the Court. If so, then Justice Scalia would have had to qualify the broad statements in the opinion to keep everyone onboard and avoid separate partial concurrences. But no one can say with certainty that it was not Chief Justice Roberts who insisted on these provisos in the opinion, or perhaps one of the other Justices. Time may tell, if there are several more Second Amendment cases while the five Justices in the *Heller* majority are all still on the Court.

9 *See* Transcript of Oral Argument 5–6 (comments of Kennedy, J.), District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07–290). Justice Kennedy refers to an argument for decoupling the two clauses of the Second Amendment, and specifies that this argument is not found in the "red brief" (the merits brief for respondents). Professor Lund's amicus brief was the only brief offering such an argument. *See generally* Brief for the Second Amendment Foundation as Amicus Curiae Supporting Respondent, *Heller*, 128 S. Ct. 2783 (No. 07–290). Although Justice Scalia's final opinion in *Heller* does not adopt this argument, instead going further with a broader argument that Justice Kennedy joined in full, Lund's argument is apparently what Justice Kennedy indicated he found persuasive during oral argument. This is also the conclusion of David Kopel, a fellow at the Cato Institute who is another leading scholar on the Second Amendment and who attended the oral argument. *See* David Kopel, *Oral Argument in D.C. v. Heller: The View from the Counsel Table*, The Volokh Conspiracy, http://volokh.com/2008/03/31/oral-argument-in-dc-v-heller-the-view-from-the-counsel-table/. This assertion in no way detracts from the excellent work of Respondent Dick Heller's legal team, especially its architect Robert Levy and its lead counsel Alan Gura. It is simply an acknowledgement that the method of constitutional interpretation suggested in Lund's amicus brief appears to have persuaded the fifth Justice in the case.

10 *See* Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1352–56 (2009).

11 *See* Klukowski, *supra* note 7, at 201.

12 *Id.* at 201 n.59 (citing *Heller*, 128 S. Ct. at 2821 (dictum) (stating that the Second Amendment extends to law-abiding citizens that are "responsible")).

13 *Id.* at 201–02.

14 *Heller*, 128 S. Ct. at 2789–90.

15 Klukowski, *supra* note 7, at 201.

16 307 U.S. 174 (1939).

17 *Id.* at 183.

18 270 F.3d 203, 264–65 (5th Cir. 2001).

19 *See id.* at 218–60. The extraordinary detail in Judge Garwood's opinion was doubtless partially due to the fact that the comprehensive briefs submitted in the case were largely written by former Justice Department OLC chief Charles Cooper and the aforementioned Professor Lund.

20 312 F.3d 1052, 1092 (9th Cir. 2002).

21 Klukowski, *supra* note 7, at 200.

22 *See, e.g.*, *Silveira*, 328 F.3d at 583–85 (Kleinfeld, J., joined by Kozinski, O'Scannlain, and T.G. Nelson, JJ., dissenting from the denial of rehearing en banc).

23 *See infra* notes 87–88 and accompanying text.

24 Klukowski, *supra* note 7, at 202–03.

25 *See* Kenneth A. Klukowski, *Armed By Right: The Emerging Jurisprudence Of The Second Amendment*, 18 Geo. Mason U. Civ. Rts. L.J. 167, 185–86 (2008).

26 Seegars v. Gonzales, 396 F.3d 1248, 1255–56 (D.C. Cir. 2005). Now-Chief Judge Sentelle dissented in that case. *See id.* at 1256–57 (Sentelle, J., dissenting).

27 Of the six plaintiffs in the case, the appellate panel unanimously held that five lacked standing, and the sixth was found to have standing by a 2–1 vote. *See* Parker v. District of Columbia, 478 F.3d 370, 378 (D.C. Cir. 2007); *id.* at 402 n.2 (Henderson, J., dissenting). Indeed, that is why the case is called *Heller*, instead of *Parker*.

28 Klukowski, *supra* note 7, at 202.

29 The NRA's petition was filed June 3, 2009 and carries docket no. 08–1497, while McDonald's petition was filed on June 9, 2009 with the docket no. 08–1521.

30 *See* Davis v. FEC, 128 S. Ct. 2759, 2768 (2008); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

31 *See* Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

32 Klukowski, *supra* note 7, at 203.

33 *See* Pernell v. Southall Realty, 416 U.S. 363, 369–80 (1974) (applying the Seventh Amendment directly to D.C.).

34 District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).

35 92 U.S. 524, 553 (1876).

36 116 U.S. 252 (1886).

37 *See* Maloney v. Cuomo, 554 F.3d 56, 58–59 (2d Cir. 2009).

38 153 U.S. 535 (1894).

39 *Cf.* Klukowski, *supra* note 7, at 226.

40 *See* Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185, 186–87 (2008).

41 *See* Nordyke v. King, 563 F.3d 439, 448, 457 n.16 (9th Cir. 2009), *vacated* Sept. 24, 2009 (No. 07–15763) (order vacating en banc submission pending Supreme Court decision on incorporation question).

42 *See Miller*, 153 U.S. at 538; Presser v. Illinois, 116 U.S. 252, 264–66 (1886); United States v. Cruikshank, 92 U.S. 524, 551 (1876).

43 Klukowski, *supra* note 7, at 254 (citing Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))).

44 *Id.* at 254–55 & 254 n.524.

45 *See* Nat'l Rifle Ass'n of Am., Inc. v. City of Chi., 567 F.3d 856, 857–58, 860 (7th Cir. 2009), *petition for cert. filed*, 77 U.S.L.W. 3679 (U.S. June 3, 2009) (No. 08–1497).

46 Klukowski, *supra* note 7, at 253–54.

47 District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).

48 Payne v. Tennessee, 501 U.S. 808, 827 (1991).

49 Agostini v. Felton, 521 U.S. 203, 235 (1997) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

50 Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (citations omitted).

51 *Agostini*, 521 U.S. at 235–36.

52 *See* Klukowski, *supra* note 7, at 203 n.79 (listing all of the incorporation cases).

53 *See id.* at 207–12.

54 NRA v. City of Chi., 567 F.3d 856, 857–58 (7th Cir. 2009). *Contra* Nordyke v. King, 563 F.3d 439, 448, 457 n.16 (9th Cir. 2009), *vacated* Sept. 24, 2009 (No. 07–15763); Lund, *supra* note 40, at 186–87.

55 *See supra* note 44.

56 Klukowski, *supra* note 7, at 211.

57 *Id.* at 205–06.

58 *Id.* at 206 & n.113 (citing, inter alia, United States v. Am. Library Ass'n, 539 U.S. 194, 235 (2003)).

59 Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

60 Klukowski, *supra* note 7, at 195 n.5 (citing various sources).

61 Burdick v. Takushi, 504 U.S. 428, 433–34 (1992).

62 *See* Klukowski, *supra* note 7, at 206 n.117.

63 *Id.* (citing Perry v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

64 *See* Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

65 Klukowski, *supra* note 7, at 206 n.117 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

66 *Id.* at 206 n.116 and accompanying text.

67 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995).

68 Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 679 (1992).

69 Klukowski, *supra* note 7, at 235.

70 198 U.S. 45 (1905).

71 *See* Ferguson v. Scrupa, 372 U.S. 726 (1963).

72 381 U.S. 479, 484 (1965).

73 *See* 410 U.S. 113, 129 (1973).

74 505 U.S. 833 (1992).

75 539 U.S. 558, 578 (2003).

76 Klukowski, *supra* note 7, at 204–05.

77 United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (listing various cases).

78 *See* Klukowski, *supra* note 7, at 238 & nn.385–87 (citing various sources).

79 *Id.* at 197, 226.

80 526 U.S. 489, 499–500, 503 (1999).

81 *Id.* at 528–29 (Thomas, J., joined by Rehnquist, C.J., dissenting).

82 Klukowski, *supra* note 7, at 195.

83 District of Columbia v. Heller, 128 S. Ct. 2783, 2817 (2008).

84 *Id.* at 2799.

85 *Id.* at 2801.

86 *Id.* at 2802.

87 Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

88 *Id.* at 570.

89 Kasler v. Lockyer, 2 P.3d 581, 602 (Cal. 2000) (Brown, J., concurring).

90 Klukowski, *supra* note 7, at 246 (citing, inter alia, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1176 (1991)).

91 Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1226 & n.151 (1992).

92 Klukowski, *supra* note 7, at 246.

93 *Id.* at 245 (citing The Declaration of Independence, para. 2 (U.S. 1776)).

94 *Id.* at 244–48.

95 83 U.S. (16 Wall.) 36 (1873).

96 1 Laurence H. Tribe, American Constitutional Law 1321 & n.4, 1322 (3d ed. 2000); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1298 n.247 (1995).

97 Klukowski, *supra* note 7, at 228.

98 *Id.* at 230.

99 *Slaughter-House*, 83 U.S. (16 Wall.) at 60.

100 *Id.* at 66.

101 *Id.* at 82.

102 *Id.* at 74.

103 *Id.* at 81.

104 Klukowski, *supra* note 7, at 226.

105 *Id.* at 230; *accord* William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 162–63 (1988); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717, 746–49 (2003).

106 *Slaughter-House*, 83 U.S. (16 Wall.) at 74.

107 *Id.* at 79.

108 Klukowski, *supra* note 7, at 228, 230.

109 Transcript of Oral Argument at 62 (comments of Kennedy, J.), District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07–290).

110 *Id.* at 2814.

111 Klukowski, *supra* note 7, at 232.

112 *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

113 *See, e.g.*, Originalism: A Quarter Century of Debate (Steven G. Calabresi ed., 2007) (reprinting speeches of Edwin M. Meese III, Robert H. Bork, and Ronald W. Reagan).

114 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting The Federalist No. 48 (James Madison)).

115 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

116 *See, e.g.*, Jesse Jackson Jr., *Fundamental Right to Healthcare*, RealClearPolitics, Nov. 26, 2008.

117 *See* Troxel v. Granville, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting).

118 *See* Saenz v. Roe, 526 U.S. 489, 502–04 (1999).

119 Klukowski, *supra* note 7, at 204 n.89 (citing John Hart Ely, Democracy and Distrust 20 (1980)).

120 *Id.* at 249–52.