THE CHANGING LANDSCAPE OF FIREARM LEGISLATION IN THE WAKE OF *McDonald v. City of Chicago*, 130 S. CT. 3020 (2010)

The Second Amendment, which enshrined the right to keep and bear arms,[1] has become one of the most contentiously debated amendments in the Bill of Rights.[2] Recently, legislation has restricted the ability to carry, use, or even own firearms.[3] The District of Columbia enacted regulations in 2001 making it a crime to possess usable unregistered firearms even in the home while, at the same time, prohibiting the registration of handguns.[4] In *District of Columbia v. Heller*, the Supreme Court struck down the law and ruled that the prohibition on possessing handguns for use in defense of an individual's home violated the Second Amendment.[5] Last Term, in *McDonald v. City of Chicago*,[6] the Court extended *Heller* to the States by incorporating the Second Amendment through the Due Process Clause of the Fourteenth Amendment.[7] The Court's decision in *McDonald* is consistent with both *Heller* and America's long history of gun ownership by its citizens. In its decision, the Court correctly concluded that "individual self-defense is 'the central component' of the Second Amendment right" to keep and bear arms.[8] The Court's analysis would be stronger, however, if it incorporated the right under the Fourteenth Amendment's Privileges or Immunities Clause—an argument that the peti-

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1. U.S. CONST. amend. II.
2. *See* Dist. of Columbia v. Heller, 554 U.S. 570, 573 (2008); *see e.g.*, Andrew R. Gould, *The Hidden Second Amendment Framework Within* District of Columbia v. Heller, 62 VAND. L. REV. 1535 (2009); Nelson Lund, *The Second Amendment,* Heller, *and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).
3. *See Heller*, 554 U.S. at 712–13 (Breyer, J., dissenting) (citing numerous city ordinances that restrict handgun possession).
4. *Id.* at 574–75 (majority opinion) (citing D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001)).
5. *Id.* at 635.
6. 130 S. Ct. 3020 (2010).
7. *Id.* at 3050.
8. *Id.* at 3036 (quoting *Heller*, 554 U.S. at 599).

tioners proposed and the Court dodged—because such an approach would be more legitimate and would not open a path for activist judges to impose new restrictions on the States based on their political ideologies.

In *McDonald*, three gun rights organizations and a group of residents challenged ordinances in Chicago and its Oak Park suburb that effectively banned the possession of handguns by private citizens.[9] Otis McDonald, one of the petitioners, lived in Chicago and wanted to possess a handgun in his home for self-defense because he was in his late seventies and lived in a neighborhood with a high crime rate.[10] Handgun possession, however, was restricted by a Chicago firearms ordinance that stated that "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm."[11] The law also prohibited the registration of most types of handguns, effectively banning nearly all possession for private residents of the city.[12] The Chicago City Council stated that the handgun ban was designed to protect residents "from the loss of property and injury or death from firearms."[13] The petitioners disagreed that the ban increased their safety and alleged that the handgun ban actually left them more vulnerable to crime.[14] In support of this position, the petitioners cited amicus briefs noting that the percentage of murders committed with handguns increased nearly forty percent between 1983 and 2008, the years in which the handgun ban was in force.[15]

The petitioners sought protection from this violence in the form of home firearm possession. McDonald, for example, was

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9. *Id.* at 3027 & n.4.

10. *Id.* at 3026–27.

11. *Id.* at 3026 (citing CHICAGO, ILL., MUNICIPAL CODE § 8-20-040(a) (2009)).

12. *Id.* (citing CHICAGO, ILL., MUNICIPAL CODE § 8-20-050(c) (2009)). Certain exceptions exist for police officers.

13. *Id.* (citing CHICAGO, ILL., JOURNAL OF PROCEEDINGS OF THE CITY COUNCIL 10049 (1982)).

14. *Id.*

15. Brief for Heartland Institute as Amici Curiae Supporting Petitioners at 6–7, *McDonald*, 130 S. Ct. 3020 (No. 08-1521). Residents of Chicago face some of the highest murder and violent crime rates in the country, Chicago leading all other U.S. cities in murder rates for both the years 2002 and 2008. Brief for Buckeye Firearms Foundation, Inc., et al. as Amici Curiae Supporting Petitioners at 8–9, *McDonald*, 130 S. Ct. 3020 (No. 08-1521). This is a notable comparison as Chicago's murder rate exceeds that of much larger metropolises such as Los Angeles and New York. *Id.*

a community activist who devoted substantial time to alternative policing methods, attempting to increase safety in his neighborhood. Because of his efforts he received violent threats from nearby drug dealers.[16] Another petitioner, Colleen Lawson, had been the victim of a home burglary and believed possessing a handgun would decrease her chances of being killed or seriously injured in future attacks.[17] The petitioners owned handguns but were forced to keep them outside the city limits instead of inside their homes, which made them ineffectual for self-defense in the home.

Following the Supreme Court's decision in *Heller*, McDonald filed suit against the City of Chicago in the United States District Court for the Northern District of Illinois, seeking a ruling that Chicago's handgun ordinances violated the Second and Fourteenth Amendments to the Constitution.[18] The National Rifle Association (NRA) and two residents filed a similar challenge to an Oak Park ordinance.[19] The three district court cases were assigned to the same judge, who rejected the plaintiffs' claims under Seventh Circuit precedent that "squarely upheld the constitutionality of a ban on handguns a quarter century ago."[20]

The Seventh Circuit affirmed the decision, basing its conclusion on a trio of cases from the nineteenth century: *United States v. Cruikshank*,[21] *Presser v. Illinois*,[22] and *Miller v. Texas*,[23] which were decided in the wake of the Supreme Court's analysis of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*.[24] Although "[t]he

16. *McDonald*, 130 S. Ct. at 3027.

17. *Id.*

18. *Id.*

19. *Id.*

20. NRA, Inc. v. Village of Oak Park, 617 F. Supp. 2d 752, 753 (N.D. Ill. 2008) (citing Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982)).

21. 92 U.S. 542 (1875).

22. 116 U.S. 252 (1886).

23. 153 U.S. 535 (1894). The cases of *Cruikshank*, *Presser*, and *Miller* all came after the Court in *Slaughter-House* first took up, and subsequently punted, on the issue of privileges and immunities. Although this trio of cases was unable to advance a privileges or immunities argument they do not outright reject an argument based on the Privileges or Immunities Clause; rather, they found it unimportant to delve into the privileges or immunities argument as they continued with the line of due process logic the Court adopted in *Slaughter-House*.

24. *McDonald*, 130 S. Ct. at 3027 (citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872)).

Seventh Circuit described the rationale of those cases as 'defunct' and recognized that they did not consider the question whether the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right to keep and bear arms,"[25] the court nonetheless felt obligated to follow the Supreme Court precedent and affirmed the judgment of the district court.[26] The Supreme Court granted certiorari.[27]

On appeal, the petitioners argued that the Court should overturn the handgun bans on two grounds. First, they contended that the right to possess handguns is among the "privileges or immunities of citizens of the United States" and that the Court should reject the narrow interpretation of the Privileges or Immunities Clause taken in the *Slaughter-House Cases*.[28] Second, they argued that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right to keep and bear arms.[29] Respondents refuted both arguments. First, they pointed to a long line of precedent where the Court declined to incorporate the Bill of Rights through the Privileges and Immunities Clause.[30] Second, they argued that a right established in the Bill of Rights applies to the States only if it is an indispensible attribute of any "civilized" legal system.[31]

Drawing on its decision in *Heller*, the Supreme Court held five to four that the local handgun bans were unconstitutional because the Fourteenth Amendment incorporates the Second Amendment.[32] Justice Alito, writing for the majority, began his analysis with an interpretation of how the provisions found in the Bill of Rights relate to the States.[33] The Bill of Rights and all its provisions initially applied only to the federal government.[34] Chief Justice Marshall in *Barron ex rel. Tiernan v. Mayor of Baltimore*, for example, rejected the theory that the first eight Amendments limited state power and instead held that they

25. *Id.*
26. NRA, Inc. v. City of Chicago, 567 F.3d 856, 857–58 (2009).
27. *McDonald*, 130 S. Ct. at 3028.
28. *Id.*
29. *Id.*
30. Brief for Municipal Respondents at 42, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).
31. *Id.* at 9.
32. *McDonald*, 130 S. Ct. at 3025, 3036.
33. *Id.* at 3031–36.
34. *Id.* at 3028.

applied only to the federal government.[35] It was not until after the Civil War and the passage of the Court began incorporating the Bill of Rights against the States.[36]

The majority went on to embrace what has become the traditional, if somewhat flawed, doctrinal approach to incorporating the Bill of Rights against the States. Section one of the Fourteenth Amendment provides that a state may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law."[37] Arguably, a facial reading of the text of the Amendment restricts the States' ability to abridge constitutional rights. So read, the gun ordinances are of questionable validity. Just four years after the ratification of the Amendment, however, the Court was asked to interpret the meaning of "privileges or immunities of citizens of the United States." In the *Slaughter House Cases*, Justice Miller announced that "the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National government," and concluded that the Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[38] The majority noted that the decisions in *Cruikshank*, *Presser*, and *Miller* did not preclude an analysis of whether the Fourteenth Amendment's Due Process Clause makes the Second Amendment binding on the States because "[f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause."[39]

Justice Alito then turned to *Heller*, where the Court "held that individual self-defense is 'the *central component*' of the Second Amendment right," and "that 'the need for defense of

35. *Id.* at 3028 (citing Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833)).

36. *Id.* at 3028–36. Prior to Chief Justice Marshall's decision in *Barron*, the Court refused to accept a theory that the Bill of Rights protections could be enforced against the States. However, beginning with *Barron* and the passage of the Fourteenth Amendment there was a change to the previous presumption that Bill of Rights protections were only against the federal government.

37. *Id.* at 3028 (citing U.S. CONST. amend. XIV).

38. *Id.* at 3028 (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872)).

39. *Id.* at 3030–31.

[one's] . . . self, [as well as one's] property, is most acute' in the home."[40] *Heller* explored the origin of the right of gun possession for self defense, looking all the way back to the 1689 English Bill of Rights, and found the self-defense component central.[41] The Court in *Heller* then interpreted the Second Amendment right to cover handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family."[42] The *McDonald* decision accepts the finding in *Heller*, and upholds that right for modern-day Americans.

Justices Scalia and Thomas each wrote a concurring opinion. Although Justice Scalia noted that he has misgivings about whether or not substantive due process is a matter to be considered through an originalist lens, he "acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'"[43] Justice Thomas agreed that the Fourteenth Amendment makes the right to keep and bear arms "fully applicable to the states," yet asserted that the Privileges or Immunities Clause offers "a more straightforward path to this conclusion, one that is more faithful to the Fourteenth Amendment's text and history."[44]

Justice Stevens penned a lengthy dissent, arguing that the Court rejected incorporation of the Second Amendment in the late nineteenth century and that the Due Process Clause as we know it today has not only procedural but substantive connotations.[45] Justice Stevens next pointed to the level of federal and state divergence on gun control as an argument against incorporating the Second Amendment.[46] Justice Stevens pointed out that at the time *Barron* was written, the Bill of Rights applied only to the federal government.[47] He proceeded to argue that under Justice Harlan's concurrence in *Williams v. Florida*, although the Fourteenth Amendment did truly alter the legal en-

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40. *Id.* at 3086 (quoting Dist. of Columbia v. Heller, 554 U.S. 570, 599 (2008)).

41. *Heller*, 554 U.S. at 592–93.

42. *Id.* at 628–29.

43. *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring) (quoting Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

44. *Id.* at 3058–59 (Thomas, J., concurring in part and concurring in the judgment) (citation and internal quotation marks omitted).

45. *Id.* at 3088–91 (Stevens, J., dissenting).

46. *Id.* at 3093–95.

47. *Id.* at 3093 (citing Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833)).

vironment, it "did not unstitch the basic federalist pattern woven into our constitutional fabric."[48]

Justice Breyer also dissented.[49] He took issue with the view that *Heller* stands for the proposition that the right to self-defense is at the core of the Second Amendment right.[50] Instead, Justice Breyer took the position that, although the Framers might have wanted the Second Amendment to allow the individual the right to keep a firearm in the home, the private self-defense right was not of paramount importance.[51] He argued that there is "no reason here to believe that incorporation of the private self-defense right will further any other or broader constitutional objective."[52]

Although the majority comes to the right result in *McDonald*, it would have been more appropriate—as Justice Thomas suggested in his concurrence—to recognize that the right to keep and bear arms is a privilege of American citizenship and therefore should fall under the Privileges or Immunities Clause of the Fourteenth Amendment. The *Slaughter-House* decision held that the Privileges or Immunities Clause describes privileges of federal, not state citizenship.[53] By stating that the rights protected from state abridgement were those "which owe their existence to the Federal government, its National character, its Constitution, or its laws," it does not foreclose the possibility that certain rights (perhaps even those enumerated in the Bill of Rights) could be considered "privileges or immunities" of federal citizenship.[54] Despite the common misconception that *Slaughter-House* barred the application of the Bill of Rights to the States through the Privileges or Immunities Clause, the matter was not addressed as there was no Bill of Rights protection (or any other constitutional protection) at issue in the case.

Contrary to the conclusions reached by the lower courts, Supreme Court precedent does not bar privileges or immunities incorporation of the Second Amendment. The reasoning in

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48. *Id.* (quoting Williams v. Florida, 399 U.S. 78, 133 (1970) (Harlan, J., concurring in the judgment)).
49. *Id.* at 3120 (Breyer, J., dissenting).
50. *Id.* at 3122.
51. *Id.* at 3124.
52. *Id.* at 3125.
53. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78–79 (1872).
54. *Id.* at 79.

Cruikshank is rather unusual—the Court held that the right to keep and bear arms was not a privilege of U.S. citizenship because it was not "in any manner dependent upon that instrument for its existence" because it predated the Constitution.[55] But if the citizens of a state lack a state right to keep and bear arms, and the Second Amendment provides them with a right to keep and bear arms, the Privileges or Immunities Clause should incorporate it against the States to ensure enjoyment of the right. Despite this logic, in the years since *Cruikshank*, the Court has held that the Privileges or Immunities Clause prevents state abridgement of only a few specific rights not readily described as essential to liberty, such as the right to travel.[56]

It is this question of what rights are essential to liberty that makes the Court's movement from the Privileges or Immunities Clause to the Due Process Clause ill advised. By incorporating rights under the Due Process Clause instead of the Privileges or Immunities Clause, the Court attempts to preserve a mysterious legal fiction rather than just strict adherence to a logically reasoned precedent. At no point does the Court ever establish a set of principles for determining which rights are fundamental and deserve the special kinds of protection from state abrogation under the Fourteenth Amendment. As Justice Thomas pointed out, the arguments within the Court regarding whether or not the Second Amendment guarantees a "fundamental" right to self-defense are hotly contested and seem only to break along personal ideological lines.[57] There is currently no clear guidance for determining what meaning the Due Process Clause has when determining what rights are to be protected. Justice Thomas astutely observes that restraining incorporation through the Privileges and Immunities Clause to those rights rooted deeply in our country's history leaves less room for abuse than other means of applying the Clause.[58] The majority reached the correct outcome by overturning the ordinance and holding that the right to self-defense is constitutionally protected. The majority was wrong, however, to continue

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55. United States v. Cruikshank, 92 U.S. 552, 553 (1875).

56. *See* Saenz v. Roe, 526 U.S. 489, 503 (1999).

57. McDonald v. City of Chicago, 130 S. Ct. 3020, 3061–62 (2010).

58. *Id.* at 3062–63. *See generally* William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 164 (2002).

expanding the already broad Due Process Clause. The Court should have instead based its decision on the Fourteenth Amendment's Privileges or Immunities Clause.

The Privileges or Immunities Clause is certainly a competent vehicle for applying federal rights of citizenship against the States. The Privileges or Immunities Clause provides that, "[n]o State . . . shall abridge the privileges or immunities of citizens of the United States."[59] In interpreting this language, Justice Thomas noted that "it is important to recall that constitutional provisions are 'written to be understood by the voters.'"[60] Ever since the time of Blackstone, both "privileges" and "immunities" had established meanings as interchangeable synonyms (used either alone or together) for the words "rights," "liberties," and "freedoms."[61] Justice Thomas sensibly pointed out that the phraseology "privileges or immunities" does not constitute some special category somehow distinct from our present conception of rights.[62] That is, privileges or immunities would not allow the unrestricted enforcement against the States of random policies by the courts. Thus, when looking to the fundamental rights that would be encompassed by the Privileges or Immunities Clause, it is appropriate to encompass those that are heavily steeped in the nation's history and tradition, such as gun ownership for self-defense.

The majority opinion in *McDonald* recognized the right to possess a firearm in the home as a right that is "deeply rooted in this Nation's history and tradition."[63] The Court in *Heller* looked not only to the extensive colonial history of keeping a firearm in the home, but to multiple states that adopted constitutional provisions between 1789 and 1820 that provided for an individual right to keep a firearm in his home.[64] By 1868, nearly sixty percent of states had their own constitutional provisions that expressly protected the right to keep and bear arms.[65] It is this fundamental

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59. U.S. CONST. amend. XIV.

60. *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring in part and concurring in the judgment) (quoting Dist. of Columbia v. Heller, 554 U.S. 570, 576 (2008)).

61. *Id.* at 3063.

62. *See id.*

63. *Id.* at 3036 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

64. *Heller*, 554 U.S. at 602–03.

65. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 50 (2008).

right to gun ownership, embedded in the history of our nation, that the majority uses to protect the right to possess a firearm in one's home for self-defense. The Court in *McDonald* logically expanded upon *Heller* by holding that the Second Amendment right to bear arms is a fundamental right of U.S. citizens.[66]

Although the majority reached the right result, the Privileges or Immunities Clause provides a better vehicle for reaching the decision than the Due Process Clause. One reason that privileges or immunities is a better mode of deciding cases like *McDonald* is that it helps to settle the internal federalism conflict present in the discussion of incorporating Bill of Rights protections against the States. The Fourteenth Amendment reflects a popular judgment that national citizenship imparts certain rights that should be guaranteed to citizens, both against the federal government as well as the States.[67] Many critics of incorporation of these protections against the States argue that if Congress intended to apply these rights against the States then it would have included explicit language stating as much, rather than hoping future legislatures and judges would interpret the Amendment in that manner.[68]

If we accept that legislatures at the time the Amendment passed had a view of Article IV's Privileges and Immunities Clause as being a strong grant of protection to citizens from the tyranny of government, those legislatures likely assumed that these rights would apply against the States as well as the federal government.[69] Given that the concern at the time of the founding was that a strong centralized government (such as the one in England) could tyrannically oppress the citizens, it would seem anathema to the Framers that the States would exercise their powers of regulation in order to impose similarly tyrannical impositions. Justice Washington, writing for the Court in *Corfield v. Coryell*[70] sought to explain that the Privileges or Immunities Clause provided substantive protections to those citizens within

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66. *McDonald*, 130 S. Ct. at 3036.

67. *See* GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY 57–74 (2001).

68. *See, e.g.,* D.O. McGovney, *Privileges or Immunities Clause: Fourteenth Amendment*, 4 IOWA L. BULL. 219, 233 (1918).

69. *See* Rich, *supra* note 58, at 163–64.

70. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

the United States, and it is not against the legislative spirit of the Clause for it to be applied against the States as well.

Additionally, application of the Privileges or Immunities Clause in incorporating the Second Amendment right to bear arms would not lead to the adoption of many new rights that infringe on states' ability to regulate; instead it would actually be more restrictive than utilizing due process in order to incorporate the right. Privileges or Immunities cabins the right, as it "embraces nearly every civil right for the establishment and protection of which organized government is instituted."[71] Given that privileges or immunities is meant to protect historic rights, there is little fear of it being utilized by activist judges to legislate from the bench. For those who worry that the application of the Privileges or Immunities Clause would lead to the rampant spread of infringement against states' rights, it is important to consider that the judiciary is more comfortable incorporating rights than it was when it decided the *Slaughter-House Cases*.[72] Because the question is whether the right that is sought to be applied against the States is fundamental, it is highly unlikely that, even should the Second Amendment right be incorporated through privileges or immunities, it would cover items such as grenades or machine guns. Instead, it would likely only extend to rifles, shotguns, and handguns—those weapons that enjoy a cultural tradition in the United States. Although it may lead to the adoption of other long-standing fundamental rights (possibly taken from the Bill of Rights), it would not allow for widespread judicial activism attempting to recognize more modern rights such as abortion.

The Court's reliance on the Fourteenth Amendment's Due Process Clause to reach its decision continues to expand the already broad doctrine of substantive due process. The Due Process Clause was meant to protect the liberty of individuals from arbitrary infringement based on the actions of state or federal government. Over time, however, it has evolved into a catch-all whenever the Court is faced with making a decision with which it does not morally or politically agree. Justice Oliver Wendell Holmes voiced his fear of the Court overstepping its boundaries:

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71. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 76 (1872).
72. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 324–25 (1937).

> I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment . . . . I see hardly any limit but the sky to the invalidating of [states'] rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions . . . . [W]e ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.[73]

If the Due Process Clause continues to be a tool for judges to legislate from the bench, the judicial system will continue to find itself losing legitimacy, and the Due Process Clause will continue to function as merely a hollow symbol for judicial activism.

The dissenters took a few positions that are insufficient to undercut the majority opinion. Initially, Justice Stevens allocated substantial time to show that by the end of the Civil War, the term "due process of law" was one that had taken on a substantive as well as procedural connotation as a legal term of art, which serves only to clarify that the Due Process Clause of the Fourteenth Amendment has a substantive component.[74] Justice Stevens then referenced Justice Harlan's opinion in *Griswold v. Connecticut*, stating that inclusion in the Bill of Rights is neither necessary nor sufficient for an interest to be judicially enforceable under the Fourteenth Amendment.[75]

Justice Breyer asserted that there is no public consensus on gun ownership.[76] Clear public opinion was expressed, however, in an amicus brief submitted by fifty-eight Members of the Senate and 251 Members of the House of Representatives urging the Court to hold that the right to keep and bear arms is fundamental.[77] Thirty-eight of the fifty states also submitted an amicus

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73. Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Thomas, J., dissenting).

74. McDonald v. City of Chicago, 130 S. Ct. 3020, 3090–91 (2010) (Stevens, J., dissenting).

75. *Id.* at 3093 (quoting Griswold v. Connecticut, 381 U.S. 479, 500 (1965)).

76. *Id.* at 3125 (Breyer, J., dissenting).

77. *See* Brief for Senator Kay Bailey Hutchison et al. as Amici Curiae Supporting Petitioners at 4, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

brief making the same assertion.[78] Firearm possession has a strong history in the United States, and the idea that gun ownership "pose[s] a distinctive threat to the social order" reflects more an ideological belief than a concern for constitutional discretion.[79]

Moreover, the Second Amendment is just the kind of traditional right that the Privileges or Immunities Clause should incorporate. Justice Stevens's dissent distinguished federal rights from state rights and assumed there is no overlap between the two. This understanding ignores the common understanding of the word "right."[80] The Oxford English Dictionary defines a right as "something a person may properly claim; a person's due."[81] Thus, looking at the conception of a right from a textualist perspective, it does not make much sense that these rights would stand in direct competition. If one would be entitled to a right as a federal citizen of the United States, why would that right be stripped in favor of a right to be enforced by the States? These rights should be cumulative, rather than competitive.

Finally, there is additional support for the proposition that the Privileges or Immunities Clause directly enforces constitutionally enumerated rights against the States. Many members of Congress echoed that sentiment while debating the Fourteenth Amendment.[82] Subsequent legislation also supports this proposition. The Civil Rights Act of 1871 is actually titled, in part, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States."[83] The statute itself prohibits state officials from depriving citizens of "any rights, privileges, or immunities *secured by the Constitution*."[84] Although the Court in the recent past has ignored the connection between a purposive reading of the Fourteenth Amendment and supporting congressional understanding and legislative intent, on its face both the intent and purpose of the Privileges or Immunities Clause would have been to force the States to respect the Second Amendment right to keep and bear arms.

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78. *See* Brief for State of Texas et al. as Amici Curiae Supporting Petitioners at 6, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

79. *McDonald*, 130 S. Ct. at 3108 (Stevens, J., dissenting).

80. *See* Rich, *supra* note 58, at 213–19.

81. OXFORD ENGLISH DICTIONARY III 1909 (3d ed. 1989).

82. *McDonald*, 130 S. Ct. at 3071–74 (Thomas, J., concurring in part and concurring in the judgment).

83. *Id*. at 3076 (citing 42 U.S.C. § 1983 (2006)).

84. *Id.*

There are many people who are still uncomfortable with the thought of incorporating Bill of Rights protections against the States, citing concerns of federalism and worrying that it will lead to widespread restrictions of state rights. However, the Privileges or Immunities Clause exists to protect historic, fundamental rights that Congress intended with the passage of the Fourteenth Amendment to immunize from government interference, whether state or federal. Instead of allowing for the rampant judicial activism that is possible through the Due Process Clause, a decision via privileges or immunities would properly cabin the right in the manner intended by Congress. Moreover, the Second Amendment is just the kind of traditional right that should be incorporated through the Privileges or Immunities Clause. Though the Court has punted on the issue a handful of times in a 150-year span, courts are more comfortable incorporating rights than they were when the Court decided the *Slaughter-House Cases*. It is time for the Court to stop punting the issue further and further into the future, and consider the intention with which Congress wished it to apply.

Michael Nieto