The Second Amendment, Incorporation and the Right to Self Defense

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by Jason Bentley[*]

I. Introduction

The District of Columbia v. Heller shot off the next round of gun litigation in the twenty-first century. The landmark case said the Second Amendment codified an individual's right to have a gun (specifically a handgun) in the home for self defense, and struck down a longstanding ban on handguns in the District of Columbia.[1] Chicago's gun ban would be the next target for gun rights groups since Chicago's ban is virtually identical to the D.C. law that was ruled unconstitutional. Hours after the *Heller* decision, Otis McDonald and other petitioners sued Chicago, saying that the *Heller* decision meant they, as U.S. citizens, also had a right to own handguns. Although *Heller* and *McDonald v. Chicago* both deal with the constitutionality of handgun bans, the constitutional roads to reach a decision in these cases couldn't be more divergent. While *Heller* dealt primarily with interpreting the Second Amendment, the *McDonald* decision will hang on the Court's interpretation of the Fourteenth Amendment.[2]

Although the Court already ruled that citizens under federal jurisdiction, like the District of Columbia, have a right to keep a handgun in their homes as a right of citizenship, the Court did not explicitly extend that right to be enforced against states and local governments.

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1 District of Columbia v. Heller, 128 S. Ct. 2783, 2817—18 (2008).

2 NRA v. Chicago, 567 F.3d 856, 857 (2009).

The reason the Court needed to explicitly specify when a part of the Bill of Rights applied to state and local governments was because originally the Bill of Rights only applied to the federal government and a state was free to ignore the provisions it didn't like. However, in the last fifty years, the Supreme Court has used a process known as incorporation to deal with this issue. Incorporation is when the justices use the Fourteenth Amendment's due process clause to implement specific provisions in the Bill of Rights to apply at the state level and not just the federal. Currently, there are few rights recognized in the Bill of Rights that haven't been incorporated, namely the Second and Third Amendments, as well as the right to be indicted by a grand jury for high crimes in the Fifth Amendment.

When legal scholars and pundits debate the issue of incorporation it often gets heated because it strikes at one of the most fundamental issues in constitutional reasoning: where is the line drawn between the people's right to write their own laws through their elected representatives and those rights which individuals retain that no government has a right to violate, even if that government is democratically appointed? In essence the Court must asnwer whether popular sovereignty trumps Second Amendment rights or vice-a-versa? To answer this question, this paper will first briefly examine the history of the Second Amendment and the Fourteenth Amendment to give context to the case. Second, it will examine past judicial formulas used to determine whether an aspect of the Bill of Rights ought to be incorporated to give a means of judging the merits of McDonald's claims. Finally, it argues that all past judicial formulas require that the Court rule in favor of Otis McDonald and the right of all citizens to own a handgun in their home.

II. HISTORY

A. Second Amendment: The Right to Bear Arms, the Militia, and Self Defense

Most controversy surrounding the Second Amendment prior to *Heller* concerned whether the Amendment only protected the use

of firearms in militia service or whether it also included the right to own firearms for personal defense. Originally the Second Amendment was ratified specifically to ensure that the people could form a militia[3] because the founding generation was suspicious of standing armies. They feared that a professional army supported by the government during peacetime would eventually abuse its power, as they perceived the British army did just before the Revolutionary War. Thus, Americans saw standing armies, even if raised by their own government, as a threat to liberty.[4] Instead, they wanted to entrust the people[5] themselves with the duty and the right of defending their own liberties with their own arms.[6] Beyond these duties, the militia also maintained security against local threats, such as bandits, pirates, and Native Americans.[7] With time, Americans became increasingly more comfortable with government-run standing armies, and today many people consider soldiers in standing armies to be performing the most patriotic service imaginable. Regardless of modern attitudes towards militias and standing armies, these concepts must be understood in order to understand why the Second Amendment was seen as necessary in the first place.

3 It's interesting to note that this is agreed upon by all sides, as can be seen in the Heller case itself. The dispute comes over the nature of the militia, as well as whether or not the "right of the people to keep and bear arms" extends beyond militia service. See *Heller*, 128 S. Ct. at 2801, *contra id.* 2822 (Stevens, J., dissenting).

4 Stephen P. Halbrook, The Founders' Second Amendment 179—82 (Ivan R. Dee 2008).

5 It should be noted here that the term "the people" had its limits. People did not necessarily mean the general public since women did not serve in militias. Like the right to vote or sit on a jury, the term "people" here means all adult males. Akhil R. Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 Harv. L. Rev. 145, 166—67 (2008).

6 Doherty, Gun Control on Trial at 9—10 (2008); Halbrook, *supra* note 4, at 330.

7 Akhil Amar wrote, "In the Founders' world, individual self-protection and community defense were not wholly separate spheres." Amar, *supra* note 5, at 164.

Unfortunately, early nineteenth-century Supreme Court decisions do not shed much light on how to properly interpret the Second Amendment since there were no cases that went to the nation's highest court until after the Civil War.[8] This is not surprising since, at the time, the Bill of Rights only applied to the federal government and had no power over the states.[9] Cases addressing the right to keep and bear arms were dealt with at the state level, and state courts generally used that specific state's Bill of Rights—and not the U.S. Constitution—to come to a decision, even though most decisions generally favored an individual rights interpretation.[10]

However, the understanding of what it meant to keep and bear arms changed significantly by the Civil War and the years following. Americans no longer feared standing armies and thus were much less enthusiastic about militias than the founding generation.[11] In the Reconstruction Era, arms bearing was no longer seen through the prism of maintaining liberty against tyrants and standing armies, but as maintaining safety and protection against private threats like mobs and bandits. The right to firearms was also a civil rights issue because many blacks in the South were being denied that right and were often helpless against groups like the KKK. To help remedy the problem, the Thirty-Ninth Congress passed the Fourteenth Amendment and a series of laws like the Freedmen's Bureau Act to protect the right of blacks to keep and bear arms.[12]

Additionally, the passage of the Fourteenth Amendment also put restrictions on states that had previously only applied to the federal government,[13] thus allowing litigation involving the Second Amendment to be taken to the Supreme Court. The first major Second Amendment case to reach the Supreme Court asked if the

8 Doherty, *supra* note 6, at 12—13.

9 Barron v. Baltimore, 32 U.S. 243, 250 (1833).

10 Doherty, *supra* note 6, at 13.

11 Akhil Amar, The Bill of Rights 258 (1998).

12 Stephen P. Halbrook, Freedmen, The Fourteenth Amendment, and the Right to Bear Arms (1998).

13 *Id.* at 40-41; Amar, *supra* note 11, at 164—65.

Fourteenth Amendment applied to conspiracies and mobs, which threatened to take away life, liberty, or property, or if it only applied to state governments. In 1873, a white mob surrounded a church in Colfax, Louisiana, where a predominantly black group had taken refuge with arms. The mob ordered those in the church to hand over their arms and later opened fire, killing over a hundred black men. Although originally nine men were charged in the incident, they were all eventually released after the Supreme Court ruled in their favor in United States v. Cruikshank. The Court decided that neither the First nor Second Amendments applied to states and even struck down provisions in certain civil rights bills passed by Congress.[14]

The next major case involving the Second Amendment was Presser v. Illinois. Herman Presser, an Illinois citizen, had organized and led a militia made up of mostly ethnic German workers who were associated with the Socialist Labor Party. Presser was accused of drilling and marching a militia without a license issued by the governor. Presser appealed to the Supreme Court on the grounds that the law violated his Second Amendment rights; however, the Court followed the precedence set in Cruikshank, reaffirming that the Second Amendment did not apply to states and requiring Presser to submit to state law.[15]

The issue of whether the Second Amendment protected a right to self defense was not addressed by the Supreme Court until 1939 in U.S. v. Miller, and even then, only indirectly. Miller challenged the National Firearms Act which required that all automatic weapons and sawed off-shotguns to be registered and taxed.[16] When Jack Miller and Frank Layton were arrested on the charges of possessing an unregistered sawed-off shotgun, they sued, claiming that the NFA violated their Second Amendment right.[17] But the Supreme Court upheld the NFA, declaring that the Second Amendment did not protect sawed-off shotguns because they were not used for mi-

14 Halbrook, *supra* note 12, 173—75; Presser v. Illinois 116 U.S., 252, 265 (1886).

15 *Presser*, 116 U.S., at 265.

16 Doherty, *supra* note 6, at 15—18.

17 *Id.* at 16.

litia service.[18] Because the case didn't give much analysis to the Second Amendment, its history, and its proper interpretation, the implications of the decision were so vague that gun rights advocates and gun control supporters later both claimed the case supported their position on the issue. Gun rights advocates said although Miller did the NFA, it was reasonable to uphold that specific restriction because the firearm in question could not be used for militia service. They further argued that had the restriction been placed on arms needed for a militia the Court would have found such a measure unconstitutional. Meanwhile, Gun control proponents said Miller showed that the Second Amendment only protected a right to weapons used in military service. While gun rights activists believed the firearm in question was the key to determining the constitutionality of a gun restriction, gun control advocates believed the decision said that the arm bearer had to be involved in some sort of military service to have a Second Amendment right. Following the Miller decision, lower courts generally sided with the latter interpretation of the Second Amendment.[19]

Heller provided the analysis that Miller lacked, and ruled that the Second Amendment protects both militia service and an individual right to own a gun. First, the Court found that the preamble of the amendment, "A well regulated militia, being necessary for the security of a Free State," did not limit the operative clause that "the right of the people to keep and bear arms shall not be infringed." Beyond just providing analysis of the original Second Amendment, Heller interpreted the Miller decision to mean that individuals did have a right to own guns, just not guns that would be useful for militia service.[20] Ultimately the case ruled that the Second Amendment did codify an individual right to keep and bear arms for self defense and struck down the District of Columbia's ban on handguns.[21]

18 United States v. Miller, 307 U.S. 174, 178 (1939).

19 Doherty, *supra* note 6, at 18—19.

20 *Heller*, 128 S. Ct., at 2815—17.

21 *Id.* at 2882.

B. Incorporation

Heller left a major question asked but unanswered: if the right to bear arms is an individual right, should state and local governments also have to respect it?[22]

As was stated above, the original Bill of Rights was designed to limit the federal government. Early in the nineteenth century, there was some dispute whether aspects of the Bill of Rights should be incorporated using the "privileges and immunities of citizenship" clause in the Constitution.[23] The Supreme Court, however, ruled in 1833 that the Bill of Rights was meant only to restrict the federal government. If the founders wanted to restrict the states, Chief Justice James Marshall reasoned, they would have specifically said so. Thus, states, and more pertinent to our case, local governments could ban weapons.[24]

But the Fourteenth Amendment changed the relationship between states and the federal government demanding that certain rights of citizenship be respected at the state level as well. Now, "no state shall make…any law which shall abridge the privileges or immunities" of citizenship. Nor could they take "life, liberty, or property, without due process of law."[25]

Unfortunately, the case that defined what the Fourteenth Amendment meant virtually left the privileges or immunities clause useless. The Supreme Court ruled in *Slaughterhouse* that the Fourteenth Amendment only protected a very limited set of rights of citizenship.[26] The next major blow to those who believed that the Fourteenth Amendment was ratified to protect individuals from state abuse was *United*

22 *Id.* at 2811.

23 David R. Upham, *Protecting the Privliges and Immunities: Founding Civil War and Reconstruction,* in Challenges to the American Founding 141-45 (Ronald J. Pestritto and Thomas G. West eds., 2005).

24 Amar, *supra* 11, at 160-161

25 U.S. Const. amend. XIV, § 1.

26 Slaughterhouse Cases: 83 U.S. 36, at 67 (1873)

States v. Cruikshank, which reaffirmed that the Bill of Rights (specifically the First and Second Amendments) did not apply to states.[27]

Eventually, the Court began to acknowledge that the Fourteenth Amendment protected more than the very limited rights enumerated in *Slaughterhouse*. But in the 1950s, Justice Hugo Black argued that the Fourteenth Amendment did incorporate the first eight amendments.[28] Although the court never embraced Justice Black's view of mechanically incorporating the entire Bill of Rights, it did change its attitude towards incorporation in general. During the Warren Court, practically all of the Bill of Rights was incorporated one right at a time under the doctrine of selective incorporation, which in essence says that the Fourteenth Amendment protects fundamental rights.[29] Today, virtually the entire Bill of Rights has been incorporated, with a few exceptions, including the right to keep and bear arms.

III. Incorporation and the Chicago case

A. Current Case

The heart of the *McDonald* case isn't about what the Second Amendment means. Rather the case is about whether the Fourteenth Amendment requires cities like Chicago to allow their citizens to own handguns. The *Heller* decision itself acknowledged both *Cruikshank* and *Presser* as saying the Second Amendment didn't apply to states, although it neither outright rejected nor endorsed the precedent set by their decisions. Rather, the opinion recognized that the issue would probably find its way back to the Supreme Court, but that the court did not feel it necessary to rule on the matter since it had no direct relation to the *Heller* case.[30]

27 United States v. Cruikshank, 92 U.S. 542, 552—54 (1875).

28 Adamson v. California, 332 U.S. 46, 71-72 (1947) (5-4 decision) (Justice Black, H., dissenting).

29 Amar, *supra* note 11, at 139.

30 *Heller*, 128 S. Ct., at 2823.

As noted in the introduction, shortly after the *Heller* decision was announced, *McDonald* was filed challenging the city of Chicago's authority to ban handguns.[31] The Seventh Circuit Court ruled in favor of Chicago because it felt that it was not the place of a circuit court to incorporate anything (since its jurisdiction was limited) and also because precedent clearly favored the view that the Second Amendment only applied to the federal government and not to the states.[32]

The Supreme Court has now decided to hear the case, thus leaving the Seventh Court's first concern resolved. The Supreme Court now is left with the second question: should the right to self defense be incorporated against Chicago or should it follow *Cruikshank* and only apply to the federal government?

B. Different Criteria for Incorporation

There have traditionally been three different methods to incorporation: the fundamental fairness approach, selective incorporation, and mechanical incorporation. The mechanical incorporation approach was championed by Justice Hugo Black, and is based primarily on his textual and historical analysis that the writers of the Fourteenth Amendment had intended to incorporate the first eight amendments to the Bill of Rights.[33] The second is the fundamental fairness doctrine which says that the Fourteenth Amendment has no relation to the Bill of Rights. Rather, it simply protects citizens in those rights which are fundamental to ordered liberty.[34] The final and thus far the most used is selective incorporation. It disagrees with the total incorporation in that it concedes that the first eight amendments are not necessarily incorporated across the board, but says that some rights of the Bill of Rights certainly are incorporated against the states.[35]

31 NRA v. Chicago, 567 F.3d 856, 856 (2009)

32 *Id.* at 858.

33 *Adamson,* 332 U.S., at 89-91 (Black, H., dissenting)

34 Amar, *supra* note 11, at 139.

35 *Id.* at 139—40.

C. Applying McDonald to the Three Methodologies

According to any of the three traditional methods of incorporation the Second Amendment ought to be incorporated. First, any judge or scholar who falls into the Hugo Black camp of total incorporation will believe the first Eight Amendments to the Constitution ought to be incorporated outright. Although some may argue over the meaning of the Second Amendment, unless the Court decides to reverse its *Heller* decision it made just two years ago, total incorporation of the Second Amendment would require striking down handgun laws across the country.

The same legal reasoning also follows using the selective incorporation model as well. The Court in *Heller* said the Second Amendment protected a pre-existing right and spent a great deal of the opinion reviewing the history of how that right has been respected throughout American history.[36] Once a right is declared fundamental it is extremely difficult to get the Court to reverse itself—especially considering the Supreme Court declared the right to own a handgun for self defense a fundamental right a mere two years ago.

The hardest judicial test for incorporating the Second Amendment is the fundamental fairness test. This requires proving a right to be absolutely essential for ordered liberty, which is difficult to do because what one judge might consider essential to ordered liberty another may not. However, a closer look at congressional debates of the Thirty Ninth Congress makes a very powerful case to incorporate the Second Amendment, even under the fundamental fairness test. Consider that proponents of the fundamental fairness test advocate it because it protects the right of the people to write their own laws through their elected representatives. The advantage to this method has traditionally been seen as protecting the separation of powers and the structural integrity of the Constitution. But even if proponents of fundamental fairness don't think the right to firearms for defense is considered necessary to ordered liberty, certainly the right to amend the Constitution is.

36 *Heller*, 128 S. Ct. at 2817.

The right to firearms for self defense was discussed extensively as a right which the Thirty-Ninth Congress considered to be a right of citizenship and one which it wished to protect by the passage of the Fourteenth Amendment.[37] This commitment to protecting the right to keep and bear arms is not only seen in congressional debate over the Fourteenth Amendment but in laws passed in connection with the Fourteenth Amendment.[38] The virtue of fundamental fairness is that it properly acknowledges that some modern questions and dilemmas simply cannot be answered by the Fourteenth Amendment since the authors themselves might not have considered the problems we face now. And in such cases, caution and restraint should be used. But the right of all citizens to bear arms—including groups that wouldn't have been protected by the original Second Amendment like blacks, women and men who weren't part of any militia—was discussed extensively as one of the fundamental rights they wanted to protect. To fail to incorporate the right to arms for self defense when there is compelling evidence that the writers and people who ratified the Amendment specifically wanted it to be protected is to rob ordered liberty of one of its basic necessities: the right of the people to amend the Constitution.

IV. Conclusion

Although the Court ought to side with Otis McDonald in this case, it should be noted that this will not end all gun regulations in the city. The Supreme Court specifically said in Heller that a right to own a gun is not an absolute right. Cities and states will still retain their right to regulate firearms in public buildings. It will still be up to these local governments to regulate other issues like concealed weapons permits. However, no government—federal, state, or local—has the right to take a citizen's right to possess a handgun to defend their family, property and own person within the walls of their own home.

37 Halbrook, *supra* note 12, at 5—9, 15—16.§

38 *Id.* at 11—13, 15.