

# FIREARM FEDERALISM

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## INTRODUCTION

The Second Amendment<sup>1</sup> is one of the least settled areas of American constitutional law, and until very recently, it was surely one of the least discussed. But the Supreme Court’s 2008 decision

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1. U.S. CONST. amend. II.

in *District of Columbia v. Heller*<sup>2</sup> has unleashed a swell of litigation challenging various states' and municipalities' gun laws as well as a stream of scholarship.<sup>3</sup>

If one counts only the Court's rather narrow holding that the Second Amendment does not allow Congress to pass an absolute ban on handgun ownership for lawful self-defense,<sup>4</sup> libertarians appear to have scored a major victory against gun control laws. Yet paradoxically, the likely result of *Heller* is not that gun control laws will diminish in reach but rather that they will be effectively nationalized. State and local governments have traditionally enjoyed a great deal of latitude in passing gun control laws,<sup>5</sup> but if the Supreme Court incorporates the Second Amendment against the states, as expected,<sup>6</sup> their authority to regulate guns may be severely curtailed and the benefits of localized regulation will be lost.

This Note argues that while incorporating the Second Amendment against the states may be inevitable, it would be a costly mistake for federal judges to nationalize the details of gun regulation by setting identical standards for the state and federal governments. Rather, even if the Second Amendment sets a constitutional floor for the protection of the right to keep and bear arms, states should retain substantial discretion to regulate gun possession, use, and sales.

To date, gun *rights* advocates have spoken primarily in terms of individual rights, while gun *control* advocates have framed the issue in terms of safety. Neither side has devoted much attention to federalism, but indeed, the choice as to which level of government will set gun policies is critical. The Second Amendment, by its nature, is ideally situated to enjoy the structural protections of federalism.<sup>7</sup> While the modern incorporation doctrine assumes that a right should look identical regardless of which level of government it is

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2. 128 S. Ct. 2783 (2008).

3. See *infra* Part II.A.2–3.

4. *Heller*, 128 S. Ct. at 2821–22.

5. See *id.* at 2816–17 (noting the wide variety of restrictions on the possession, carrying, and sale of guns commonly issued by the states).

6. See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 312–13 (2009); Robert Levy, *District of Columbia v. Heller: What's Next?*, CATO UNBOUND, July 14, 2008, <http://www.cato-unbound.org/2008/07/14/robert-a-levy/district-of-columbia-v-heller-whats-next>. The Justices have recently decided to hear arguments this Term specifically on the question whether the Second Amendment should be incorporated against the states. See Nat'l Rifle Ass'n of Am., Inc. v. Chicago, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom.* McDonald v. Chicago, 78 U.S.L.W. 3169 (Sept. 30, 2009) (No. 08-1521).

7. See *infra* Part II.

asserted against,<sup>8</sup> there are several reasons to allow for local variation in gun policies.

First, individual gun rights must be balanced against the states' responsibility to ensure public safety. Second, this state interest is explicit in the Amendment's text,<sup>9</sup> although its meaning has shifted over time.<sup>10</sup> Third, gun regulation is so polarizing as to make it impossible to please everyone in a large republic with national laws. Fourth, neither the Second Amendment nor the *Heller* opinion provides any sort of constitutional bright line to guide policymaking at the national level. Finally, gun rights today do not implicate any substantial minority interests, eliminating the most common justification for nationalizing rights.<sup>11</sup> This Note argues that these considerations outweigh the arguments in favor of nationalization. In short, the benefits of federalism are too powerful to ignore.

## I. DEFINING NATIONAL RIGHTS IN A FEDERAL REPUBLIC

### A. *Incorporation: Uniform Protection of Fundamental Rights*

In recent decades, the Supreme Court has overturned countless state laws on the grounds that they conflict with various provisions in the Bill of Rights. For instance, the First Amendment's Free Exercise<sup>12</sup> and Establishment Clauses,<sup>13</sup> the Fourth Amendment's exclusionary rule,<sup>14</sup> and the Fifth Amendment's Double Jeopardy Clause<sup>15</sup> have all been successfully invoked to invalidate the actions of state governments. In each case, the Court's analysis focuses primarily on the substantive provision in question; the Four-

8. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969); see also *infra* note 68.

9. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

10. See *infra* Part II.B.2 and notes 186–89.

11. See *infra* Part II.B.5.

12. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws that violate the Free Exercise Clause).

13. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (holding that the Establishment Clause "means at least this: Neither a state nor the Federal Government can set up a church").

14. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the exclusionary rule against a state government for the first time).

15. See *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (holding that the Double Jeopardy Clause "should apply to the States through the Fourteenth Amendment").

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teenth Amendment tends to drop out of the discussion, even though each of the underlying amendments, on its face, applies only against the federal government. This is critical, because the Supreme Court's invalidation of state laws has consequences in the balance of power both among the three branches of the federal government and between the national and state governments. This Note concerns itself with the latter issue—federalism. In particular, it will argue that the inevitable result of incorporating rights, under the Court's doctrine of selective incorporation, is uniformity in enforcement of the rights in question, which is not a desirable outcome with respect to the Second Amendment right to keep and bear arms. It is beyond the scope of this Note to provide a complete history of incorporation, but a discussion of some basic propositions is warranted nonetheless.

### 1. Before Incorporation: Background

Today, it is natural to look at the Bill of Rights simply as a powerful set of limitations on government, without distinguishing between the various levels of government against which a right protects. But our founding generation would have no doubt been shocked to see the Supreme Court invalidate so many state laws on the basis of conflict with the federal Constitution. Indeed, the Bill of Rights was originally seen as a constraint only on the federal government.<sup>16</sup> The text clearly reflects this idea; the opening clause of the Bill reads: "Congress shall make no law . . ." <sup>17</sup> Even Alexander Hamilton, the great centralizer, agreed that the Bill of Rights did not apply to the states.<sup>18</sup> In the entire Bill, only the First Amendment explicitly references any particular level of government.<sup>19</sup>

However, at least one scholar has noted the fact that the original 1787 Bill sent to the states for ratification began with an additional two amendments that were not rights-based at all but rather dealt with representation and remuneration in Congress.<sup>20</sup> According to Akhil Amar, this supports the inference that the remaining provisions, particularly our first eight amendments, were intended

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16. For a thorough discussion of this point, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1492–1520 (1987).

17. U.S. CONST. amend. I.

18. See, e.g., THE FEDERALIST NO. 83, at 468 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The United States, in their united or collective capacity, are the OBJECT to which all general provisions in the Constitution must necessarily be construed to refer.").

19. U.S. CONST. amend. I.

20. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 8–19 (1998).

to apply only to Congress despite the lack of exclusive reference to the federal government.<sup>21</sup> A reader from the Founding era would thus have likely conceived of a Bill of Rights, preceded by the “Congress shall make no law” language, that applied only to the federal government.<sup>22</sup>

In the common law, this view found its ultimate expression in the 1833 case of *Barron v. City Council of Baltimore*.<sup>23</sup> *Barron*’s narrow holding was that the Takings Clause of the Fifth Amendment limits only the federal government and not states or municipalities.<sup>24</sup> But Chief Justice Marshall seemed to recognize that much more was implied; this was the first time the Court was called upon to apply a provision of the Bill against a state government. While he acknowledged that this was a doctrinal question “of great importance,” Marshall rejected it without “much difficulty,”<sup>25</sup> writing perfunctorily that the Bill of Rights should not apply to the states.<sup>26</sup> This may have been dictum, but in any event the more expansive interpretation of *Barron*—that none of the provisions in the Bill of Rights limits the states<sup>27</sup>—would remain the law for nearly 100 years.

## 2. A Brief History of Incorporation

In the years before the *Barron* case was decided, at least three notable jurists had argued that various elements of the Bill of Rights limited state governments.<sup>28</sup> Justice William Johnson explicitly argued in an 1820 case that the Fifth Amendment’s Double Jeopardy Clause “operates equally” on the state and federal governments.<sup>29</sup> William Rawle’s 1825 treatise on constitutional law argued vigorously that many of the provisions of the Bill of Rights could be in-

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21. *See id.* at 20–22.

22. *See* U.S. CONST. amend. I.

23. 32 U.S. (7 Pet.) 243 (1833).

24. *Id.* at 250–51 (holding that the Takings Clause “is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states”).

25. *Id.* at 247.

26. *Id.* at 250 (“These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).

27. Modern commentators typically cite *Barron* for this proposition. *See, e.g.,* Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1528 (2005) (“[T]he landmark case of *Barron* . . . famously held in 1833 that the proscriptions delineated in the Bill of Rights did not apply to the subfederal polities.”).

28. *See* AMAR, *supra* note 20, at 145.

29. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 33–34 (1820) (Johnson, J., concurring).

voked against the states.<sup>30</sup> As late as 1833, the same year that *Barron* came down, Justice Henry Baldwin held while riding circuit that elements of the First, Second, and Fourth Amendments applied with at least some force against state governments.<sup>31</sup>

These were fringe arguments, but it is notable that they predated the Civil War Amendments, and most importantly the Fourteenth Amendment—the incorporation mechanism that Justices Black, Frankfurter, and Brennan would later use to subject the state governments to the limitations of the Bill of Rights.<sup>32</sup> These nineteenth century authors effectively reached the same result, although a majority of the Supreme Court never applied any element of the Bill of Rights against a state government without the aid of the Fourteenth Amendment. Instead, *Barron* would hold the day.

The Fourteenth Amendment substantially changed the relationship between the federal government and the states. In relevant part, the Amendment reads as follows: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>33</sup> This language may appear to overturn *Barron*, and in fact there is strong historical support for the position that the “privileges or immunities” language was intended to incorporate the Bill of Rights against the states. For example, Congressman John Bingham, the principal author of Section 1 of the Fourteenth Amendment, declared repeatedly in a prominent 1866 floor speech on the Amendment that the Privileges or Immunities Clause directly applied the Bill of Rights against the state governments.<sup>34</sup> Over the course of several months in 1866 and 1867, Representative Bingham repeatedly emphasized to his colleagues that the Fourteenth Amendment was necessary to overrule *Barron*’s restrictive view of the Bill of Rights.<sup>35</sup>

30. WILLIAM RAWLE, A VIEW ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120–30 (Philadelphia, H.C. Carey & I. Lea 1825).

31. *Magill v. Brown*, 16 F. Cas. 408, 419, 427 (C.C.E.D. Pa. 1833) (No. 8952) (interpreting Pennsylvania state law with the gloss of the federal religion clauses); AMAR, *supra* note 20, at 145 & 355 n.48 (citing *Johnson v. Tompkins*, 13 F. Cas. 840, 849–52 (C.C.E.D. Pa. 1833) (No. 7416) (applying the Second and Fourth Amendments)).

32. See *infra* discussion accompanying notes 53–73.

33. U.S. CONST. amend. XIV, § 1.

34. CONG. GLOBE, 39th Cong., 1st Sess. 1088–94 (1866) (remarks of John Bingham); see also AMAR, *supra* note 20, at 181–83 (discussing Bingham’s efforts in drafting and advocating passage of Section 1 and citing numerous contemporary authorities strongly suggesting incorporation through the Privileges or Immunities Clause).

35. See AMAR, *supra* note 20, at 181–83.

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Thaddeus Stevens, House leader of the Joint Committee on Reconstruction, argued just before the Amendment went to a vote in the House that “the Constitution . . . is not a limitation on the States. This amendment supplies that defect.”<sup>36</sup> Jacob Howard, Senate leader of the same Committee, suggested that to the “privileges and immunities [already enjoyed by the citizens of all states] should be added the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution.”<sup>37</sup>

All of this suggests that the 1866 Reconstruction Congress that passed the Fourteenth Amendment intended that the first eight amendments to the Constitution, which previously limited only the federal government, would now be counted among the privileges and immunities held by all citizens against the states. Notably, this would have included the Second Amendment, meaning that nothing further would be needed for an individual to invoke his right to own a gun against a state government. However, the Supreme Court quickly stepped in to foreclose any such interpretation.

In the *Slaughter-House Cases*,<sup>38</sup> Justice Miller’s opinion for the Court upheld a state scheme granting a monopoly to a corporation of New Orleans butchers, denying the claims of other butchers that the scheme violated the Thirteenth and Fourteenth Amendments.<sup>39</sup> In so doing, Miller eviscerated the Privileges or Immunities Clause by holding that it protected only those rights the federal government already protected and enforced against the states through the Supremacy Clause.<sup>40</sup>

Justice Field dissented, worrying that a “citizen of a State is now only a citizen of the United States residing in that State.”<sup>41</sup> He believed that the Privileges or Immunities Clause incorporated against the states a set of substantive rights held by all American citizens.<sup>42</sup>

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36. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

37. *Id.* at 2765; see also AMAR, *supra* note 20, at 181–87 (discussing Bingham’s, Stevens’, and Howard’s roles in the passage of the Fourteenth Amendment).

38. 83 U.S. (16 Wall.) 36 (1873).

39. 83 U.S. at 57–60, 66, 79–81 (holding, *inter alia*, that the right to freely choose one’s profession is not a privilege or immunity guaranteed to individuals against state governments).

40. *Id.* at 79–80. Note that Miller’s distinction between state and federal citizenship was premised largely on a crucial misquotation of the Art. IV, § 1 Privileges and Immunities Clause. See Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI-KENT L. REV. 627, 646 (1994).

41. 83 U.S. at 95 (Field, J., dissenting).

42. See *id.* at 96 (arguing that the Fourteenth Amendment protects “the natural and inalienable rights which belong to all citizens”).

Justice Bradley dissented as well, going so far as to explicitly list several provisions of the Bill of Rights that he believed were now among the privileges and immunities enjoyed by all.<sup>43</sup>

Justice Miller's view of the Privileges or Immunities Clause won the day, but "virtually every modern commentator is in agreement" that he was "clearly wrong."<sup>44</sup> Professor Amar has argued that *Slaughter-House* "has the effect of rendering the privileges or immunities clause wholly unnecessary" by holding that the clause guarantees only those rights already covered by the Supremacy Clause.<sup>45</sup> Laurence Tribe wrote that the Court "incorrectly gutted the Privileges or Immunities Clause."<sup>46</sup> Sanford Levinson called the opinion "shoddily justified."<sup>47</sup> Walter Murphy called it an "intellectual shambles."<sup>48</sup> Some lawyers and commentators would like to see the Clause revived,<sup>49</sup> and others are perfectly satisfied to see it lay dead,<sup>50</sup> but in any event today it stands for almost nothing.

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43. *Id.* at 118–19 (including free exercise of religion, free speech, free press, the right of assembly, freedom from unreasonable searches and seizures, and suggesting that Section 1 of the Fourteenth Amendment might also incorporate certain unenumerated rights).

44. Thomas B. McAfee, *Constitutional Interpretation—The Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986); see also Aynes, *supra* note 40, at 628 ("Miller's majority opinion was indeed based on an incorrect reading of the Fourteenth Amendment . . ."); *id.* at 627 (citing LEONARD W. LEVY, *The Fourteenth Amendment and the Bill of Rights*, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 64, 69 (1972) ("one of the most tragically wrong opinions ever given by the Court."); LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 201 (1975) ("defying the plain intention of the Constitutors").

45. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1258–59 (1992). In Justice Field's words, it became "a vain and idle enactment." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1873) (Field, J., dissenting).

46. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297–98 n.247 (1995) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 7-2 to 7-4, at 550–59 (2d ed. 1998)).

47. Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71, 73 (1989).

48. Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 5 (1987).

49. Alan Gura, who argued the *Heller* case, is a prominent example. See, e.g., Complaint at 11, *McDonald v. City of Chicago*, No. 08-CV-3645, at 11 (N.D. Ill. filed June 26, 2008), 2008 WL 2571757.

50. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990) (arguing that the clause is "properly . . . a dead letter").

The *Slaughter-House* Court may have foreclosed the availability of the Privileges or Immunities Clause as a vehicle for incorporating the Bill of Rights against the states, but in any case most of the Bill has been incorporated, albeit through the textually awkward vehicle of the Due Process Clause of the Fourteenth Amendment.<sup>51</sup> Historically, the methodology of incorporation has not always been clear, and in fact various Justices of the Supreme Court have at times defended several different methods of applying national rights against the states.<sup>52</sup>

Justice Black, for example, argued for many years that the Fourteenth Amendment was intended to apply the entire Bill of Rights against the states in the same way that it applied them against the federal government.<sup>53</sup> This approach came to be known as “total” or “complete” incorporation.<sup>54</sup> Initially, Black argued in his *Adamson v. California*<sup>55</sup> dissent that the structure of the Fourteenth Amendment “as a whole” incorporated the Bill of Rights against the states.<sup>56</sup> More than twenty years later, he settled on the Privileges or Immunities Clause as the particular mechanism of incorporation.<sup>57</sup> No majority of the Court, however, has seen fit to alter the *Slaughter-House* Court’s severe limitation of the Clause.<sup>58</sup> While four Justices supported some form of total incorporation in *Adamson*, it has “never commanded a majority of the Court.”<sup>59</sup>

Justice Frankfurter, on the other hand, argued against a formal approach to incorporation, preferring the substantially more open-ended view that the Fourteenth Amendment requires states to re-

51. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

52. See AMAR, *supra* note 20, at 139–40, for a general discussion of the three particular methods of incorporation discussed here. R

53. See *Betts v. Brady*, 316 U.S. 455, 474–75 (1942) (Black, J., dissenting); HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* 34 (1968); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 25 (1980) (discussing some of the mechanical problems associated with Black’s approach). Note, however, that Justice Black defined the Bill of Rights as the first *eight* amendments only, leaving out the more purely structural protections of the Ninth and Tenth Amendments. See, e.g., AMAR, *supra* note 20, at 139, 219, 222 (discussing the reasoning that required this distinction). R

54. See BLACK, *supra* note 53, at 36, 40. R

55. 332 U.S. 46 (1947).

56. *Id.* at 71–74 (Black, J., dissenting).

57. See *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

58. See ELY, *supra* note 53, at 23 (noting that the Supreme Court quickly withdrew from *Slaughter-House*’s narrow interpretation of the Equal Protection Clause, but that “the Court hasn’t moved an inch on Privileges or Immunities”). R

59. Rosen, *supra* note 27, at 1533 (discussing the Justices’ votes in *Adamson*, 332 U.S. 46). R

spect those principles of fundamental fairness and ordered liberty reflected by—but not necessarily explicitly stated in—the due process guarantees of the federal Constitution.<sup>60</sup> In his last published work, Justice Frankfurter continued to argue that states must honor the various requirements of the Bill of Rights “because they are fundamental (not because they are contained in [the text of an amendment]).”<sup>61</sup> Interestingly, this approach allows for the protection of rights at different levels of government by different constitutional standards,<sup>62</sup> a consequence that is clearly not allowed by Black’s total incorporation.<sup>63</sup>

Justice Brennan later advocated for a third approach, combining elements of both Black’s and Frankfurter’s theories.<sup>64</sup> The result, which came to be known as “selective incorporation,” involved fully incorporating each provision of the Bill of Rights that a majority of Justices considered fundamental.<sup>65</sup> Doctrinally, the question is whether a state’s action implicates a right that is “implicit in the concept of ordered liberty.”<sup>66</sup> Crucially, at least since the Court’s 1969 decision in *Benton v. Maryland*,<sup>67</sup> once this test is met, the scope of the constitutional right is identical whether it is invoked against the federal government or any of the states.<sup>68</sup> Each level of government is held to an identical standard.<sup>69</sup>

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60. *Adamson*, 332 U.S. at 59–68 (1947) (Frankfurter, J., concurring).

61. Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 749 (1965).

62. See Rosen, *supra* note 27, at 1528.

63. At least on this point, the second Justice Harlan took an approach similar to Frankfurter’s. See *Roth v. United States*, 354 U.S. 476, 498–504 (1957) (Harlan, J., concurring in part and dissenting in part).

64. See, e.g., William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 540–47 (1986) (discussing the landmark cases incorporating each of the most recognizable rights contained in the first eight amendments).

65. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

66. *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

67. 395 U.S. 784 (1969).

68. See *id.* at 795 (“Once it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ the same constitutional standards apply against both the State and Federal Governments.” (citations omitted)); see also Rosen, *supra* note 27, at 1535; *infra* text accompanying notes 84–88.

69. See AMAR, *supra* note 20, at 140. It is important to note, however, that incorporated rights set a constitutional floor but not a ceiling. In other words, states can guarantee greater protection of constitutional rights to their citizens than the United States Constitution requires, but they cannot offer less. For a recent case, see *People v. Weaver*, 909 N.E.2d 1195, 1198–1203 (N.Y. 2009) (holding that the New York state Constitution prevents police from monitoring a suspect’s

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This approach, which might reasonably be called “mechanical incorporation,” has prevailed in the Supreme Court, with the result that “virtually every clause of the Bill [has] be[en] deemed fundamental,”<sup>70</sup> and each such clause can now be invoked against the federal government or the states. The Justices have repeatedly “held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the states.”<sup>71</sup> The only exceptions are the Fifth Amendment’s Grand Jury Clause, the Seventh Amendment’s Civil Jury Clause, the Second Amendment, and the Third Amendment.<sup>72</sup> So, while as a matter of doctrine Justice Brennan’s model of selective incorporation has held the day, Justice Black’s vision of total incorporation has nearly come true in practice. This year, in fact, the Court will hear arguments on the question of “[w]hether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment’s Privileges or Immunities or Due Process Clauses.”<sup>73</sup>

### B. *Federalizing Rights: Alternatives to Uniform Incorporation*

As we have seen, incorporation was not inevitable, and neither was the mechanical form of incorporation that we have today. In recent years, scholars have proposed several alternatives that might better allow for desirable variation among the states.

#### 1. The “Refined Incorporation” Model

Akhil Amar has developed a model that he calls “refined incorporation.”<sup>74</sup> Like Justice Black, he acknowledges that the Fourteenth Amendment incorporates some of the Bill of Rights, but argues that some of the provisions in the Bill are not “rights of citizens” but rather “at least in part rights of states.”<sup>75</sup> According to

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car for an extended period using a GPS device, even though the United States Supreme Court held that a strikingly similar practice was permissible under the Fourth Amendment in *United States v. Knotts*, 460 U.S. 276, 282 (1983)).

70. AMAR, *supra* note 20, at 140.

71. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992).

72. *See Rosen, supra* note 27, at 1515 & n.2.

73. *See Nat’l Rifle Ass’n of Am., Inc. v. Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom. McDonald v. Chicago*, 78 U.S.L.W. 3169 (Sept. 30, 2009) (No. 08-1521).

74. AMAR, *supra* note 20, at xiv–xv. At least one scholar responded by calling Professor Amar’s book “the best book ever written about the Bill of Rights,” while acknowledging that it was in fact to date “the *only* book on the Bill of Rights as a whole.” Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might be About Structure After All*, 93 NW. U. L. REV. 977, 977 (1999).

75. AMAR, *supra* note 20, at xiv.

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Professor Amar, the crucial question is therefore not simply whether a right appears in the Bill, or whether it is fundamental, but “whether the provision guarantees a privilege or immunity of individual citizens rather than a right of states or the public at large.”<sup>76</sup> A natural consequence of addressing this question, and perhaps the most crucial insight of Amar’s work, is that “a particular principle in the Bill of Rights may change its shape in the process of absorption into the Fourteenth Amendment.”<sup>77</sup> In other words, a constitutional right may be protected differently against each level of government.

As Amar points out, incorporating some rights would be nonsensical. The Tenth Amendment is the clearest example: how could one possibly protect against state action infringing “[t]he powers . . . reserved to the States?”<sup>78</sup> It is not clear what this would mean.<sup>79</sup> The First Amendment’s Establishment Clause also cannot be incorporated without overcoming substantial grammatical obstacles. As originally conceived, it “stood as a pure federalism provision . . . agnostic on the substantive issue of establishment,” mandating simply that Congress leave the issue to the states and refrain from establishing a national church.<sup>80</sup> If we accept this textualist understanding of the Establishment Clause, it would make little sense to apply it against a state government.<sup>81</sup> Finally, incorporating the Due Process Clause of the Fifth Amendment through the analogous clause of the Fourteenth Amendment would be

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76. *Id.* This distinction is crucial. Professor Amar argues that while the original Bill of Rights “tightly knit together citizens’ rights and states’ rights,” since states were commonly perceived as the best guarantors of liberty, the Fourteenth Amendment “unraveled this fabric, vesting citizens with rights *against* states.” *Id.* at 215.

77. *Id.* at xiv.

78. U.S. CONST. amend. X. Admittedly, the Amendment speaks to popular sovereignty as well as federalism, but as Professor Amar points out, to the extent that it protects federalism, “it makes little sense” to apply it against the states, and to the extent that it affirms a principle of popular sovereignty, it “adds little” to the Article IV Republican Government Clause, “which has always applied against the states.” AMAR, *supra* note 20, at 280.

79. To my knowledge, no one has proposed incorporating the Tenth Amendment.

80. AMAR, *supra* note 20, at 246.

81. However, that understanding has changed, and the Establishment Clause has been incorporated along with nearly all of the remainder of the Bill. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).

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wholly superfluous, since the language of the two clauses is identical.<sup>82</sup>

Refined incorporation solves many of these awkward structural problems associated with mechanical incorporation. To the extent that a particular clause was intended to protect individuals, it can be incorporated against the state governments as one of the privileges or immunities of United States citizenship, whereas the clauses intended to protect states—federalism provisions—should not be. If the Second Amendment does indeed protect an individual right,<sup>83</sup> then under this model it may be an excellent candidate for incorporation. But the more general point is that even a provision that has been incorporated can take a different form depending on which level of government it is asserted against.

## 2. Tailoring Rights

Mark Rosen, elaborating on this last point, has approached federalized rights—those left to be defined at the state level, instead of by the national government—from a different angle, developing a model that he calls “Tailoring.”<sup>84</sup> Rosen points out that the Court’s incorporation doctrine includes the idea that once “it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, *the same constitutional standards apply against both the State and Federal Governments.*”<sup>85</sup> Essentially, once a particular provision has been incorporated through the Fourteenth Amendment, it holds the federal and state governments to the same standard.<sup>86</sup> Rosen calls this form of incorporation “One-Size-Fits-All,”<sup>87</sup> but it is simply another name for what Amar calls “mechanical incorporation.”<sup>88</sup>

In contrast, Tailoring “contemplates that the doctrinal details developed in the federal context might not all transfer over to the states.”<sup>89</sup> Rosen accepts the foundational idea behind selective incorporation—that the appearance of a right in the first eight

82. ELY, *supra* note 53, at 27.

83. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2799 (2008).

84. Rosen, *supra* note 27, at 1516.

85. *Id.* at 1535 (emphasis in Rosen’s treatment of the original) (quoting *Benton v. Maryland*, 395 U.S. 784 (1969)).

86. As just one example of this approach, see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995) (adopting a principle of “congruence between the standards applicable to federal and state racial classifications”) (cited by Rosen, *supra* note 27, at 1516).

87. *See* Rosen, *supra* note 27, at 1535.

88. *See* AMAR, *supra* note 20.

89. Rosen, *supra* note 27, at 1536.

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amendments is “strong evidence” that it is “sufficiently fundamental” so as to belong in the list of rights applied against the states,<sup>90</sup>—while agreeing with Akhil Amar that the doctrinal details of rights enforcement can vary across the different levels of a federal government.<sup>91</sup> In fact, Rosen does not argue that selective incorporation, holding the federal and state governments to the same standards, should be discarded altogether. Rather, he concludes that One-Size-Fits-All incorporation should simply be “softened” from a “categorical requirement” to a presumption that can be rebutted for one of five broad reasons in cases where Tailoring makes good sense.<sup>92</sup>

First, to the extent that constitutional law exists to remedy failures of democratic political processes, we should recognize that effective political participation is easier at local levels than it is at the national level. Therefore federal courts should not thwart local efforts to correct problems of under- or over-representation in government.<sup>93</sup> Second, the “varying geographical scopes” of federal and state regulation suggest that local regulations tend to interfere less with “marketplace” values in different localities nationwide.<sup>94</sup> Third, since exit costs diminish at lower levels of government and citizens can move between lower-level jurisdictions to find a more suitable set of regulations and rights-protecting policies, Tailoring should “increase[e] the welfare of voter-consumers.”<sup>95</sup> Fourth, each American citizen is a member of more than one polity, and tailoring rights at a lower level reduces the threat of majorities forcing undesirable policies onto politically weaker minorities.<sup>96</sup> Fifth, the different levels of government often have divergent interests

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90. *Id.*

91. *Id.* at 1537; *see also* AMAR, *supra* note 20, at xiv.

92. Rosen, *supra* note 27, at 1517.

93. *See id.* at 1582–96; *accord* ELY, *supra* note 53, at 101–02 (arguing for a “representation-reinforcing orientation” of rights enforcement instead of a “judicial imposition of ‘fundamental values’”).

94. Rosen, *supra* note 27, at 1601–03.

95. *See id.* at 1611. Professor Rosen approvingly references Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), for the theory that “local governments compete for citizens by offering different packages of public goods,” increasing efficiency and leading to differentiated packages of policies and public goods. Rosen, *supra* note 27, at 1608; *see also* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 312 (1974) (“Different communities, each with a slightly different mix, will provide a range from which each individual can choose that community which best approximates *his* balance among competing values.”).

96. *See* Rosen, *supra* note 27, at 1615–21. Interestingly, Rosen argues that this principle is fully consistent with Rawlsian equality principles, even though Rawls himself tended to “overlook[ ] federalism” as a solution for majoritarian overreach. *Id.* at 1625–26.

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and unique responsibilities, and these differences should inform courts' development of rights balancing tests.<sup>97</sup>

### 3. Rights Federalism: Justice Harlan's *Roth* Dissent

Even without emphasizing localism as a beneficial value, a pragmatic case can be made that states and the federal government should not necessarily be held to identical standards in enforcing a given right. Half a century ago, the second Justice Harlan's famous separate opinion in *Roth v. United States*<sup>98</sup> made such an argument. In that case, the Court rejected First Amendment challenges to two obscenity statutes, one federal and the other from California, holding that the same standard applies regardless of which level of government was regulating speech.<sup>99</sup> Justice Harlan disagreed, arguing that one case involved balancing a state's power against the limitations of the Fourteenth Amendment, while the other required balancing the federal government's more limited power against the confines of the First Amendment.<sup>100</sup> Without developing a complex doctrinal model, Justice Harlan simply looked to federalism where it is most effective.<sup>101</sup>

Harlan argued that the basic differences between the First and Fourteenth Amendments should not be ignored.<sup>102</sup> The First Amendment, in his view, declares that federal officials lack substantive power to regulate speech, or at least the sort of speech in question.<sup>103</sup> The Fourteenth Amendment, on the other hand, limits states only to the extent that the right in question rises to the level of "ordered liberty."<sup>104</sup> This leaves states some latitude to regulate in protecting public health, safety, and welfare; Harlan did not specify just how much latitude, but believed that it included at least the ability to protect against unsolicited mailings of pornographic

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97. *Id.* at 1627–29.

98. 354 U.S. 476 (1957). Justice Harlan's opinion is a concurrence in one of the two combined cases and a dissent in the other. 354 U.S. at 496–508 (Harlan J., concurring in part and dissenting in part).

99. *See id.* at 492–93 & n.31.

100. *See id.* at 498.

101. *See id.*

102. *See id.* at 504 (“[I]n every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results.”).

103. *Id.* at 504 (“Congress has no substantive power over sexual morality.”).

104. *Id.* at 501 (citing *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937)).

materials.<sup>105</sup> It is worth noting that Mark Rosen's second justification for Tailoring—that local regulations tend to threaten the marketplace of ideas less than national ones—is a direct reflection of Justice Harlan's distinction between the two levels of government.<sup>106</sup> While pointing to the states' broader sphere of constitutional powers, Harlan also asserted that the states posed a lesser threat to liberty than the federal government.<sup>107</sup> In other words, states' efforts to protect against unsolicited pornography pose a much smaller threat to free speech than would a federal program applied across all fifty states.

Each of these three models—Amar's, Rosen's, and Harlan's—addresses some of the difficult problems associated with defining and protecting national rights in a federal republic. They illustrate the importance of recognizing that rights can take different forms when asserted against different levels of government—as Harlan's dissent demonstrates, *Roth* would have come out differently under any of the three models—and more importantly they demonstrate that alternatives to mechanical incorporation are available. This Note argues that even if the Supreme Court incorporates the Second Amendment against the states later this Term, states should retain the authority to tailor gun regulations to their own localized circumstances. Before arguing that gun rights should remain federalized, it will be helpful to examine recent constitutional arguments surrounding the Second Amendment.

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105. *Id.* at 502.

106. Compare Rosen, *supra* note 27, at 1602 (“The quantum of the constitutionally problematic interference is smaller if the regulation is the product of a municipality rather than the federal government, because a nationwide proscription interferes with these interests more than a city-wide prohibition does.”), with *Roth*, 354 U.S. at 506 (Harlan, J., concurring in part and dissenting in part) (“[I]t seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nationwide suppression of the book, and so long as other States are free to experiment with the same or bolder books. . . . But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book.”).

107. *Roth*, 354 U.S. at 505–06 (Harlan J., concurring in part and dissenting in part).

II.  
FIREARMS: MODERNIZING THE OBSOLETE

A. District of Columbia v. Heller *and the Individual Right to Bear Arms*

The Second Amendment reads as follows: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>108</sup> This is one of the more inscrutable provisions in the Constitution, largely because the first, or prefatory, clause, and the second, or operative, clause seem at first to suggest two very different sorts of rights. Many have argued that the most natural reading of the Amendment is that individuals’ right to carry a firearm for the purpose of self-defense, or any other lawful purpose, cannot be infringed.<sup>109</sup> Others have argued with strong support that the Amendment protects the states’ ability to maintain effective militias, and that it pertains to individuals only in connection with militia service.<sup>110</sup> The difference is crucial; there are potentially two separate rights at work here, with important consequences for incorporation. If the Second Amendment were a right held by the states, then incorporation would not be sensible.<sup>111</sup> However, if it protects a right of individual citizens to keep and bear arms, then incorporation would be justifiable.

1. The *Heller* Decision

The Supreme Court did not have occasion to address this central interpretive question until 2008, when in the landmark *Heller* case, it finally attempted to settle “the meaning of the Second Amendment.”<sup>112</sup> The Justices split 5-4, conceiving of two very different sorts of rights. Writing for the majority, Justice Scalia looked to grammar,<sup>113</sup> other constitutional provisions,<sup>114</sup> eighteenth century texts,<sup>115</sup> and historical commentaries, cases, and legislative materials<sup>116</sup> in concluding that “the Second Amendment confer[s]

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108. U.S. CONST. amend. II.

109. See, e.g., Respondent’s Brief at 2–4, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

110. See, e.g., Brief for Petitioners at 11–12, *Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

111. See *supra* Part I.B.1.

112. *Heller*, 128 S. Ct. at 2788.

113. *Id.* at 2788–90.

114. *Id.* at 2790–91.

115. *Id.* at 2791–2805.

116. *Id.* at 2805–17.

an individual right to keep and bear arms.”<sup>117</sup> Clearly comfortable with a right that extends past service in the militia, the Court held that the District of Columbia’s ban on handgun possession in the home, coupled with its “prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense,” violated the Second Amendment.<sup>118</sup>

In his dissent, Stevens was willing to concede that the Second Amendment protects an individual right, but only in a much more narrow sense.<sup>119</sup> Emphasizing the language of the prefatory clause,<sup>120</sup> as well as historical evidence of the meaning of “keep and bear Arms,”<sup>121</sup> he would have held that “the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia.”<sup>122</sup>

Breyer departed further from the majority. After a thorough historical inquiry,<sup>123</sup> he agreed with Stevens that the Amendment protects firearm ownership only in the context of the militia.<sup>124</sup> However, he also believed that the right is not absolute but rather subject to interest balancing, leaving a wide “zone” open to “regulation by legislatures.”<sup>125</sup>

Justice Scalia’s majority opinion flatly rejected these arguments, denying that the right to bear arms could be subjected to interest balancing by a legislature.<sup>126</sup> While conceding that the original purpose of the Second Amendment was to protect state militias, Scalia insisted that the “*central component* of the right itself” was not militia service per se but rather self-defense.<sup>127</sup>

However, Scalia conceded that the right to bear arms is not unconditional. For example, the Second Amendment contains no protection for types of weapons “not typically possessed by law-abid-

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117. *Id.* at 2799.

118. *Id.* at 2821–22.

119. *Id.* at 2822 (Stevens, J., dissenting).

120. *Id.* at 2824–26.

121. *Id.* at 2827–30.

122. *Id.* at 2831.

123. *Id.* at 2848–50 (Breyer, J., dissenting).

124. *See id.* at 2847 (“[T]he Second Amendment protects militia-related, not self-defense-related, interests.”).

125. *Id.* at 2848.

126. *See id.* at 2821 (majority opinion) (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”).

127. *Id.* at 2801 (emphasis in original).

ing citizens for lawful purposes.”<sup>128</sup> Citing English common law materials and early cases, the Court also acknowledged the “historical tradition of prohibiting the carrying of dangerous and unusual” firearms.<sup>129</sup> Scalia included a non-exhaustive list of “presumptively lawful regulatory measures” covering a wide range of regulations on gun ownership and use commonly in effect in jurisdictions across the United States today.<sup>130</sup> These include restrictions on the status of the owner, gun-free locations, and conditions on legal firearm sales.<sup>131</sup> The list, however, does not mention other common restrictions, such as trigger-lock laws that are less restrictive than those of the District of Columbia, restrictions on carrying guns in churches, or any others.

Most importantly for this Note, neither Scalia’s opinion nor either of the dissents addressed in any way the question of federalism. *Heller* tells us that the Second Amendment protects an individual right to bear arms, the core of which is ownership for lawful self-defense, although certain reasonable legislative restrictions on that right are presumptively permissible.<sup>132</sup> However, we do not know which levels of government can pass which sorts of regulations, and the *Heller* case did nothing to resolve this uncertainty. Instead, the Court’s opinion deliberately left open the question of incorporation.<sup>133</sup> In justifying its central holding that the Second Amendment is an individual right, Justice Scalia argued that it should be “unsurprising” that such a central question would have remained unresolved for so long due to the relatively recent historical development of the incorporation doctrine.<sup>134</sup> Even after *Heller*, the right to own a gun is one of the few rights contained in the first

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128. *Id.* at 2815–16 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939), the only post-Civil War Second Amendment case before *Heller*, which held that a ban on sawed-off shotguns did not violate the Amendment).

129. *Id.* at 2817 (internal quotation marks omitted).

130. *Id.* at 2816–17 & n.26.

131. *See id.* at 2816–17 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

132. *See id.*

133. *See id.* at 2813 n.23 (declining to address the issue of “incorporation, a question not presented by this case”).

134. *Id.* at 2816 (“For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods.”).

eight amendments to the Constitution that has not yet been applied against the states.<sup>135</sup>

Of course, the *Heller* court was not required to address the question of state limitations on gun ownership; any such discussion would have been dictum since the District of Columbia is a federal municipality. For this reason, *Heller* was an unusual test case whose relevance to other municipalities is not clear. However, numerous lawsuits have already been filed all over the country, citing *Heller* and arguing that its logic and holding should be applied against state and local governments as well.<sup>136</sup>

Most prominently, Alan Gura, following his successful representation of Dick Heller before the Supreme Court, immediately filed a lawsuit on behalf of six plaintiffs challenging Chicago's similar ban on handgun ownership.<sup>137</sup> Submitting his complaint the day after *Heller* was decided, he argued that the Fourteenth Amendment—through both the Privileges or Immunities and Due Process Clauses—incorporates the Second Amendment right to keep and bear arms against states and municipalities.<sup>138</sup> Gura went so far as to argue that “the right to keep and bear arms was the right whose incorporation was most urgently desired.”<sup>139</sup> Gura admits that the

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135. See Rosen, *supra* note 27, at 1515 & n.2.

136. Three circuit courts have already addressed the question, reaching very different results. See *Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009) (holding that *Heller* did not overrule the longstanding principle that the Second Amendment only limits the federal government); *Nordyke v. King*, 563 F.3d 439, 446, 457 (9th Cir. 2009) (finding that *Heller* left the question open, but that the Fourteenth Amendment incorporates the Second Amendment against the states); *Nat'l Rifle Ass'n of America, Inc. v. City of Chicago*, 567 F.3d 856, 860 (7th Cir. 2009) (deciding that if there is to be a shift away from precedent declining to incorporate the Second Amendment against the states, it is for the Supreme Court to do so). The Supreme Court has in fact granted certiorari to address the question of incorporation in the Seventh Circuit case. See *Nat'l Rifle Ass'n of Am., Inc.*, 567 F.3d 856, *cert. granted sub nom. McDonald v. Chicago*, 78 U.S.L.W. 3169 (Sept. 30, 2009) (No. 08-1521).

137. See Complaint, *McDonald v. City of Chicago*, No. 08-CV-3645 (N.D. Ill. June 26, 2008), 2008 WL 2571757.

138. See *id.* at ¶ 48 (“The Second Amendment right is incorporated as against the states and their political subdivisions pursuant to the Due Process Clause of the Fourteenth Amendment”); *id.* at ¶ 49 (“The Second Amendment right to keep and bear arms is a privilege and immunity of United States citizenship which, pursuant to the Fourteenth Amendment, states and their political subdivisions may not violate.”). Gura further argues that Chicago violates the Equal Protection Clause by making certain firearms “unregisterable.” *Id.* at 59.

139. Memorandum of Points and Authorities in Support for Plaintiffs' Motion for Summary Judgment at 7, *McDonald v. Chicago*, No. 08-CV-3645 (N.D. Ill. July 31, 2008), 2008 WL 3334070.

*Slaughter-House Cases* “foreclosed” incorporation of gun rights as a privilege or immunity of United States citizenship, but argues forcefully that the weight of more recent scholarship and case law suggests that *Slaughter-House* was wrong and should be revisited.<sup>140</sup> Barring this difficult step, he claims that the right to bear arms “clearly meets” the Court’s standard for incorporation through the Due Process Clause.<sup>141</sup> Gura will soon test these arguments before the Supreme Court.<sup>142</sup>

## 2. Judicial Reactions

In recent months, three circuit courts have addressed the question of incorporation head on. The Second Circuit spoke first, holding in January of 2009 that a New York state ban on the possession of nunchakus<sup>143</sup> does not violate the Second Amendment.<sup>144</sup> Relying primarily on the Supreme Court’s 1886 decision in *Presser v. Illinois*,<sup>145</sup> the court found that “it is settled law” that the Second Amendment binds only the federal government.<sup>146</sup> The Second Circuit panel acknowledged *Heller*’s declaration of an individual right to bear arms but emphasized the *Heller* Court’s reluctance to incorporate the right against the states.<sup>147</sup> Ultimately, the Second Circuit refused to go further than the Supreme Court. It is worth noting briefly that then-Judge Sonia Sotomayor signed on to the *per curiam* opinion along with two other circuit judges.<sup>148</sup> Of course, it is not clear whether her position may change now that she is less constrained by precedent in her new role as a Justice.

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140. *See id.* at 5–6.

141. *See id.* at 8–13 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149, 150 n.14, 155 (1968)).

142. *See Nat’l Rifle Ass’n of Am., Inc. v. Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom. McDonald v. Chicago*, 78 U.S.L.W. 3169 (Sept. 30, 2009) (No. 08-1521).

143. Nunchakus are defined as weapons comprised of two rigid objects “joined together by a thong, rope, or chain” and intended to be swung at a victim. *See Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009). While they are not firearms, the court, without any comment, treated them as “arms” within the meaning of the Second Amendment. *See id.* at 58–60.

144. *Id.* at 59.

145. 116 U.S. 252 (1886).

146. *Maloney*, 554 F.3d at 58–59 (citing *Presser*, 116 U.S. at 265 (declining to apply the Second Amendment against the states); *Bach v. Pataki*, 408 F.3d 75, 84, 86 (2d Cir. 2005) (relying on *Presser* to uphold a state law against a Second Amendment challenge)).

147. 554 F.3d at 58–59 (citing *District of Columbia v. Heller*, 128 S. Ct. 2783, 2783, 2813 n.23 (2008)).

148. *Id.* at 57.

By contrast, in April of 2009, Judge O’Scannlain wrote for a unanimous panel of Ninth Circuit judges that the Second Amendment right to bear arms, as enunciated in *Heller*, ranks as fundamental and does apply against state governments.<sup>149</sup> Reviewing late eighteenth-century legal history, the passage of the Civil War Amendments, the literature of Akhil Amar and other scholars, and the language of the *Heller* opinion, the court found that gun rights are “characteriz[ed] the same way other opinions described enumerated rights found to be incorporated.”<sup>150</sup> The court acknowledged the Second Circuit’s interpretation of *Presser* and *Heller*, but openly disagreed.<sup>151</sup> Instead, the Ninth Circuit found that incorporation was not only plausible by analogy, but was in fact one of “*Heller*’s suggestions.”<sup>152</sup> The court also pointed out that *Presser* “did not discuss selective incorporation through the Due Process Clause,” now the primary vehicle for incorporating rights against the states.<sup>153</sup> In any event, while the Second Circuit found that *Heller*’s silence on the issue foreclosed incorporation,<sup>154</sup> the Ninth Circuit was undeterred, holding that the Due Process Clause incorporates the Second Amendment against the states.<sup>155</sup>

Finally, in June of 2009, the Seventh Circuit, in a decision written by Judge Easterbrook and joined by Judges Posner and Bauer, weighed the two opinions by the Second and Ninth Circuits and sided with the former in declining to apply the Second Amendment against the states.<sup>156</sup> The court relied heavily on *Presser* as well as *United States v. Cruikshank*,<sup>157</sup> finding that they were “open to reexamination by the Justices themselves when the time comes,” but not to an inferior appeals court.<sup>158</sup>

However, the court also relied heavily on another factor that the Second Circuit did not explicitly discuss—federalism, which it called “an older and more deeply rooted tradition than is a right to

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149. *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009) (“We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.”).

150. *Id.* at 451–57.

151. *See id.* at 457 n.16 (citing *Maloney*, 554 F.3d at 58–59).

152. *Id.*

153. *Id.*

154. *See Maloney*, 554 F.3d at 59.

155. *See Nordyke*, 563 F.3d at 457–58.

156. *See Nat’l Rifle Ass’n of America, Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009) (citing *Nordyke*, 563 F.3d 439; *Maloney*, 554 F.3d 56).

157. 92 U.S. 542 (1875) (holding that the Second Amendment only applies to the national government).

158. *Nat’l Rifle Ass’n*, 567 F.3d at 858.

carry any particular kind of weapon.”<sup>159</sup> Pointing to the states’ traditional role as policy laboratories, Judge Easterbrook argued that differences in policy across state lines should be “cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule.”<sup>160</sup> In other words, while the Second Circuit simply relied on precedent when it declined to incorporate the Second Amendment, the Seventh Circuit affirmatively offered its support for the idea of a federalized right.

No doubt noting this split among the circuits, the Supreme Court will soon reexamine the field of gun rights, addressing the question of incorporation directly.<sup>161</sup> In the meantime, several scholars have weighed in.

### 3. Scholarly Reactions

Many scholars today seem to assume that incorporation is inevitable. Judge J. Harvie Wilkinson of the Fourth Circuit recently published a blistering critique of the *Heller* opinion as non-textual, antidemocratic, anti-federalist, and likely to cause an endless wave of litigation.<sup>162</sup> On the federalism front, he writes that “the Court would hardly have gone to such great lengths to recognize” a strong, individual right to keep and bear arms “if it did not plan to incorporate that right against the states as well.”<sup>163</sup> To the same end, he points out that the Court “proceeded to all but label” *Cruikshank*,<sup>164</sup> an 1875 case decades older than the incorporation doctrine, “erroneous” for failing to engage in the sort of incorporation inquiry seen in later cases.<sup>165</sup> Finally, Wilkinson argues that the *Heller* Court’s not-so-subtle hints at a future Second Amendment docket, coupled with its deliberately non-exhaustive list of presumptively legal gun regulations, strongly suggest that state and local regulations will be invalidated by the Supreme Court “when, to the surprise of no one, it incorporates the Second Amendment against the states.”<sup>166</sup>

Many others have agreed. Robert Levy, Gura’s co-counsel in the *Heller* case, wrote that the Second Amendment “will no doubt

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159. *Id.* at 860.

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

161. *See Nat’l Rifle Ass’n*, 567 F.3d 856, *cert. granted sub nom.* McDonald v. Chicago, 78 U.S.L.W. 3169 (Sept. 30, 2009) (No. 08-1521).

162. Wilkinson, *supra* note 6.

163. *Id.* at 312.

164. 92 U.S. 542 (1875).

165. Wilkinson, *supra* note 6, at 312.

166. *Id.* at 313.

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be incorporated,” leaving only the question whether it will occur through the Due Process Clause or as a privilege or immunity of U.S. citizenship.<sup>167</sup> Professor Chemerinsky thinks that “now that five Justices have found an individual right to have guns . . . incorporation will follow.”<sup>168</sup> Others have pointed to powerful pro-gun interest groups, strong opinions on both sides, and the *Heller* Court’s wide-open language about permissible regulations in predicting a rapid and widespread stream of lower court cases challenging state and local regulations.<sup>169</sup> Some have resorted to hyperbole, predicting an “avalanche” of Second Amendment claims challenging various restrictions on gun ownership.<sup>170</sup> In addition, Akhil Amar recently expressed his view that incorporation will happen soon, noting the convergence of two trends: a recent groundswell of liberal scholarship focusing on incorporation, and also the fact that “nearly every provision of the Bill of Rights” has been incorporated.<sup>171</sup> Indeed, even before *Heller* was decided, without the benefit of any cases holding that the Second Amendment protects an individual right, some scholars had openly called for incorporation.<sup>172</sup>

However, too much focus is on the matter of incorporation per se. As this Note has argued, even an incorporated right need not apply equally to the states and the federal government. An unwieldy federal docket of Second Amendment cases is not inevitable: the key is to let federalism work by simply leaving most regulatory authority with the state governments. There are several good reasons to focus on federalism rather than incorporation, emanating from the models of incorporation advanced by Professors Amar and Rosen as well as Justice Harlan. Even if the Second Amendment is

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167. Levy, *supra* note 6.

168. Erwin Chemerinsky, *The Heller Decision: Conservative Activism and its Aftermath*, CATO UNBOUND, July 25, 2008, <http://www.cato-unbound.org/2008/07/25/erwin-chemerinsky/the-heller-decision-conservative-activism-and-its-aftermath/>.

169. See Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. L. REV. 2035, 2040–42 (2008).

170. Dennis A. Henigan, *The Heller Paradox: A Response to Robert Levy*, CATO UNBOUND, July 16, 2008, <http://www.cato-unbound.org/2008/07/16/dennis-henigan/the-heller-paradox-a-response-to-robert-levy/>.

171. John Schwartz, *Conflicting Rulings on Guns Open Way to Supreme Court Review*, N.Y. TIMES, June 17, 2009, at A14 (quoting Akhil Reed Amar).

172. See, e.g., Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 1 (2007) (“The Second Amendment, alternately maligned . . . and praised . . . , should be recognized by the United States Supreme Court to apply to the several States through the Fourteenth Amendment privileges or immunities clause or, alternatively, through the due process clause.”).

formally incorporated against the states in the near future, states should retain substantial discretion to regulate guns free from federal interference.

*B. A Proposal: Federalize the Right to Keep and Bear Arms*

As we have already seen, under the Court's doctrine of selective incorporation, national rights are applied against the states when they are held to be so fundamental as to be "implicit in the concept of ordered liberty."<sup>173</sup> By mechanically incorporating a national right against state governments, the Supreme Court restrains the discretion of states to determine the scope of that right, shifting interpretive responsibility from each individual state to the federal judiciary. For a number of reasons, this is not a desirable result. The inevitable result of mechanical incorporation is uniformity—each state would be held to the same standard as the federal government.<sup>174</sup> In some situations, however, it would be far more sensible to allow states some range of discretion to enforce federal rights according to their own unique circumstances. This will require a more refined model of incorporation, one that allows states and local governments to tailor gun policies to their own unique situations. There are at least five reasons why the discretion to develop the details of gun regulation should be left to states rather than the federal courts.

1. Interest Balancing

First, even the most ardent libertarian gun-rights advocate must admit that guns, whether used in the military or in civilian self-defense, lawfully or unlawfully, are capable of killing people. So, while gun ownership may be a component of the liberty protected by the Bill of Rights, a countervailing interest in protecting human life lies on the other side. In fact, if we accept the Court's characterization of gun rights as being centered around a core right to self-defense, as opposed to military service,<sup>175</sup> then a power-

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173. *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937); *see also supra* text accompanying notes 64–69 (discussing the mechanism of selective incorporation).

174. *See Benton v. Maryland*, 395 U.S. 784, 795 (1969).

175. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008) (pointing out that the District of Columbia's ban on handgun ownership "makes it impossible for citizens to use them for the core lawful purpose of self-defense"). It would be an understatement to call this a controversial view. Justice Breyer mocks Justice Scalia's use of limited historical authority to support the "far-reaching proposition that the Second Amendment's primary concern is not its stated concern about the militia, but rather a right to keep loaded weapons at one's bedside to shoot intruders." *See id.* at 2869 (Breyer, J., dissenting).

ful interest in life must be balanced on each side—potential gun victims' interest in physical security on the one side, and lawful gun owners' interest in defending themselves on the other. In more general terms, any gun regulation will necessarily curtail someone's right to self-defense with a firearm.

Justice Scalia's majority opinion in *Heller* purported to categorically reject Justice Breyer's proposed interest-balancing approach.<sup>176</sup> Yet Scalia recognized that the District of Columbia has a powerful interest in combating gun violence, which can be addressed using a number of policy tools.<sup>177</sup> Each of these would restrict private citizens' rights to lawful handgun ownership.<sup>178</sup> In other words, Justice Scalia may not call it interest balancing, but he acknowledges that the District of Columbia must make difficult choices about how to regulate guns.<sup>179</sup>

Balancing state and individual interests, even in the face of fundamental, enumerated constitutional rights, is nothing new. For example, Justice Brandeis' dissent in *Pennsylvania Coal Co v. Mahon*<sup>180</sup> argued that in the Fifth Amendment context "every restriction upon the use of property . . . deprives the owner of some right theretofore enjoyed . . . [b]ut a restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking."<sup>181</sup> Regulatory takings, of course, are not the same as gun control, and Brandeis' dissent is not law, but the reasoning is analogous: local governments must have some ability to regulate in ways designed to protect their citizens, even when constitutional rights

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176. *Id.* at 2821 (majority opinion) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").

177. *See id.* at 2822.

178. *See id.* ("We are aware of the problem of handgun violence in this country . . . . The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns.").

179. Some scholars also deplore the practice of interest balancing, or at least the rhetoric. *See, e.g.,* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 711–15 (1994) (arguing that interest balancing is not inevitable and calling instead for greater focus on "defining the boundaries on political authority").

180. 260 U.S. 393 (1922).

181. *Id.* at 417 (Brandeis, J., dissenting); *see also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (sustaining a municipality's zoning regulations over due process objections, while positing that "while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation").

are implicated.<sup>182</sup> The federal government must sometimes be able to do so as well,<sup>183</sup> but surely federal regulations are more troubling than state ones, if only because they apply to the citizens of all fifty states, eliminating any possibility of policy experimentation by the states.

Brandeis argued that within federal constitutional limits “it is for a state to say how its public policy shall be enforced.”<sup>184</sup> Similarly, when it comes to guns, states must have some latitude. As with property rights, citizens’ use of guns is necessarily subject to regulation, since the state has a powerful interest in maintaining public safety. One can enjoy many rights without endangering public safety—the free exercise of religion, or jury service, or the right to competent counsel are all examples—but the right to gun ownership has the potential to be deadly.<sup>185</sup> Because gun laws implicate the state governments’ interest in maintaining public safety, the Second Amendment is not the sort of purely individual right that is well-suited to mechanical incorporation. Rather, states must be able to tailor gun laws to their own citizens’ needs.

## 2. Explicit State Interest

Second, the states’ regulation of gun use arguably deserves more latitude than that of other issues implicating guarantees in the Bill of Rights, because unlike any other constitutional rights, the state interest is present in the text of the Second Amendment: “A well regulated Militia, being necessary to the security of a free State . . . .”<sup>186</sup> To be sure, the militia-protecting function of gun

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182. Indeed, in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the Court allowed that “government may execute laws or programs that adversely affect recognized economic values.” *Id.* at 124. The *Penn Central* balancing test reflects the need to balance state and private interests. *See id.* at 123–24.

183. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 174–75 (1979) (holding that “Congress could assure the public a free right of access” to a formerly private marina as an exercise of its Commerce Clause power, even though this would nearly amount to a taking).

184. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 421 (1922) (Brandeis, J., dissenting).

185. Even other activities that a state might disdain, whether flag burning or nude dancing or telemarketing, do not implicate the same sort of strong interest that states hold in maintaining public safety.

186. U.S. CONST. amend. II. At least one prominent scholar has argued that the presence of this prefatory, or “justification” clause, should not be read to distinguish the Second Amendment from other rights, since such clauses were commonplace in contemporary state constitutional provisions. *See Eugene Volokh, The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998). This is clearly an important historical insight, as Professor Volokh convincingly argues that prefatory

ownership is less relevant today than it was when the Bill of Rights was ratified,<sup>187</sup> but nevertheless it remains an explicit constitutional priority, and therefore in addition to the state's interest in protecting its citizens we must add an interest in militia maintenance.<sup>188</sup> This could change, by constitutional amendment or at least a congressional statute, but today the unamended text by its own terms continues to protect state militias. Judge Wilkinson writes that *Heller* was wrongly decided in part because of its "absence of a commitment to textualism."<sup>189</sup> But even if Wilkinson is right, and *Heller* was wrong, the state continues to retain a prominent place in the text. So, even if the Second Amendment protects an individual right, textualists should at least acknowledge the states' interest in gun regulation.

### 3. Uniquely Polarizing

Third, while some degree of gun regulation is surely necessary, gun control is one of the most deeply polarizing, divisive issues across the nation today,<sup>190</sup> suggesting that it is particularly important that the level of government that takes responsibility for regulating is as accountable to its citizens as possible.<sup>191</sup>

The gun rights lobby is one of the most powerful in the country, and it exists with no effective counterpart, although Americans

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clauses are often both underinclusive and overinclusive. *Id.* at 804–06. But while he may be correct that prefatory clauses often do not precisely reflect the will of constitutional drafters, he cannot overcome the fact that our Second Amendment is the only surviving rights provision in our Constitution that contains such a clause. Presuming that its inclusion was deliberate, it would be odd to say that it has *no* content.

187. The Supreme Court has long recognized that the National Guard now represents "the modern Militia" contemplated by the Constitution. *Maryland v. United States*, 381 U.S. 41, 46 (1965).

188. Even if the core of the modern Second Amendment is self-defense, there is a deep common law tradition that recognizes it as a "declar[ation] that a well regulated militia is necessary to the security of a free state." RAWLE, *supra* note 30, at 125; *see also* AMAR, *supra* note 20, at 147 (discussing the theory that the Bill of Rights was not so much law-creating as "declaratory of certain fundamental common-law rights").

189. Wilkinson, *supra* note 6, at 254. Judge Wilkinson's textualist critique of *Heller* appears as the first of his four primary arguments, lending it particular emphasis. *Id.*

190. *See* KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 6 (2006) (presenting statistics about Americans' desire for stronger gun control laws, but noting the overwhelming effectiveness of advocacy organizations, especially the National Rifle Association, in thwarting legislative efforts to tighten gun control laws).

191. *See generally* ELY, *supra* note 53.

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hold very strong opinions on both sides.<sup>192</sup> Citizens of Alabama and California may look at gun control in widely different ways. And of course, there is plenty for lawyers to argue about; after all, the result in *Heller* was not obvious or inevitable.<sup>193</sup> As Mark Rosen argues, it is in precisely this sort of situation, when citizens' interests vary and the law is unclear, that it is most important that regulation take place at a more local level of government.<sup>194</sup>

There remains the substantial problem that localized gun regulation inevitably leads to negative externalities. As gun control skeptic James Jacobs has pointed out, "Some communities wishing to ban private possession of firearms in public places . . . will find their ambition undermined by a neighboring community's policy of allowing liberal access to firearms."<sup>195</sup> This is not a problem unique to guns—decentralization of any sort of regulation may produce externalities—but decentralizing gun regulation may have unusually serious consequences since guns can easily move across jurisdictional lines when purchased, meaning that any one town's use and possession regulations are affected by its neighbor's purchasing regulations.<sup>196</sup>

For this reason, local governments may find that restrictions on gun possession and use may be most effective, since they will capture guns purchased both within and outside of their jurisdic-

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192. Kristen Goss has persuasively argued that while a powerful undercurrent of support for gun control runs through American society, no effective "movement" has mobilized on the national level to combat the National Rifle Association because "opponents of gun control have accommodated themselves better to the stubborn realities and political inconveniences of a fragmented, federalist system than have the supporters of gun control whose strategies were . . . politically naïve." Goss, *supra* note 190, at 30; *see also id.* at 22–30.

193. *See* Wilkinson, *supra* note 6, at 271 (citing MARK V. TUSHNET, *OUT OF RANGE: WHY THE SUPREME COURT CAN'T END THE BATTLE OVER GUNS* xvi (2007) (arguing, after a thorough survey of the legal and historical literature, that "the arguments about the Second Amendment's meaning are in reasonably close balance")).

194. *See* Rosen, *supra* note 27, at 1601–03; *see also supra* Part I.B.2.

195. JAMES JACOBS, *CAN GUN CONTROL WORK?* 224 (2002).

196. *See* ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 142–43 (3d ed. 2004) ("[D]espite our country's geographic size and diversity, the ease of long-distance travel means that the flow of arms from low-regulation to high-regulation states continues nearly unabated."). Professor Spitzer's book calls for much stricter gun control laws, finding that "meaningful gun regulation must be federal." *Id.* at 144. However, his pre-*Heller* conclusion that "there is no constitutional barrier to stricter gun laws, even including a ban on the possession of handguns," is clearly incorrect today, and his policy arguments in favor of increasing federal regulation fail to address many of the arguments advanced in this Note. *Id.* at 146; *see also id.* at 142–158.

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tion.<sup>197</sup> Such regulations are likely preferable to sales restrictions, which can easily be evaded by cross-border transactions. There are also other options available, without simply resorting to regulation at a higher level of government. Heavier policing of gun entry into jurisdictions is an option, although not one without cost. Finally, jurisdictions may be able to negotiate and create collaborative schemes to regulate gun ownership and use in various ways.

In any event, the costs to local regulatory initiatives associated with movement of guns across jurisdictional borders are outweighed by the many other benefits of decentralization. Leaving the details of gun regulation to the states will be more likely to leave citizens free from regulations they do not support; if nothing else, one can move to a different state with more suitable gun regulations. In other words, individual citizens' welfare is more likely to be maximized when more regulatory authority is vested in states and municipalities.

#### 4. Lack of Bright Lines

Fourth, while implying that some types of gun regulation are acceptable and others are not, the *Heller* decision offers no bright lines to distinguish them.<sup>198</sup> The Second Amendment itself offers no meaningful guidance, either. So, for instance, how can we know whether a ban on carrying handguns near a church is one of Justice Scalia's "presumptively lawful regulatory measures"<sup>199</sup> or rather something that goes to the core of handgun ownership? Gun rights are arguably so tied up with both crucial self-defense interests and unacceptable gun violence that principled policy, whether regulatory or libertarian, may be simply impossible at the national level.

The level of government that promulgates regulations may make a significant difference. After all, it is not at all clear how the federal government might justify constitutionally meaningful limitations on regulation. As noted above, neither constitutional text nor precedent is helpful.<sup>200</sup> So, Judge Wilkinson argues that if federal courts continue to involve themselves in scrutinizing local gun regulations, they will "be forced . . . to decide contentious questions

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197. See JACOBS, *supra* note 195, at 224–25 (“[A] community that wishes to enforce its ‘no guns on the streets’ law is free to do so, aggressively arresting and prosecuting unlicensed gun carriers.”).

198. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008) (asserting that some gun regulations do not violate the Second Amendment).

199. *Id.* at 2817 n.26.

200. See *supra* discussion accompanying notes 108–111.

without clear constitutional guidance.”<sup>201</sup> He compares the countless “subsidiary issues” surrounding gun regulations to “a thicket . . . that will thoroughly ensnare” the Court if it decides to engage in any substantial judicial scrutiny of local gun regulations.<sup>202</sup> States, at the very least, have a narrower reach in formulating policy and are more directly accountable to their citizens; it is surely easier for a disgruntled citizen to appear at his state legislature and petition for a change in policy than it is to appear in Congress. Finally, it is far less burdensome, as a last resort, to move to a state with more salutary gun laws than it is to move to another country.<sup>203</sup>

An added benefit is that allowing states a degree of latitude in passing gun control regulation tends to encourage innovation. One of the greatest advantages of federalism is that states can act as laboratories, tailoring policies to their own polities and finding new solutions to policy problems.<sup>204</sup> Judge Wilkinson, for example, points favorably to Richmond, Virginia’s approach to gun control, which is markedly different from the District of Columbia’s and arguably more effective.<sup>205</sup> In the past decade, Richmond has “reduced firearm-related violence dramatically,” while retaining lax restrictions on gun sales, by “severely punishing all gun crimes, including those as minor as illegal possession.”<sup>206</sup> Crucially, “[o]ther cities . . . have visited to see what Richmond is doing.”<sup>207</sup>

If the federal courts attempt to set uniform federal standards for gun regulation, they will inevitably “limit the space in which states and cities can innovate.”<sup>208</sup> Cities like Washington and Richmond differ in many ways, and something substantial is lost if they cannot experiment and tailor their gun laws to protect their citizens’ lives and liberty. The stakes are high when it comes to gun regulation, and scholars like James Jacobs have concluded that we

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201. Wilkinson, *supra* note 6, at 275. He argues that the inevitable result will be something like the Court’s abortion jurisprudence, in which it issues a series of opinions attempting to balance powerful interests on both sides of the debate, without any “relationship between [the right] and the text or structure of the Constitution.” *Id.* at 257–58.

202. *Id.* at 280.

203. *See id.* at 320–21 (arguing that citizens unhappy with restrictive gun laws “remain free to move to other localities more protective of gun rights . . . . Under the Court’s rigid national rule, moreover, no one will be able to exercise the liberty to live in a city in which handguns are prohibited”).

204. *See id.* at 319.

205. *Id.*

206. Gary Fields, *Going After Crimes—and Guns*, WALL ST. J., Aug. 5, 2008, at A12.

207. *Id.*

208. Wilkinson, *supra* note 6, at 320.

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simply cannot afford to lose the experimentation, innovation, and empirical comparisons that are possible only when regulation is localized.<sup>209</sup>

##### 5. Lack of Minority Interest

Fifth, and finally, there is a deep and powerful sense in American constitutional law, at least since the famous fourth footnote in *United States v. Carolene Products Company*,<sup>210</sup> that federal courts should protect individual rights with the highest degree of scrutiny when the rights of discrete and insular minorities are implicated or when participation in the political process is at stake.<sup>211</sup> Arguing that these two interests are inextricably linked, John Hart Ely has called for a “participation-oriented, representation-reinforcing approach to judicial review.”<sup>212</sup> In adjudicating cases that do not directly implicate participation in the political process, courts may stand on firmer ground by deferring to legislative judgments on contentious matters.

This view enjoys particularly strong support in the context of incorporation. John Harrison has argued that the Fourteenth Amendment is not about substance but rather “equality through and through;”<sup>213</sup> it was intended not to set national standards for state regulation, but rather to ensure that state laws—whatever their substance—would be applied in a race-neutral way.<sup>214</sup> Placing the Fourteenth Amendment squarely in the context of racism suggests that states should be largely free of federal intervention as they regulate gun rights, so long as they do so in a race-neutral way.

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209. See also JACOBS, *supra* note 195, at 224 (“The firearms traditions in small town and urban America are different. Level of trust and anonymity is different. The level of policing is different. . . . There is much that could be learned from evaluating the efforts of jurisdictions that have a solid political consensus to implement such initiatives. If it turns out that they can be done well in one jurisdiction, that alone will encourage other jurisdictions to follow suit.”).

210. 304 U.S. 144 (1938).

211. See *id.* at 152–53 n.4 (noting for the first time that “prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial inquiry”).

212. ELY, *supra* note 53, at 87 (citing 304 U.S. at 152–53 n.4); see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 6 (2005) (arguing that a heightened standard of judicial review is appropriate when enforcing the “Constitution’s democratic objective”).

213. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1454 (1992).

214. See *id. passim*.

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This is not a trivial point. The Second Amendment has some historical significance in protecting freed slaves in the late nineteenth century. The Freedman's Bureau Act, after all, explicitly affirmed free blacks' right to arms,<sup>215</sup> and part of the purpose of the Fourteenth Amendment was indisputably to ensure that blacks would not be disarmed.<sup>216</sup> However, no one alleges that gun rights are a core element of racial equality today, and, after all, *Heller* clearly prevents legal disarmament, rendering much of this historical discussion moot. We tend not to perceive racial minorities' rights as closely tied to gun rights.<sup>217</sup>

Uniformity in enforcing federal rights is more important in cases where protection of minority rights is a core concern. This is not such a case; guns are generally not part of identity. In terms of racial equality, regulation of guns at the federal level would add little or nothing, while coming at great cost to the states' ability to make policy judgments according to their own citizens' wishes.

#### CONCLUSION

After many years of effectively lying dormant, the Second Amendment has quickly and suddenly become relevant. The *Heller* Court held that it is an individual right to keep and bear arms: the government cannot ban handgun ownership. Soon, the Court will determine whether the states will be held to the same standard as the federal government regarding gun regulation. This Note has argued that whether or not the Second Amendment is formally incorporated against the states, it would be a costly mistake for the federal government to set uniform standards for gun regulation throughout the fifty states.

The federal courts should leave the details of gun regulation to local governments for several reasons. First, the Second Amendment may protect an individual right, but it is not purely individual—the states retain a powerful interest, and a deep responsibility,

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215. See AMAR, *supra* note 20, at 196 n.\* (citing the Freedman's Bureau Act, 14 Stat. 173, 176 (1866) (guaranteeing freed slaves the "full . . . benefit of all laws and proceedings concerning personal liberty, personal security, and [property,] including the constitutional right to bear arms") (emphasis added)).

216. See *id.* (discussing the close connection between the Freedman's Bureau Act, the 1866 Civil Rights Act, and the Fourteenth Amendment, which were all passed by the same Republican Congress).

217. In theory, gun rights could implicate racial authority if, say, a city did not adequately police minority neighborhoods. In 2009, however, at least in the sorts of cities where legal challenges to gun regulations tend to be brought, self-help with firearms is discouraged. We tend to rely on police for safety, and there are surely legitimate legal avenues for challenging racially unequal police protection.

to ensure their citizens' safety. While the state interest in maintaining a militia, explicit in the Second Amendment's text, is anachronistic, our substantial reliance on state-run police forces for physical security means that states continue to retain a crucial interest in regulating guns.<sup>218</sup> Unlike the rights to free speech and judicial process, the exercise of gun rights is dangerous and implicates important state policies. In addition, because gun culture and gun violence vary so much across state lines, federal policymakers cannot maintain safety across the nation while complying with *Heller*; effective policymaking at the national level is impractical. Finally, gun ownership does not sufficiently implicate any discrete and insular minority groups in modern America so as to justify judicial intrusion into local regulatory processes.

While recognizing that decentralization carries risks—particularly because guns can be carried across state borders—this Note argues that these considerations suggest that gun regulation should remain largely localized. The Supreme Court has declared that the Second Amendment is an individual right and that an absolute ban on effective gun ownership is unconstitutional, but it should not go further at the expense of federalism. The Court should not delve into the details of gun regulation; instead, it should accept a federalized Second Amendment.

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218. Cf. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1308–10 (2009) (noting that the modern state's monopoly on legitimate violence "relieve[s] individuals of the necessity for self-protection").