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McDonald v. Chicago: Five Takes

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Five Takes on *McDonald v. Chicago*
Brannon P. Denning* & Glenn H. Reynolds**

**INTRODUCTION**

The Supreme Court’s ruling in *District of Columbia v. Heller*1, that the Second Amendment protects an individual right to arms that is judicially enforceable after the fashion of other individual rights, answered one longstanding question in constitutional law. But another question remained: Would the Supreme Court proceed to incorporate the right to arms against states and localities, or would it, as some urged, leave the Second Amendment as a purely federal constitutional right, enforceable against the national government but not against anyone else?

*McDonald v. Chicago*2 answered that question, making clear that the Second Amendment’s right to arms provides protection to individuals regardless of whether the infringement takes place at the hands of federal, state, or local officials. This brought to an end the first era of Second Amendment scholarship, in which discussion on the part of scholars was largely untempered by actual judicial authority. Now, though scholars may (and no doubt will) charge the Supreme Court with error, they are no longer writing on a blank slate. Instead, as with other areas of constitutional law, the discussion will focus on whether the judiciary is doing what it should do, as opposed to focusing on whether the judiciary will do anything at all.

Following, in our now well-known format,3 are five takes on what the *McDonald* case means. While these do not, of course, exhaust the potential ramifications of the *McDonald* decision, we hope that they will at least serve as a springboard for numerous lines of discussion. First, we argue that the Second Amendment, post-*McDonald*, is now normal constitutional law, constraining governments after the fashion of other, familiar provisions of the Bill of Rights. This change in and of itself represents a substantial departure from prior history. Second, we look at the argument that the *McDonald* result was, in current parlance,

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2130 S.Ct. 3020 (2010).
“overdetermined.” Third, we note the surprisingly large role played by the racial history of gun control, and Reconstruction views of the right to arms, in the *McDonald* decision and what that might portend for future case law. Fourth, we look at the second death (or is it the rebirth?) of the Privileges or Immunities Clause following the plurality’s (and dissenters’) rejection of the *McDonald* petitioners’ invitation to incorporate the Second Amendment via that Clause. Fifth and finally, we look at *McDonald*’s likely reception in the lower courts. A brief conclusion follows.

I. TAKE ONE: THE SECOND AMENDMENT AS NORMAL CONSTITUTIONAL LAW

For a long time, the Second Amendment lived in something of a constitutional netherworld. Though of enormous interest to Americans in general, it received virtually no attention from the legal academy, and its treatment by courts was, to put it mildly, dismissive. Perhaps the most significant consequence of *McDonald* is that the Second Amendment right to arms is now part of ordinary constitutional law.

That fact represents quite a change from the status quo ante. For most of its existence, the Second Amendment did no real work, and was seldom cited – and never followed – in court. One reason for its late appearance, of course, is that gun control laws were (with the significant exception of Jim Crow enactments) a product of the twentieth century. With no federal gun control laws, and no doctrine of incorporation, the first century-plus after the Second Amendment’s ratification offered few opportunities for judicial implementation.

The 1934 National Firearms Act, the first significant federal gun control measure, produced the Supreme Court’s only real Second Amendment case of the twentieth century, *United States v. Miller*. *Miller* held only that the Court could not take judicial notice of the usefulness of a sawed off shotgun to a well-organized militia, remanding that question for further fact-finding. The opinion, however, wound up being cited, and usually mis-cited, in support of the proposition that the Second Amendment protected only some sort of state right to have an organized militia, and not

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4For a summary of the federal gun control regime, see JAMES B. JACOBS, CAN GUN CONTROL WORK? 19-35 (2002).
5307 U.S. 174 (1939).
an individual right. Acting in a non-judicial capacity, Chief Justice Warren Burger later opined:

One of the frauds – and I use that term advisedly – on the American people has been the campaign to mislead the public about the Second Amendment. The Second Amendment doesn’t guarantee the right to have firearms at all. . . [The Framers] wanted the Bill of Rights to make sure there was no standing army in this country, but that there would be state armies.  

Burger produced no scholarly evidence for this proposition, which would likely have produced some rather awkward consequences had it been adopted, but gun control advocates did produce some law review literature making a similar point. Things began to change after the publication of Sanford Levinson’s *Yale Law Journal* essay, *The Embarrassing Second Amendment*, in which Levinson, noting the paucity of academic writing on the Second Amendment, observed:

I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even “winning,” interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.

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12Id. at 642 (footnote omitted).
The scholarly near-silence that had accompanied the Second Amendment for its first two centuries began to dispel after Levinson’s piece, in effect, granted permission for writers to discuss the subject, and within a few years it was possible to speak of a “standard model” of Second Amendment interpretation, one which featured an individual right to arms that was of clear existence, if of uncertain scope.\textsuperscript{13} Though the matter was not free from controversy, the Second Amendment was at least on the scholarly radar.

Outside of politics and scholarship, however, the Second Amendment was still not doing any work. Courts continued to dismiss its invocation (usually by incarcerated felons); and although other Bill of Rights provisions, such as the First, Fourth, or Sixth Amendments continued to be routinely enforced by the courts – sometimes even in favor of rather unsavory actors – the Second Amendment enjoyed no such position.

With the Court’s \textit{Heller} opinion, the Second Amendment left the field of scholarship and became judicially enforceable, at least against the federal government. Yet even post-\textit{Heller}, some wondered whether (or feared, or hoped that) the Second Amendment would remain enforceable only against the federal government, and not against states and localities, the entities responsible for the vast majority of gun control laws.\textsuperscript{14} This result would have left the Second Amendment as something of an anomaly, certainly in a different position than other popular provisions of the Bill of Rights, or even judicially-found rights, such as the right of privacy, which are not enumerated in the Bill of Rights at all.\textsuperscript{15}

With its incorporation against the states post-\textit{McDonald}, the Second Amendment now leaves the netherworld it inhabited previously, and enters the realm of what might be considered “normal constitutional law.” We now have a constitutional right recognized in no uncertain terms by the Supreme Court, and incorporated against the states. Litigants may now invoke that right without having to overcome questions of whether the right exists, whether it can be invoked by individuals, or whether it applies only against the states. For this reason, the Second Amendment, long treated like an embarrassing stepchild, joins other provisions of the Bill of Rights, not as some odd exception, but as normal constitutional law.

\textsuperscript{14}See Denning & Reynolds, \textit{supra} note 3, at 679-88 (discussing incorporation issue).
The question remains whether the federal courts will protect Second Amendment rights vigorously, as they generally do with regard to First Amendment free speech rights, or lackadaisically, as they often seem to do with regard to Fourth Amendment search and seizure rights. At least these questions will now be decided in court and not relegated to the arenas of scholarship and politics alone. Courts will now be forced to address, rather than evade, Second Amendment questions.

II. TAKE TWO: *McDonald* AS AN OVERDETERMINED CASE

To describe a result as “overdetermined” is to say that multiple factors brought it about, any one of which by itself would have been sufficient to produce that result. Legal scholars often use the term to describe, say, a Supreme Court decision whose outcome was nearly inevitable because of the multiple factors pushing the Court in a particular direction. We argue in this Part that *McDonald* can be seen as the result of at least four factors, any one of which could have been sufficient to produce the result.

First, there is the *Heller* decision itself, which eased the way for the plurality (and even Justice Thomas) to apply the Second Amendment against the states. Second, there is the Court’s own selective incorporation framework, which incorporated “fundamental” rights through the Fourteenth Amendment. Third, there is the history of Reconstruction and the Fourteenth Amendment that, unlike the somewhat ambiguous eighteenth century history, seemed to more fully embrace an individual right to keep and bear arms with a self-defense component at its core, and without the civil responsibility component alleged to qualify the Framers’ vision of an armed republic. Finally, and perhaps most important, is the persistent unpopularity of draconian gun control measures like Chicago’s, which make it well-nigh impossible for individuals to possess certain arms for self-protection. Not only are such measures unpopular; their unpopularity is rooted in part in the public’s belief that such measures violate rights guaranteed by the Second Amendment.

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A. Heller

The Heller decision itself undoubtedly contributed to the McDonald decision in both obvious and not-so-obvious ways. First, the Court unanimously rejected the “collective rights” theory of the Second Amendment; even the dissents concluded that the right guaranteed was an individual one. The majority argued that at the heart of the right was the ability of individuals to engage in lawful self-defense against aggressors. The self-consciously originalist posture of Justice Scalia’s opinion, moreover, eased the way for the McDonald plurality’s conclusion that the right (to possess arms for self-defense) was indeed seen as a fundamental one by both the Framers of the Second Amendment as well as those of the Fourteenth Amendment. Indeed many commentators regarded the Second Amendment’s incorporation as nearly a foregone conclusion after Heller.

Largely because of the triumph of incorporation, discussed more below, Americans have come to expect that the federal and state governments will be required to play by the same constitutional rules when it comes to individual rights. The relationship between McDonald and Heller is thus not unlike the relationship between Bolling v. Sharpe and Brown v. Board of Education. Recall that Bolling, decided the same day as Brown, desegregated schools in the District of Columbia. Despite the lack of an Equal Protection Clause in the Fifth Amendment, the Court found the Fifth Amendment’s Due Process Clause contained an “equal protection component.” According to the Court, in light of Brown, “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”

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19128 S. Ct. at 2797; id. at 2822 (Stevens, J., dissenting); id. at 2848 (Breyer, J., dissenting); Denning & Reynolds, supra note 3, at 673 (noting that “the Court unanimously interred the old ‘collective’ right interpretation of the Second Amendment”).

20128 S. Ct. at 2797 (holding that the right guaranteed was “the individual right to possess and carry weapons in case of confrontation”).

21See infra notes 53-56 and accompanying text.

22See, e.g., Dale Carpenter, Heller and the Incorporation of the Second Amendment, VOLOKH CONSPIRACY (June 27, 2008, 12:01 PM) http://volokh.com/ (“Whichever specific route the lower courts now choose — the Citizenship Clause, the Privileges and Immunities Clause, the Due Process Clause — it seems the Supreme Court is providing a road map and is strongly suggesting that the ultimate destination is incorporation.”).


25Bolling, 347 U.S. at 499 (noting that “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive” and that “discrimination may be so unjustifiable as to be violative of due process”). The phrase “equal protection component” appears to have been first used in Dep’t of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

26347 U.S. at 500 (footnote omitted).
the Court correctly bet that the public was willing to overlook the unconvincing discovery (or rediscovery) of the Fifth Amendment’s equal protection element, apparently because an opposite result would have been unacceptable. *Bolling*—whatever its flaws—will remain, with *Brown*, what Dan Farber once termed a “bedrock precedent,” unlikely to be revisited by future Courts.

It would have been difficult for the Court to enforce the Second Amendment against the federal government in *Heller*, then turn around in *McDonald* and leave gun owners to the tender mercies of state and local governments, which were much more likely than Congress to enact strict gun control regimes. Doing so would have made clear that *Heller* was only a symbolic victory for gun rights, and would have signaled to lower courts (and to other political branches) that the Second Amendment need not be treated like “ordinary constitutional law.” While in an earlier article on *Heller*, we described some reasons why the Court might not want to incorporate the Second Amendment against the states, we noted that the Court seemed to have made up its mind some time ago that jot-for-jot incorporation was the norm. Departures from that norm just for the Second Amendment risked making the Court look unprincipled. Given *Heller*, the result in *McDonald* seemed almost preordained.

### B. Selective Incorporation

In addition to what public relations folks call the “bad optics” of a refusal to enforce the individual right recognized in *Heller* against state and local governments in *McDonald*, over a half-century of the Court’s own jurisprudence also pushed it in the direction of incorporation. The Court’s incorporation doctrine evolved over the first two-thirds of the twentieth century. Early on, the Court rejected total incorporation, refused to incorporate some provisions of the Bill of Rights because they were not deemed essential to a “civilized system” of law, and applied even those

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28See id. at 32 (“Had Warren not been so disdainful of history, he could have shown that, prior to the Civil War, due process had a strong equal protection component, but this had been lost in history, and Warren did not rediscover it.”).

29Daniel A. Farber, The Rule of Law and the Law of Precedents, 90 MINN. L. REV. 1173, 1180 (2006) (defining “bedrock precedents” as “precedents that have become the foundation for large areas of important doctrine”).

30See *supra* Part I.

31Denning & Reynolds, *supra* note 3, at 684-86.
provisions that were incorporated differently against the federal and state governments. 32

By the late 1960s, however, the Court, while still rejecting the total incorporation of the Bill of Rights favored by Justice Hugo Black, "overruled earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States." 33 In doing so, the Court "abandoned three . . . characteristics of the earlier period [of incorporation]." 34 First, "[t]he Court made it clear that the governing standard is not whether any 'civilized system [can] be imagined that would not accord the particular protection.' . . . Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice." 35 Second, "[t]he Court . . . shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirement for protection under the Due Process Clause." 36 Third, "the Court abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights' . . . ." 37 The contemporary incorporation standard, announced in *Duncan v. Louisiana,* 38 asked "whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' . . . [or] whether it is 'basic in our system of jurisprudence' . . . ." 39 In other words, is the right "fundamental to the American scheme of justice?" 40

Thus framed, the proper result was an easy lay-up. First, the Court subtly shifted ground in addressing whether private arms possession is a fundamental right. Justice Alito began his analysis stating that "[s]elf-defense is a basic right" and noted that *Heller* itself placed individual self-defense at the core of the Second Amendment. 41 The Court then observed

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32 *McDonald,* 130 S.Ct. at 3032-3035 (summarizing the Court's selective incorporation jurisprudence); see also Denning & Reynolds, supra note 3, at 679-80.
33 *Id.,* at 3036.
34 *Id. at* 3034 (footnote omitted).
35 *Id. (citation omitted) (emphasis in original).*
36 That is, for earlier Courts the fact that a right was enshrined in the federal Bill of Rights had little to do with whether the Due Process Clause incorporated the right against the states. *Id.*
37 *Id* at 3035 (quoting Malloy v. Hogan, 378 U.S. 1, 10-11 (1964)).
38 *Duncan,* 391 U.S. at 148-49 (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932); In re Oliver, 333 U.S. 257, 273 (1948)).
39 *Duncan,* 391 U.S. at 149.
40 *McDonald,* 130 S.Ct. at 3023; *Heller,* 128 S. Ct. at 2801-02. For some interesting speculation about the implications of the Court's constitutionalization of self-defense, see Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism,* and Other Second Amendment Musings, 60 Hastings L.J. 1205 (2009); Darrell A.H. Miller, Retail
that the Second Amendment suggests that “[t]he right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights.” 42 By the time the Fourteenth Amendment was proposed, debated, and ratified, “[t]he right to keep and bear arms was . . . widely protected by state constitutions,” many of whose provisions “explicitly protected the right to keep and bear arms as an individual right to self-defense.” 43

The fundamental status of arms possession in the service of self-defense thus established, the path of the Court’s selective incorporation cases enabled the majority to turn aside arguments that either the Second Amendment should be treated differently than other incorporated rights, or that state and local governments should be given more leeway than the federal government to regulate gun possession. Justice Alito described the first as “nothing less than a plea to disregard 50 years of incorporation precedent and return (presumably for this case only) to a bygone era” that is “inconsistent with the long-established standard we apply in incorporation cases.” 44

While acknowledging that respected members of the Court, like Justice John Marshall Harlan II, had previously argued in favor of a “two track” approach to incorporated rights, whereby “a federal constitutional right should not be fully binding on the States,” Justice Alito noted that “those pleas failed” in the Court. 45 Unless the Court was either to “turn back the clock or adopt a special incorporation test applicable only to the Second Amendment,” those arguments must again fail in McDonald. Justice Alito explained that “[u]nder our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless stare decisis counsels otherwise, that guarantee is fully binding on the States and thus limits . . . their ability to devise solutions to social problems that suit local needs and values.” 46

The dissenting opinions in McDonald, like the arguments of the City of Chicago, were notable for their apparent willingness to discard the selective incorporation framework—at least where the Second Amendment was involved. Justice Stevens, for example, reframed the case as one

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42 McDonald, 130 S.Ct. at 3037.
43 Id. at 3042.
44 Id. at 3044.
45 Id. at 3046.
46 Id. (footnote omitted).
involving questions of substantive due process. Justice Breyer, after a plea to relitigate the central holding in *Heller* would have also altered the selective incorporation framework substantially, “look[ing] to other factors in considering whether a right is sufficiently ‘fundamental’ to remove it from the political process in every State,” including

the nature of the right; any contemporary disagreement about whether the right is fundamental; the extent to which incorporation will further other, perhaps more basic, constitutional aims, including its division of powers among different governmental institutions (and the people as well). . . . In a word, will incorporation prove consistent, or inconsistent, with the Constitution’s efforts to create governmental institutions well suited to the carrying out of its constitutional promises?

But Justice Breyer made no attempt to show either (1) that no historical ambiguity accompanied the incorporation of other rights whose application to states continues unquestioned or (2) that earlier Courts had taken his prudential considerations into account.

Anticipating the incorporation debate after *Heller*, we predicted that “if [t]he Court takes up the issue of incorporation, and applies the *Duncan* standard, the opinions would likely end up rehashing the historical debate engaged in by the majority and the dissenters [in *Heller*].” One of the big surprises of *McDonald* was the willingness of the dissenting members to jettison the doctrinal scaffolding that had produced the nationalization of the Bill of Rights—regarded as one of the great triumphs of the Warren Court—because they objected to the substance of the Second Amendment itself. Then again, as Scot Powe has pointed out, selective

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47Id. at 3089 (Stevens, J., dissenting) (“This is a substantive due process case.”).
48Id. at 3123 (Breyer, J., dissenting).
49Id. (Breyer, J., dissenting).
50Denning & Reynolds, *supra* note 3, at 682.
51See, e.g., MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN, 1953-1969, 308 (2005) (“The Warren Court stood . . . for the nationalization of the Bill of Rights [and] for increased federal supervision of the states and their political subdivisions . . . .”); PETER CHARLES HOFFER, WILLIAM JAMES HULL, HOFFER & N.E.H. NULL, THE SUPREME COURT: AN ESSENTIAL HISTORY 368 (2007) (“[T]he vast expansion of civil rights and civil liberties under the Warren Court profoundly changed American law. . . . The Court’s nationalization of American law and the accompanying centering of its own authority within that law would not have been possible without the nationalization of society and economy, the immense increase in the power of the national government, and the liberal optimism that coalesced in Washington, D.C., during the Warren Court era.”).
incorporation was probably adopted in the first place because “there are three guarantees in the Bill of Rights that the justices probably did not like,” including the right to keep and bear arms. 52

C. History and the Fourteenth Amendment

Despite our earlier predictions that an incorporation decision would feature a reprise of Heller’s historical debates, when compared to the exhaustive exchange between Justice Scalia and Stevens in Heller, McDonald did not produce much of a debate. Contrary to the evidence presented by Justice Alito showing that the Framers of the Fourteenth Amendment were concerned about disarmament of freed blacks and unionist whites in the South, Justice Breyer argued that history demonstrated “no consensus that the right is, or was ‘fundamental.’”53 Justice Breyer seemed to base this argument on the fact that governments continued to regulate the right to arms and that courts sometimes upheld those regulatory efforts, both of which are true of other rights deemed fundamental and neither of which is particularly responsive to the questions posed by the Duncan framework.

In any event, in contrast to the debate over the Second Amendment in its eighteenth century context, it does seem clear that by Reconstruction the right (as enshrined in other state constitutions and discussed by, among others, members of the Reconstruction Congress) was recognizable to modern audiences as an unmistakably individual one that was regarded as essential for self-defense.54 As an influential historian of Reconstruction put it, “it is abundantly clear that Republicans [in the 39th Congress] wished to give constitutional sanction to states’ obligation to respect such key provisions [of the Bill of Rights] as freedom of speech, the right to keep and bear arms, trial by impartial jury, and protection and cruel and unusual punishment and unreasonable search and seizure.”55 These rights, moreover, were being systematically violated in the post-Civil War

52POWE, supra note 27, at 415. See also MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN’T END THE BATTLE OVER GUNS 44 (2008) (“Surely the right to keep and bear arms is as at least important as other rights that have been selectively incorporated, and certainly it isn’t the kind of triviality that the Seventh Amendment’s right to jury trial is. Intellectual honesty requires that the courts take the next step and decide that the Fourteenth Amendment guarantees the right to keep and bear arms against state regulations, just as the Second Amendment does against regulations by the national government.”).

53McDonald, 130 S.Ct. 3020, 3139-36 (Breyer, J., dissenting).

54See AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 257-68 (1998); see also McDonald, 130 S.Ct. at 3036-41.

We discuss the prominence that the plurality and Justice Thomas gave to race in Part III; the point here is that unlike in *Heller*, there seemed to be much less controversy over the nature of the right as discussed by members of the 39th Congress, even if plenty of questions remained over either the scope of that right or its implications in contemporary debates over gun control.

**D. Popular Opinion**

A fourth factor—perhaps the most important factor—supporting the Court’s decision, is the continued unpopularity of gun bans or near-bans like those in Washington, D.C. and Chicago. Eight months before *McDonald* was announced, Gallup reported the lowest levels of popular support for stricter gun control laws since it began polling on that question in 1990.\(^{57}\) In 1990, 78% of Americans supported stricter gun control; in 2009, support for stricter measures had declined to 44%. Those favoring less strict gun control laws rose from 2% to 12% in the same period. Further, the percentage of persons supporting a handgun ban dropped from 60% in 1990 to 28% in 2009. Other polls show an overwhelming majority of Americans believe that the Second Amendment guarantees an individual right to keep and bear arms.\(^{58}\)

Like *Heller*, *McDonald* produced a result that aligned with the expectations of many Americans. The decision is another data point in favor of the theory that the Court is a lagging, rather than a leading indicator of popular preference, often constitutionalizing a national consensus and enforcing that consensus against outliers. Moreover, as was true in *Heller*, the Court took pains to emphasize that “reasonable” gun control measures—also popular with majorities—were not being questioned.\(^{59}\)

While we are aware of hindsight bias that can make contingent events seem inevitable, we nevertheless think that there were multiple factors at work that made the outcome in *McDonald* likely. To be sure, without

\(^{56}\) Id. at 258-59.


\(^{59}\) See infra notes 110-111 and accompanying text.
Heller one would likely have had no McDonald, but given Heller, the path to incorporation was undoubtedly eased by the other factors described above, any one of which might have been enough to persuade the Court to incorporate.

III. TAKE THREE: RACE, RECONSTRUCTION, AND Mc Donald’s View of the Second Amendment

Both the plurality opinion and the separate concurrence of Justice Clarence Thomas in McDonald stressed the particular racial history of gun control and the right to arms, something that has received considerable attention in scholarship, but that has been largely left out of the general public discussion of gun control and gun rights. Though pundits and commentators expressed their surprise, this angle on the Second Amendment was new only from the standpoint of public debate. The racial angle of the right to bear arms had long been noted in scholarship on the subject.

Even before the Civil War, some states amended their state constitutions in order to disarm free blacks – Tennessee, for example, amended its constitution to provide that the right to keep and bear arms, previously extended to all freemen, extended only to “free white m[e]n.” But after the Civil War, with the antebellum system of social controls aimed at blacks scrapped, the Southern states proceeded to disarm the newly enfranchised former slaves as rapidly and thoroughly as possible, as a step toward the gradual elimination of as many other civil rights as possible. As the majority’s opinion notes:

After the Civil War, many of the over 180,000 African Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks. . . . The laws

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of some states formally prohibited African Americans from possessing firearms. . . . Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves.63

The Framers of the Fourteenth Amendment, as the Court notes, intended to protect the right of black citizens to defend themselves with firearms, a protection that the federal courts eviscerated in following decades. But, as Justice Thomas points out in his concurrence:

The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence. As Eli Cooper, one target of such violence, is said to have explained, “[t]he Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob.” . . . One man recalled the night during his childhood when his father stood armed at a jail until morning to ward off lynchers. The experience left him with a sense, “not of powerlessness, but of the possibilities of salvation” that came from standing up to intimidation.64

Scholars like Robert Cottrol and Ray Diamond had been addressing this for years, noting the importance of firearms in resisting lynchings and in protecting civil rights workers during the 1950s and 1960s – as well as the extensive history of gun-control laws being aimed at blacks and other minorities. Their arguments were cogent, copiously documented, and not seriously disputed by other scholars, but they received comparatively little public attention.65

In the wake of the McDonald opinion, however, this history is likely to achieve considerably greater salience. As courts look at various cities’ gun control laws, the racial roots of gun control may be particularly relevant. We are often told that gun control is more appropriate for “urban” areas than for rural ones, but one key difference between urban and rural areas is that the former are more heavily populated by blacks and other minorities.

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63McDonald, 130 S.Ct. at 3038-39.
64Id. at 3088 (Thomas, J., concurring).
65Cottrol & Diamond, supra note 61.
If – as is often the case in contemporary discourse – “urban” is a synonym for “black,” then what does it mean to say that gun control is more appropriate in urban settings?

It is at least plausible that the racial roots of gun control laws, and the Supreme Court’s particular attention to them, might give rise to skepticism about the often-stated claim that stricter gun laws are more appropriate in urban areas. Certainly the history of urban gun control is not without its own tinge of racism. As Dave Kopel writes:

New York State passed the 1911 Sullivan Law to license handguns while the New York Tribune complained about pistols found "chiefly in the pockets of ignorant and quarrelsome immigrants of law-breaking propensities" and condemned "the practice of going armed ... among citizens of foreign birth." The New York Times noted the affinity of "low-browed foreigners" for handguns. Even before the Sullivan Law, the New York City police had been canceling pistol permits in the Italian sections of the city.... In the first three years of the Sullivan Law, 70 percent of those arrested had Italian surnames.

Nor was New York the only state to follow this approach; in fact, it was widespread wherever "out" groups frightened the establishment. In the West, it was Chinese and Japanese immigrants who frightened the establishment into enacting restrictive gun laws; in the South it was Americans of African descent. Indeed, one Florida judge went so far as to write about Florida's weapons law that:

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in the turpentine and lumber camps. The same condition existed when the Act was amended in

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66As one relevant source (the “Urban Dictionary”) notes, “[t]he term is exploited by corporations such as MTV to refer to black music/culture, without mentioning race.” Available at http://www.urbandictionary.com/define.php?term=urban.


68Id.

69Cottrol & Diamond, supra note 61.
1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied.\footnote{Watson v. Stone, 4 So.2d 700, 703 (Fla. 1924) (Buford, J., concurring specially) (emphasis added). This case is quoted in Cottrol & Diamond, supra note 65, at 355, along with a number of other cases making the same point. In particular, it is worth noting another opinion quoted in that work, in which a dissenting judge noted that "the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions." State v. Nieto, 130 N.E. 663, 669 (Ohio 1920) (Wannamaker, J., dissenting). See also Robert J. Cottrol & Raymond T. Diamond, "Never Intended to Be Applied to the White Population: Firearms Regulation and Racial Disparity -- The Redeemed South's Legacy to a National Jurisprudence, 70 CHI.-KENT L. REV. 1307 (1995).}

Not surprisingly, an effort to disarm citizens who were deemed undesirable, inferior, or not sufficiently submissive is hardly consistent with the Second Amendment's notions of popular sovereignty, fearless, self-reliant citizens, and an individual right to bear arms. To the extent—and it appears to have been a significant extent—that gun control legislation rests on such a foundation, the Supreme Court’s focus on the racist underpinnings of such regulation suggests that it should receive strict scrutiny indeed.

IV. TAKE FOUR: THE DEATH (OR REBIRTH?) OF THE PRIVILEGES OR IMMUNITIES CLAUSE

In contrast to the expectations surrounding McDonald, the actual decision was somewhat anticlimactic because eight justices declined invitations from the petitioners and amici to overrule the Slaughter-House Cases\footnote{83 U.S. 36 (1873).} and decide McDonald under the Fourteenth Amendment’s Privileges or Immunities Clause.\footnote{McDonald, 130 S.Ct. at 3031 (“We . . . decline to disturb the Slaughter-House holding); Id. at 3089 (Stevens, J., dissenting) (“I agree with the plurality’s refusal to accept petitioners’ primary submission that the case should be decided under the Privileges or Immunities Clause.”); see also id. at 3120-3138 (Breyer, J., dissenting) (not discussing the Privileges and Immunities Clause); but see id. at 3059 (Thomas, J., concurring) (incorporating Second Amendment through the Privileges or Immunities Clause).} On the surface, this seems to us a crushing defeat, because considerable resources were devoted to persuading the Court to abandon what many considered an unduly narrow
interpretation of the Clause adopted by the Slaughter-House Court and
revive it for future use. Only Justice Thomas would have incorporated
through the Privileges or Immunities Clause. Despite appearances, Randy
Barnett has argued that Thomas’s concurring opinion, not the rest of the
Court’s apparent embrace of the Slaughter-House Cases, is the harbinger
of things to come. In this part, we’ll describe the attempts to revive the
Privileges or Immunities Clause and reflect on Randy Barnett’s argument
that, despite appearances, it is “alive again.”

As students learn in constitutional law, the Privileges or Immunities
Clause was narrowed to the vanishing point in the Slaughter-House Cases.
Among other things, scholars argue that this decision deprived the Court of
a more textually and historically satisfying basis for the incorporation
doctrine than the Due Process Clause. A robust Privileges or Immunities
Clause might also prove a fertile source for various unenumerated rights—
including economic liberties embraced by the Court in the late nineteenth
century and later abandoned in the early twentieth.

The Slaughter-House Cases have long been criticized; why did the
petitioners think that McDonald presented an attractive vehicle for
reconsidering 130 years of precedent? One reason may be that the Court
itself had hinted it might be amenable to revisiting the Privileges or
Immunities Clause in Saenz v. Roe, in which it struck down a California
requirement limiting amounts of welfare that new arrivals to the state could
receive. Justice Stevens’s majority opinion rooted the right to travel freely
from state to state, in part, in the Privileges or Immunities Clause of the
Fourteenth Amendment. Even Justice Thomas, who dissented, expressed
a willingness to revisit the scope of the Privileges or Immunities Clause in
some appropriate future case. Many thought that, with its decision in
Saenz, the Court was on the threshold of repudiating the Slaughter-House

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1See, e.g., Robert Barnes, Gun Case Presents Quandary for Supreme Court Justices, WASH. POST, Mar. 1, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/02/28/AR2010022803985.html (noting that liberal and libertarian groups supported petitioners’ efforts to persuade the Court to use the Privileges or Immunities Clause).
3Id.
5Saenz, 526 U.S. at 502-03.
6Id. at 527-28 (Thomas, J., dissenting).
Cases and reinvigorating Privileges or Immunities. 79 Those predictions, at the time, were premature.

Nevertheless, Alan Gura, the attorney for the McDonald petitioners, took a gamble and devoted fifty-six of sixty-three pages of argument in his initial brief to the Privileges or Immunities Clause argument. 80 A number of amicus briefs were filed in support of Gura’s argument. 81 Gura’s gambit so alarmed the National Rifle Association (“NRA”) (which had been ambivalent at best about the litigation in Heller and McDonald) that the NRA filed a brief making the selective incorporation argument more forcefully than did the petitioners’ brief, 82 asked for (and was granted) some of Gura’s time during oral argument, and hired former acting Solicitor General Paul Clement (who argued the government’s case in Heller) to participate in the oral argument. 83

Any hopes that the McDonald decision would herald a Privileges or Immunities renascence were dashed early in oral argument. Gura was not yet finished with his opening statement when Chief Justice Roberts noted that the Slaughter-House Cases had been the law for 140 years, adding that “it's a heavy burden for you to carry to suggest that we ought to overrule that decision.” 84 A few minutes later, Justice Scalia began the following exchange, which seemed to seal the fate of Gura’s argument:

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79 For contemporary doubts, see Laurence H. Tribe, Comment, Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present? 113 Harv. L. Rev. 110 (1999).


JUSTICE SCALIA: Mr. Gura, do you think it is at all easier to bring the Second Amendment under the Privileges and Immunities Clause than it is to bring it under our established law of substantive due?

MR. GURA: It's—

JUSTICE SCALIA: Is it easier to do it under privileges and immunities than it is under substantive due process?

MR. GURA: It is easier in terms, perhaps, of—of the text and history of the original public understanding of—

JUSTICE SCALIA: No, no. I'm not talking about whether—whether the Slaughter-House Cases were right or wrong. I'm saying, assuming we give, you know, the Privileges and Immunities Clause your definition, does that make it any easier to get the Second Amendment adopted with respect to the States?

MR. GURA: Justice Scalia, I suppose the answer to that would be no, because—

JUSTICE SCALIA: Then if the answer is no, why are you asking us to overrule 150, 140 years of prior law, when—when you can reach your result under substantive due—I mean, you know, unless you are bucking for a—a place on some law school faculty—

(Laughter.)

MR. GURA: No. No. I have left law school some time ago and this is not an attempt to—to return.

JUSTICE SCALIA: What you argue is the darling of the professoriate, for sure, but it's also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process,
which as much as I think it's wrong, I have—even I have acquiesced in it?

(Laughter.)

In the end, only Justice Thomas embraced Gura’s argument. He concurred, incorporating the Second Amendment through the Privileges or Immunities Clause. It would appear, having had eight Justices reject the argument, and—worse—having had the centerpiece of one’s case mocked from the bench, that the Slaughter-House Cases are on an even more solid footing, and that Privileges or Immunities Clause is even more of a dead-letter provision, than before McDonald.

Yet, the day after McDonald was decided, Georgetown law professor and noted libertarian scholar Randy Barnett wrote in the Wall Street Journal that Justice Thomas’s “essential” opinion meant that the Privileges or Immunities Clause “is now very much alive. Put another way, there is no longer a majority of the court willing to use the Due Process Clause in a case in which the Privileges or Immunities Clause is the right clause on which to rest its decision.” He argued that “[b]y declining to take issue with Justice Thomas’s impressive 56-page originalist analysis, the other justices in effect conceded what legal scholars have for some time maintained—that the court’s cramped reading of the clause in 1873 was inconsistent with its original meaning.”

Despite Professor Barnett’s heroic lemonade-making, we remain skeptical that a future Court will adopt Justice Thomas’s opinion as the majority position, as the Grutter majority did with Justice Powell’s lone Bakke opinion. First, the McDonald plurality and the dissenters have reasons to keep the Privileges or Immunities Clause buried. For members of the conservative plurality, exhuming and reviving the Clause raises troubling boundary-drawing and indeterminacy problems like those present in the Court’s substantive due process jurisprudence. Why give litigants two bites at the substantive due process apple where unenumerated rights

85Id. at *6-*7.
86McDonald, 130 S.Ct. at 3059 (Thomas, J. concurring).
88Id.
89The old saying is, “if life gives you lemons, make lemonade,” but this only works if life also gives you water and sugar. It is not clear that the Supreme Court supplied either where the Privileges or Immunities Clause is concerned.
are concerned, these justices might reason. As for the liberal dissenters, they are likely nervous about the possibility that economic liberties could find constitutional protection under a reading of the Privileges or Immunities Clause. Thus, there seems to be a “Baptists-and-bootleggers” coalition at work here; each coalition partner is eager, for its own reasons, to keep Privileges or Immunities moribund. We are not sure that the vote breakdown in *McDonald* will predict Due Process Clause line-ups in the future.

Second, we are not confident that the failure of the plurality (or the dissent) to engage Justice Thomas’s argument concedes anything. It could mean that Thomas’s colleagues thought he was wrong. It might mean that they thought his arguments so misguided that they bordered on the frivolous and that it was not worth the time or energy to refute them. Silence in this context is hardly consent; it certainly cannot be regarded as having precedential value.

Third, we think that Professor Barnett’s analogy of Justice Thomas’s *McDonald* concurrence to *Bakke* misfires. Justice Powell’s decision in *Bakke*, according to his biographer, was “designed both to permit affirmative action and to constrain it.”[^91] The “opinion was as conflicted as its author,” who was himself the very embodiment of judicial prudence and pragmatism.[^92] No one would accuse Justice Thomas of being conflicted, or a pragmatic “trimmer.”[^93] One recent account of his early days on the Supreme Court described his disdain for judicial horse-trading and compromise, noting that, “[t]hat was not Thomas’s approach. He was the brash newcomer who believed there were right answers in the law.”[^94] Justice Thomas’s *McDonald* concurrence has none of the ambivalence of Powell’s *Bakke* opinion.

Overthrowing 140 years of jurisprudence and reviving the Privileges or Immunities Clause may be right thing to do. It may indeed furnish a superior textual and historical hook for what developed as “substantive due process.” Thomas’s opinion, however, is not an attempt to legitimize the Clause in order to limit it, as Powell sought to do with affirmative action. Thomas’s concurrence, rather, appears to be of a piece with an earlier

[^92]: *Id.* at 1; *id.* at 18-25 (on the pragmatic qualities of the Powell position).
opinion in which he suggested that the Import-Export Clause be used as a
textual hook for the dormant Commerce Clause doctrine,\textsuperscript{95} or of Justice
Stevens’s call for a rejection of tiered-scrutiny in Equal Protection
cases\textsuperscript{96}—an idiosyncratic opinion of a self-styled judicial maverick, who
has few ambitions for arguing colleagues around to his view.

Finally, we think that Professor Barnett’s prediction is unlikely to come
to pass for a very practical reason: there will be precious few opportunities
available to the Court to take another stab at reviving the Privileges or
Immunities Clause. Lower courts will likely interpret the Court’s decision
as having set its face against overruling the \textit{Slaughter-House Cases}. A
lower court would either have to flout the Supreme Court’s injunction
against anticipatory overruling of its cases and enable litigants to argue the
issue on the merits,\textsuperscript{97} or four justices on the Court itself would have to
grant certiorari on a Privileges or Immunities issue. We think neither case
is likely in the near (or even medium) term.

One final observation on lawyering: we have assumed that Alan Gura’s
Privileges or Immunities argument was sincere, and that he was genuinely
irritated by the NRA’s efforts to “bully” its way into the case and into his
oral argument. There is, of course, another possibility: that the Privileges
or Immunities Clause argument was simply a stalking horse for the
selective incorporation argument. By arguing such an “extreme” theory
with such far-reaching implications, Gura made it possible for the NRA’s
due process incorporation argument to seem, by contrast, like sweet
moderation itself. If that was indeed the case, then Gura’s gamble was a
shrewd one, which paid off handsomely for gun rights proponents in the
end.

\textbf{V. TAKE FIVE: \textit{McDONALD} IN THE LOWER COURTS}

Our final take concerns the likely effect of \textit{McDonald} in the lower
courts. As we have noted before, the effects of Supreme Court decisions

\textsuperscript{95}Camps Newfound/Owatonna, Inc. v. Harrison, 520 U.S. 564, 609, 621-40 (Thomas, J.,
dissenting). For a critique of his proposal, see Brannon P. Denning, \textit{Justice Thomas, the Import-Export


\textsuperscript{97}See Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) (“If a precedent of this
Court has direct application in a case, yet appears to rest on reasons rejected in some other line of
decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the
prerogative of overruling its own decisions.”).
are highly dependent upon treatment by lower courts. In an essay written immediately after *Heller*, we flagged four factors that might temper lower court implementation of the right to keep and bear arms: (1) the inherent conservatism of the lower courts; (2) what we termed the “*Heller* safe harbor” that enumerated “presumptively lawful regulatory measures” and the paucity of vulnerable federal firearms statutes; (3) the Court’s studied ambiguity regarding the standard of review it was employing, and (4) the lack of applicability to state and local governments.

While we offered some countervailing reasons to think that robust implementation might be in the offing, our survey of the lower courts roughly eight months after *Heller* was decided demonstrated that our skepticism was warranted in some respects. We wrote:

> [T]he foregoing seems to confirm our pessimistic predictions about the effect of *Heller*. As was true following *Lopez*, courts sometimes strain to distinguish the challenged law from the one invalidated in *Heller*, with courts frequently remarking that this or that challenged law sweeps much more narrowly than did the District of Columbia’s ordinance. Similarly, one often sees little analysis—a grudging acknowledgement of *Heller* as a new fact of life, quickly followed by the conclusion that the case did not really change anything. And while lower courts sometimes lament the lack of clarity in *Heller* regarding, say, what the standard of review actually was,

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100 District of Columbia v. *Heller*, 128 S.Ct. 2783, 2816-17 (2008) (declaiming intent 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”); Reynolds & Denning, *Heller’s Future, supra* note 98, at 2039; see also Denning & Reynolds, *Heller, High Water(mark)?*, supra note 98, at 1247 (naming the “*Heller* safe harbor”).


102 Id. at 2040.

103 Id. at 2040-42.
few judges seem interested in figuring it out on their own.104

We ended, though, on a hopeful note, observing that “not all [lower court] responses had been dismissive” and that there were “a number of courts that are conscientiously attempting to adjust their reasoning in light of” Heller.105 We also suggested that there might be a synergy between the recognition of the federal right and analogous state rights to keep and bear arms from which could emerge a robust form of the right.106

By Heller’s first anniversary, and after, we think it’s fair to say that we were perhaps a little optimistic about what Heller might herald. While McDonald’s incorporation of the Second Amendment against state and local governments may inaugurate a gun rights revival in lower courts, we still think that the decision itself contains some signals that lower court judges need not go hog-wild in implementing it.

First, there is the fact that, unlike Heller, which declared Washington D.C.’s gun ban unconstitutional, McDonald merely remands Chicago’s gun law to the lower courts.107 Second, despite that remand, the plurality again declined to articulate the precise standard of review that the lower courts should use.108 On the one hand, Justice Alito declined Chicago’s suggestion that the right to keep and bear arms be subject to “interest-balancing” allegedly engaged in by state courts. “In Heller,” he wrote, “we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing[.]”109 On the other hand, however, the plurality opinion notes that the right is not absolute, and explicitly cites the Heller safe harbor as an example of the reasonable limits to the right.110 “We repeat those assurances here,” Justice Alito added, noting that “despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.”111

104 Denning & Reynolds, Heller High Water(mark), supra note 98, at 1259 (footnotes omitted).
105 Id. at 1267.
106 Id. at 1268.
107 130 S.Ct. at 3050 (“The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.”).
108 Justice Thomas’s concurring opinion was silent on this issue as well.
109 130 S.Ct. at 3047.
110 Id.
111 Id.
The Court’s doctrinal fan dance requires lower courts to continue to guess at the standard of review.\textsuperscript{112} The Court’s continued reticence offers lower courts a way to “narrow [the right to keep and bear arms] or even avoid it altogether,” thus “impair[ing] the robust implementation . . . of the right.”\textsuperscript{113} A recent example from the Seventh Circuit provides an illustration of the continuing problem.

In \textit{United States v. Skoien},\textsuperscript{114} the Seventh Circuit, sitting en banc, upheld 18 U.S.C. § 922(g)(9), which prohibits ownership of firearms by domestic violence misdemeanants. In his opinion, Judge Easterbrook noted the government’s concession that “some form of strong showing (‘intermediate scrutiny,’ many opinions say) is essential, and that § 922(g)(9) is valid only if substantially related to an important governmental objective.”\textsuperscript{115} Judge Easterbrook termed the concession “prudent,” adding with relief that “we need not get more deeply into the ‘levels of scrutiny’ quagmire, for no one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective.”\textsuperscript{116} He went on to conclude, moreover, that “logic and data establish a substantial relation between § 922(g)(9) and this objective.”\textsuperscript{117} This relationship exists, he reasoned, because of (1) undercharging of defendants (charging them with less serious offenses than if the victim were a stranger); (2) lethality of firearms in homes where domestic violence occurs; and (3) rates of recidivism among perpetrators of domestic violence.\textsuperscript{118}

It is not clear that courts can avoid the standards of review quagmire that easily, however. First, there are different forms of intermediate scrutiny.\textsuperscript{119} While generic intermediate scrutiny does require the government to demonstrate a “substantial relationship” between some

\begin{footnotesize}
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\item \textsuperscript{112}See, e.g., United States v. Tooley, 2010 WL 2842915 at *18 (S.D.W.Va.) (July 16, 2010) (“The McDonald Court, as the Court in \textit{District of Columbia v. Heller}, failed to articulate a standard of review.”); cf. \textit{Heller v. District of Columbia}, 698 F. Supp.2d 179, 184 (D.D.C. 2010) (“This court, like many others to have considered Second Amendment challenges in the nearly two years since the \textit{Heller} decision was issued, must determine what standard of review to apply to the plaintiff’s claims notwithstanding the fact that no clear directive is contained in the \textit{Heller} decision itself.”).
\item \textsuperscript{114}614 F.3d 638 (7th Cir. 2010) (en banc).
\item \textsuperscript{115}Id. at 641.
\item \textsuperscript{116}Id. at 642.
\item \textsuperscript{117}Id.
\item \textsuperscript{118}Id. at 643-44 (citing studies in support of these propositions).
\end{itemize}
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regulation and an “important” governmental interest, different doctrinal areas in which intermediate scrutiny is applied often have important glosses. For example, in judicial review of content-neutral regulations of speech, to which the Court applies intermediate scrutiny, the Court also asks whether the purpose of the regulation is to suppress ideas and whether the regulation leaves open adequate alternative forms of communication. Moreover, the Court has made clear that the government must demonstrate that its regulation is “narrowly tailored” to its important interest, though it need not be the least restrictive means available to it.

Alternatively, consider gender classifications, which are also reviewed under intermediate scrutiny. In these cases, recent Courts have admonished government that the important interest be the actual purpose for enacting a particular law, and that the end itself not rely on “archaic and overbroad” sex stereotypes. Further, “[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation.”

We express no opinion regarding which of these competing models of intermediate scrutiny is the appropriate one—that is an issue for another paper. But the fact that intermediate scrutiny exists in two or more forms suggests that Judge Easterbrook was hasty in his assumption that the government’s “prudent” concession settled the standard of review.

Then there is the Skoien majority’s application of intermediate scrutiny, in which the majority seems to make things rather easy for the government, although the government is supposed to bear the burden of proof on both prongs of intermediate scrutiny. First, the court seems to assume that that the goal of 18 U.S.C. § 922(g)(9) (“preventing armed mayhem”) is both self-evident and “important” in the constitutionally relevant sense. But simply stating this and having the government prove it are two different things. Presumably any state or federal gun control law could be justified as “preventing armed mayhem”—and that would get federal, state, or local governments halfway home with little or no effort on their part.

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121 Id. at 933 (“[T]he general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations only need meet intermediate scrutiny.”).
125 Virginia, 518 U.S. at 533.
126 U.S. v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010).
127 Incidentally, it seems that “preventing armed mayhem,” would justify gun bans of the sort invalidated in Heller, if that is accepted as a important governmental interest. Id. Presumably a total
Further, as Judge Diane Sykes pointed out in her Skoien dissent, the majority gave “the government a decisive assist; most of the empirical data cited to sustain § 922(g)(9) has been supplied by the court. This is an odd way to put the government to its burden of justifying a law that prohibits the exercise of a constitutional right.”128 Allowing this issue to be decided in the appellate court, as opposed to remanding it for a decision to the district court, “relieves the government of its burden and deprives Skoien of the opportunity to review the outcome-determinative evidence, let alone subject it to normal adversarial testing.”129

Anyone who studies constitutional law knows that standards of review are neither self-defining nor self-enforcing. The Supreme Court itself has been guilty of applying strict rational basis review in some cases130 and a rather loose strict scrutiny in others.131 But we agree with Judge Sykes that because “[t]he government . . . has the burden of justifying the application of laws that criminalize the exercise of enumerated constitutional rights,” the lower courts “should follow that norm, not pay lip service to it.”132 If lower courts begin emulating the Supreme Court by manipulating standards of review or placing a thumb on the scales when applying them, then constitutional litigation begins to look like tennis with the net down. We remain skeptical that the Court is inclined to monitor lower courts’ implementation of the Second Amendment. This lack of monitoring may further increase the discretion of those courts and raise the stakes of appellate court litigation.

Perhaps Skoien is an example of hard cases making bad law. One could hardly produce a less sympathetic gun rights litigant than a repeat domestic violence offender. But the strength of commitment to a right can be measured in our willingness to apply it when its enforcement costs us something. As Justice Frankfurter once put it, “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”133 The discretion that the ban would be substantially related to that purpose insofar as disarming people would render them incapable of shooting one another. Because Heller came out the way it did, the Court could not have intended to countenance such a result.

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128 Id. at 646–47 (Sykes, C.J., dissenting).
129 Id. at 652 (Sykes, C.J., dissenting).
132 Skoien, 614 F.3d at 654 (Sykes, C.J., dissenting).
courts of appeals exercise in the absence of Supreme Court guidance will be more legitimate if the judges play it straight, and not “read Heller’s dicta in a way that swallows its holding.” If intermediate scrutiny is to be the test, then the courts ought not lessen the government’s burden by ipse dixit acceptance of important purposes or by supplying the fit between means and ends that it is the government’s burden to provide.

The post-Skoien Seventh Circuit opinion in United States v. Williams suggests that these questions of application remain open, even within the United States Court of Appeals for the Seventh Circuit. Williams involved another § 922(g) challenge that proved unavailing. The unanimous panel (which included retired Supreme Court Associate Justice Sandra Day O’Connor), however, did allow for the possibility of an as-applied challenge where nonviolent felons are concerned:

[A]lthough we recognize that § 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent, that is not the case for Williams. Even if the government may face a difficult burden of proving § 922(g)(1)’s “strong showing” in future cases, it certainly satisfies its burden in this case, where Williams challenges § 922(g)(1) as it was applied to him. See Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) (“[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.”). Williams, as a violent felon, is not the ideal candidate to challenge the constitutionality of § 922(g)(1).

That last is certainly true, but the Williams court’s willingness to keep the question open for future cases suggests that Skoien and Williams are not the last word. The overall tone of Williams also seems somewhat less deferential, and more willing to emphasize the “scrutiny” aspect of “intermediate scrutiny” than does Skoien. Both within and without the

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134Skoien, 614 F.3d at 654 (Sykes, C.J., dissenting).
135U.S. v. Williams, 616 F.3d 685 (7th Cir. 2010).
136Id.
Seventh Circuit, we can expect more discussion and debate on this topic in cases to come.

CONCLUSION: BEGINNING, END, OR END OF THE BEGINNING?

Scholars, judges, and some of the Justices themselves have predicted that the recognition of the right to keep and bear arms—and certainly its application to state and local governments—will enmesh lower courts in a welter of controversies whose resolution will tax those judges’ institutional competence.137 For them, Heller was prologue, and McDonald the first battle in a long campaign to overturn gun control laws with heavy costs to public safety. The flip side to this dread is the anticipation of gun rights activists and gun owners in restrictive communities and states that McDonald heralds the dawn of a new era in firearms litigation—one in which gun owners have a fighting chance to overturn what are, in their eyes, draconian or arbitrary gun laws.

These two camps view McDonald as merely the beginning of active judicial involvement in the administration of the nation’s gun laws. The assumption is that there is more to come; whether one loathes or loves this prospect depends on whether one generally supports more or less strict gun control laws.

An opposing view is that these victories are largely, if not exclusively, symbolic. The presence of the Heller safe harbor, the support for “reasonable” (in all of its vague generality) gun controls, and the institutional conservatism of lower courts mean that little will happen on the ground, even after McDonald.138 On this theory, opportunities for enacting new gun control laws might actually increase, because Heller and McDonald have removed some of the sting from slippery slope arguments, effective in the past, which portrayed every incremental gun regulation as prelude to prohibition.139

So who is right? Readers familiar with our past work will not be surprised to find that we occupy a middle position between those two poles. First, we believe that there is a kind of fin de siècle quality to these opinions. Heller and McDonald settle one of the most hotly-contested

137See, e.g., William G. Merkel, Heller as Hubris: How McDonald v. City of Chicago May Well Change the Constitutional World as We Know It, 50 SANTA CLARA L. REV. 1221 (2010).
138See, e.g., Adam Liptak, Justices Extend Firearms Rights in 5-to-4 Ruling, N.Y. TIMES, June 29, 2010 at A1 (describing ruling as an “enormous symbolic victory”).
constitutional and policy questions of the last forty or so years. The relevance or irrelevance of the Second Amendment to the gun control debate is a question that has attracted scholars’ interest and resulted in hundreds of law review and other professional journal articles, many of which have been written in the last twenty-five years.

The decisions in *Heller* and *McDonald*, moreover, not only resulted in the invalidation of Washington D.C.’s gun ban, but will likely produce dramatic changes to Chicago’s. Further, courts and policymakers have begun to adjudicate and legislate in the shadow of the Second Amendment—some cities changed their laws in the aftermath of *Heller*—acting before *McDonald’s* official incorporation.140 Thus, it appears that the decisions are more than just empty symbolism.

And yet, there is a long way from these (relatively) modest results and *le deluge* feared (or anticipated) by activists on both sides. Having rendered *Heller* and *McDonald*, the Court is likely to retire again to the clouds, leaving the lower courts to sort out its decisions.141 This means that, once again, one will have to read lots of lower court opinions to get a complete picture of what is going on. The difference between *McDonald* and *Heller*, though, is the fact that now state courts will be able to apply the Second Amendment to state laws. If a state “overenforces” the Second Amendment, the Court might step in to correct it. But for now, we suspect that many of the post-*McDonald* opinions will resemble those post-*Heller*, with the *Heller* safe harbor providing cover for the majority of regulations. As Eugene Volokh has noted, there are a number of interesting issues that could occupy courts as they flesh out the scope of the right to keep and bear arms.142 In any event, the discretion of lower court judges will again determine the true meaning of *McDonald* (and *Heller*).

That discretion, as we have noted in the past, receives less attention than it should from academics and other court-watchers. Though the Supreme Court receives the lion’s share of the attention, the proportion of cases that

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141 For a critique of the Court’s penchant for doing this in areas that generate significant litigation, see Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 Sup. Ct. Rev. 205.

it actually decides is tiny – and much tinier, in relation to the caseload of the lower courts, than it was in the Warren or Burger eras. 143

Will the Heller and McDonald decisions herald another constitutional revolution where no one showed up?144 Probably not. To a much greater extent than the Commerce Clause issues addressed in Lopez, the Second Amendment involves questions and issues that inspire fierce passion in large numbers of Americans, and in well-funded organizations both equipped and inclined to pursue follow-up litigation in both state and lower federal courts. So in concluding that this is, at most, “the end of the beginning,” we do not mean to suggest that there will not be further battles – only that those battles will now be fought on terrain, and in fashions, that constitutional lawyers will find familiar.

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143See Glenn Harlan Reynolds, Looking Ahead: October Term 2007, 2007 CATO SUP. CT. REV. 335, 350-53 (“In 2006, the federal courts of appeal produced 34,580 decisions on the merits. In 1973, by contrast, the courts of appeal produced a mere 777 decisions on the merits. A Court that decided 129 cases on the merits could plausibly oversee a system of inferior courts that decided 777. But can a Court that decides 68 cases on the merits plausibly oversee a system that decides 34,580?”).

144Glenn H. Reynolds & Brannon P. Denning, Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?, 2000 Wis. L. REV. 369.