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## Applying the Privileges or Immunities Clause to Gun Rights: A Framework to Depolarize the Debate and Strengthen the Federal Judiciary

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**APPLYING THE PRIVILEGES OR IMMUNITIES CLAUSE TO GUN RIGHTS: A FRAMEWORK TO DEPOLARIZE THE DEBATE AND STRENGTHEN THE FEDERAL JUDICIARY**

MOHAMED AKRAM FAIZER\*

SYNOPSIS

Americans own a staggering 300 million plus firearms.<sup>1</sup> The vast majority of the weapons are used safely and properly for recreation and self-defense purposes.<sup>2</sup> However, firearms are often used improperly and subject Americans to a level of gun violence that is unique for an advanced democracy.<sup>3</sup> Because this violence disproportionately effects urban and racial minority Americans, significant geographical and political polarization has arisen on the gun rights issue.<sup>4</sup> Rural and conservative Americans tend to be gun owners who are highly protective of broad gun rights, while the complete opposite is the case for urban and racial minority Americans.<sup>5</sup> This polarization harms political discourse and minimizes the likelihood of finding bipartisan compromise as to the appropriate

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1. Christopher Ingraham, *There are More Guns Than People in the United States According to a New Study of Global Firearm Ownership*, WASH. POST (June 19, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/?noredirect=on&utm\\_term=.15e45e9098b1](https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/?noredirect=on&utm_term=.15e45e9098b1) [<https://perma.cc/PB5Q-LXC7>] (citing the findings of a Congressional Research Service report and the 2017 Small Arms Survey that report more than 393 million civilian-owned firearms in the United States).

2. Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, NAT'L INST. OF JUSTICE, May 1997, at 2–3.

3. Cassandra K. Crifasi et al., *Storage Practices of U.S. Gun Owners in 2016*, 108 AM. J. PUB. HEALTH 532, 532 (2018); German Lopez, *America is One of 6 Countries That Make Up More Than Half of Gun Deaths Worldwide*, VOX (Aug. 29, 2018), <https://www.vox.com/2018/8/29/17792776/us-gun-deaths-global> [<https://perma.cc/Q7RA-FHXY>].

4. Ruth Igielnik, *Rural and Urban Gun Owners Have Different Experiences, Views on Gun Policy*, PEW RES. CTR. FACTTANK (July 10, 2017), <https://www.pewresearch.org/fact-tank/2017/07/10/rural-and-urban-gun-owners-have-different-experiences-views-on-gun-policy/> [<https://perma.cc/7ZLW-SYVF>].

5. *Id.*

level of gun regulation. The U.S. Supreme Court chose to needlessly interpose itself into the gun rights debate in *District of Columbia v. Heller*<sup>6</sup> and *McDonald v. City of Chicago*,<sup>7</sup> which concluded that the Second Amendment protects an individual's right to possess handguns for self-defense purposes in the home and that this right is made applicable to state and local governments by way of the Fourteenth Amendment's Due Process Clause. Since these decisions, polarization on the issue of gun rights has only worsened<sup>8</sup> and the federal courts are increasingly preoccupied with challenges to municipal and state gun restrictions on Second and Fourteenth Amendment grounds.<sup>9</sup>

My argument is that the federal judiciary can protect itself from continued polarization on the gun rights issue by revisiting *McDonald* and incorporating the Second Amendment against state and local governments by way of the Fourteenth Amendment's Privileges or Immunities Clause.<sup>10</sup> Doing so would adumbrate a bipartisan compromise that protects federalism and legitimizes both perspectives on the gun rights debate because use of the Privileges or Immunities Clause, as opposed to the Due Process Clause, enables the federal courts to bring nuance to the issue by granting state and local governments broad discretion to regulate guns, provided they take adequate steps to accommodate the self-defense rights of all citizens. This way, all citizens, including historically marginalized racial and ethnic minorities, will be provided a level of safety consistent with U.S. citizenship. My approach will reduce polarization surrounding the gun rights debate, strengthen the federal judiciary, and, ultimately, engender national cohesion.

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6. 554 U.S. 570, 635 (2008).

7. 561 U.S. 742, 791 (2010).

8. Obvious examples being the U.S. Senate's refusal to grant Judge Merrick Garland a hearing after he was nominated by former President Obama to replace the late Justice Antonin Scalia on the U.S. Supreme Court and the parlous treatment of Associate Justice Brett Kavanaugh during his confirmation hearings to replace former Justice Anthony Kennedy.

9. *E.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015) (unsuccessful challenge brought to New York and Connecticut's ban on semiautomatic weapons); *see also* *Friedman v. City of Highland Park*, 784 F.3d 406, 407, 412 (7th Cir. 2015) (affirming the City of Highland Park's assault weapons ban); *Kolbe v. Hogan*, 849 F.3d 114, 138–39 (4th Cir. 2017) (the en banc Fourth Circuit Court of Appeals reversed a divided panel of the same court to conclude that Maryland's Firearm Safety Act satisfied strict scrutiny); *but see* *Wrenn v. District of Columbia*, 864 F.3d 650, 664 (D.C. Cir. 2017) (concluding that a D.C. ordinance that limited concealed carry permits to those with special needs violates the Second Amendment).

10. This is because the Court's due process jurisprudence requires jot-by-jot incorporation of the relevant Bill of Rights provision, whereas incorporation via the Privileges or Immunities Clause would grant states greater leeway to be effective laboratories of democracy while recognizing gun rights.

## INTRODUCTION

Working in a beautiful law school building in historic downtown Knoxville, Tennessee, I am privileged to work with, teach, and meet Americans of all political persuasions. Many of my colleagues, students, and friends are classic “red state” conservatives whose support for President Trump is based largely on a concern about protecting individual gun rights and insuring a conservative majority in the federal courts. My liberal students, colleagues and friends often cite their opposition to these goals as their reason for opposing the President’s reelection. In short, pronounced partisanship on gun rights and the federal judiciary explain much of the nation’s political divide. The U.S. Supreme Court interposed itself into the highly charged gun rights debate in *District of Columbia v. Heller*<sup>11</sup> and *McDonald v. City of Chicago*,<sup>12</sup> which concluded that the Second Amendment protects an individual’s right to possess handguns for self-defense purposes in the home, and that this right is made applicable to state and local governments by way of the Fourteenth Amendment’s Due Process Clause.<sup>13</sup> These judicial interventions were untimely in that they will satisfy neither side of the gun rights debate and only exacerbate the polarization problem that affects the federal judiciary. A cautionary reminder for all of us is the pronounced polarization on reproductive rights and judicial review that followed the judiciary’s creation of abortion rights based on a very broad interpretation of the Fourteenth Amendment’s Due Process Clause.<sup>14</sup> This was the perspective of none other than Associate Supreme Court Justice Ruth Bader Ginsburg, who stated that state laws liberalizing abortion were needlessly preempted by the Court’s decision to make abortion a national right.<sup>15</sup> My concern is that we are needlessly compounding this problem in the area of gun rights, an area left to the political branches until the *Heller* and *McDonald* decisions. The result has been the further politicization of the judiciary and worsened political polarization on gun rights nationwide.

My recommendation is that the federal courts reverse course by incorporating gun rights against the states by way of the Privileges or Immunities Clause of the Fourteenth Amendment as opposed to the Due Process Clause. Such an approach will enable the courts to consider local conditions in evaluating the constitutionality of gun restrictions by empowering them to balance the restrictions imposed, including how they affect racial minority and

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11. 554 U.S. at 635.

12. 561 U.S. at 791.

13. See *supra* notes 11–12.

14. See *Roe v. Wade*, 410 U.S. 113 (1973); see also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

15. Joshua Zeitz, *Why Conservatives Should Beware a Roe v. Wade Repeal*, POLITICO, (Sept. 4, 2018), <https://www.politico.com/magazine/story/2018/09/04/kavanaugh-roe-v-wade-conservatives-beware-backlash-219623> [<https://perma.cc/8GAJ-NPBT>].

other distressed communities, against local jurisdictions' effectiveness in protecting citizens from crime and violence in all its forms. This means of evaluating gun rights will appeal to a broader constituency of Americans than the current Due Process jot-by-jot approach because it legitimizes and effectuates the different perspectives in the current rights debate, while preserving and incentivizing the states to be legitimate laboratories of democracy on the issue. It will also, potentially, stem what has been an inexorable tendency to hyper-politicize the federal judiciary and therefore engender national cohesion.

AMERICA TODAY: HIGH LEVELS OF GUN OWNERSHIP IN A POLITICALLY  
POLARIZED ENVIRONMENT

America's high gun ownership rate means that Americans possess approximately 121 firearms per 100 persons.<sup>16</sup> This is 3.5 times the gun ownership rate of Canada, four times the gun ownership rate of Austria, Norway, and Switzerland, and five times the gun ownership rate found in New Zealand, Sweden, France, and Germany.<sup>17</sup> The vast majority of weapons owned by Americans are used lawfully for recreation and self-defense purposes and only a tiny fraction of these weapons are misused to perpetrate violence.<sup>18</sup> The U.S., however, does suffer from a substantial gun violence problem that makes it an outlier among first-world democracies. More than 115,000 Americans are shot each year and approximately 40,000 are killed by guns.<sup>19</sup> Of these deaths, more than 23,000 are suicides.<sup>20</sup> Roughly half the suicides in the U.S., which is the nation's tenth leading cause of death, are caused by gun shots.<sup>21</sup> The number of gun deaths is now roughly equal to the number of annual roadway deaths

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16. Carol Schaeffer, *US Citizens Own 40% of All Guns in World—More than Next 25 Top-Ranked Countries Combined Study Suggests*, INDEPENDENT (June 19, 2018), <https://www.independent.co.uk/news/world/americas/gun-ownership-country-us-legal-firearm-citizens-statistics-a8406941.html> [<https://perma.cc/63KK-KFGW>].

17. AARON KARP, SMALL ARMS SURVEY, ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS 4 tbl.2 (2018).

18. Cook & Ludwig, *supra* note 2, at 2–3. The Bureau of Justice tracks statistics on the number of guns are used for crime, mass shootings, etc. BUREAU OF JUSTICE STATISTICS, NCJ 243035, HOMICIDE TRENDS IN THE UNITED STATES KNOWN TO LAW ENFORCEMENT, 1 (Dec. 2013) (data collected from 1992–2011).

19. *Facts and Figures*, UC DAVIS HEALTH, <https://health.ucdavis.edu/what-you-can-do/facts.html> [<https://perma.cc/JZH5-9ZCY>].

20. Melonie Heron, *Deaths: Leading Causes for 2017*, NAT'L VITAL STAT. REP. 51 tbl. 11 (2019), [https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68\\_06-508.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_06-508.pdf) [<https://perma.cc/3PMJ-RYZ2>] (The number of motor vehicle traffic deaths for 2016 was 38,659, compared with the number of all firearm-related deaths, which was 39,773.).

21. Melonie Heron, *Deaths: Leading Causes for 2016*, NAT'L VITAL STAT. REP. 17 tbl.1 (2018), [https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67\\_06.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_06.pdf) [<https://perma.cc/BY5K-EGR3>].

nationwide.<sup>22</sup> To those who understandably claim guns are necessary to protect against criminals and home intruders, the evidence demonstrates that gun ownership increases the likelihood of deaths caused by accident, suicide, and theft.<sup>23</sup> Guns kept in the home correlate with a five-fold increase in suicide, a four-fold increase in accidental shooting, and a seven-fold increase in homicide.<sup>24</sup>

The U.S.'s gun death rate makes it, by far, the laggard among developed countries in terms of minimizing gun fatalities.<sup>25</sup> The U.S.'s gun death rate of 10.6 per 100,000 annually is dramatically higher than the rates of other developed nations that have stricter gun laws and have less violent cultures.<sup>26</sup> Switzerland's gun death rate of 2.8 per 100,000, which is amongst the highest in Western Europe, is less than a third of the gun death rate in the U.S.<sup>27</sup> The rates for Canada, Germany, the U.K., and Japan are 2.1, 0.9, 0.3, and 0.2 respectively.<sup>28</sup>

Additionally, blaming the U.S.'s high gun death rate on mental illness is wrong.<sup>29</sup> The evidence demonstrates that the U.S. population does not suffer from higher rates of mental illness than other mature democracies and there is no correlation between mental illness and gun homicides.<sup>30</sup> Rather, the U.S. suffers from an inordinately high rate of gun violence that is attributable to high rates of gun ownership, in conjunction with an atypical culture of self-reliance.<sup>31</sup>

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22. Neal E. Boudette, *U.S. Traffic Deaths Rise for a Second Straight Year*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/business/highway-traffic-safety.html> [https://perma.cc/AHS2-J778].

23. Melinda Wenner Moyer, *More Guns Do Not Stop More Crimes Evidence Shows*, SCIENTIFIC AM. (Oct. 1, 2017), <https://www.scientificamerican.com/article/more-guns-do-not-stop-more-crimes-evidence-shows/> [https://perma.cc/Y98K-G5U8].

24. *Id.*

25. Lopez, *supra* note 3.

26. *Id.*

27. *Id.*

28. *Id.*

29. See e.g., Fareed Zakaria, *Talking About Mental Health After Mass Shootings is a Cop-Out*, WASH. POST (Oct. 5, 2017), [https://www.washingtonpost.com/opinions/talking-about-mental-health-after-mass-shootings-is-a-cop-out/2017/10/05/8c319ca4-aa13-11e7-850e-2bdd1236be5d\\_story.html?utm\\_term=.ca58196fc4d3](https://www.washingtonpost.com/opinions/talking-about-mental-health-after-mass-shootings-is-a-cop-out/2017/10/05/8c319ca4-aa13-11e7-850e-2bdd1236be5d_story.html?utm_term=.ca58196fc4d3) [https://perma.cc/H6GM-Y75D].

30. Emma E. McGinty, *Mental Illness and Gun Violence: Disrupting the Narrative*, PSYCHIATRIC SERV. (June 20, 2018), <https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201800172> [https://perma.cc/FSK3-R78X].

31. See e.g., German Lopez, *America's Unique Gun Violence Problem, Explained in 16 Maps and Charts*, VOX (Aug. 31, 2019), <https://www.vox.com/policy-and-politics/2017/10/2/16399418/us-gun-violence-statistics-maps-charts> [https://perma.cc/A472-VXZG]; see also Dave Gilson, *10 Pro-Gun Myths, Shot Down*, MOTHER JONES (Jan. 31, 2013), <https://www.motherjones.com/politics/2013/01/pro-gun-myths-fact-check/> [https://perma.cc/YLE8-TNMS] (“People with access to more guns tend to kill more people—with guns. States with higher gun ownership rates have higher gun murder rates—as much as 114 percent higher than states with lower gun ownership rates.”)

The vast majority of Americans, however, do not own guns for improper purposes. Rather, most guns are used properly and safely for self-defense and recreation purposes. Gun ownership is, to many, as American as charitable giving or apple pie. This cultural disposition in favor of gun ownership explains why many Americans have taken such an expansive view of the Second Amendment and have joined civil society interest groups such as the National Rifle Association, which claims to have 5 million members.<sup>32</sup> Indeed, regardless of the objective metrics, gun ownership is a chosen means of self-defense for many Americans and it would be foolhardy and counterproductive for any level of government to systematically disarm gun owners or deny them ammunition.<sup>33</sup>

Gun rights, however, have historically been abused both to subject racial minority communities to systematic gun violence, and to deprive those communities of access to guns for self-defense purposes.<sup>34</sup> This paradigm of loose gun restrictions for the white majority community, in conjunction with the systemic disarming of racial minorities, has, of course, worsened the pronounced polarization of the gun rights debate.

A proper public policy remedy would have to balance the public's "love of guns" born of a hyper-individualistic culture, especially in rural America, with urban America's preference for gun restrictions. It would also consider the fact that many Americans, especially racial minorities and those living in urban areas, increasingly see broad gun rights, in conjunction with the lack of economic development and ineffective crime control, as a means of effectively undermining struggling communities.<sup>35</sup>

#### I. DEPOLITICIZING GUN RIGHTS BY REVISITING *HELLER* AND *MCDONALD*

In view of pronounced polarization surrounding the gun rights debate, it was a mistake for the Court to issue its *Heller* and *McDonald* decisions. The Court should limit these cases to their facts and instead conclude that the public's right to bear arms should be incorporated against state and local governments by way

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However, gun possession in view of the manifest dangers is not irrational. Rather, it is akin to driving for those afraid of flying.

32. Ryan Sit, *How Big is the NRA? Gun Group's Membership Might Not Be As Powerful As It Says*, NEWSWEEK (Mar. 30, 2018), <https://www.newsweek.com/nra-membership-5-million-members-analysis-842040> [<https://perma.cc/738C-HAP4>].

33. I say foolhardy because such a measure would most likely result in either violence or civil disobedience.

34. Examples include denial of guns to those with criminal background problems and other more invidious forms of discrimination.

35. Trymaine Lee, *The Age of Trump is Producing More Black Gun Owners*, NBC NEWS, (May 12, 2017), <https://www.nbcnews.com/news/nbcblk/age-trump-producing-more-black-gun-owners-n758211> [<https://perma.cc/4DDB-W3GZ>] ("While no agency or group keeps track of gun sales by race, interviews with firearms dealers and gun clubs across the country strongly suggest a sharp rise in the number of African-Americans buying guns since Trump's election.").

of the Privileges or Immunities Clause of the Fourteenth Amendment and not the Due Process Clause. This will ideally recognize the different narratives surrounding the gun debate to further effectuate the Fourteenth Amendment's goal of protecting human freedom consistent with Madisonian federalism. It would also, ideally, depoliticize the federal judiciary and help cohere the nation.

A. *Evaluating the Court's Jurisprudence*

The Supreme Court's decisions should not solely be evaluated according to the apparent desirability of the judicial outcomes, but also according to the institutional legitimacy of these outcomes, the legal soundness of the Court's jurisprudence, and, finally, to how these decisions will affect and interact with both U.S. government and society. The standard for evaluating the legitimacy of federal court oversight was adumbrated by Justice Brandeis's *Ashwander* Rules,<sup>36</sup> set forth in his concurring opinion in *Ashwander v. Tennessee Valley*

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36. *See id.* The *Ashwander* Rules are as follows:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."
2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."
3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."
4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.
5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right to challenge to one who lacks a personal or property right. . . .
6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.
7. When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

*Id.* (emphasis added) (internal citations omitted).



*Authority.*<sup>37</sup> The most important of these is that the Court should abjure from adjudicating the constitutionality of an issue unless it is absolutely necessary to resolve the case.<sup>38</sup> This is to minimize the footprint of the appointed federal judiciary and allow for the Framers' laboratories of democracy to flourish. Justice Brandeis's admonition is especially relevant to the issue of gun rights in view of its political saliency and the risk of further politicizing the federal judiciary. This was the unfortunate result of the Court's creation of nationwide abortion rights under the Fourteenth Amendment's Due Process Clause. Justice Ginsburg, no less, has argued that it had the parlous consequence of creating sharp divisions on the abortion issue at the very moment when states were liberalizing their abortion laws.<sup>39</sup> Applying this framework, the Court's decisions jurisprudentially protecting gun rights are altogether problematic uses of judicial review. They were unnecessary judicial interventions that anticipate a one-way ratchet to effectively preclude state and local governments from regulating guns to minimize the risk of gun violence. This, in turn, will harm U.S. society by increasing the level of gun violence, further polarizing the gun debate and needlessly damaging the Court's institutional legitimacy.

A better approach would be to conclude that the Fourteenth Amendment's Privileges or Immunities Clause grants all Americans a right to greater freedom and liberty as against all levels of governments and still allow for effective gun regulation at the state and local level. Firearms are valued for self-defense purposes, but their misuse imposes significant dangers to human freedom that can undermine the value of American citizenship. Under my approach, federal courts will be empowered to apply the Privileges or Immunities Clause as against state and local governments that systematically deny the broader public, including historically oppressed minorities, their self and collective defense rights. Conversely, though, state and local governments that provide non-discriminatory policing and adequate safety to their citizens are to be given broader leeway under the Clause to implement reasonable gun regulations to protect against all forms of firearm misuse, including suicide. This will satisfy the Fourteenth Amendment Framers' goal of enhancing the value of American citizenship and, ultimately, depoliticize the gun rights debate. The U.S. Supreme Court has lamentably failed to take this approach and has instead chosen to nationalize gun rights via the Fourteenth Amendment's Due Process Clause.

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37. 297 U.S. 288, 346–48 (1936).

38. *See id.* at 347.

39. *See* Jonathan Bullington, *Justice Ginsburg: Roe v. Wade Not 'Woman-Centered'*, CHI. TRIB. (May 11, 2013), [http://articles.chicagotribune.com/2013-05-11/news/chi-justice-ginsburg-roe-v-wade-not-womancentered-20130511\\_1\\_roe-v-abortion-related-cases-wade-case](http://articles.chicagotribune.com/2013-05-11/news/chi-justice-ginsburg-roe-v-wade-not-womancentered-20130511_1_roe-v-abortion-related-cases-wade-case) [https://perma.cc/Y7MG-F6RS].

### B. *Heller* and *McDonald*

Disregarding over two hundred years of judicial restraint on the issue, the U.S. Supreme Court in *District of Columbia v. Heller* waded into the gun debate to conclude that the District of Columbia violated the Second Amendment to the U.S. Constitution when it banned the possession of unregistered firearms and disallowed the registration of handguns.<sup>40</sup> The Court, in an opinion by the late Justice Scalia, looked to grammar, eighteenth century texts, historical commentaries, cases, and legislative materials to conclude that there is a personal right to possess firearms that are commonly used by the American public for self-defense purposes.<sup>41</sup> Comfortable with a right extending beyond militia service, the decision concluded that D.C.'s ban on handgun possession in the home, coupled with a prohibition rendering any lawful firearm in the home inoperable for immediate self-defense purposes, violated the Second Amendment.<sup>42</sup> The Court concluded that the central component of the right itself was not militia service per se, but self-defense, and held that because handguns are the most commonly used weapon by American households for self-defense, the District's handgun ban violated the Second Amendment.<sup>43</sup>

Although a stunning victory for gun-rights enthusiasts, *Heller* concurrently created problems for Second Amendment advocates. First, the *Heller* decision was silent on the level of scrutiny that applies to gun restrictions.<sup>44</sup> Second, the Court concluded that nothing in its decision precludes local governments from denying weapons to those traditionally denied them, including convicted felons and the mentally ill.<sup>45</sup> As noted in Justice Breyer's dissent, convicts and the mentally ill are typically not denied other Bill of Rights provisions such as those found in the First, Fourth, Fifth, and Sixth Amendments.<sup>46</sup> Finally, the Court majority disregarded evidence presented to the D.C. City Council that handguns are actually an ineffective means of self-defense, e.g., handguns in the home are more than four times more likely to be accidentally misused against a family member than purposely used against a home invader.<sup>47</sup>

Notwithstanding these omissions and limitations, the Court in *McDonald*<sup>48</sup> invalidated a Chicago municipal ordinance that prohibited handgun possession in the home by incorporating, for the first time, *Heller's* understanding of a personal right to a firearm for self-defense purposes as against state and local

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40. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

41. *Id.* at 598, 605, 614, 634–35; see also Anthony P. Badaracco, *Firearm Federalism*, 65 N.Y.U. ANN. SURV. AM. L. 761, 777 (2010).

42. Badaracco, *supra* note 41, at 778.

43. *Heller*, 554 U.S. at 629.

44. *Id.* at 635.

45. *Id.* at 626–27.

46. *Id.* at 721.

47. *Id.* at 694.

48. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

governments by way of the Fourteenth Amendment's Due Process Clause.<sup>49</sup> As set forth more fully below, use of the Due Process Clause of the Fourteenth Amendment as opposed to the Privileges or Immunities Clause of the same amendment is not only mistaken, but has deprived the Court of an opportunity to effectively protect gun rights consistent with federalism. It is to the issue of federalism and its benefits to which this paper now turns.

## II. THE TENTH AMENDMENT, FEDERALISM, AND ITS BENEFITS

The Tenth Amendment provides “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>50</sup> It has historically been seen as a reminder that the American system of federalism provides the Federal Government with limited and enumerated powers, with the several states retaining broad police powers to govern themselves as autonomous entities. Although the states “surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty.”<sup>51</sup>

Maintaining individual state sovereignty was imperative for the Founders because it insured that the several states would remain “laboratories of democracy” that could effectively vie for the American people’s affections and thereby minimize the risk of oppression by any one governmental entity. The Framers were aware of the need to institutionalize the Nation’s federalism and did so by 1) giving the national Congress only limited and enumerated powers under the Constitution’s Article I;<sup>52</sup> 2) giving States a disproportionate power in the Senate and in electing the Nation’s President under Article II;<sup>53</sup> 3) ensuring the free movement of U.S. citizens under Article IV’s Privileges and Immunities Clause;<sup>54</sup> and 4) ensuring the several States retained residual police powers by implication under Article I and explicitly under the Tenth Amendment.<sup>55</sup>

The importance of federalism is outlined in *New York v. United States*, which involved a challenge brought by the State of New York to the take title provision of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985.<sup>56</sup> This law was enacted at the behest of the National Governors’

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49. *Id.* at 752, 791.

50. U.S. CONST. amend. X.

51. *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (citing THE FEDERALIST No. 39 (James Madison)) (internal quotations omitted).

52. *See* U.S. CONST. art. I, § 1 (provides that the Congress has limited and enumerated legislative power).

53. U.S. CONST. art. I, § 3 (mandates “two Senators from each State”); U.S. CONST. art. 2, § 1 (mandates Presidential elections via an electoral college of electors from each state as opposed to by nationwide popular vote).

54. *See* U.S. CONST. art. IV, § 2.

55. *See* U.S. CONST. amend. X.

56. *New York v. United States*, 505 U.S. 144, 153–54 (1992).

Association to incentivize states to adequately provide for the disposal of radioactive waste generated within their borders.<sup>57</sup> Two of the three incentives provided to states under the Act were monetary in nature, but the third incentive, known as the “take title” provision, provided that states are to take title to low-level radioactive waste generated within their borders when they are unable to provide for the disposal of such waste upon the request of the owner or generator of such waste.<sup>58</sup> In an opinion by former Justice O’Connor, the Court concluded this “take title” provision was an unconstitutional infringement of state sovereignty because it improperly coerced the state legislative process.<sup>59</sup> The decision emphasized that the Constitution’s emphasis on federalism was not to protect state governments as political entities. Rather, Justice O’Connor writes:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: “Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Coleman v. Thompson*, 501 U.S. 722, 759 . . . (1991). “Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S. at 458 . . . (1991).<sup>60</sup>

Federalism’s healthy diffusion of power is for the protection of individuals and not a simple end in itself. This, in turn requires that state and local governments retain broad police powers as a supplement to federal constitutional rights.<sup>61</sup>

Federalism, however, is threatened by broad application of the Fourteenth Amendment’s Due Process Clause to constrain state legislatures from effectively using their police powers. This is what the Court did in *McDonald*, where absent an absolute necessity to do so, it jurisprudentially expanded gun rights by incorporating the *Heller* definition of the Second Amendment rights. This coercion of a state’s legislative process by the least democratically accountable branch of the federal government both politicizes the federal judiciary and undermines national cohesion by polarizing the gun rights issue. My recommendation is to have the Court revisit its incorporation jurisprudence and instead use the Fourteenth Amendment’s Privileges or Immunities Clause, which prioritizes human freedom, to contextually apply the freedoms emanating

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57. *Id.* at 150–51.

58. *Id.* at 153–54.

59. *Id.* at 176.

60. *Id.* at 181–82.

61. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting).

from the Bill of Rights, including gun rights, to enhance the value of U.S. citizenship. Such an approach, as opposed to jot-by-jot incorporation by way of the Due Process Clause, will grant Americans their right to full citizenship while insuring States remain vibrant laboratories of democracy.

### III. THE PRIVILEGES OR IMMUNITIES CLAUSE — A MEANS OF INCORPORATING GUN RIGHTS

The Privileges and Immunities Clause of the U.S. Constitution's Article IV, Section 2, ratified in 1788, provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."<sup>62</sup> This informed the Framers of the Fourteenth Amendment's Privileges or Immunities Clause ("Clause"), ratified in 1868, which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States."<sup>63</sup> The Clause has been mistakenly interpreted to mean little more than protection of foreign residents against state governments that attempt to deny them their the ability to earn a livelihood or to relocate and take up residency on equal terms.<sup>64</sup> This mistaken marginalization of the Clause, attributable to the doctrine of judicial deference,<sup>65</sup> goes back to *The Slaughter-House Cases*.<sup>66</sup> *The Slaughter-House Cases*, issued a mere four years after the Fourteenth Amendment's ratification, concluded that the Clause provided no redress to New Orleans slaughterhouse operators against their own state government's granting of a monopoly tariff to a competitor slaughterhouse because it would ostensibly empower the federal courts to be illegitimate overseers of state government.<sup>67</sup>

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62. U.S. CONST. art. IV, § 2, cl. 1.

63. U.S. CONST. amend. XIV, § 1. For a detailed description of why this provision arguably can be the basis to judicially enforce socio-economic rights for all Americans, see M. Akram Faizer, *The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon*, 121 PENN ST. L. REV. 61, 65 (2016).

64. *Saenz v. Roe*, 526 U.S. 489, 502, 507–08 (1999) (concluding that California could not impose a durational residency requirement before new residents could be entitled to full welfare benefits).

65. The doctrine of judicial deference refers to courts being reluctant to invalidate the actions of the other branches of government for fear of institutionally undermining the judiciary and antagonizing the political culture. By way of example, Chief Justice Roberts was accused by conservatives of excessive judicial deference when he found an ingenious means of concluding the Patient Protection and Affordable Care Act's individual mandate was not a prohibited penalty under the Commerce Clause, but a constitutional means of raising revenue under the Taxing and Spending Clause in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 668–69 (2012).

66. *Slaughter-House Cases*, 83 U.S. 36, 55, 80–81 (1873).

67. *Id.* at 78; see also Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 31, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08–1521); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 429 (1990).

The *Slaughter-House* decision was immediately condemned by former members of the Thirty-Ninth Congress as a “great mistake,”<sup>68</sup> which, according to U.S. Senator Timothy O. Howe, had perverted the Constitution by “assert[ing] a principle of constitutional law which [would never] be accepted by the [legal] profession or the people of the United States.”<sup>69</sup> U.S. Senator George Franklin Edmunds said the *Slaughter-House* view of the Fourteenth Amendment’s Clause “radically differed” from the Framers’ intent.<sup>70</sup> The Court’s reluctance to revisit this conclusion, although based on an interpretation that is “contrary to an overwhelming consensus among leading constitutional scholars today[] who agree that the opinion is egregiously wrong[,]”<sup>71</sup> has distorted its jurisprudence by foreclosing the Clause as a means of reviewing unjust state laws in a manner consistent with federalism and has led to the current paradigm whereby the Court, being limited to the Due Process and Equal Protection Clauses to protect individual rights, cannot properly balance gun and other rights in a manner consistent with federalism.

The Clause should be reinterpreted to correctly apply its Framers’ intent to ensure that all citizens of the post-reconstruction republic be granted citizenship rights and living standards at the forefront of international standards. This requires rejecting the distinction between positive and negative rights, and requiring the federal government to protect the fundamental rights of all citizens against state action that undermines these rights.<sup>72</sup> Because the Clause was enacted and ratified based on, among other things, revulsion at the institution of slavery and its consequences in the antebellum American South, its Framers, seeking to protect Americans from recalcitrant state and local government, sought to ensure provision of substantive negative and positive freedoms by all levels of government.<sup>73</sup> The Clause should therefore be interpreted to provide all citizens with federally protected substantive rights, including but not limited to those found in the Bill of Rights.<sup>74</sup> Although the Court rejected this approach and instead used the Due Process Clause to selectively incorporate the Bill of Rights over a more than one-hundred year time-frame that began a generation

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68. Brief of Constitutional Law Professors, *supra* note 67, at 32–33 (quoting former U.S. Senator and Fourteenth Amendment Framer George S. Boutwell).

69. 43 CONG. REC. 4148 (1874).

70. See Brief of Constitutional Law Professors, *supra* note 67, at 33; see also MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 177 (1986).

71. Brief of Constitutional Law Professors, *supra* note 67 at 33 (citing Amar, *infra* note 72, at 631).

72. See Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631–32 (2001); see also Gerhardt, *supra* note 67, at 437.

73. See Gerhardt, *supra* note 67, at 417.

74. See Brief of Constitutional Law Professors, *supra* note 67, at 16, 20.

after the Fourteenth Amendment's ratification,<sup>75</sup> most legal scholars would agree this was a mistake that is belied by the Fourteenth Amendment's text and its Framers' intent.<sup>76</sup>

Because the Framers of the Fourteenth Amendment Clause intended to dramatically alter American federalism by imposing positive duties on all levels of government to enhance the value of American citizenship, it can be surmised that a concomitant of this requirement is to insure all Americans are provided with individual rights and material living conditions consistent with living in a free and democratic society.<sup>77</sup> Consistent with Madisonian federalism, it also empowers state and local governments to effectively use their police powers to enhance the value of this citizenship. Included in this is the right to self-defense and to be free from violence, including gun violence.<sup>78</sup>

#### IV. MCDONALD'S FAILURE TO EFFECTUATE THE CLAUSE AND HOW THIS DISTORTS THE MEANING OF GUN RIGHTS

In *McDonald*, the Court rejected an invitation to overturn the *Slaughter-House Cases* and properly apply the Second Amendment as against the City of Chicago by way of the Privileges or Immunities Clause. It chose to, once again, rely on *stare decisis* to incorporate the Second Amendment by way of the Fourteenth Amendment's Due Process Clause. This is a highly consequential mistake because unlike the Privileges or Immunities Clause, which would textually authorize a nuanced approach to the issue of gun rights and citizenship, use of the Due Process Clause to jot-by-jot apply the Second Amendment against state and local governments precludes such nuance and requires application of

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75. The Court first applied the Due Process Clause to incorporate the Fifth Amendment's Takings Clause against the states via the Fourteenth Amendment's Due Process Clause in *Chi., Burlington and Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235 (1897), and it took another one hundred and thirteen years for the Court to conclude the Fourteenth Amendment's Due Process Clause required state and local governments to provide Second Amendment protections. See *McDonald v. City of Chicago*, 561 U.S. 742, 792 (2010).

76. See Brief of Amicus Curiae Institute for Justice in Support of Petitioners at 8–9, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08–1521); see also Anthony P. Badaracco, *supra* note 41, at 762; Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Meaning of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L. J. 1509, 1510 (2007); David S. Cohen, *McDonald's Paradoxical Legacy: State Restrictions of Non-Citizens' Gun Rights*, 71 MD. L. REV. 1219, 1220 (2012). For a detailed description as to the Court's mistaken marginalization of the Privileges or Immunities Clause and its incorrect application of the Bill of Rights against the states via the Due Process Clause, see Faizer, *supra* note 63, at 64.

77. Gerhardt, *supra* note 67, at 427; see also Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 221–22 (2009).

78. Klukowski, *supra* note 77, at 237 n.376.

strict scrutiny to evaluate state and local gun restrictions.<sup>79</sup> Justice Alito, whose majority opinion in *McDonald* governs, writes:

Finally, 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,” stating that it would be “incongruous” to apply different standards “depending on whether the claim was asserted in a state or federal court.” *Malloy*, 378 U.S., at 10–11 . . . (internal quotation marks omitted). Instead, the Court decisively held that incorporated Bill of Rights protections “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” *Id.* at 10.<sup>80</sup>

Accordingly, applying the Due Process framework, the Court presented the issue before it as whether the right to keep and bear arms is “fundamental to *our* scheme of ordered liberty, or as we have said in a related context, whether this right is deeply rooted in this Nation’s history and tradition.”<sup>81</sup> The Court concluded that the right to keep and bear arms is deeply rooted in the nation’s history and traditions based on many factors, including the value that the early colonists placed on gun ownership and the fact that Union Army commanders after the Civil War took steps to insure all Americans, including African Americans, had gun rights safe from state confiscation.<sup>82</sup>

Justice Alito’s opinion, however, fails to acknowledge that gun rights, more than other rights, present an obvious tension between liberty and safety.<sup>83</sup> This tension explains why most jurisdictions have historically denied firearms to convicted felons, the mentally ill, and others who might have greater self-defense needs than the broader public.<sup>84</sup> The inherent dangers attendant to firearm possession undoubtedly explain why other advanced democracies are far stricter with guns than the U.S., which, in turn, explains why the U.S. is an outlier with respect to its high rate of gun fatalities.<sup>85</sup>

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79. *Id.* at 235–36.

80. *McDonald*, 561 U.S. at 765 (2010) (some internal citations omitted).

81. *Id.* at 767 (internal citations omitted, internal quotation marks omitted, emphasis original).

82. *Id.* at 773.

83. *See supra* notes 16–21. Guns are far more likely to be misused by their owner than properly against assailants and home intruders.

84. *Categories of Prohibited People*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/categories-of-prohibited-people/> [<https://perma.cc/QC7H-8TKY>] (categories of prohibited people include: “those who have been convicted of violent or gun-related misdemeanors[,] those with a history of abusing alcohol or drugs[,] those convicted of juvenile offenses[,] and additional people who have suffered from severe mental illness.”).

85. Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN REL. (Aug. 6, 2019), <https://www.cfr.org/backgrounders/us-gun-policy-global-comparisons> [<https://perma.cc/NG38-56CL>].



Justice Alito's decision also fails to appreciate that nationwide application of broad gun rights via the Due Process Clause on the grounds that they are "so rooted in our history, tradition, and practice as to require special protection" contradicts the Court's previously enunciated grounds for heightened judicial scrutiny, *i.e.*, there is no need for federal courts to expand the scope of constitutional rights where the basis for doing so is the presumed protection by the democratic process.<sup>86</sup>

The *McDonald* majority completely disregards the fact that none of the Bill of Rights, including the Second Amendment, were intended to be nationalized by way of the Due Process Clause.<sup>87</sup> Responding to the City of Chicago's claim that textually applying the Second Amendment against state and local governments by way of the Due Process Clause undermines federalism by preventing state and local governments from enacting reasonable gun safety laws, Justice Alito writes:

Unless we turn back the clock or adopt a special incorporation test applicable only to the Second Amendment, municipal respondents' argument must be rejected. Under 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* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment."<sup>88</sup>

This, however, posits that application of gun rights to state and local governments requires a symmetrical textual application of *Heller* by way of the Due Process Clause. This is untrue.<sup>89</sup> Justice Stevens writes in dissent:

I do not mean to deny that there can be significant practical, as well as esthetic, benefits from treating rights symmetrically with regard to the State and Federal Governments. Jot-for-jot incorporation of a provision may entail greater protection of the right at issue and therefore greater freedom for those who hold it; jot-for-jot incorporation may also yield greater clarity about the contours of the legal rule. In a federalist system such as ours, however, this approach can carry substantial costs. When a federal court insists that state and local authorities follow its dictates on a matter not critical to personal liberty or procedural justice, the latter may be prevented from engaging in the kind of

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86. *See also* *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1934) (concluding that heightened judicial scrutiny should apply to protect discrete and insular minorities).

87. *Id.*

88. *McDonald v. City of Chicago*, 561 U.S. 741, 784–85 (2010).

89. *See, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005). There, the Court concluded that the Fifth Amendment's public use requirement for eminent domain acquisitions is to be broadened to a public purpose requirement when evaluating a state and local government taking under the Fourteenth Amendment's Due Process Clause. *Id.* at 485, 487–89.

beneficent “experimentation in things social and economic” that ultimately redounds to the benefit of all Americans. The costs of federal courts’ imposing a uniform national standard may be especially high when the relevant regulatory interests vary significantly across localities, and when the ruling implicates the States’ core police powers.<sup>90</sup>

While Justice Stevens refused to revisit the Court’s jurisprudence and incorporate the Second Amendment by way of the Privileges or Immunities Clause, he effectively outlines the problem with blanket jot-by-jot textual application of the Bill of Rights, including the Second Amendment, against state and local governments—namely, that it undermines the benefits of federalism to the detriment of individual liberty.<sup>91</sup>

A more nuanced approach is required, especially since firearms are viewed so differently based on regional political culture differences, partisanship, and race. Justice Stevens writes:

First, firearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs and insurrectionists murder innocent victims. The threat that firearms will be misused is far from hypothetical, for gun crime has devastated many of our communities. *Amici* calculate that approximately 1 million Americans have been wounded or killed by gunfire in the last decade. Urban areas such as Chicago suffer disproportionately from this epidemic of violence. Handguns contribute disproportionately to it. Just as some homeowners may prefer handguns because of their small size, light weight, and ease of operation, some criminals will value them for the same reasons. In recent years, handguns were reportedly used in more than four-fifths of firearm murders and more than half of all murders nationwide. Hence, in evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. *Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence. And while granting you the right to own a handgun might make you safer on any given day—assuming the handgun’s marginal contribution to self-defense outweighs its marginal contribution to the risk of accident, suicide, and criminal mischief—it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation. It is at least reasonable for a democratically elected legislature to take such concerns into account in considering what sorts of regulations would best serve the public welfare.<sup>92</sup>

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90. *McDonald*, 561 U.S. at 869–70 (internal citations omitted).

91. *Id.*

92. *Id.* at 891–92 (internal citations omitted).

Justice Stevens then addressed the claim that the Framers of the Fourteenth Amendment intended the nationalization of a personal right to firearms based on the systematic disarming of freedmen by recalcitrant state and local governments. Although he refused to revisit the Court's failure to apply the Bill of Rights as against the states by way of the Clause, he correctly notes that the issue of the systematic disarming of racial minorities for oppressive purposes is better remedied by an equal protection claim than an expansion of purported gun rights under the Due Process Clause. Justice Stevens writes:

I accept that the evolution in Americans' understanding of the Second Amendment may help shed light on the question whether a right to keep and bear arms is included within Fourteenth Amendment "liberty." But the reasons that motivated the Framers to protect the ability of militiamen to keep muskets available for military use when our Nation was in its infancy, or that motivated the Reconstruction Congress to extend full citizenship to the freedmen in the wake of the Civil War, have only a limited bearing on the question that confronts the homeowner in a crime-infested metropolis today. The many episodes of brutal violence against African-Americans that blight our Nation's history do not suggest that every American must be allowed to own whatever type of firearm he or she desires—just that no group of Americans should be systematically and discriminatorily disarmed and left to the mercy of racial terrorists. And the fact that some Americans may have thought or hoped that the Fourteenth Amendment would nationalize the Second Amendment hardly suffices to justify the conclusion that it did.<sup>93</sup>

The claim by gun rights enthusiasts that racial justice requires a broad personal right to firearms is belied by the fact racial minorities, including African Americans, tend to be more skeptical of gun rights than the white majority and by the fact that the African-American community, which was, at the time of Reconstruction, largely rural agrarian, has developed into an overwhelmingly urban one that does not perceive its rights as being closely tied to gun possession.<sup>94</sup>

In short, the Fourteenth Amendment's Due Process Clause should not be used as a vehicle to nationalize a personal right to firearms because: 1) the Framers of the Fourteenth Amendment never intended the Bill of Rights to be nationalized against state and local governments via the Due Process Clause and actually intended for those and other rights to be incorporated via the Privileges or Immunities Clause; 2) the basis for increasing the scope of individual rights under the Due Process Clause, namely that they are rooted in our history,

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93. *Id.* at 898–99 (internal citations omitted).

94. Ben Schreckinger, *New CPAC Stars: Black Gun Rights Activists*, POLITICO (Mar. 1, 2019), <https://www.politico.com/story/2019/03/01/gun-rights-african-americans-1197153> [<https://perma.cc/A8H6-KE6R>] ("Opinion polling shows that black Americans view guns more negatively and are more supportive of gun control than whites and Hispanics."). *See also* Badaracco, *supra* note 41, at 793.

tradition, and practice belies any reason for the purported rights expansion because there is no need to encroach on democratic freedom when the individual rights involved are already rooted in practice; 3) firearms are inherently dangerous and tend to be lethally misused and therefore gun rights impose significant externalities; and 4) using the Due Process Clause to textually apply the Bill of Rights against the several states improperly undermines federalism to the detriment of individual liberty, which contradicts the entire basis for the Bill of Rights.

#### V. APPLYING THE PRIVILEGES OR IMMUNITIES CLAUSE TO GUN RIGHTS CLAIMS

A proper federal court evaluation of state and local government gun restrictions under the Clause should be based on a searching inquiry of local conditions that balances the individual's need for self-defense against the broader need for protections against gun misuse. This nuanced approach, as opposed to a Due Process-based jot-by-jot incorporation of *Heller* as against state and local governments, would be true to the Framers' intent and still provide for federalism's benefits. If gun rights are too restrictive in view of the public's lack of access to adequate and timely police protection, the federal courts should apply the Clause to require state and local jurisdictions to improve policing and/or facilitate access to firearms for self-defense purposes. Similarly, if racial minorities and other vulnerable groups are systematically denied access to weapons for self-defense purposes by illegitimate permitting and background check requirements, the federal courts are to invalidate these laws under the Clause.<sup>95</sup> Under this approach, the City of Chicago's handgun ban would have been invalidated based on its abject failure to reduce crime and violence, especially in racial minority communities.<sup>96</sup> Conversely, jurisdictions that provide proper policing and that can demonstrate that historically oppressed communities have equal access to weapons are to be given broad discretion to impose gun restrictions for purposes of improving public safety.<sup>97</sup> Such an approach is necessary because simply subjecting gun rights to state and local police powers, or even granting such rights only to militia-members, would

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95. I am referring to typical state laws that disproportionately affect racial minorities, such as laws that preclude convicted felons from either voting or being licensed to own firearms. The federal courts should be empowered under the Fourteenth Amendment Clause to invalidate these laws on Second and Fourteenth Amendment grounds.

96. Shannon Antinori, *FBI Crime Stats: Where Illinois Stands*, PATCH (Oct. 1, 2018), <https://patch.com/illinois/chicago/fbi-crime-stats-where-illinois-stands> [<https://perma.cc/3YNM-8JG9>].

97. *Transcript of Scholar Akhil Reed Amar on Turning to the Constitution to Confront the Issue of Our Time*, NPR: DIANE REHM SHOW (Sep. 13, 2016), <https://dianerehm.org/shows/2016-09-13/scholar-akhil-reed-amar-on-turning-to-the-constitution-to-confront-the-issue-of-our-time> [<https://perma.cc/ZQ75-VT3F>].

undermine the Framers' goal of protecting all Americans from racial terrorism and other forms of illegal violence. Incorporating gun rights via the Clause would empower federal courts to undertake a searching inquiry into local safety conditions, including the predicament of historically marginalized groups, in evaluating the constitutionality of local gun restrictions and permitting requirements.

To illustrate a potential result, rural states and economically distressed inner cities that struggle to provide adequate levels of public safety would be precluded from systematically disallowing gun permits because the Clause would guarantee citizens the right to self-defense by way of gun rights. By contrast, state and local governments that provide more than adequate levels of policing and public safety in a nondiscriminatory manner are to be given leeway under the Clause to restrict gun ownership and impose greater requirements on would-be gun purchasers because of the obvious risks of firearm misuse. The key here is that unlike the jot-by-jot incorporation of *Heller* by way of the Due Process Clause, my approach, premised on a beneficial understanding of citizenship that is respectful of federalism, allows gun rights to be contextualized to account for state and local conditions in their implementation. It has the added benefit of facilitating national cohesion in what is currently a very polarized republic by allowing states to be effective sovereigns, while recognizing the legitimacy of both sides of the gun debate.

Ideally, it will force states to undertake necessary policies within their jurisdictions to minimize gun violence, such that states that demonstrate success in reducing violence will be allowed to implement gun restrictions. Conversely, states that systematically fail to reduce violence will have less leeway to deny citizens the right to keep and bear arms for self-defense purposes. This approach to nationalizing gun rights recognizes the importance many Americans attach to guns for self-defense and recreational purposes. It also takes note of the fact that the high likelihood of gun misuse leads many Americans to feel unsafe. By allowing states more latitude to implement gun restrictions, provided they are protecting public safety by implementing policies to protect urban and racial minority citizens and communities, my approach has the fortuitous benefit of encouraging states to undertake measures to actually reduce violence and the related problems of economic and social exclusion. It is also jurisprudentially restrained in that it would allow the federal courts to tailor the Clause's requirement, namely the broadening of individual freedom, based on local conditions and not needlessly expand gun rights at the expense of Madisonian federalism.

#### CONCLUSION

Compared to other rich countries, Americans have an unusual love of guns. Though benevolently motivated, it imposes pronounced externalities on the broader public, including a staggeringly high rate of gun misuse. Nationalizing

gun rights via the Fourteenth Amendment's Due Process Clause will exacerbate polarization on the gun rights issue and undermine the federal judiciary's institutional legitimacy. Because Supreme Court decisions should be evaluated according to their institutional legitimacy, their jurisprudential soundness, and how they will affect and interact with both the United States government and society, the Court's *Heller* and *McDonald* decisions are altogether problematic uses of judicial review. They needlessly foretell a one-way ratchet of successful legal challenges to reasonable gun regulations that will eventually preclude state and local governments from effectively regulating guns as independent sovereigns. This is unfortunately what happened in the realm of reproductive rights, where polarization has grown so pronounced and rigid that a reversal of *Roe* or *Casey* will likely lead to a dramatic reversal on reproductive freedom for women in "red" states. A far better approach with respect to gun rights is to recognize the ambiguous relationship guns have to human freedom and instead apply gun rights by way of the Privileges or Immunities Clause and not the Due Process Clause. This would empower the federal courts to undertake a searching and proper inquiry as to local conditions in evaluating the constitutionality of local gun restrictions and still allow state and local governments leeway to effectively regulate guns based on local needs. This way, state and local governments that provide adequate policing and safety to their citizens will have greater latitude to enact measures to protect against suicide and other forms of firearm misuse. This approach will satisfy the Framers' goal of enhancing the value of American citizenship and, perhaps, by depoliticizing the gun rights debate, strengthen the federal judiciary and engender national cohesion.

