**<RT>*McDonald v. City of Chicago*, 130 S. Ct. 3020** (2010)</RT>

*<RI>Otis McDonald was an elderly community activist in Chicago who wished to keep a handgun in his house for protection against local drug dealers. Chicago law prohibited most persons from keeping a handgun in their home. In 2008 the Supreme Court in* District of Columbia v. Heller *ruled that the Second Amendment protected an individual’s right to keep guns for self-defense and not merely a collective right connected to the state militia. McDonald and others immediately filed suit against Chicago. They claimed that the Chicago ban on handguns violated the Fourteenth Amendment, which, in their view, incorporated the Second Amendment. Relying heavily on recent scholarship, lawyers for McDonald and the NRA urged the court to reverse the holding in the* Slaughter-House Cases *(1873) and hold that the privileges and immunities clause of the Fourteenth Amendment incorporated the Bill of Rights. Both the local federal district court and the Court of Appeals for the Seventh Circuit rejected McDonald’s lawsuit on the ground that the Fourteenth Amendment did not incorporate the Second Amendment right to bear arms. McDonald appealed to the U.S. Supreme Court.*

*The Supreme Court in* McDonald *ruled that the due process clause of the Fourteenth Amendment incorporated the Second Amendment. This was the first provision of the Bill of Rights to be selectively incorporated since the Supreme Court in* Benton v. Maryland *(1969) incorporated the double jeopardy clause of the Fifth Amendment. Justice Alito’s majority opinion maintained that the right to bear arms was a fundamental right that state officials could not violate. The vote in* McDonald *was identical to the vote in* Heller *(see Section IIIC). To what extent does* McDonald *replay* Heller*? If you believe that* Heller *was correctly decided, then is* McDonald *also correctly decided? Notice how broadly conservatives interpret incorporation and how narrowly liberals interpret it. Did both sides flip from their earlier positions? What is the significance of those flips? Justice Thomas insists that the privileges and immunities clause is the correct hook for incorporation. Why does he make that claim? Why do the justices reject that hook? What difference might a reliance on privileges and immunities make? Prominent professors submitted amicus briefs on both sides of* McDonald*. Do the various judicial opinions acknowledge disagreement among historians? How does that disagreement influence their analysis?</RI>*

<P>JUSTICE [ALITO](https://web2.westlaw.com/find/default.wl?tc=-1&docname=0153052401&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586) announced the judgment of the Court</P><PI>

. . . We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

. . .

Petitioners argue . . . that we should overrule [such decisions as *Slaughter-House* (1873)]and hold that the right to keep and bear arms is one of the “privileges or immunities of citizens of the United States.”. . .

We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the [*Slaughter-House*](https://web2.westlaw.com/find/default.wl?serialnum=1872196552&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586) holding.

. . .

. . . [W]e now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, . . . we must decide 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.” . . .

Our decision in *Heller* (2008) points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in [*Heller,*](https://web2.westlaw.com/find/default.wl?serialnum=2016385211&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586) we held that individual self-defense is “the central component” of the Second Amendment right. . . .

[*Heller*](https://web2.westlaw.com/find/default.wl?serialnum=2016385211&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586) makes it clear that this right is “deeply rooted in this Nation’s history and tradition.” [*Heller*](https://web2.westlaw.com/find/default.wl?serialnum=2016385211&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586) explored the right’s origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was “one of the fundamental rights of Englishmen.”

. . .

The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights. “During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.” . . . Federalists responded, not by arguing that the right was insufficiently important to warrant protection but by contending that the right was adequately protected by the Constitution’s assignment of only limited powers to the Federal Government. . . . Thus, Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government. . . .

. . .

The Civil Rights Act of 1866 . . . sought to protect the right of all citizens to keep and bear arms. Section 1 of the Civil Rights Act guaranteed the “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”. . . Representative Bingham believed that the Civil Rights Act protected the same rights as enumerated in the Freedmen’s Bureau bill, which of course explicitly mentioned the right to keep and bear arms. The unavoidable conclusion is that the Civil Rights Act, like the Freedmen’s Bureau Act, aimed to protect “the constitutional right to bear arms” and not simply to prohibit discrimination.

. . .

Congress, however, ultimately deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court’s pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks. Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866. . . .

. . .

In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.

. . .

. . . [W]e have never held that a provision of the Bill of Rights applies to the States only if there is a “popular consensus” that the right is fundamental, and we see no basis for such a rule. But in this case, as it turns out, there is evidence of such a consensus. An amicus brief submitted by 58 Members of the Senate and 251 Members of the House of Representatives urges us to hold that the right to keep and bear arms is fundamental. Another brief submitted by 38 States takes the same position.

. . . [P]etitioners and many others who live in high-crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout. . . . If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

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<P>JUSTICE [SCALIA](https://web2.westlaw.com/find/default.wl?tc=-1&docname=0254763301&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586), concurring. . . .

JUSTICE [THOMAS](https://web2.westlaw.com/find/default.wl?tc=-1&docname=0216654601&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586), concurring in part and concurring in the judgment.</P><PI>

. . .

. . . [T]he right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.

. . .

. . . The notion that a constitutional provision that guarantees only “process” before a person is deprived of life, liberty, or property could define the substance of those rights [presently protected by the due process clause] strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that links the Court’s substantive due process precedents together is their lack of a guiding principle to distinguish “fundamental” rights that warrant protection from nonfundamental rights that do not. . . .

. . .

Section 1 [of the Fourteenth Amendment] protects the rights of citizens “of the United States” specifically. The evidence overwhelmingly demonstrates that the privileges and immunities of such citizens included individual rights enumerated in the Constitution, including the right to keep and bear arms.

. . .

Commentators of the time explained that the rights and immunities of “citizens of the United States” recognized in [American] treaties “undoubtedly mean[t] those privileges that are common to all citizens of this republic.” . . . It is therefore altogether unsurprising that several of these treaties identify liberties enumerated in the Constitution as privileges and immunities common to all United States citizens.

. . .

. . . Representative John Bingham, the principal draftsman of § 1 [of the Fourteenth Amendment], delivered a speech on the floor of the House in February 1866 introducing his first draft of the provision. Bingham began by discussing [*Barron*](https://web2.westlaw.com/find/default.wl?serialnum=1833191656&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586) *v. Baltimore* (1833) and its holding that the Bill of Rights did not apply to the States. He then argued that a constitutional amendment was necessary to provide “an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person.” . . . Bingham emphasized that § 1 was designed “to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It ‘hath that extent-no more.’”

. . .

This history confirms what the text of the Privileges or Immunities Clause most naturally suggests: Consistent with its command that “[n]o State shall . . . abridge” the rights of United States citizens, the Clause establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them.

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<P>JUSTICE [STEVENS](https://web2.westlaw.com/find/default.wl?tc=-1&docname=0156277701&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586), dissenting.</P><PI>

. . .

I agree with the plurality’s refusal to accept petitioners’ primary submission. . . . Their briefs marshal an impressive amount of historical evidence for their argument that the Court interpreted the Privileges or Immunities Clause too narrowly in the *Slaughter-House Cases*. But the original meaning of the Clause is not as clear as they suggest and not nearly as clear as it would need to be to dislodge 137 years of precedent. The burden is severe for those who seek radical change in such an established body of constitutional doctrine. Moreover, the suggestion that invigorating the Privileges or Immunities Clause will reduce judicial discretion, strikes me as implausible, if not exactly backwards. “For the very reason that it has so long remained a clean slate, a revitalized Privileges or Immunities Clause holds special hazards for judges who are mindful that their proper task is not to write their personal views of appropriate public policy into the Constitution.”

. . .

. . . [T]he right to possess a firearm of one’s choosing is different in kind from the liberty interests we have recognized under the Due Process Clause. Despite the plethora of substantive due process cases that have been decided in the post-*Lochner* (1905) century, I have found none that holds, states, or even suggests that the term “liberty” encompasses either the common-law right of self-defense or a right to keep and bear arms. I do not doubt for a moment that many Americans feel deeply passionate about firearms, and see them as critical to their way of life as well as to their security. Nevertheless, it does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality. . . .

. . .

. . . [T]he Second Amendment differs in kind from the Amendments that surround it, with the consequence that its inclusion in the Bill of Rights is not merely unhelpful but positively harmful to petitioners’ claim. Generally, the inclusion of a liberty interest in the Bill of Rights points toward the conclusion that it is of fundamental significance and ought to be enforceable against the States. But the Second Amendment plays a peculiar role within the Bill, as announced by its peculiar opening clause. Even accepting the *Heller* Court’s view that the Amendment protects an individual right to keep and bear arms disconnected from militia service, it remains undeniable that “the purpose for which the right was codified” was “to prevent elimination of the militia.” . . . It was the States, not private persons, on whose immediate behalf the Second Amendment was adopted. Notwithstanding the *Heller* Court’s efforts to write the Second Amendment’s preamble out of the Constitution, the Amendment still serves the structural function of protecting the States from encroachment by an overreaching Federal Government.

. . .

. . . [A]lthough it may be true that Americans’ interest in firearm possession and state-law recognition of that interest are “deeply rooted” in some important senses, it is equally true that the States have a long and unbroken history of regulating firearms. . . .

. . .

. . . [T]he Court’s imposition of a national standard is still more unwise because the elected branches have shown themselves to be perfectly capable of safeguarding the interest in keeping and bearing arms. The strength of a liberty claim must be assessed in connection with its status in the democratic process. And in this case, no one disputes “that opponents of [gun] control have considerable political power and do not seem to be at a systematic disadvantage in the democratic process,” or that “the widespread commitment to an individual right to own guns . . . operates as a safeguard against excessive or unjustified gun control laws.” . . .

. . . </PI>

<P>JUSTICE [BREYER](https://web2.westlaw.com/find/default.wl?tc=-1&docname=0254766801&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586), with whom JUSTICE [GINSBURG](https://web2.westlaw.com/find/default.wl?tc=-1&docname=0224420501&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586) and JUSTICE [SOTOMAYOR](https://web2.westlaw.com/find/default.wl?tc=-1&docname=0145172701&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=DC537380&ordoc=2022394586) join, dissenting.</P><PI>

. . .

I think it proper, above all where history provides no clear answer, to look to other factors in considering whether a right is sufficiently “fundamental” to remove it from the political process in every State. I would include among those factors 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; and the extent to which incorporation will advance or hinder the Constitution’s structural aims, including its division of powers among different governmental institutions (and the people as well). Is incorporation needed, for example, to further the Constitution’s effort to ensure that the government treats each individual with equal respect? Will it help maintain the democratic form of government that the Constitution foresees? 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?

. . .

. . . [T]here is no popular consensus that the private self-defense right described in *Heller* is fundamental. . . . One side believes the right essential to protect the lives of those attacked in the home; the other side believes it essential to regulate the right in order to protect the lives of others attacked with guns. It seems unlikely that definitive evidence will develop one way or the other. And the appropriate level of firearm regulation has thus long been, and continues to be, a hotly contested matter of political debate. . . .

Moreover, there is no reason here to believe that incorporation of the private self-defense right will further any other or broader constitutional objective. We are aware of no argument that gun-control regulations target or are passed with the purpose of targeting “discrete and insular minorities.” . . . Nor will incorporation help to assure equal respect for individuals. Unlike the First Amendment’s rights of free speech, free press, assembly, and petition, the private self-defense right does not comprise a necessary part of the democratic process that the Constitution seeks to establish. . . . Unlike the First Amendment’s religious protections, the Fourth Amendment’s protection against unreasonable searches and seizures, the Fifth and Sixth Amendments’ insistence upon fair criminal procedure, and the Eighth Amendment’s protection against cruel and unusual punishments, the private self-defense right does not significantly seek to protect individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority. . . .

. . .

. . . [T]he incorporation of the right recognized in *Heller* would amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government. Private gun regulation is the quintessential exercise of a State’s “police power”—i.e., the power to “protec[t] . . . the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state,” by enacting “all kinds of restraints and burdens” on both “persons and property.” . . .

In sum, the police power, the superiority of legislative decisionmaking, the need for local decisionmaking, the comparative desirability of democratic decisionmaking, the lack of a manageable judicial standard, and the life-threatening harm that may flow from striking down regulations all argue against incorporation. Where the incorporation of other rights has been at issue, some of these problems have arisen. But in this instance all these problems are present, all at the same time, and all are likely to be present in most, perhaps nearly all, of the cases in which the constitutionality of a gun regulation is at issue. . . .

. . .

. . . [T]he very evidence that [the Court majority] advances in support of the conclusion that Reconstruction-era Americans strongly supported a private self-defense right shows with equal force that Americans wanted African-American citizens to have the same rights to possess guns as did white citizens. Here, for example is what Congress said when it enacted a Fourteenth Amendment predecessor, the Second Freedman’s Bureau Act. It wrote that the statute, in order to secure “the constitutional right to bear arms . . . for all citizens,” would assure that each citizen: “shall have . . . full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, [by securing] . . . to . . . all the citizens of [every] . . . State or district without respect to race or color, or previous condition of slavery.” This sounds like an antidiscrimination provision. . . .

. . .

. . . [N]othing in 18th-, 19th-, 20th-, or 21st-century history shows a consensus that the right to private armed self-defense, as described in *Heller*, is “deeply rooted in this Nation’s history or tradition” or is otherwise “fundamental.” Indeed, incorporating the right recognized in *Heller* may change the law in many of the 50 States. Read in the majority’s favor, the historical evidence is at most ambiguous. And, in the absence of any other support for its conclusion, ambiguous history cannot show that the Fourteenth Amendment incorporates a private right of self-defense against the States.</PI><RD1-CLOSE>