

SECOND AMENDMENT REDUX: SCRUTINY, INCORPORATION, AND THE *HELLER* PARADOX

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In *District of Columbia v. Heller*,¹ the final opinion of the Supreme Court's 2007 term, Justice Antonin Scalia reinvigorated the Second Amendment. Writing for a 5-4 majority, Justice Scalia held unequivocally that the Second Amendment protects an individual right to possess a firearm in the home for self-defense, unconnected with militia service.² He also held that the three Washington, D.C., laws that *Heller* challenged were unconstitutional: first, the outright ban on all handguns acquired after 1976; second, the ban on carrying handguns acquired before 1976 from room to room without a permit, which could not be obtained; and third, the requirement that rifles and shotguns in the home had to be unloaded and either disassembled or trigger-locked.³

Three issues received less attention in the majority and dissenting opinions, but have significant implications. First, what gun regulations are now permissible? Second, will the Second Amendment apply against state and local governments? Third, was the *Heller* decision a hidden victory for gun controllers?

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1. 128 S. Ct. 2783 (2008).

2. *Id.* at 2799.

3. *Id.* at 2821–22.

I. SCRUTINY: WHAT GUN REGULATIONS ARE PERMISSIBLE AFTER *HELLER*?

Justice Scalia acknowledged that the Second Amendment, like the First, is not absolute. He noted, for example, that courts had upheld concealed carry prohibitions in the past, although he stopped short of saying courts should uphold them in the future.⁴ The same goes for licensing requirements, which *Heller* did not challenge.⁵ Justice Scalia went even further to state that the Court's opinion did not "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."⁶ He added that he could also find support in "the historical tradition of prohibiting the carrying of dangerous and unusual weapons."⁷

Heller was likely well advised not to have antagonized potential allies among the Justices by demanding deregulation of weapons like machine guns. *Heller*'s success was due in part to the moderate, incremental relief that he sought. Subsequent cases will have to resolve what weapons and persons can be regulated and what restrictions are permissible. Those questions will depend in large measure on the standard of review that the Court chooses to apply—an issue *Heller* does not resolve despite considerable attention to that subject in various amicus briefs, including one by Solicitor General Paul Clement.

Solicitor General Clement suggested that the Court apply a form of "heightened" scrutiny in reviewing gun regulations. Specifically, he advised the Court to consider "the practical impact of the challenged restriction on the plaintiff's ability to possess firearms for lawful purposes (which depends in turn on the nature and functional adequacy of available alternatives)."⁸ Although Solicitor General Clement acknowl-

4. *Id.* at 2816.

5. *Id.* at 2819.

6. *Id.* at 2816–17.

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

8. Brief for the United States as Amicus Curiae at 8, *Heller*, 128 S. Ct. 2783 (No. 07-290).

edged that the D.C. gun ban “may well fail such scrutiny,” he expressed concern that the circuit court had mistakenly applied a different *per se* test, which would preclude “any ban on a category of ‘Arms’ that can be traced back to the Founding era.”⁹

Heller argued that the D.C. gun ban was unconstitutional no matter which standard of review the Supreme Court applied. Accordingly, said Heller, the Court did not have to address the standard of review question. On the other hand, should the Court decide to tackle that issue, Heller urged that “strict,” not heightened, scrutiny be the standard.¹⁰ To justify a gun control regulation under strict scrutiny, the government would have to demonstrate a compelling need for the law and then show that any restrictions were narrowly tailored—that is, no more invasive than necessary to achieve the government’s objectives.¹¹ Traditionally, the Court has been more rigorous in scrutinizing government regulations that infringe on a “fundamental” right: one that is “implicit in the concept of ordered liberty”¹² or “deeply rooted in this Nation’s history and tradition[s].”¹³ Virtually all of the first eight amendments qualify,¹⁴ and it is difficult to imagine that the right to keep and bear arms is an exception to the rule.

9. *Id.* at 9.

10. See Respondent’s Brief at 54–62, *Heller*, 128 S. Ct. 2783 (No. 07-290).

11. See *Abrams v. Johnson*, 521 U.S. 74, 82 (1997).

12. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

13. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

14. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (impartial criminal jury); *Washington v. Texas*, 388 U.S. 14, 18 (1967) (compulsory process); *Klopfer v. North Carolina*, 386 U.S. 213, 233 (1967) (speedy trial); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (confrontation of witnesses); *Aguilar v. Texas*, 378 U.S. 108, 110 (1964) (warrants); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (self incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (counsel); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (redress of grievances); *Robinson v. California*, 370 U.S. 660, 667 (1962) (cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (search and seizure); *In re Oliver*, 333 U.S. 257, 273 (1948) (public trial and notice of accusations); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (establishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (exercise of religion); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (assembly); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (press); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (speech); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 241 (1897) (takings). The Supreme Court has not declared the following Bill of Rights provisions to be “fundamental”: keeping and bearing arms, quartering of soldiers, grand jury indictment, civil jury trial, excessive bail, and excessive fines.

Ultimately, the Court agreed with *Heller* that D.C.'s ban on all functional firearms in the home is unconstitutional "[u]nder any of the standards of scrutiny [the Court has] applied to enumerated constitutional rights."¹⁵ But the Court did not choose a specific standard. In later cases it might apply something less than the strict scrutiny standard that *Heller* had suggested. On the other hand, the Court categorically rejected "rational basis" scrutiny, which has been a rubber stamp for nearly all legislative enactments.¹⁶ The Court also rejected Justice Stephen Breyer's "interest-balancing" test, which is merely a repetition of the process that legislatures already go through in crafting regulations.¹⁷ Something higher is demanded, said Justice Scalia, when an express constitutional right is at issue.¹⁸ At a minimum, it appears that the Court will adopt some version of intermediate or heightened scrutiny.

In fact, Justice Scalia's citation in footnote twenty-seven to *United States v. Carolene Products*¹⁹ is illuminating on this point. *Carolene* was the 1938 case that effectively bifurcated our rights. The Court rigorously protects some rights, such as those codified in the Bill of Rights, but rubber-stamps regulations of second-tier rights, such as those related to contract, property, and commerce. By positioning the right to keep and bear arms squarely within the camp of specific, enumerated rights, and linking the Second Amendment to "the freedom of speech, the guarantee against double jeopardy, [and] the right to counsel,"²⁰ Justice Scalia sent an unmistakable signal that the Court will rigorously review gun control regulations. It is fair to say then that the standard of review will have more than a few teeth in it.

That outcome will not make the antigun crowd happy. When it comes to the Second Amendment, they believe in greater judicial deference to legislative judgments. The right to keep and bear arms has, they say, "immediate and direct implications for the health and safety of others" — a factor that does not apply

15. *Heller*, 128 S. Ct. at 2817–18.

16. *Id.* at 2817–18 n.27.

17. *Id.* at 2821.

18. *Id.*

19. 304 U.S. 144 (1938).

20. *Heller*, 128 S. Ct. at 2817–18 n.27 (citing *Carolene*, 304 U.S. at 152 n.4).

to, for example, the First Amendment.²¹ Yet the First Amendment protects even “advocacy of the use of force or of law violation” unless it is intended and likely to incite or produce such action.²² Advocating force or law violation can have greater implications for public safety than the right of D.C. residents to keep a handgun in their home.

Another argument from gun controllers is that “state courts . . . have universally rejected strict scrutiny or any heightened level of review in favor of a highly deferential ‘reasonableness’ test that has been met by virtually every gun control law challenged in the state courts.”²³ First, that statement is inaccurate. Through 2003, state courts voided laws infringing on the right to keep or bear arms on twenty-four occasions.²⁴ Many of the cases overturned carry restrictions,²⁵ which are surely less of a restraint on Second Amendment rights than the outright prohibitions at issue in places like D.C., Chicago, and San Francisco.

Second, there is no inherent incompatibility between “reasonableness” and heightened scrutiny. Courts can rigorously review gun restrictions for reasonableness without being highly deferential to the legislature. For example, a court could strictly scrutinize whether a Fourth Amendment search is reasonable. An amicus brief in *Heller* filed by the Goldwater Institute put it this way: “As with the First Amendment’s free speech right, the Second Amendment’s personal right is subject to a range of reasonable restrictions even though strict scrutiny applies to the core of the protected conduct.”²⁶ The brief goes on to recommend strict scrutiny as the standard of review, but “subject to well-understood historical exceptions and reasonable restric-

21. Posting of Dennis A. Henigan to Cato Unbound, <http://www.cato-unbound.org/2008/07/23/dennis-henigan/does-heller-point-the-way-to-victory-for-reasonable-gun-laws/> (July 23, 2008, 17:48 EDT) (quoting Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007)).

22. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

23. Henigan, *supra* note 21.

24. Brief for Amicus Curiae American Legislative Exchange Council in Support of Respondent at 10, *Heller*, 128 S. Ct. 2783 (No. 07-290).

25. *Id.* at 10–11 n.2.

26. Brief for Amicus Curiae Goldwater Institute in Support of Respondent at 14, *Heller*, 128 S. Ct. 2783 (No. 07-290).

tions on time, place, and manner—just as is the case with other constitutionally enumerated rights.”²⁷

Tiered levels of review for our various rights are mystifying and, even worse, often permit judges to express their personal policy preference for some rights over others. The key point is that courts must be vigorously engaged in protecting against legislative and executive impulses that violate constitutionally secured rights. Judges must have a proper respect for the document they are charged with enforcing, focusing on expansive individual liberties and a tightly constrained government of limited and enumerated powers. Indeed, the judiciary exists, in large part, to bind the legislative and executive branches with the chains of the Constitution.

II. INCORPORATION: WILL THE SECOND AMENDMENT BE ENFORCEABLE AGAINST STATE GOVERNMENT?

Imminently, the Supreme Court will have to decide whether Second Amendment rights apply against state governments. Washington, D.C., is not a state; it is a federal enclave where Congress exercises plenary legislative power.²⁸ Until 1868, when the Fourteenth Amendment was ratified, the Bill of Rights applied only to the federal government and not to states or municipalities legislating under delegated state authority.²⁹ In a series of post-Civil War cases, however, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment “incorporated” most of the Bill of Rights in order to hold state governments accountable for violations of the rights protected therein.³⁰ Interestingly, the Court has never incorporated the Second Amendment. If gun control regulations are challenged in places such as Chicago, New York, and San Francisco, the Court must address that question.

Justice Scalia devoted several pages of his opinion to analyzing post-Civil War legislation and commentators.³¹ He con-

27. *Id.* at 14–15.

28. U.S. CONST. art. I, § 8, cl. 17.

29. See *Barron v. City of Baltimore*, 32 U.S. 243, 250 (1833) (The Bill of Rights “contain[s] no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).

30. See cases cited, *supra* note 14.

31. *Heller*, 128 S. Ct. at 2809–12.

cluded that civil rights statutes, enacted under the Fourteenth Amendment, were intended to ensure that freed blacks had the right to keep and bear arms for self-defense. It appears, therefore, that Justice Scalia believes the Second Amendment limits state governments. Officially, however, he stated that incorporation is “a question not presented” by *Heller*.³²

Nonincorporation advocates point to *United States v. Cruikshank* and *Presser v. Illinois*, two cases in which the Court stated squarely that the Second Amendment is a limitation on the power of Congress, not state and local legislative bodies.³³ Yet both of those cases arose prior to the Court’s incorporation doctrine, which took form beginning in 1897.³⁴ As Justice Scalia pointed out, *Cruikshank* “did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.”³⁵ In fact, noted Justice Scalia, *Cruikshank* also held that the First Amendment did not apply against the states³⁶—a notion that is obviously antiquated. It may be, as Ninth Circuit Judge Stephen Reinhardt has written, that “*Presser* rests on a principle that is now thoroughly discredited.”³⁷ Even so, the Second Circuit stated in *Bach v. Pataki* that those cases still control;³⁸ if they are no longer good law, the Supreme Court, not the lower courts, will have to reverse.

It will soon become clear where the Supreme Court stands. In February 2009, the Second Circuit denied incorporation of the Second Amendment in *Maloney v. Cuomo*,³⁹ which involved a challenge to New York State’s ban on nunchuks in the home. Four months later, the Seventh Circuit agreed, stating that *Cruikshank* and *Presser* control unless and until the Supreme Court holds otherwise.⁴⁰ But between those two decisions, a Ninth Circuit panel held the opposite. In *Nordyke v. King*, Judges Diarmuid F. O’Scannlain (a Reagan appointee), Arthur L. Alarcon (a

32. *Id.* at 2813 n.23.

33. *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

34. *See Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

35. *Heller*, 128 S. Ct. at 2813 n.23.

36. *Id.*

37. *Silveira v. Lockyer*, 312 F.3d 1052, 1067 n.17 (9th Cir. 2002).

38. *Bach v. Pataki*, 408 F.3d 75, 84–86 (2005).

39. 554 F.3d 56 (2d Cir. 2009).

40. *NRA v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009), *cert. granted*, *McDonald v. City of Chicago*, 130 S. Ct. 48 (2009).

Carter appointee), and Ronald M. Gould (a Clinton appointee) unanimously held that the Supreme Court's prior opinions had merely foreclosed direct application of the entire Bill of Rights to the states, as well as indirect application through the Privileges or Immunities Clause of the Fourteenth Amendment.⁴¹ But *Cruikshank* and *Presser* did *not* foreclose, according to the panel, selective incorporation of the Second Amendment through the Due Process Clause.⁴² The panel then noted that other "fundamental" rights among the first ten amendments had been incorporated using the Due Process Clause.⁴³ The right to keep and bear arms, said the panel, is also "fundamental." It is implicit in our Anglo-American system of ordered liberty and deeply rooted in our nation's history.⁴⁴ Moreover, the framers of the Fourteenth Amendment specifically intended the Second Amendment to be applicable against the states.⁴⁵

In July 2009, the Ninth Circuit agreed to reconsider *Nordyke* en banc. Thus, the apparent circuit split on the incorporation issue was only temporary. Still, with so much confusion about the precedential value of *Cruikshank* and *Presser*, on September 30, 2009 the Supreme Court granted certiorari in *McDonald v. City of Chicago*, a companion case to *NRA v. City of Chicago*.⁴⁶ A decision in *McDonald* is expected by June 30, 2010. In the end, the Second Amendment will very likely constrain state governments as well as the national government. Perhaps the more interesting question is whether the Court will expand its selective incorporation via the Due Process Clause or side with Harvard Law Professor Laurence Tribe, who wrote in his treatise on American constitutional law that Second Amendment rights "may well . . . be among the privileges or immunities of United States citizens protected by Section 1 of the Fourteenth Amendment against state or local government

41. *Nordyke v. King*, 563 F.3d 439, 446–49 (9th Cir. 2009), *reh'g granted*, 575 F.3d 890 (9th Cir. 2009).

42. *Id.* at 448.

43. *Id.* at 449.

44. *Id.* at 457.

45. *Id.* at 455–56. Notwithstanding its conclusion that the Second Amendment applies to the states, the Ninth Circuit refused to overturn the county ordinance banning guns on public property. According to the court, the ordinance did not limit self-defense in the home and applied only on property that might reasonably be characterized as "sensitive." *Id.* at 460.

46. See *supra* note 40.

action.”⁴⁷ The question presented in *McDonald* suggests that the Court will consider both the Due Process and the Privileges and Immunities Clauses: “Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment’s Privileges or Immunities or Due Process Clauses.”⁴⁸

The Privileges or Immunities Clause of the Fourteenth Amendment declares: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁴⁹ Some argue that the Amendment’s framers intended that clause to secure natural rights of property and liberty against state actions.⁵⁰ But it was stripped of any real meaning in the infamous *Slaughter-House Cases*, in which the Court concluded that the privileges or immunities were those of *national* citizenship—that is, only rights that would not exist except for the existence of the federal government—such as access to seaports, navigable waters, the seat of government, and the federal courts.⁵¹

After *Slaughter-House*, the Court enforced substantive rights against the states through the Due Process Clause of the Fourteenth Amendment.⁵² That clause, as its name implies, is better for enforcing procedural rather than substantive rights. Interestingly, however, constitutional scholars from both the left and right are embracing the notion that the Privileges or Immunities Clause encompasses the right to keep and bear arms. In *NRA v. City of Chicago*, both the Institute for Justice, a libertarian public interest law firm, and the Constitutional Accountability Center, a liberal advocacy group, filed amicus briefs advocating the enforceability of Second Amendment rights via the Privileges or Immunities Clause.⁵³

47. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 902 n.221 (3d ed. 2000).

48. Petitioners Brief at i, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Nov. 16, 2009).

49. U.S. CONST. amend. XIV, § 1.

50. See, e.g., Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 326 POL’Y ANALYSIS 1, 36–37 (1998).

51. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–80 (1872).

52. Shankman & Pilon, *supra* note 50, at 3.

53. See Brief of Amicus Curiae the Institute for Justice in Support of Appellants at 4, *NRA v. City of Chicago*, 567 F.3d 856 (2009) (No. 08-4241); Brief of Constitu-

Libertarians interpret the Privileges or Immunities Clause as providing the foundation for vindicating negative rights—both enumerated and unenumerated—which free people can exercise without imposing positive obligations on others. Negative rights include the rights to pursue happiness, own property, start a business, and contract for one’s labor. Not included among the privileges or immunities of citizenship are positive rights, including entitlements favored by liberals, such as welfare or a minimum wage, the enforcement of which affirmatively obligates nonconsenting parties.

Historically, courts have used the Due Process Clause selectively to incorporate only rights considered “fundamental to the American scheme of justice.”⁵⁴ Since the New Deal, however, states have had broad leeway to regulate economic liberties,⁵⁵ and courts have rubber-stamped regulation of property, contract, and entrepreneurial activity despite the Due Process Clause.⁵⁶

This state of affairs could change if the Supreme Court revisits the Privileges or Immunities Clause. This Article is not the forum to explore the arguments and counterarguments for due process versus privileges or immunities, but the choice does matter. The Court’s handling of the Second Amendment might hearten libertarians who believe that the bifurcation of our liberties into fundamental and nonfundamental categories is incompatible with the text, structure, purpose, and history of the Fourteenth Amendment.

III. THE *HELLER* PARADOX: WHOSE VICTORY WAS IT?

Meanwhile, the antigun community is trying to spin the *Heller* case as a hidden victory for gun control. The argument, which Dennis Henigan at the Brady Center to Prevent Gun Violence calls the “*Heller* paradox,” takes this essential form: First, the National Rifle Association and others in the

tional Law Professors as Amici Curiae in Support of Reversal at 2, *NRA*, 567 F.3d 856 (No. 08-4241).

54. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

55. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

56. *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (regulatory takings); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (entrepreneurial activity); *Vesta Fire Ins. Corp. v. Florida*, 141 F.3d 1427 (11th Cir. 1998) (impairment of contracts).

“gun lobby” argued that each new gun regulation was a step down the slippery slope toward confiscation. Second, fear of the slippery slope made gun control a “wedge” or “cultural” issue. Third, by erecting a constitutional barrier to a broad gun ban, *Heller* has taken confiscation off the table. Therefore, the NRA and its allies can no longer invoke the slippery slope argument, and without that wedge issue, ordinary gun owners will be more receptive to sensible regulations. In summation, *Heller* will prove to be an important milestone favoring “reasonable” approaches such as those promoted by the Brady Center.⁵⁷

This line of argument is problematic for a number of reasons. First, *Heller* challenged only three provisions of the D.C. code, and sought no relief beyond a declaration that those three provisions were unconstitutional. The Supreme Court granted *Heller* one hundred percent of the relief that he requested—not bad for a hidden defeat. Before *Heller*, federal appeals courts covering forty-seven of fifty states indicated that litigants have no redress under the Second Amendment if their right to keep and bear arms is violated by state law.⁵⁸ After *Heller*—and after the likely application of the Fourteenth Amendment to the states—litigants in every state will have redress under the Second Amendment if their right to keep and bear arms is violated by state law. That means Chicago’s gun ban will fall,

57. Posting of Dennis A. Henigan to Cato Unbound, <http://www.cato-unbound.org/2008/07/16/dennis-henigan/the-heller-paradox-a-response-to-robert-levy> (July 16, 2008, 10:01 EDT).

58. See, e.g., *United States v. Lippman*, 369 F.3d 1039, 1044 (8th Cir. 2004), *cert. denied*, 543 U.S. 1080 (2005); *United States v. Parker*, 362 F.3d 1279, 1282 (10th Cir. 2004), *cert. denied*, 543 U.S. 874 (2004); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997), *cert. denied*, 522 U.S. 1007 (1997); *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995), *cert. denied*, 516 U.S. 813 (1995); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984); *United States v. Graves*, 554 F.2d 65, 66–67 n.2 (3d Cir. 1977); *United States v. Warin*, 530 F.2d 103, 106–07 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942). Only the Fifth Circuit—covering Texas, Louisiana, and Mississippi—has affirmed that the Second Amendment secures an individual right. See *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (“[The Second Amendment] protects the right of individuals, including those not then actually a member of any militia . . . to privately possess and bear their own firearms . . . suitable as personal, individual weapons.”). In that case, however, the federal statute at issue was upheld as a reasonable regulation notwithstanding Emerson’s Second Amendment right.

many of San Francisco's laws will fall, and parts of New York's regulations will fall. If that is a defeat for gun rights advocates, we will take it.

Moreover, the so-called *Heller* paradox depends on demonizing the gun lobby. That tactic may be rhetorically useful for the Brady Center and its devotees, but two other lawyers and I, not the gun lobby, filed the *Heller* lawsuit, picked the right time, identified the issues, selected the plaintiffs, served as their attorneys, chose the venue, decided on the legal strategy, wrote the briefs, argued in court, and won the case. The NRA can speak for itself, but our goals were not grounded on wedge issues or a cultural base. First and foremost, our interest was to ensure that the D.C. government complied with the Second Amendment. For us, *Heller* was about the Constitution; guns merely provided the context.

Furthermore, if extreme elements within the gun lobby exploit the cultural aspects of gun control, that criticism is no less valid when applied to gun controllers themselves. According to Glenn Ivey, the state's attorney for Prince George's County, a Washington, D.C. suburb, "Democrats and others were frequently unwilling to recognize any right to gun ownership and motivated their constituents, especially those in urban areas with high crime rates, by claiming that the NRA would flood our streets with weapons that would wreak havoc."⁵⁹ One tactic was to rile up urban residents with dire predictions of streets running with blood, awash with military-style weapons. "To some, it seemed that no civilian should ever own a gun and that the government should ban gun ownership or impose as many restrictions as possible on it. It didn't matter that an owner had never committed a crime or demonstrated mental or emotional instability."⁶⁰ That is how gun controllers attempted to marginalize anyone who argued for an individual right to possess defensive firearms.

Also, years ago the slippery slope argument was justified, not illusory. According to Nelson T. "Pete" Shields, founding chair of the Brady Center:

59. Glenn F. Ivey, Op-Ed., *A New Chance to Curb Gun Violence*, WASH. POST, July 17, 2008, at A21.

60. *Id.*

The first problem is to slow down the increasing number of handguns being produced and sold The second problem is to get handguns registered. And the final problem is to make possession of *all* handguns . . . —except [those] for the military, policemen, licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal.⁶¹

That sure sounds like confiscation. But if confiscation is now off the table, and the slippery slope argument is no longer valid, good riddance on both counts.

According to Henigan, “the NRA’s core strategy” is to keep gun owners “in a perpetual state of fear and anxiety about gun confiscation.”⁶² Even pre-*Heller*, that strategy would have been bizarre and ineffective. After all, forty-four states secure an individual right to keep and bear arms under their own constitutions.⁶³ Forty-five states now allow individuals to carry concealed handguns for self-defense.⁶⁴ Confiscation has not been on the radar screen for many years, except perhaps in a small handful of municipalities and counties legislating under delegated state power. Whatever plans Pete Shields may have had for confiscation in his early days at the Brady Center, those plans went out the window with the enactment of permissive state laws long before the *Heller* decision. Gun control is a losing issue for would-be confiscators. That is why even liberals, like President Obama, find it necessary to embrace—or at least pretend to embrace—an individualist view of the Second Amendment.⁶⁵

Lastly, if the antigun crowd is correct in predicting that the byproduct of *Heller* will be sensible regulations, gun rights proponents should applaud that development. But “sensible” is not what prevails in New York, Chicago, San Francisco, or

61. Richard Harris, *A Reporter at Large: Handguns*, NEW YORKER, July 26, 1976, at 58.

62. Henigan, *supra* note 21.

63. Brief of State of Texas et al. as Amici Curiae in Support of Respondent at 1, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

64. *Id.* at 33.

65. See Robert D. Novak, Op-Ed., *Obama’s Second Amendment Dance*, WASH. POST, April 7, 2008, at A17 (“Obama . . . declares that the Second Amendment’s ‘right of the people to keep and bear arms’ applies to individuals, not just the ‘well regulated militia’ in the amendment. In the next breath, he asserts that this constitutional guarantee does not preclude local ‘common sense’ restrictions on firearms. Does the draconian prohibition in Washington fit that description? My attempts to get an answer have proved unavailing.”).

many other major cities, and sensible is not what D.C.'s allies supported—arguing in their amicus briefs in *Heller* that legislatures like the D.C. City Council should have carte blanche, unimpeded by judicial review, to ban all functional firearms.⁶⁶ Thankfully, *Heller* has taken a major step to restore sensibility in Washington, D.C. Soon, with the Fourteenth Amendment binding the states, *Heller* will have nationwide implications. That result is a big win for common sense. More important, that result is a big win for the Constitution.

66. See, e.g., Brief for Brady Center to Prevent Gun Violence et al. as Amici Curiae Supporting Petitioner at 5, *Heller*, 128 S. Ct. 2783 (No. 07-290).