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ANTICIPATING THE SECOND AMENDMENT INCORPORATION: THE ROLE OF THE INFERIOR COURTS

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Anticipating Second Amendment Incorporation: The Role of the Inferior Courts

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I. Introduction

In *District of Columbia v. Heller*,¹ the Supreme Court finally decided that the Second Amendment really does protect the right of the people to keep and bear arms, and that this includes at least the right to keep a handgun in the home for self defense. Understandably, all eyes have turned to the next logical question. Is the right to arms protected only from federal infringement, as in *Heller*, or is it also good against state and local governments? Test cases have already been filed challenging Chicago's handgun ban, which is similar to the regulation invalidated in *Heller*.² The "incorporation" issue—whether

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¹ 128 S. Ct. 2783 (2008).

² Warren Richey, *Battle over Gun Rights—Round 2*, Christian Science Monitor, Aug. 14, 2008, 2008 WLNR 15154948.

the Fourteenth Amendment protects the right to keep and bear arms from infringement by the states—may be virtually dispositive in those cases, and it will be a threshold issue in many others as well.

In *Heller*, the Justices were almost compelled to address the original meaning of the Second Amendment because there was virtually no relevant Supreme Court precedent to consider.³ By way of contrast, there is a huge mass of case law dealing with “incorporation” of the Bill of Rights through the Fourteenth Amendment. There is also a great deal of commentary criticizing this case law on a variety of grounds. When the Supreme Court next reviews the constitutionality of a state gun regulation, it will have several options, one of which is to overrule precedents that it concludes were erroneous. Before that happens, however, the inferior courts will first have to interpret those precedents. Those courts are not authorized to overrule the Supreme Court, even when there are good reasons to think that the precedents were wrongly decided or have become outmoded.⁴

This short essay reviews the principal precedents that these courts will have to confront. Part II concludes that the lower courts, though not the Supreme Court, are probably barred by precedent from finding that the right to keep and bear arms is protected by the Fourteenth Amendment’s Privileges or Immunities Clause. Part III shows that existing Supreme Court precedent points very strongly in favor of incorporation under substantive due process. Part IV argues, on the basis of existing precedent, that the inferior courts need not wait for the Supreme Court to reach this conclusion. They can best

³ For analysis of the precedent that did exist, see Nelson Lund, *Heller and Second Amendment Precedent*, Lewis & Clark L. Rev. (forthcoming), [SSRN cite]

⁴ See, e.g., *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997); *Wallace v. Jaffree*, 472 U.S. 38, 46-47 & n.26 (1985).

perform their role in our hierarchical judicial system by treating the Supreme Court’s modern incorporation jurisprudence as law. If they do, they should conclude that the right to keep and bear arms is protected against infringement by the state governments, just as it is protected against the federal government.

II. Incorporation through the Privileges or Immunities Clause

Heller expressly reserved the incorporation issue. While noting that its own precedents seem to speak with different voices, the Court did not explore the relationship between these different lines of case law.⁵

The two cases most apparently on point are *United States v. Cruikshank*⁶ and *Presser v. Illinois*.⁷ Both cases properly relied on *Barron v. Baltimore*⁸ for the proposition that the Second Amendment itself, like the Bill of a Rights as a whole, applies only to the federal

⁵ 128 S. Ct. at 2813 n.23:

With respect to *Cruikshank*’s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, 116 U.S. 252 (1886) and *Miller v. Texas*, 153 U.S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.

⁶ 92 U. S. 542 (1875).

⁷ 116 U.S. 252 (1886).

⁸ 32 U.S. 243 (1833).

government.⁹ But do they also hold that the right to arms is outside the protection of the Privileges or Immunities Clause of the Fourteenth Amendment?

A. *Reading Cruikshank and Presser Narrowly*

Cruikshank arose from a Reconstruction Era incident known to history as the Colfax Massacre, a gun battle that resulted in the killing of a large number of blacks who had gathered together for mutual protection from a white paramilitary group. The federal government prosecuted the white defendants under the Enforcement Act of 1870, which made it a crime for two or more persons to band or conspire together with intent to hinder or prevent a citizen in the “free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.” The defendants were convicted on several counts, including two charges that specified intent to interfere with the “right to keep and bear arms for a lawful purpose.”

The Court held that these counts could not serve as a basis for indictment. “This [i.e. the right to keep and bear arms for a lawful purpose] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”¹⁰ The Second Amendment only means that *Congress* may not infringe the right, “leaving the people to look for their protection against any violation *by their fellow-citizens*” to the police power of the states, a power that was in this respect not removed from the state

⁹ *Miller v. Texas*, 153 U.S. 535, 539 (1894), declined to address a Fourteenth Amendment incorporation claim, on the ground that it had not been raised below.

¹⁰ 92 U.S. at 553.

governments or delegated to the federal government.¹¹ Using a similar analysis, the Court also rejected those portions of the indictment charging that the defendants acted with the intent to deprive the victims “of their respective several lives and liberty of person without due process of law.” The Fourteenth Amendment’s Due Process Clause, said the Court, “adds nothing to *the rights of one citizen as against another*. It simply furnishes an additional guaranty against any encroachment *by the States* upon the fundamental rights which belong to every citizen as a member of society.”¹²

The *Cruikshank* case itself was thus not understood to involve what we now call “state action.” If one focuses on the italicized portions of the quotations in the previous paragraph, one could read the opinion to leave open the possibility that the Privileges or Immunities Clause (which *Cruikshank* does not cite) forbids the state government *themselves* from abridging the right of the people to keep and bear arms.¹³

¹¹ *Id.* (emphasis added).

¹² *Id.* at 554 (emphasis added).

¹³ Cf. Nelson Lund, *Outsider Voices on Guns and the Constitution*, 17 Const. Comm. 701, 709-15 (2000). For more elaborate presentations of the argument that *Cruikshank* was decided on state-action grounds, see Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* 172-75 (1998); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J. 1051, 712-20 (2000). This reading may be strengthened by the way that the Court treated those counts in the indictment that seemed most clearly to allude to the Privileges or Immunities Clause. *See id.* at 556-57 (discussing several counts that referenced “the rights, privileges, immunities, and protection” secured to the victims “as citizens of the United States,” and “rights and privileges” secured to the victims “by the constitution and laws of the United States.”). Rather than invoking what we would call the state-action doctrine, or considering what we would call the argument for

Presser can also be read to leave this possibility open, though for different reasons. In this case, the Court upheld an Illinois statute that forbade bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law. On the authority of *Barron* and subsequent cases, including *Cruikshank*, the Court once again correctly held that the Second Amendment of its own force “has no other effect than to restrict the powers of the national government.”¹⁴

Presser also rejected an argument that the statute violated the Privileges or Immunities Clause. Citing *Cruikshank*, the Court held that this constitutional provision covers only those rights or privileges “expressly or by implication placed under the [federal government’s] jurisdiction.”¹⁵ Because the Court could identify no provision of the Constitution or statutes of the United States conferring a right to form private military organizations, or to conduct private military drills, the Privileges or Immunities Clause had no applicability. The Court did not expressly consider, and therefore arguably did not reject, the proposition that the right to keep and bear arms protected by the Second Amendment is among the privileges or immunities “placed under the jurisdiction” of the federal government. The rejection of this proposition, one could argue, would be implicit in *Presser* only if the Court believed that the Second Amendment itself protects a right to form private military organizations. But this would be a far-fetched interpretation of the Second Amendment, and there is no

incorporation, the Court held that these counts were not sufficiently specific to satisfy the Sixth Amendment.

¹⁴ 116 U.S. at 265.

¹⁵ *Id.* at 366.

indication in *Presser* that the Court made any such assumption.¹⁶

B. *The Slaughter-House Problem*

The chief obstacle to adopting these narrow interpretations of *Cruikshank* and *Presser* is that both cases relied heavily and expressly on the *Slaughter-House Cases*¹⁷ for the general framework of their analysis. That case *did* involve state action, and clearly held that the only rights protected by the Privileges or Immunities Clause are those that “owe their existence to the Federal government, its National character, its Constitution, or its laws.”¹⁸ Thus, when *Cruikshank* declared that the right to bear arms for a lawful purpose “is not a right granted by the Constitution,” it is highly unlikely that the Court could have meant that *Slaughter-House* left open the possibility that the right *is* protected against state action even though Congress may not protect it against the kind of private conspiracies at issue in *Cruikshank*. Similarly, *Presser*’s conclusion (quoting *Cruikshank*) that the right at issue is not “expressly or by implication placed under the [federal government’s] jurisdiction”¹⁹ cannot very plausibly be limited to the peculiar subset of arms bearing at issue in that case.

It is possible, as some commentators have argued, that *Slaughter-House*, and maybe even *Cruikshank*, left open the

¹⁶ *Presser* also says that an argument that the statute violated the Due Process Clause “is so clearly untenable as to require no discussion.” 116 U.S. at 268. For obvious reasons, the Court did not consider the twentieth century doctrine of due process incorporation.

¹⁷ 83 U.S. 36 (1873).

¹⁸ *Id.* at 79.

¹⁹ 116 U.S. at 266.

possibility of incorporation under the Privileges or Immunities Clause.²⁰ But that is not how the cases have been read in subsequent Supreme Court opinions.²¹ The Court's interpretation of the Privileges or Immunities Clause has been widely criticized, and serious arguments have been made for interpreting the Privileges or Immunities Clause to protect at least the personal, individual rights listed in the Constitution's first eight amendments.²² A strong case

²⁰ See, e.g., Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. Ill. L. Rev. 739 (1984) (*Slaughter-House* but not *Cruikshank*); Earl M. Maltz, *The Concept of Incorporation*, 33 U. Richmond L. Rev. 525 (1999) (*Slaughter-House* but not *Cruikshank*); Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases*, 109 Yale L.J. 643 (2000) (both *Slaughter-House* and *Cruikshank*); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J. 1051 (2000) (*Slaughter-House* but not *Cruikshank*).

For an argument that *Slaughter-House* deliberately paved the way for *Cruikshank*'s rejection of Second Amendment incorporation, because the Court wanted to preserve to the states the option of disarming white opponents of black equality in the South, see Leslie Friedman Goldstein, *The Second Amendment, the Slaughter-House Cases (1873), and United States v. Cruikshank (1876)*, 1 Albany Govt. L. Rev. 365 (2008).

²¹ See, e.g., *Maxwell v. Dow*, 176 U.S. 581, 587-97 (1900), *overruled in part on other grounds*, *Williams v. Florida*, 399 U.S. 78; *Twining v. New Jersey*, 211 U.S. 78, 93-99 (1908), *overruled in part on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Adamson v. California*, 332 U.S. 46, 51-53 (1947), *overruled in part on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

²² For somewhat different approaches, with somewhat different conclusions, see, e.g., Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986); Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869* 113-18 (1990); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57 (1993); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998).

can be made for reconsidering the original meaning of the Privileges or Immunities in an appropriate case, as Justice Thomas has proposed.²³ And if the Court becomes sufficiently serious about employing the kind of original-meaning jurisprudence that was on conspicuous display in *Heller*'s discussion of the text of the Second Amendment, it may be willing to undertake that reconsideration in a Second Amendment case.²⁴

I agree with Justice Thomas, and I think a Second Amendment case would provide a suitable vehicle for revisiting the original meaning of the Privileges or Immunities Clause. But whether or not the Supreme Court ever proves willing to take this step, I doubt that it would be proper for the inferior courts to do so. *Cruikshank* and *Presser* may not absolutely and unambiguously foreclose incorporation of the right to arms under that clause, but they at least come very close to doing so. The Supreme Court, moreover, has consistently assumed that incorporation of the guarantees listed in the Bill of Rights may not proceed under the Privileges or Immunities

For analyses that focus especially on the right to keep and bear arms, see Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (1998); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1 (2007). For a more skeptical views of the historical evidence supporting this interpretation of the Privileges or Immunities Clause, see, e.g., Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 134-56 (1977); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 110-23 (1988).

²³ *Saenz v. Roe*, 526 U.S. 489, 527-28 (Thomas, J., dissenting).

²⁴ For an elaborate argument, including a discussion of certain advantages that might arise from proceeding under the Privileges or Immunities Clause rather than under due process, see Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, [SSRN cite].

Clause. The lower courts, it seems to me, are stuck with that result until the Supreme Court changes course.

III. Incorporation through Substantive Due Process

Cruikshank and *Presser* correctly held that the Second Amendment itself does not apply to the states. Both cases should also be read by the inferior courts to hold that the right to keep and bear arms is not among the rights covered by the Privileges or Immunities Clause of the Fourteenth Amendment. Neither of these cases, however, nor any other Supreme Court decision, has even considered whether this right is protected under the modern doctrine of substantive due process.²⁵

As is well known, most of the rights listed in the Bill of Rights have been applied against the state governments under the aegis of substantive due process, through what is now called “selective incorporation.”²⁶ This has been an odd undertaking. First, the Court has never so much as attempted to reconcile selective incorporation, or any of its many other substantive due process decisions, with the text of the Constitution. And if it tried to do so, it

²⁵ When *Cruikshank* discussed due process, it addressed only the state action issue. 92 U.S. at 553-54. *Presser* dismissed claims based on due process, as well as on bill of attainder and ex post facto grounds, as “so clearly untenable as to require no discussion.” 116 U.S. at 268. This dismissal without discussion cannot be taken as a rejection of substantive due process arguments that were not available at the time.

²⁶ The process is call “selective” because it has proceeded incrementally and because the Court has rejected incorporation of the Seventh Amendment right to a civil jury and the Fifth Amendment right to a grand jury indictment. *See* *Mayes v. Ellis*, 409 U.S. 943 (1972) (summarily affirming *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.)); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

would probably fail.²⁷ Second, the Court’s important early decisions—holding that certain rights protected against the federal government by the Bill of Rights were also protected against the state governments by the Due Process Clause— were based on little more than unreasoned and unelaborated pronouncements.²⁸ Third, as I will explain briefly below, the Court has never developed a legal test that provides a coherent way of explaining all of its incorporation decisions.

Confronted with this doctrinal miasma, one might conclude that the inferior courts should just leave it up to the Supreme Court to decide whether or when to protect the right to keep and bear arms through substantive due process. This is exactly what the lower courts have done.²⁹ Whatever other justifications there may have been for this timidity, the Supreme Court’s incorporation jurisprudence is not so confused as to make it impossible—or even particularly

²⁷ See, e.g., John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va. L. Rev. 493 (1997).

²⁸ See, e.g., *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 236 (1897) (“(I)f, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen.”); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming in dicta that due process protects freedoms of speech and press from state interference); *Stromberg v. California*, 283 U.S. 359, 368 (1931) (relying on prior dicta to hold that due process disallows state law infringing freedom of speech).

²⁹ E.g., *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982); *Love v. Peppersack*, 47 F.3d 120, 123-24 (4th Cir. 1995); *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 730 (9th Cir. 1992); *Bach v. Pataki*, 408 F.3d 75, 85-86 (2d Cir. 2005).

difficult—for the lower courts to apply it to the right to arms.

To see why, it is important to note at the outset that *Barron v. Baltimore* has never been overruled. Technically, it remains true that none of the various provisions of the Bill of Rights applies to the states. Some of the same *rights* listed in the first eight amendments are protected by the Fourteenth Amendment’s Due Process Clause, but the *provisions* in those amendments still apply only to the federal government. This was clear in the Court’s early incorporation decisions.³⁰ When the Court began issuing decisions declining to find any substantive difference between the rights that protected by both the Bill of Rights and by substantive due process,³¹ it naturally became common to say things like, “The First Amendment forbids Texas to outlaw flag burning.” This is a shorthand that everyone now employs, but it is still only shorthand. Technically, it is the Due Process Clause of the Fourteenth Amendment, not the First Amendment as such, that forbids Texas to outlaw flag burning.

If there is a general description of the rights protected by substantive due process, it is those rights that the Court regards as “fundamental.” The most demanding test of fundamentality articulated by the Court in the incorporation context was adopted in *Palko v. Connecticut*,³² where the Court said that the test is whether

³⁰ *E.g.*, *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 235-366 (1897); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

³¹ *See, e.g.*, *Ker v. California*, 374 U.S. 23 (1962). The one odd exception is the unanimity requirement for criminal jury verdicts, which is imposed on the federal government by the Sixth Amendment, but not on the states by due process. *See Apodaca v. Oregon*, 406 U.S. 404 (1972).

³² 302 U.S. 319 (1937).

a particular immunity is “implicit in the concept of ordered liberty,”³³ meaning that the immunity must be “of the very essence of a scheme of ordered liberty.”³⁴ The Court offered an example from the First Amendment: freedom of thought and speech “is the matrix, the indispensable condition, of nearly every other form of freedom.”³⁵

Under this most stringent of standards, the text of the Constitution itself demands the incorporation of Second Amendment rights. The Second Amendment, unlike any other provision of the Bill of Rights, includes a prefatory phrase expressing its sense of the fundamental importance of the Amendment. Moreover, that phrase contains language whose meaning is virtually identical to that of the language in the *Palko* incorporation test: the Supreme Court’s reference to those rights that are “of the very essence of a scheme of ordered liberty” is nothing but a slightly reworded version of the Second Amendment’s reference to what is “necessary to the security of a free State.” It is as though the Court had taken its legal test for incorporation directly from the Second Amendment itself, and this stunning similarity gives the right to arms a much stronger textual claim to being “fundamental” in the Court’s stated sense of the term than any other right listed in the Bill of Rights.

It is, of course, quite possible to conceive of a scheme of ordered liberty that does not include the right to keep and bear arms, and thus to argue that this right need not be incorporated under *Palko*. But it is at least as easy to conceive of such a scheme that did not

³³ *Id.* at 325.

³⁴ *Id.*

³⁵ *Id.* at 327.

include anything like our right of free speech.³⁶ If the *Palko* test requires incorporation of the right of free speech, as *Palko* said it does, the text of the Second Amendment therefore requires that the right to keep and bear arms must be incorporated under the same test.

In any event, the Court itself eventually recognized that the *Palko* test was too stringent. *Duncan v. Louisiana* jettisoned *Palko*'s insistence that a right be *essential* to a scheme of ordered liberty, and replaced it with a requirement that the right be "necessary to an Anglo-American regime of ordered liberty."³⁷ This alteration of the standard was articulated in the realm of criminal procedure, but the Court did not suggest that some different standard would apply elsewhere. Thus, *Duncan* merely adjusted the *Palko* test by adopting an historical rather than philosophic or speculative mode of deciding what rights are "necessary" to our scheme of ordered liberty.

The right to arms unquestionably meets this revised test. Like the right to a jury trial in criminal cases, which was at issue in *Duncan* itself, "[i]ts preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and

³⁶ *Palko* said that the Court's incorporation decisions were "dictated by a study and appreciation of the meaning, the essential implications, of liberty itself." 302 U.S. at 326. The Court itself later overruled the holding in *Palko*, thus throwing doubt on its earlier studies of "liberty itself." *Benton v. Maryland*, 302 U.S. 319 (1969). In any event, it is not by any means self evident that the freedom of thought and speech protected by the First Amendment "is the matrix, the indispensable condition, of nearly every other form of freedom." *See, e.g.*, Plato, *The Laws*; Jean-Jacques Rousseau, *Letter to M. d'Alembert on the Theatre*.

³⁷ 391 U.S. 145, 149 n.14 (1968).

Bill of Rights of 1689.³⁸ And, like the right to a criminal jury, the right to arms “came to America with English colonists, and received strong support from them.”³⁹ When the Second Amendment was adopted, almost half the states with bills of rights included provisions protecting the right to arms,⁴⁰ and no state sought to deny that right to its citizenry. Even today, forty-four states have constitutional provisions expressly protecting a right to arms,⁴¹ and no jurisdiction has attempted to ban guns completely. The right protected by the Second Amendment meets the Court’s test of what is “fundamental” far more easily than other rights that have already been incorporated, some of which were never even included in the fundamental documents of the English constitution.⁴²

Finally, *Heller* itself comes very close to characterizing the right to arms as a fundamental right in the *Duncan* sense of the term. In the course of arguing that the right to arms in the English Bill of

³⁸ *Duncan*, 391 U.S. at 151 (referring to trial by jury in criminal cases). Section 6 of the 1689 Declaration and Bill of Rights states “[t]hat the subjects which are Protestants may have arms for their defence suitable to the Conditions and as allowed by Law.” 1 W & M., ch 2, sess. 2 (1689) (Eng.).

³⁹ 391 U.S. at 152.

⁴⁰ See Donald S. Lutz, *The States and the U.S. Bills of Rights*, 16 S. Ill. U. L.J. 251, 259 tbl. III (1992).

⁴¹ See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191 (2006).

⁴² Conspicuous examples include the religious rights protected by the First Amendment, the First Amendment rights of speech and press, the Fifth Amendment's prohibition against uncompensated takings of private property, and several of the Fifth and Sixth Amendment rights of the criminally accused. See Lutz, *supra* note —, at 253 tbl. I (listing documents that first protected Bill of Rights guarantees).

Rights was “an individual right protecting against both public and private violence,”⁴³ *Heller* emphasizes that this was “one of the fundamental rights of Englishmen.”⁴⁴ *Heller* also stresses that the “*inherent* right of self-defense” has been central to the Second Amendment right,⁴⁵ which explains why the right to arms must be “fundamental” in the sense articulated in *Duncan*’s incorporation test.

Thus, if one purports to take the Supreme Court’s incorporation jurisprudence seriously as law—as the inferior courts are required to do—one can hardly escape the conclusion that the Fourteenth Amendment protects the right of the people to keep and bears against action by the states, just as the Second Amendment protects that right against the federal government.

IV. Anticipating the Supreme Court

Notwithstanding the ready availability of strong, precedent-based arguments for incorporating the Second Amendment right, the inferior courts have consistently refused to take this step. Maybe this was because the Supreme Court had never indicated that the Second Amendment was even a serious constraint on the federal government. That justification obviously does not survive *Heller*. Or perhaps the lower courts believed that the Supreme Court has reserved to itself the privilege of engaging in the Fourteenth Amendment analysis that *Heller* said is required by the modern cases.⁴⁶ But the Supreme Court

⁴³ 128 S. Ct. at 2798-99.

⁴⁴ *Id.* at 2798.

⁴⁵ *Id.* at 2817.

⁴⁶ *Id.* at 2813 n.23.

has said no such thing. Moreover, we have precedent indicating that it would be perfectly proper for the inferior courts to apply the Supreme Court's incorporation standards to the right to arms before the Supreme Court itself does so.

In 1965, the Second Circuit was presented with a habeas petition raising a double jeopardy claim.⁴⁷ In simplified form, the facts were as follows. The defendant had been convicted of first degree murder in a trial at which the jury had been the option of convicting him on that charge or on one of several lesser homicide charges. He appealed and the conviction was reversed on procedural grounds. The defendant was tried again under the same indictment, and again convicted of first degree murder. He appealed, and this conviction was also reversed on procedural grounds. In a third trial, on the same indictment, the defendant was convicted of second degree murder.

The Second Circuit concluded that it violated the Due Process Clause to re prosecute the defendant for first degree murder after the first conviction was reversed. The court then held that it was also unconstitutional to convict him of second degree murder in the third trial because that trial was based on an indictment that included the charge of first degree murder. Although it would have been permissible for the state to re prosecute him for second degree murder after the first trial, the court reasoned that there was a reasonable possibility that the jury in the third trial had been prejudiced by the inclusion of the first degree murder charge in the indictment.

The obstacles to reaching this result were seemingly enormous. As the court noted, the Supreme Court had never invalidated any state-court conviction on the ground that it violated

⁴⁷ United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965).

federal constitutional limitations on re prosecution.⁴⁸ Furthermore, *Palko* (which had not yet been overruled) had sustained a conviction in a seemingly more egregious case, where the defendant's second degree murder conviction had been reversed and he was re prosecuted for first degree murder. Finally, the Supreme Court had twice upheld state convictions in which the pattern of re prosecutions had been identical to the pattern in the case that was now before the Second Circuit.⁴⁹

The Second Circuit distinguished *Palko* on the ground that the reversal of the first conviction in that case had come in an appeal by the prosecution, not in an appeal by the defendant. But what about the two Supreme Court decisions that could not be distinguished because they involved identical procedural facts? And what about the absence of any Supreme Court decisions overturning a state-court conviction on the ground that it involved an unconstitutional re prosecution?

In a lengthy and complex analysis, the Second Circuit argued that recent Supreme Court opinions dealing with "selective incorporation" and "fundamental fairness" under substantive due process, none of which was directly on point, had vitiated the authority of all the older and arguably dispositive precedents. A dissenting member of the panel made the obvious rejoinder. After conceding that recent Supreme Court incorporation decisions might well presage the announcement of a new Fourteenth Amendment double jeopardy rule, that judge said: "However, the incorporation of guarantees of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment at the expense of departing from several long-standing Supreme Court decisions is a step which should only

⁴⁸ *Id.* at 850.

⁴⁹ *See id.* at 861.

be taken by that Court.”⁵⁰

The dissenting judge’s understanding of how incorporation doctrine is required to develop proved to be incorrect. First, the Supreme Court denied a petition for certiorari in this case. Next, the author of the Second Circuit’s opinion, Thurgood Marshall, was appointed to the Supreme Court, which at least suggests that the decision in this case was not outrageous. Finally, and most significantly, the Supreme Court later went out of its way to cite Marshall’s Second Circuit opinion with approval in a unanimous double jeopardy case.⁵¹

I have chosen to discuss Marshall’s Second Circuit opinion in detail because it is carefully reasoned and appropriately respectful, in a lawyerly way, of seemingly adverse Supreme Court precedents. But it is not unique. Other circuits have also anticipated Supreme Court incorporation decisions, but they did so in a much more cavalier manner.⁵² And even they were not rebuked.

⁵⁰ 348 F.2d at 868 (Metzner, J., dissenting).

⁵¹ See *Price v. Georgia*, 398 U.S. 323, 331-32 (1970) (opinion for the Court by Chief Justice Burger). By the time this case was decided, *Palko* had been overruled. The Court cited Marshall’s circuit court opinion for the proposition that when a jury is given the option of convicting on either a more serious or a less serious charge, it might be induced to convict on the less serious charge rather than continue to debate the defendant’s guilt or innocence.

⁵² One example is *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3rd Cir. 1969) (en banc), which treated the Sixth Amendment right to a public trial as applicable to the states, notwithstanding *Gaines v. Washington*, 277 U.S. 81 (1928), which held to the contrary. The *Rundle* court noted that *Gaines* had “never been overruled explicitly,” 419 F.2d at 603, but argued that comments in various other opinions suggested that it was no longer good law. The Supreme Court denied a petition for certiorari in *Rundle*, 409 U.S. 916 (1972), and twice cited the Third Circuit’s opinion approval in *Waller v. Georgia*, 467 U.S. 39, 46, 49 n.9 (1984).

In 1965—before *Palko* had been overruled and while the Court’s incorporation jurisprudence was more unsettled than it is now—then-Judge Marshall had to perform some fairly elaborate legal gymnastics in order to justify a decision effectively anticipating Supreme Court decisions that were yet to come. Today—and especially after the *Heller* decision—it would be much, much easier for a lower court to explain why the Supreme Court’s incorporation jurisprudence clearly indicates that the Fourteenth Amendment protects the right to keep and bear arms against infringement by the state governments.

Neither *Cruikshank* nor *Presser* considered, and should not be read to have rejected, incorporation arguments based on substantive due process. Indeed, they could not possibly have considered or rejected the novel and elaborate version of substantive due process that the Court developed in its twentieth century incorporation cases. The inferior courts are not obliged to pretend that they would be “overruling” *Cruikshank* and *Presser* by undertaking an analysis that the Supreme Court has said is now “required.”⁵³

Rather, their true obligation is to take this new jurisprudence seriously. If they issue well reasoned opinions applying that jurisprudence, they will assist the Supreme Court when it faces the

Another example is *United States ex rel. Latmore v. Sielaff*, 561 F.2d 691, 693 n.2 (7th Cir. 1977). Here, the court did not even acknowledge *Gaines* or provide any analysis at all, but just dropped a footnote citing two Supreme Court decisions that were not on point, as well as the Third Circuit’s decision in *Rundle*. The Court also denied a petition for certiorari in *Latmore*, 434 U.S. 1076 (1978).

The Supreme Court, of course, did eventually overrule *Gaines*, though it did not bother to do so expressly. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 379 (1979).

⁵³ *Heller*, 128 S. Ct. at 2813 n.23.

issue of Second Amendment incorporation directly, as the Court inevitably must. And if their opinions are well reasoned, they will surely conclude that the right to keep and bear arms is protected from infringement by the state governments, just as it protected against the federal government.