



Reconsidering McDonald v. Chicago: How the 14th Amendment Obliges States to Protect the Fundamental Right to Bear Arms

Nick Dranias

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For decades, debate has raged over whether the Second Amendment to the U.S. Constitution protects the individual right to keep and bear arms. In its landmark 2008 *District of Columbia v. Heller* decision, the U.S. Supreme Court ruled that the right to keep and bear arms is an individual right. Many assumed that lower courts would take the next logical step of “incorporation”—recognizing that the right to keep and bear arms, like the right to free speech, is among the fundamental liberties the Fourteenth Amendment protects against contrary state and local laws. But so far, two of the three federal courts of appeals considering Second Amendment cases have refused to apply it to the states. The U.S. Courts of Appeals for the Second and Seventh Circuits claim that their hands are tied by century-old Supreme Court decisions—specifically, *United States v. Cruikshank* (1876), *Presser v. Illinois* (1886), and *Miller v. Texas* (1894)—that did not expressly apply the Second Amendment to the states.

Although the Supreme Court has accepted review of—and may reverse—the Seventh Circuit’s anti-incorporation decision in *McDonald v. Chicago*, the stakes are being raised legislatively. Gun prohibitionists in California, Arizona, and elsewhere are shifting the fight from guns to ammunition, pushing legislation to regulate and tax bullets. This regulatory effort is likely to gain speed and reach if the courts refuse to extend Second Amendment guarantees to the states.

Regardless of whether the Supreme Court overturns the Seventh Circuit’s anti-incorporation decision, no single case will be the last word on the constitutional right to keep and bear arms. Proponents of the Second Amendment should maintain the eternal vigilance and fortitude necessary to encourage principled jurists to recognize that, under the Fourteenth Amendment, states are obliged to respect the fundamental liberty the Second Amendment protects. And if jurists fail to do so based on a misplaced devotion to cases like *Cruikshank*, then Congress can and should intervene to prevent the doctrine of *stare decisis* from trumping the federal judiciary’s primary obligation to enforce the plain meaning of the Constitution.

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