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CAN RIGHTS BE DIFFERENT?: JUSTICE STEVENS' DISSENT IN *MCDONALD V. CITY OF CHICAGO*

By: Kristina M. Campbell[1]

I. INTRODUCTION

Our nation was founded on the premise of equality.[2] The rights stated within the Bill of Rights are announced for all, and every individual, regardless of background, education, lineage, or location may challenge practices that interfere with the equal application of those

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2. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[A]ll men are created equal . . . ."); David A. J. Richards, *Constitutional Liberty, Dignity, and Justification*, *in* THE CONSTITUTION OF RIGHTS 73, 75 (Michael J. Meyer & William A. Parent eds., 1992) ("The American idea of constitutionalism rests on a normative political theory of equal inalienable rights . . . .").

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rights.[3] However, the Bill of Rights and later amendments did not erase the federalist principles woven into the very fabric of our Constitution.[4] The Constitution still envisions a system of divided sovereignty, still creates a federal republic where local differences are valued as fundamental to liberty, and still places police power in the states alone.[5]

It is within this context that Justice Stevens' dissent in *McDonald v. City of Chicago*[6] is noteworthy.[7] While the Court's incorporation of the Second Amendment right to possess a handgun in the home through the Fourteenth Amendment's Due Process Clause[8] fundamentally altered the Court's Second Amendment jurisprudence,[9] it is the conflict between the fundamental principles of equality and federalism highlighted by Justice Stevens[10] that will continue to haunt the Court in future cases.[11]

This Article responds to Justice Stevens' assertion in *McDonald* that rights "need not be identical in shape or scope."[12] Section II of this Article introduces the events that led to *McDonald* and outlines the case's journey from the district court to the Supreme Court. Section III explores the Court's opinion in *McDonald*, beginning with a discussion of the state of the law before *McDonald* in Section III(A). Section III(B) addresses the facial impact of *McDonald*, discussing both the plaintiff residents of Chicago and the Court's incorporation of the Second Amendment right. Section III(C) explores Justice Stevens' concept of selective incorporation, outlining his depiction of the proper role of the Bill of Rights in incorporation analysis, noting the impact this approach has on rights jurisprudence, and finally, arguing that Justice Stevens' approach has serious doctrinal implications. Balancing federalism and equality concerns, Section III(D) suggests a means of resolution: consider federalism concerns in the balancing

3. *Compare infra* note 140 and accompanying text, *with* Kristina M. Campbell, Note, *Will Equal Again Mean Equal?: Understanding* Ricci v. DeStefano, 14 TEX. REV. L. & POL. 385, 387 (2010) (noting the Constitution's commitment to equality).

4. Baldwin v. New York, 399 U.S. 117, 133 (1970) (Harlan, J., concurring).

5. McDonald v. City of Chicago, 130 S. Ct. 3020, 3093 (2010) (Stevens, J., dissenting); United States v. Comstock, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring in judgment).

6. *McDonald*, 130 S. Ct. at 3020.

7. *See infra* Part III.C.3 (discussing dissent by Justice Stevens in the context of rights jurisprudence).

8. *McDonald*, 130 S. Ct. at 3050.

9. *See* Lawrence Rosenthal & Joyce Lee Malcom, McDonald v. Chicago: *Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 Nw. U. L. REV. 85, 86 (2010) (referring to *Heller* and *McDonald* as "landmark decisions").

10. *See infra* Section II.D.2.

11. *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 48 (2010) ("As a result, relations between federalism and equal protection have long been strained . . . .").

12. *McDonald*, 130 S. Ct. at 3093 (Stevens, J., dissenting).

test, rather than in the definition of the right. Section IV concludes this Article.

II. THE CASE

A. *The Facts of* McDonald v. Chicago

The City of Chicago enacted an ordinance that read, "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm."[13] The City also prohibited registration of most handguns, thus effectively banning handgun possession by nearly all private citizens residing within the City.[14] Otis McDonald and several other Chicago residents that wanted to keep handguns in their homes, but were prohibited by law from doing so, sued the City.[15] They sought a declaration that the handgun ban and several related ordinances violated the Second and Fourteenth Amendments of the United States Constitution.[16]

B. *The District Court Opinion*

McDonald and the Chicago plaintiffs filed suit against the City in the United States District Court for the Northern District of Illinois.[17] The district court rejected the plaintiffs' argument that the City laws were unconstitutional, finding that because the Seventh Circuit had upheld the constitutionality of a ban on handguns, the court was bound by Second Circuit precedent even though more recent case law may be persuasive of an alternative outcome.[18]

C. *The Seventh Circuit Opinion*

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the district court.[19] The court relied on nineteenth century cases decided in the wake of the Supreme Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-*

13. *McDonald*, 130 S. Ct. at 3026 (citing CHI., ILL., MUN. CODE § 8-20-040(a) (2009)).

14. *Id.* (citing CHI., ILL., MUN. CODE § 8-20-050(c) (2009)).

15. *Id.* at 3026–27.

16. *Id.* at 3027. The petitioners argued that "this right is among the 'privileges or immunities of citizens of the United States'" and, in the alternative, that "the Fourteenth Amendment's Due Process Clause 'incorporates' the Second Amendment right." *Id.* at 3028.

17. *Id.* at 3027. The National Rifle Association ("NRA") and two Oak Park residents filed suit challenging a similar Oak Park law, and the NRA and others filed an additional suit, challenging the Chicago ordinances. *Id.* The three cases were assigned to the same District Judge. *Id.*

18. *See* NRA, Inc. v. Oak Park, 617 F. Supp. 2d 752, 753–54 (N.D. Ill. 2008). Addressing *District of Columbia v. Heller*, 554 U.S. 570 (2008), the district court noted that the Court had explicitly refrained from addressing the subject of incorporation of the Second Amendment. *NRA*, 617 F. Supp. 2d at 754.

19. *McDonald*, 130 S. Ct. at 3027.

House Cases to affirm, and the court declined to predict how the Second Amendment would fare under the Court's modern selective incorporation approach.[20]

D. McDonald *Before the Supreme Court*

1. Justice Alito's Majority Opinion

A five-member majority[21] of the Supreme Court overruled the lower court's decision and concluded that the Second Amendment right is incorporated by the Due Process Clause of the Fourteenth Amendment, and therefore applies to the states.[22] The Court rejected the plaintiffs' contention that the Second Amendment was applicable to the states through the Privileges or Immunities Clause of the Fourteenth Amendment based upon longstanding precedent following the *Slaughter-House Cases*.[23]

The majority began their analysis by examining the Court's writings on the relationship between the Bill of Rights and the states, and they concluded that the proper starting point for rights protected by the Fourteenth Amendment was the Due Process Clause.[24] Although the Court deferred to precedent in basing incorporation in the Due Process Clause, the Court did not allow nineteenth century cases that declined to apply the Second Amendment to the states[25] to preclude their consideration of incorporation.[26]

The Court then turned to historical incorporation jurisprudence to form the foundation of their analysis, noting several fundamental premises.[27] First, the only rights protected against state infringement by the Due Process Clause are those rights included in the conception of due process of law.[28] While it was possible that some rights afforded by the Bill of Rights might be safeguarded against state action, this is not merely because those rights are enumerated in the first eight amendments.[29] To determine whether the right is included within the conception of due process, the Court will inquire whether the right is "fundamental to *our* scheme of ordered liberty and system

20. NRA, Inc. v. City of Chicago, 567 F.3d 856, 857 (2009).

21. Justice Alito was joined by Justices Roberts, Scalia, Kennedy, and Thomas. *McDonald*, 130 S. Ct. at 3026. Justices Scalia and Thomas filed separate concurring opinions, which are beyond the scope of this Article. *Id.* at 3025.

22. *Id.* at 3050.

23. *Id.* at 3030–31 (discussing *Slaughter-House Cases*, 83 U.S. 36 (1872)).

24. *Id.* at 3028–31.

25. The Court addresses three nineteenth century cases: *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); and *United States v. Cruikshank*, 92 U.S. 542 (1876).

26. *McDonald*, 130 S. Ct. at 3031. Because these cases preceded the Court's selective incorporation doctrine, the Court reasoned that that incorporation of the Second Amendment should be reconsidered. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

of justice" and is "deeply rooted in this Nation's history and tradition."[30] Second, the Court noted that it had abandoned any notion that the Fourteenth Amendment applies to the states only a "watered-down, subjective version" of the individual in guarantees of the Bill of Rights; instead, incorporated portions of the Bill of Rights are to be enforced against the states according to the same standards that protect those rights against federal encroachment.[31]

After applying these fundamental premises, the Court looked to its decision in *District of Columbia v. Heller*[32] to find that self-defense is "deeply rooted in this Nation's history and tradition," and further, that the right to keep and bear arms is among the fundamental rights necessary to our system of ordered liberty.[33] The Court reaffirmed its holding in *Heller* that the scope of the right is not determined by judicial interest balancing.[34] Further, the Court stated that the right to keep and bear arms would not apply to the states in a "watered-down, subjective version" of the Second Amendment.[35]

After finding that the Due Process Clause protects the right to possess a handgun in the home for the purpose of self-defense, the Court found the Chicago handgun laws unconstitutional.[36] Based on this finding, the Court reversed the judgment of the court of appeals and remanded the case for further proceedings.[37]

2. Justice Stevens' Dissent

Four members of the Court dissented from the judgment,[38] and Justice Stevens authored a dissent in which no other members of the Court joined.[39] Justice Stevens' dissent was premised on the acceptance of the resolution of the incorporation question in nineteenth century Second Amendment cases and the view that the case presented a substantive due process question, not a privileges or immunities ques-

30. *Id.* at 3034, 3036.

31. *Id.* at 3035. The Court noted that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." *Id.*

32. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

33. *McDonald*, 130 S. Ct. at 3036, 3042. To reach this conclusion, the Court engaged in a lengthy historical discussion of the Second Amendment and the drafting of the Fourteenth Amendment. *See id.* at 3036–42.

34. *Id.* at 3036, 3047.

35. *Id.* at 3047. However, the Court did repeat its assurances in *Heller* that recognition of the right to bear arms does not imperil every law regulating firearms. *Id.*

36. *Id.* at 3050.

37. *Id.*

38. *Id.* at 3088, 3120.

39. *Id.* at 3088 (Stevens, J., dissenting). Justice Breyer also authored a dissent, in which Justices Ginsburg and Sotomayor joined. *Id.* at 3120. Discussion of Justice Breyer's dissent is beyond the scope of this Article.

tion.[40] Further, Justice Stevens read the Court's incorporation jurisprudence to hold that the rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against federal government infringement under the Bill of Rights.[41] For Justice Stevens, the question was not whether the right to keep and bear arms applies to the states because the Second Amendment has been incorporated into the Fourteenth Amendment, but rather, whether the particular right to possess a handgun asserted by petitioners applied to the states because of the Fourteenth Amendment itself.[42] Justice Stevens found no indication in the Court's substantive due process jurisprudence that the term "liberty" within the Fourteenth Amendment encompasses either the common-law right to self-defense or a right to keep and bear arms, and further, found no indication that nineteenth century Second Amendment cases should be overturned.[43] As a result, Justice Stevens would uphold the City's handgun laws.[44]

III. ANALYSIS

> *Given that the Due Process Clause has incorporated virtually all other enumerated rights, the obvious question is what exactly justifies treating the Second Amendment as the great exception.*[45]

Justice Stevens' dissent in *McDonald* made clear that the fundamental principles of federalism and equal possession of rights are often in conflict.[46] Before deciding whether rights must always be "identical in shape or scope,"[47] it is crucial to not only understand the Court's incorporation jurisprudence, but to identify the complications that arise when attempting to reconcile federalism and equality. This section will address (a) the state of the law before *McDonald*, (b) the facial impact of *McDonald*, (c) Justice Stevens' selective incorporation analysis, (d) the most advisable solution for reconciling the fundamental principles of equality and federalism in the balancing test, and (e) response to anticipated critiques.

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40. *Id.* at 3088–90 (Stevens, J., dissenting). Justice Stevens disagrees with the test employed by the majority, as he believed the fundamental question is whether the interest is "comprised within the term liberty." *Id.* at 3092 (Stevens, J., dissenting).

41. *Id.* at 3093–95 (Stevens, J., dissenting). Stevens pointed to "[e]lementary considerations of constitutional text and structure" as legitimate reasons to hold the states to different standards than the federal government, and he argued that perfect state and federal congruence is necessary only on matters "at the core" of the relevant constitutional guarantee. *Id.* at 3093–94 (Stevens, J., dissenting).

42. *Id.* at 3103 (Stevens, J., dissenting).

43. *Id.* at 3109 (Stevens, J., dissenting). To Justice Stevens, "[t]here was nothing foreordained about [*McDonald's*] outcome." *Id.* at 3119 (Stevens, J., dissenting).

44. *See id.* at 3120 (Stevens, J., dissenting).

45. Brief for Petitioners, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4378912, at *66.

46. *McDonald*, 130 S. Ct. at 3101.

47. *Id.* at 3093 (Stevens, J., dissenting).

A. *The State of the Law Before* McDonald

The Bill of Rights originally applied only to the federal government.[48] However, the constitutional amendments adopted following the Civil War fundamentally altered our nation's federal system and prompted review of this fundamental precept.[49] Specifically, the Fourteenth Amendment's provision that a state may not deprive "any person of life, liberty, or property, without due process of law" provided a ground for a fresh look at the Bill of Rights.[50]

In the late nineteenth century, the Court began to consider whether the Due Process Clause prohibited the states from infringing upon rights established by the Bill of Rights.[51] As noted by the Court in *McDonald*, there were five primary features of the approach taken during this era.[52] First, the Court viewed the due process question as distinct from the question of whether a right was a privilege or immunity of national citizenship, allowing for reconsideration of rights previously found not deserving of protection from state infringement.[53] Second, the Court held that the only rights protected against state infringement by the Due Process Clause were those rights "of such a nature that they are included in the conception of due process of law."[54] While the Court noted that it was possible that many of the personal rights safeguarded by the Bill of Rights might also be safeguarded against state action, the Court stated that this was not merely because those rights were enumerated in the Bill of Rights.[55] Third, the Court used several different formulations in describing the boundaries of due process during this era,[56] including references to "immutable principles of justice"[57] and those rights "so rooted in the

48. *See* Livingston v. Moore, 32 U.S. 469, 551–52 (1833) ("It is now settled that those amendments do not extend to the states . . . ."); Edmond Cahn, *A New Kind of Society, in* THE GREAT RIGHTS 8 (Edmond Cahn ed., 1963) ("[T]he Bill of Rights originally restricted only the *Federal Government.*").

49. *McDonald*, 130 S. Ct. at 3028; *accord* Clark M. Neily III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate over Privileges or Immunities*, 14 TEX. REV. L. & POL. 15, 16 (2009) ("The Fourteenth Amendment represents a deliberate decision by the people of this nation to make the U.S. Constitution—not state constitutions and not state officials—the primary guardians of liberty in America.").

50. U.S. CONST. amend. XIV, § 1. The Court looked to the Bill of Rights for guidance in determining the meaning of the Due Process Clause. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

51. *McDonald*, 130 S. Ct. at 3031.

52. *Id.*

53. Twining v. New Jersey, 211 U.S. 78, 99 (1908).

54. *McDonald*, 130 S. Ct. at 3031; *see, e.g.*, Adamson v. California, 332 U.S. 46, 67 (1947); Betts v. Brady, 316 U.S. 455, 471 (1942); Palko v. Connecticut, 302 U.S. 319, 327 n.4 (1937).

55. *Twining*, 211 U.S. at 99.

56. *See McDonald*, 130 S. Ct. at 3032 (outlining formulations for the boundaries of due process).

57. *Twining*, 211 U.S. at 102.

traditions and conscience of our people to be ranked as fundamental."[58] Fourth, the Court did not hesitate to hold that a right stated in the Bill of Rights failed to meet the test for inclusion and protection under the Due Process Clause.[59] Finally, even when a right set out in the Bill of Rights was found to fall within the conception of due process, the protection afforded by the Court against state infringement occasionally differed from the protection provided against abridgement by the federal government.[60]

An alternative theory of the proper relationship between the Bill of Rights and the Due Process Clause was championed by Justice Black during this time, and it has since been promoted by several scholars and Justices.[61] Based on a belief that the drafters of the Fourteenth Amendment intended to make the Bill of Rights applicable against the states,[62] this theory suggests that the Fourteenth Amendment completely incorporated all of the provisions of the Bill of Rights when it was enacted.[63] However, the Court has never embraced Justice Black's total incorporation theory.[64]

Although the Court has never embraced Justice Black's theory, the Court began moving in that direction at the beginning of the twentieth century by adopting the practice of selective incorporation and finding that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments.[65] Consequently, the Court's de-

58. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

59. *See, e.g.*, *Twining*, 211 U.S. at 113 (privilege against self-incrimination).

60. *McDonald*, 130 S. Ct. at 3032. For example, in *Betts v. Brady*, the Court held that, although the Sixth Amendment required the appointment of counsel in all federal criminal cases in which the defendant was unable to afford an attorney, the Due Process Clause required appointment of counsel in state proceedings only where want of counsel resulted in a conviction lacking fundamental fairness. Betts v. Brady, 316 U.S. 455, 473 (1942). *Accord* Wolf v. Colorado, 338 U.S. 25, 27–28, 33 (1949) (finding that while the core of the Fourth Amendment was enforceable against the states under the Due Process Clause, the exclusionary rule does not apply to the states).

61. Hugo L. Black, *The Bill of Rights and the Federal Government, in* THE GREAT RIGHTS 44 (Edmond Cahn ed., 1963) ("[B]y virtue of the Fourteenth Amendment, the first ten amendments are now applicable to the states."). *See also* Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964) (noting the Justices that have argued for incorporation of the entire Bill of Rights).

62. Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 907 (2001).

63. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring).

64. *McDonald*, 130 S. Ct. at 3033.

65. *See, e.g.*, *Malloy*, 378 U.S. 1; Gideon v. Wainwright, 372 U.S. 335 (1963). *Accord* B. Aubrey Smith, *Laying Privileges or Immunities to Rest:* McDonald v. City of Chicago, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 161, 165 (2010), *available at* http://www.scholarsh65ip.law.duke.edu/djclpp_sidebar/63/ ("[T]he Court has increasingly recognized specific, constitutional rights as binding and protected from intrusion by both the federal and state government through the Fourteenth Amendment's Due Process Clause . . . ."). *But see* Brief for Respondents in Opposition, McDonald v. City of Chicago, 130 S. Ct. 3020 (2009) (Nos. 08-1497, 08-1521), 2009 WL 2419169, at *10 ("[T]he Court has flatly rejected '[t]he notion that the due process of law guaran-

cisions shifted away from the previously discussed characteristics[66] of the early nineteenth century.[67] The Court formulated a single test for the boundaries of due process, asking whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice.[68] The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights were protected by the Due Process Clause.[69] Most importantly to the scope of this Article, the Court abandoned the notion that the Fourteenth Amendment protects the guarantees of the Bill of Rights in a "watered-down, subjective version," and instead, the Court decisively held that incorporated Bill of Rights provisions are to be enforced against the states by the same standards that protect those rights against federal encroachment.[70]

Before *McDonald*, the Court had only addressed whether the Second Amendment applied to the states through the Privileges and Immunities Clause, and it had not addressed the question under the Due Process Clause.[71] In *United States v. Cruikshank*, the Court wrote that the right to bear arms "is not a right granted by the Constitution" and held that the Second Amendment applied only to the federal government and was not protected against state infringement by the Privi-

teed by the Fourteenth Amendment is shorthand for the first eight amendments . . . .'" (quoting *Wolf*, 338 U.S. at 26)).

66. *See supra* notes 51–60 and accompanying text.

67. *McDonald*, 130 S. Ct. at 3034.

68. *See Duncan*, 391 U.S. at 148–49 n.14 (referring to those "fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions"). *Duncan* has been read to suggest that the Court will also look to the right's historical acceptance in our nation, its recognition by the states, and the nature of the interest secured by the right. Petition for a Writ of Certiorari at 17, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521). *But see* Brief for Respondents in Opposition at 10–11, McDonald v. City of Chicago, 130 S. Ct. 3020 (2009) (Nos. 08-1497, 08-1521), 2009 WL 2419169, at *10–11 (commenting that the Court examines numerous factors: "the right's purpose, function, and efficacy; its origins in English and American jurisprudence; and its prevalence in and treatment under state constitutions," with "our laws and traditions in the past half century" being most relevant).

69. *McDonald*, 130 S. Ct. at 3034. The Court eventually incorporated almost all provisions of the Bill of Rights. *See id.* at nn.12–13 (listing relevant cases).

70. *See Malloy*, 378 U.S. at 10–11 (1964) ("It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution . . . ."). However, the Court has held that the Sixth Amendment right to trial by jury does not require a unanimous jury verdict in state criminal trials. Apodaca v. Oregon, 406 U.S. 404, 412–13 (1972); *accord* Michael P. O'Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 215–16 (2008) (discussing additional examples of remaining partial incorporation). In addition, several members of the Court continued to critique the full incorporation method. *See, e.g.*, *Malloy*, 378 U.S. at 15–17 (criticizing the premise that the Due Process Clause is "a shorthand directive to . . . pick and choose among the provisions of the first eight Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States").

71. Michael Anthony Lawrence, *The Potentially Expansive Reach of* McDonald v. Chicago*: Enabling the Privileges or Immunities Clause*, 2010 CARDOZO L. REV. (DE NOVO) 139, 140 (2010).

leges or Immunities Clause.[72] As a result, the Second Amendment had not been incorporated against the states when *McDonald* reached the Court.[73]

B. *The Facial Impact of* McDonald

The plaintiffs in *McDonald*, and others like them, are the immediate beneficiaries of the Court's ruling in *McDonald*, as they are no longer restricted by Chicago's firearm laws.[74] However, the real impact of *McDonald* stretches further, both in the application of Second Amendment rights by lower courts and in incorporation jurisprudence.[75] This Section will address the Court's holding read narrowly; *McDonald*'s impact on incorporation jurisprudence will be discussed in Section III(C).

In *McDonald*, the Court inquired whether the Second Amendment right is "fundamental to *our* scheme of ordered liberty and system of justice" and is "deeply rooted in this Nation's history and tradition" to determine whether it is incorporated against the states under the Due Process Clause of the Fourteenth Amendment.[76] Because the Court found the Second Amendment right to possess a handgun fundamental and therefore incorporated against the states, the Court found the City's ordinances unconstitutional.[77] The *McDonald* Court limited its holding to the right to possess a handgun in the home for the purpose of self-defense, as recognized in *Heller*,[78] and noted that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[79]

Since the Court's ruling in *McDonald*, lower courts have read *McDonald* to reaffirm *Heller*'s holding that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, specifically for self-defense within the home.[80] Lower courts have also viewed *McDonald*'s reference to exceptions as a warning not to apply the Court's holding too broadly, as the right to bear arms is not without limits.[81] For instance, the D.C. Circuit upheld prohibitions on "as-

72. United States v. Cruikshank, 92 U.S. 542, 553 (1876).

73. *See* Smith, *supra* note 65, at 166 ("The modern Court has yet to consider whether the Second Amendment right to keep and bear arms is [a] fundamental right.").

74. *Compare McDonald*, 130 S. Ct. at 3026 (noting petitioners' claims), *with supra* notes 36–37 and accompanying text (noting the Court's holding in *McDonald*).

75. *See infra* Part III.B–C.

76. *McDonald*, 130 S. Ct. at 3036, 3042.

77. *Id.* at 3036.

78. *See id.* at 3050 ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

79. *Id.* at 3047 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

80. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011).

81. *See, e.g.*, United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (finding the inquiry to be whether the plaintiff is "qualified to possess a firearm in the first

sault weapons and large-capacity magazines."[82] Lower courts have noted that *McDonald* did not elaborate on the level of review for Second Amendment claims, whether against the federal government or a state.[83] Finally, lower courts have read *McDonald* to hold that the Second Amendment applies equally to the federal government and the states.[84]

It is useful not only to examine subsequent lower court rulings for the facial impact of *McDonald*, but also to examine relevant commentary by legal scholars. Scholars have read *McDonald* to hold that the Second Amendment right to keep and bear arms is fully enforceable against the states under the Due Process Clause of the Fourteenth Amendment[85] and have noted the uncertainty *McDonald* brings for local gun regulations.[86] Further, while recognizing that the Due Process Clause provides the basis for incorporation in *McDonald*, legal scholars have argued that *McDonald* leaves open the possibility of future reconsideration of the *Slaughter-House Cases* and use of the Privileges or Immunities Clause.[87] Finally, legal scholars have debated the

instance"); United States v. Marzzarella, 614 F.3d 85, 91–92 (3rd Cir. 2010) (noting the limitations to the right); United States v. Pope, 613 F.3d 1255, 1257 (10th Cir. 2010) (noting *Heller*'s dictum that recognition of an individual right to keep and bear arms was not intended to upset "longstanding prohibitions on the possession of firearms by felons"); United States v. Skoien, 614 F.3d 638, 647 (7th Cir. 2010) (noting *McDonald*'s discussion of "longstanding regulatory measures"). *But see* Saldinger v. Santa Cruz Cnty. Super. Ct., No. C 10-3147 SBA PR., 2010 WL 3339512, at *4 (N.D. Cal. Aug. 24, 2010) ("*McDonald* forbids any State from imposing reasonable restrictions on the use of weapons to eject or prevent trespassers.").

82. Heller v. District of Columbia, 670 F.3d 1244, 1264 (D.C. Cir. 2011).

83. *See, e.g.*, United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010) ("We have thus far, like the Supreme Court, declined to wade into the 'levels of scrutiny' quagmire . . . ."). However, at least one court has held that " 'longstanding prohibitions on the possession of firearms', derived from various historical provisions, as 'presumptively lawful regulatory measures.' " United States v. Smith, 742 F. Supp. 2d 855, 858 (S.D. W. Va. 2010).

84. *See, e.g., id.* at 866 ("In *McDonald*, the Supreme Court held that the Second Amendment is fully applicable to the states by operation of the Fourteenth Amendment Due Process Clause."); Richards v. Cnty. of Yolo, 821 F. Supp. 2d 1169, 1174 (E.D. Cal. 2011) ("Rights bestowed under the Second Amendment . . . apply equally to the federal government and the states."); *Saldinger*, 2010 WL 3339512, at *4 (citing *McDonald* as "extending *Heller* to the States"); *cf.* Durga v. Bryan, No. 3:10-CV-1989, 2011 WL 4594281, at *5 n.1 (D. N.J. Sept. 30, 2011) ("*McDonald* . . . held that Second Amendment rights are applicable to the States").

85. Richard J. Hunter, Jr. & Hector R. Lozada, *A Nomination of a Supreme Court Justice: The Incorporation Doctrine Revisited*, 35 OKLA. CITY. U. L. REV. 365, 384 (2010); *The Supreme Court, 2009 Term—Leading Cases: Incorporation of the Right to Keep and Bear Arms*, 124 HARV. L. REV. 229, 229 (2010) [hereinafter *2009 Term—Leading Cases*]. *Cf.* Richard Primus, *Constitutional Expectations*, 109 MICH. L. REV. 91, 100 (2010) (noting the "Supreme Court's recent announcement that the Second Amendment protects an individual right to own firearms").

86. *Cf.* Ian W. Henderson, *Rights, Regulations, and Revolvers: Baltimore City's Complex Constitutional Challenge Following* District of Columbia v. Heller, 39 U. BALT. L. REV. 423 (2010) (noting the effect on Baltimore's gun regulations).

87. *2009 Term—Leading Cases, supra* note 85, at 234.

appropriate level of scrutiny for regulations that infringe upon the right to possess a handgun in the home.[88]

C. *Justice Stevens' Selective Incorporation Doctrine*

While the majority in *McDonald* recognized that rights contained within the Bill of Rights are not protected against state infringement by the Due Process Clause merely because they are part of the Bill of Rights,[89] Justice Stevens fully embraced this principle.[90] Justice Stevens made clear that inclusion in the Bill of Rights is neither necessary nor sufficient for a right to be judicially enforceable under the Fourteenth Amendment;[91] it is merely informative.[92] Part (1) of this Section will elaborate on Justice Stevens' view of the proper role of the Bill of Rights in incorporation analysis. Part (2) will highlight the practical impact of his approach, and Part (3) will contrast his approach with the Court's current rights jurisprudence, noting the doctrinal implications of his approach. Finally, Part (4) will critique Justice Stevens' dissent in *McDonald.*

1. The Bill of Rights in Incorporation Analysis

For Justice Stevens, regardless of whether the asserted right is named within the Bill of Rights, the underlying inquiry is the same: whether the interest is "comprised in the term liberty" found in the Fourteenth Amendment.[93] Indeed, only those values "implicit in the concept of ordered liberty" that contribute to a "fair and enlightened system of justice" are suitable for substantive due process protection.[94] Justice Stevens' liberty inquiry is not limited to *our* notion of ordered liberty, as suggested by the majority,[95] but gives liberty a universal character that can be separated from the customs of certain regions, the expectations of a certain group, and the preferences of the interest's proponents.[96] Further, for Justice Stevens, *our* history and tradition are only a starting point for consideration of the suggested right, as substantive due process "must not be wholly backward look-

88. *See, e.g., generally* Rosenthal & Malcom, *supra* note 9, at 86 (debating the appropriate level of scrutiny after *McDonald*).

89. McDonald v. City of Chicago, 130 S. Ct. 3020, 3031 (2010).

90. *Id.* at 3097 (Stevens, J., dissenting).

91. *Id.* at 3093 (Stevens, J., dissenting).

92. *Id.* at 3096 (Stevens, J., dissenting). Justice Stevens notes that "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 he is quick to find that this does not apply to the Second Amendment. *Id.* at 3111 (Stevens, J., dissenting).

93. *Id.* at 3092 (Stevens, J., dissenting). Justice Stevens stresses that the Court's "selective incorporation" doctrine is not simply related to substantive due process; it is a subset of the doctrine. *Id.* at 3093 (Stevens, J., dissenting).

94. *Id.* at 3096 (Stevens, J., dissenting).

95. *Id.* at 3034, 3036.

96. *Id.* at 3096 (Stevens, J., dissenting).

ing."[97] Rather than considering current state protection of the right only as evidence of the right's historical acceptance,[98] Justice Stevens finds that "respect for the democratic process," by deference to ongoing state experimentation with the right, is a key factor in substantive due process analysis.[99]

While the outer bounds of liberty protected by the Fourteenth Amendment are admittedly "not capable of being fully clarified" under this approach, Justice Stevens does suggest that substantive due process only protects "certain types of especially significant personal interests."[100] He argues that if the majority's assertion that the Fourteenth Amendment's guarantee of liberty embraces only those rights "so rooted in our history, tradition, and practice as to require special protection" is correct, then the guarantee is circular—it would do little more than ratify those rights for which state actors *already* afford the most extensive protection.[101] Within Justice Stevens' framework, a right's status as protected under *our* Bill of Rights is little more than evidence that at one time, one nation, out of the greater universal society under consideration, included the right within its Constitution.[102]

2. Practical Impact on the Second Amendment Right

Justice Stevens explores the outcome of his approach to incorporation in *McDonald*,[103] and it is not difficult to imagine the impact of his approach on an individual right.[104] In general, if incorporation analysis gives little, if any, weight to a right's inclusion in the Bill of Rights, then it is very possible that a right protected from federal infringement is not judicially enforceable against the states.[105] The Second Amendment right to keep a handgun in the home for self-defense,

97. *Id.* at 3097 (Stevens, J., dissenting). Justice Stevens stated that the majority was "seriously mistaken" in finding that the historical pedigree of a right is the sole determinant of its status under the Due Process Clause. *Id.*

98. Under traditional rights analysis, consideration of the state action does not occur until the right is determined and the Court asks whether the action infringing upon the recognized right is appropriate. *See infra* note 150 and accompanying text.

99. *McDonald*, 130 S. Ct. at 3101 (Stevens, J., dissenting).

100. *Id.* at 3100 (Stevens, J., dissenting). Justice Stevens lists "[s]elf-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect" as "central values . . . implicit in the concept of ordered liberty." *Id.* at 3101 (Stevens, J., dissenting).

101. *Id.* at 3097 (Stevens, J., dissenting).

102. *Infra* notes 110–11 and accompanying text. *But see supra* note 92 (recognizing Justice Stevens' swift dismissal of the general implication of a right's inclusion in the Bill of Rights).

103. *See McDonald*, 130 S. Ct. at 3103–20 (Stevens, J., dissenting) (applying substantive due process doctrine to the Second Amendment).

104. *See infra* notes 105–20 and accompanying text (discussing the practical impact).

105. *McDonald*, 130 S. Ct. at 3103 (Stevens, J., dissenting).

recognized in *Heller* and addressed at the state level in *McDonald*,[106] provides an excellent case study for the impact of Justice Stevens' approach on a specific right.

In *McDonald*, Justice Stevens phrases the issue as "whether the interest in keeping in the home a firearm of one's choosing . . . is one that is comprised within the term liberty in the Fourteenth Amendment."[107] Instead of finding that the Court's decision in *Heller* "points unmistakably to the answer,"[108] Justice Stevens questions the right anew through his substantive due process framework.[109] Justice Stevens finds the following factors persuasive: (i) in evaluating the right to be free from particular gun-control regulations, liberty is on the side of all interests; (ii) the right to possess a firearm is different in kind from other liberty interests the Court has recognized under the Due Process Clause; (iii) the regulations of other advanced democracies undercuts the premise that an expansive right to keep and bear arms is intrinsic to ordered liberty; (iv) the Second Amendment serves the structural function of protecting the states from encroachment by an overreaching federal government, and it was not designed to protect an individual right; (v) states have a long history of regulating firearms; and (vi) federalism should be allowed to flourish without the Court's meddling in the area of firearm regulation.[110] As a result, Justice Stevens' substantive due process review views the right's protection under the Second Amendment as only one—if even one—factor considered.[111]

Justice Stevens not only concludes that it is possible that the Second Amendment right recognized in *Heller* is not protected against state infringement, but also that even if this right is protected by the Due Process Clause, it "need not be identical in shape or scope to the right[ ] protected against Federal Government infringement."[112] Because the right's inclusion in the Bill of Rights does not, in itself, warrant protection against state infringement, it is not necessary that the right have precisely the same meaning in both contexts.[113] While Justice Stevens recognizes the practical benefits that result from treating rights symmetrically, his conception of the Due Process Clause and

106. *Compare* District of Columbia v. Heller, 128 S. Ct. 2783 (2010), *with McDonald*, 130 S. Ct. at 3107.

107. *McDonald*, 130 S. Ct. at 3107 (Stevens, J., dissenting).

108. *Id.* at 3036.

109. *Id.* at 3107 (Stevens, J., dissenting).

110. *Id.* at 3107–15 (Stevens, J., dissenting).

111. *Id.* While Justice Stevens addresses the right's protection under the Second Amendment, he does not do so in light of the Court's opinion in *Heller*. *Id.* at 3111 (Stevens, J., dissenting). Justice Stevens emphasizes the purpose for which the right was codified "to prevent elimination of the militia," and he assigns little importance to *Heller*'s recognition of an individual right to keep and bear arms disconnected from militia service within the Second Amendment. *Id.*

112. *Id.* at 3093 (Stevens, J., dissenting).

113. *Id.* at 3094 (Stevens, J., dissenting).

federalism does not warrant such uniformity.[114] However, Justice Stevens does not illustrate what these different rights might look like in *McDonald*, as he concludes that the right to keep a handgun in the home is protected against federal infringement under *Heller* but is not protected against state infringement.[115]

The impact of Justice Stevens' approach to Second Amendment incorporation is perplexing, if not impractical. At its extreme, if an individual has a federal right to possess a handgun in his home but does not have a right within any state to possess any type of gun in his home, then his federal right may never be exercised, regardless of where he makes his home within the United States.[116] His federal right to possess a handgun in the home has become meaningless as a practical matter.[117] Similarly, if an individual citizen's state right is to possess only a certain caliber of handgun within the home, or to possess only an unloaded handgun, locked away at all times, within his home, then he may only exercise his federal right to that extent.[118] Any greater federal right has again become meaningless as a practical matter.[119] In any event, the individual citizen will only enjoy his right to possess a handgun to the extent it is recognized against state infringement, regardless of the breadth of his federal right.[120] Such an

114. *Id.* at 3095 (Stevens, J., dissenting).

115. *Compare id.* at 3103 n.26 (Second Amendment right), *with id.* at 3107 (finding no state right).

116. *See* Brief for Eagle Forum Education & Legal Defense as Amicus Curiae Supporting Petitioners at 7, McDonald v. City of Chicago, 130 S. Ct. 3020 (2009) (No. 08-1521), 2009 WL 4099516, at *7 [hereinafter Eagle Forum Brief] ("The right to self-defense is a right that is meaningless unless protected against state encroachment."); Reply Brief for Petitioner at 3, McDonald v. City of Chicago, 130 S. Ct. 3020 (2009) (No. 08-1521), 2009 WL 2574073, at *3 ("A Second Amendment right valid only against the federal government is meaningless to Americans disarmed by state officials."). Even Justice Stevens recognizes that "[j]ot-for-jot incorporation of a provision may entail greater protection of the right at issue." *McDonald*, 130 S. Ct. at 3095 (Stevens, J., dissenting).

117. *See* sources cited *supra* note 116.

118. *Cf. supra* note 116 and accompanying text (noting the effect of a federal right without a corresponding state right). Under Justice Stevens' approach, another plausible scenario might be that the citizens in certain locales have different rights than those in other areas and different than that protected against federal infringement by the Second Amendment. *See McDonald*, 130 S. Ct. at 3093 (Stevens, J., dissenting) ("Elementary considerations of constitutional text and structure suggest there may be legitimate reasons to hold state governments to different standards than the Federal Government in *certain areas*.") (emphasis added). If this were the case, a citizen's right to possess a handgun will vary based upon his residence or current location. *See* Eagle Forum Brief, *supra* note 116, at *4 (arguing the right to self-defense is "worth less if it disappears and reappears during a citizen's road trip across the nation, or as a citizen relocates from town to town, or state to state.").

119. *Cf. supra* note 116 and accompanying text (noting the effect of a federal right without a corresponding state right).

120. *Cf.* O'Shea, *supra* note 70, at 222 (illustrating the disparity in the right to own a weapon in Wyoming and New Jersey).

outcome is far from the original design of the Fourteenth Amendment.[121]

3. Impact on Rights Jurisprudence

The practical impact of Justice Stevens' approach to incorporation in *McDonald* is worth exploration, but recognizing this practical impact is not enough. If his approach to incorporation is adopted, current rights jurisprudence will be fundamentally altered.[122]

There is certainly nothing heretical about Justice Stevens' assertion that the Court has never accepted a total incorporation theory where the Fourteenth Amendment is deemed to "subsume the provisions of the Bill of Rights *en masse*."[123] The Court has declined to apply any part of the Seventh Amendment and the Grand Jury Clause to the states.[124] Further, the Court has resisted a uniform approach to the Sixth Amendment's criminal jury guarantee, requiring twelve-member jury panels and unanimous verdicts in federal trials but not in state trials.[125] However, these cases are exceptions to the Court's general trend of treating the Due Process Clause as if it transplants language from the Bill of Rights into the Fourteenth Amendment;[126] in all but these few cases of criminal procedure, the Court has abandoned a two-track approach to incorporation.[127] As a result, Justice Stevens'

121. *See* Amar, *supra* note 62, at 907 ("The Fourteenth Amendment's framers emphatically proclaimed their intent to make the Bill of Rights applicable against states."); 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, 1114 (2000) ("[T]he Fourteenth Amendment was designed to sharply limit the power of the states to abuse the fundamental rights of American[s].").

122. *See infra* Part III.C.3 (discussing such implications).

123. *Compare McDonald*, 130 S. Ct. at 3093–94 (Stevens, J., dissenting), *with id.* at 3033 ("[T]he Court has never embraced Justice Black's 'total incorporation' theory . . . .").

124. *See, e.g.*, Minneapolis & Saint Louis R.R. Co. v. Bombolis, 241 U.S. 211, 216 (1916) (stating that the Seventh Amendment does not apply to the states); Hurtado v. California, 110 U.S. 516, 538 (1884) (stating that the Grand Jury Clause does not apply to the states).

125. *See* Apodaca v. Oregon, 406 U.S. 404, 406 (1972). The Court has repeatedly declined certiorari to review this case. *See, e.g.*, Bowen v. Oregon, 168 P.3d 1208 (Or. App. 2007), *cert. denied*, 130 S. Ct. 52 (2009). While this denial has no precedential significant, Justice Stevens notes that the Court "confirm[s] the proposition that the 'incorporation' of a provision of the Bill of Rights into the Fourteenth Amendment does not, in itself, mean the provision must have precisely the same meaning in both contexts." *McDonald*, 130 S. Ct. at 3094 n.12 (Stevens, J., dissenting).

126. *Id.* at 3034–35, nn.12–13 (listing incorporated and unincorporated provisions). Some have noted that the common characteristic of rights that have not been incorporated is that they are local in nature, where there is little need for national uniformity. Eagle Forum Brief, *supra* note 116, at *7.

127. *See* Motion to File and Brief of Amicus Curiae American Legislative Exchange Council in Support of Petitioners at 6–7, McDonald v. City of Chicago. 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4099519, at *6–7 (noting that unincorporated rights concern criminal procedure); *see supra* note 31 and accompanying text. Some

approach would return the Court to its early incorporation jurisprudence, where recognizing an identical federal and state right is the exception, not the norm.[128]

While Justice Stevens' suggestion that the Fourteenth Amendment need not adopt a provision of the Bill of Rights in its entirety is hardly novel,[129] his suggestion that the content of a right need not be identical in shape or scope is a fundamental departure from incorporation jurisprudence.[130] The Court has firmly rejected the notion that "the Fourteenth Amendment applies to the states only a watered-down, subjective version of the individual guarantees of the Bill of Rights,"[131] and instead, it has decisively held that incorporated Bill of Rights provisions are to be enforced against the states according to the same standards that protect those federal rights against federal encroachment.[132]

Further, Justice Stevens' assertion that the content of a right need not always be the same directly contrasts with our fundamental rights jurisprudence.[133] Calling something a "right" to claim priority and protection regardless of the kind of normative ground offered has been characteristic of rights discourse throughout American history.[134] The most fundamental proposition of our constitutional law

states have historically afforded greater rights to their residents than those required of the national government by the corresponding federal guarantee. William J. Brennan, Jr., *The Bill of Rights and the States*, *in* THE BILL OF RIGHTS AND THE FEDERAL GOVERNMENT 65, 85 n.66 (Edmond Cahn ed., 1963). However, this Article only addresses the ramifications of defining a right more narrowly in certain areas, and as a result, analysis of instances of extension are only minimally helpful.

128. *See* Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) (finding that as initially drafted, the Bill of Rights directly constrained only the federal government).

129. *See supra* notes 59–60 and accompanying text.

130. *See, e.g.*, Hunter & Lozada, *supra* note 85, at 381 ("There is an implicit assumption, if a right is incorporated by the Fourteenth Amendment . . . the right will receive the same protection against state intrusion through the Fourteenth Amendment that it receives through the Bill of Rights."). *But see* JOSEPH G. COOK ET AL., CRIMINAL PROCEDURE 14–15 (7th ed. 2009) (exploring "neo-incorporation" views).

131. Malloy v. Hogan, 378 U.S. 1, 10–11 (1964) (quoting Ohio *ex rel.* Eaton v. Price, 364 U.S. 264, 275 (1960) (per curiam)).

132. *E.g.*, Pointer v. Texas, 380 U.S. 400, 406 (2010); Aguilar v. Texas, 378 U.S. 108, 110 (1964). *But see Malloy*, 378 U.S. at 16–17 (Harlan, J., dissenting) ("compelled uniformity . . . is inconsistent with the purpose of our federal system").

133. *See, e.g.*, DAVID G. SAVAGE, THE SUPREME COURT & INDIVIDUAL RIGHTS 11 (4th ed. 2004) (noting the Fourteenth Amendment's promise of equal protection); Primus, *supra* note 85, at 101 (noting the "modern vision of constitutionalism on which equal individual rights are the cornerstone of constitutional law").

134. RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 236 (1999). *But see* A.I. Melden, *Dignity, Worth, and Rights*, *in* THE CONSTITUTION OF RIGHTS 39 (Michael J. Meyer & William A. Parent eds., 1992) ("For to understand what is involved in having a right . . . is to understand the good reasons, sufficient or not as these may be, for waiving or relinquishing the right . . . .").

jurisprudence is that the law must afford equal protection to all,[135] and the ideal of due process, protected by the Fifth and Fourteenth Amendments, embodies to our deepest notions of what is just and fair.[136] Even in the early years of Reconstruction, following the enaction of the Fourteenth Amendment, there was uniform agreement that at least civil rights—the rights that people must hold in order to act as private individuals in civil society, capable of personal independence and self-sufficiency—attached to all persons equally.[137] It has long been understood that the government may make classifications and distinctions in their infringement upon a right,[138] but to do so, the government must overcome the rebuttable presumption that such action is condemnable under the standard of equal protection.[139] It is important to note that this legislative leeway is to act in such a way that infringes upon the right, rather than in the act of defining the right.[140] If the Due Process Clauses of the Fifth and Fourteenth Amendments are designed to forbid injustice in the form of capricious legislative deprivations of life, liberty, or property, then it is reasonable to believe that the Equal Protection Clause is designed to prohibit

135. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law, in* THE RIGHTS RETAINED BY THE PEOPLE 67, 72 (Randy E. Barnett ed., 1989); *accord* Louis Henkin, *Dignity and Constitutional Rights, in* THE CONSTITUTION OF RIGHTS 210, 215 (Michael J. Meyer & William A. Parent eds., 1992) (writing that the framers built the government on theory "rooted in rights" and embodied in the Declaration of Independence's articulation that "all Men are created equal"); Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J. L. & SOC. POL'Y 307, 312 (2010) ("The right to equality has been defined as the most fundamental claim a citizen has against government: the right to be held in equal regard and to be treated equally by the government."). *But see* BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 484 (1968) (noting that "[a] society characterized by equality among men was, in many ways, the opposite of that in which [the founders] desired to live"). However, Scharwtz notes that the adoption of the Fourteenth Amendment guarantees "equality of all persons before the law." *Id.* at 487.

136. William A. Parent, *Constitutional Values and Human Dignity, in* THE CONSTITUTION OF RIGHTS 66 (Michael J. Meyer & William A. Parent eds., 1992).

137. PRIMUS, *supra* note 134, at 154–55.

138. SCHWARTZ, *supra* note 135, at 504; *see also* Parent, *supra* note 136, at 67 ("[O]bviously, this [equal protection] guarantee does not mean that states may draw no distinctions at all . . . .").

139. *See* Parent, *supra* note 136, at 67 (noting the presumption against arbitrary government discriminations).

140. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3056 (2010) (Scalia, J., concurring) (asserting that prudential reasons are not a valid basis to "withhold rights that are within the Constitution's command"). *Cf.* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–90 (2008) (identifying the right as to be free from the "affluence of the voter or payment of any fee an electoral standard," and balancing that right against the offered state interest); New State Ice Co. v. Liebmann, 285 U.S. 262, 303 (1932) (Brandeis, J., dissenting) (defining the relevant liberty as "to engage in a common calling," but noting that like other liberties, it "may be limited in the exercise of the police power"); SCHWARTZ, *supra* note 135, at 473–504 (discussing leeway in the context of government action affecting an established right).

injustice in the form of capricious legislative assignments of rights.[141] Further, while equality is not mentioned in the Bill of Rights, there is an implicit commitment to equality; the rights within the Bill of Rights are announced for all and invite challenges to practices that interfere with the equal application of those rights.[142] Every individual is assured the same rights assured others.[143] While this notion of underlying equality might be dismissed as merely idealistic and uncompromising for practical considerations, these enduring constitutional principles form the very foundation of our legal system.[144] As a result, Justice Stevens' assertion in *McDonald* that a right "need not be identical in shape or scope," if adopted, poses a serious challenge to the underlying promise of equality within the very conception of a right.[145]

As noted, the government may make classifications that infringe upon individual rights.[146] Federal and state interests are properly considered in determining whether the government act infringing upon an individual right is permissible.[147] Although some, including Justice Black, have asserted that one of the primary purposes of the Constitution was to withdraw from the government the ability to act in certain areas, and that there is never a justification for balancing a particular right against an expressly granted power to the government,[148] this

141. *Cf.* Parent, *supra* note 136, at 67. This argument is generally made to overcome suspect classifications based on race, gender, or other "morally irrelevant grounds," *see id.* at 70, but the Constitution itself does not limit due process or equal protection based on racial or similar discrimination. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

142. Martha Minow, *Equality and the Bill of Rights*, *in* THE CONSTITUTION OF RIGHTS 118 (Michael J. Meyer & William A. Parent eds., 1992). While this is admittedly not a "standard of interpretation" of the Bill of Rights, the due process provision of the Fifth Amendment shares with the "guarantees of orderly legal procedures throughout the Bill of Rights a demand for equal treatment before the law." *Id.* at 119–21.

143. *Id.* at 121.

144. *See* David A. Richards, *Liberty, Dignity, and Justification*, *in* THE CONSTITUTION OF RIGHTS 100 (Michael J. Meyer & William A. Parent eds., 1992) (discussing the "community of principle"). *Cf.* Jurgen Habermas, *Constitutional Democracy*, *in* PHILOSOPHY OF LAW 177 (Joel Feinberg & Jules Coleman eds., 2008) (noting the importance of basic rights that result from the equal actionability of individual rights to a constitutional democracy).

145. *Compare McDonald*, 130 S. Ct. at 3093–95 (Stevens, J., dissenting), *with supra* notes 133–44 and accompanying text (discussing rights jurisprudence).

146. *Supra* note 138 and accompanying text.

147. *See, e.g.*, Reply Brief for Respondents the National Rifle Association of America, Inc. et al in Support of Petitioners as Amicus Curiae Supporting Petitioners at 14, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 WL 360206, at *14 [hereinafter NRA Brief] ("[L]ocalized concerns . . . may be relevant to determining whether certain laws and regulations can withstand the scrutiny of the courts.").

148. BLACK, *supra* note 61, at 55.

view has been consistently rejected by the Court.[149] In each case before the Court where a fundamental right is at stake, the Court makes an independent determination of the legitimacy of the law that affects that right.[150] The Court subjects the action at issue to a strict scrutiny standard of review, requiring the law to be narrowly tailored to promote a compelling interest of government if it is to limit the fundamental rights of citizens.[151] If the Court is not satisfied that the government action meets this burden, then the Court will find the action unconstitutional.[152] Strict scrutiny review is said to require the most exact connection between justification and classification, but the Court has repeatedly rejected the notion that it is "strict in theory, but fatal in fact."[153] On several occasions, the Court has found a state's interest so compelling and narrowly tailored as to warrant overriding an individual right.[154]

The Court's consideration of state interests in rights cases maintains the delicate constitutional balance between the individual and the government actor.[155] This consideration is not only a result of traditional rights jurisprudence,[156] but also stems from principles of federalism embedded in our Constitution.[157] The Founders sought to create a government with two spheres wherein the laws of the United States would be supreme, "as to all their constitutional objects," and the laws

149. This can be seen in First Amendment cases. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971 (2010) (stating that the right to association may be overcome by compelling state interests that cannot be advanced through significantly less restrictive means); Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (same).

150. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 427 (8th ed. 2010).

151. *See id.* at 428. *Cf.* Richards, *supra* note 2, at 98 ("In effect, the state may abridge such fundamental rights . . . by showing that the abridgement is indispensable to some compelling secular state purpose.").

152. NOWAK & ROTUNDA, *supra* note 150, at 428.

153. Campbell, *supra* note 3, at 397 n.78.

154. Because the Court has not ruled on state infringements of an individual's right to possess a handgun in the home, looking to other Due Process Clause cases is helpful. *See, e.g.*, *Christian Legal Soc'y*, 130 S. Ct. at 2978 (ruling for the state on claim that university infringed students' right to associate); Grutter v. Bollinger, 539 U.S. 306, 311, 343 (2003) (ruling for the state on claim that state university admissions process violated students right to equal protection).

155. *See supra* notes 149–52 and accompanying text (discussing strict scrutiny review).

156. *Cf.* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469 (2009) (subjecting government action infringing "strong free speech rights" to strict scrutiny). *See generally* Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973) (discussing local differences in the context of school desegregation and the right to be free from discrimination on the basis of race).

157. *Cf.* ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 106–13 (2008) (arguing that federalism protects liberty). *See generally* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987) (exploring federalist underpinnings of the Constitution).

of the states would be supreme in the same way.[158] James Madison described the powers left to the states in our system of joint sovereignty as including "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[159] One of federalism's chief virtues is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory, and may try novel social and economic experiments without risk to the rest of the country."[160] The role of states as a laboratory is most often noted in the states' core police powers—the authority to define criminal law and to protect the health, safety, and welfare of their citizens.[161] While a right may be established at the federal level and common across the states, local police power may limit the exercise of that right.[162]

However, judicial restraint that defers too much to the sovereign powers of the states and reserves judicial intervention for only the most egregious of cases will not protect "the great rights of mankind secured under [our] Constitution" necessary for freedom to exist.[163] Denying the states the power to impair a fundamental right is not an increase of federal power; rather, it limits the power of all levels of government in favor of safeguarding the fundamental rights and liberties of the individual.[164] Further, after the ratification of the Fourteenth Amendment, it is much more difficult to argue that federalism sanctions violation by state actors of individual fundamental rights.[165] As a result, the Court may strike down state action, even if under the

158. BERGER, *supra* note 157, at 58 (quoting 2 JONATHAN ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 355 (2d ed. 1996)) (describing the "two independent spheres of government" for the United States).

159. Gonzales v. Raich, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting). Madison describes the powers that remain to the state governments as "numerous and indefinite," while those of the federal government are "few and defined." *Id.*

160. *Id.* at 42; New State Ice Co. v. Liebmann, 285 U.S. 262, 302 (1932) (Brandeis, J., dissenting).

161. *Gonzales*, 545 U.S. at 42 (O'Connor, J., dissenting).

162. *See supra* notes 138–140 and accompanying text.

163. Brennan, *supra* note 127, at 86. *But see* THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) ("The power[ ] reserved to the several States will extend to . . . [the] liberties and properties of the people . . . of the State.").

164. Duncan v. Louisiana, 391 U.S. 145, 170 (1968) (Black, J., concurring).

165. Petition for a Writ of Certiorari at 19, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521). The Court has not allowed states to act as laboratories of democracy in the establishment of religion, suppression of the press, racial segregation, regulation of family planning, or intrusion into personal relationships, when fundamental rights are at stake. *Id.* at *20; *accord* NRA Brief, *supra* note 147, at *12–13 (same). *But see* Baldwin v. Williams, 399 U.S. 117, 133 (1970) (Harlan, J., dissenting) (arguing the Fourteenth Amendment tempered federalism but "did not unstitch the basic federalist pattern woven into our constitutional fabric"). A similar argument may be made that the Supremacy Clause demands that where there is conflict between federal law and state law, then federal law must prevail. *Cf. Gonzales*, 545 U.S. at 29 (noting the mandate of the Supremacy Clause in the context of the Commerce

guise of federalism, which infringes upon fundamental rights and fails the required degree of scrutiny.[166]

In *McDonald*, Justice Stevens notes that federalism considerations, found within constitutional text and structure, suggest that there may be legitimate reasons to hold state governments to different standards than the federal government in certain areas.[167] His assertion seems compatible with the Court's federalism jurisprudence at first glance.[168] However, rather than consider federalism and other state and local concerns in weighing government action against the individual right infringed upon, as the Court's jurisprudence dictates,[169] Justice Stevens gives weight to these considerations as he determines whether individuals have the underlying right at the state level.[170] Justice Stevens' approach to determining the existence of a right has the effect of considering state and local interests in both prongs of the test to determine whether government action is constitutional, and as a result, it is a significant departure from the Court's rights jurisprudence.[171]

In addition to rejecting several decades of incorporation jurisprudence, Justice Stevens presents a serious challenge to the Court's substantive due process jurisprudence in *McDonald*.[172] Although Justice Stevens claims to base his dissent in *McDonald* on the "vast corpus of substantive due process opinions,"[173] the principles he offers are not those of the Court's substantive due process jurisprudence.[174] The

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Clause). Further exploration of the Supremacy Clause is beyond the scope of this Article.

166. *See Baldwin*, 399 U.S. at 118 (Harlan, J., dissenting) ("But to accomplish [federalism] by diluting constitutional protections within the federal system itself is something to which I cannot possibly subscribe."). *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable."); Eagle Forum Brief, *supra* note 116, at *3, *8 (arguing that a "full view" of federalism requires incorporation of fundamental rights because a national structure can protect against local tyranny).

167. McDonald v. City of Chicago, 130 S. Ct. 3020, 3093 (2010) (Stevens, J., dissenting).

168. *See supra* notes 155–62 and accompanying text (discussing the Court's federalism jurisprudence).

169. *Supra* notes 138–140 and accompanying text.

170. *See McDonald*, 130 S. Ct. at 3112–16 (Stevens, J., dissenting) (noting several concerns: federalism, "the States have a long and unbroken history of regulating firearms," patterns of gun violence in urban versus rural areas, and the states' "right to experiment").

171. Justice Stevens considers state and local interests while determining whether the right exists, and traditional analysis would consider these factors again in balancing the government interest against the individual right. *Compare supra* notes 99, 110 and accompanying text, *with supra* note 140 and accompanying text (traditional analysis).

172. *Compare McDonald*, 130 S. Ct. at 3090–3103 (Stevens, J., dissenting), *with id.* at 3050 (Scalia, J., concurring) (addressing Justice Stevens's discussion of substantive due process).

173. *Id.* at 3090.

174. *Id.* at 3050.

Court has held that the proper inquiry is whether a right is "fundamental to *our* scheme of ordered liberty and system of justice" and is "deeply rooted in this Nation's history and tradition."[175] Justice Stevens, however, asserts that the proper inquiry is whether the right is "implicit in *the* concept of ordered liberty" and whether it contributes to a "*fair and enlightened* system of justice."[176] Further exploration of this difference is beyond the scope of this Article, but it suffices to note that his conception of the Due Process Clause is much broader, much more global, and much more open to changing norms and values than substantive due process jurisprudence dictates.[177]

4. Is Justice Stevens Right?

Justice Stevens' dissent in *McDonald* not only challenges the outcome found by the majority, but proposes fundamental changes to the Court's constitutional law jurisprudence.[178] Justice Stevens is correct in his assertion that if a right is incorporated against the states through the Due Process Clause of the Fourteenth Amendment, then the Court should employ the same test as it applies in other due process cases.[179] Doing so provides consistency and a ready framework for future decisions.[180] However, any promise of consistency is undermined by Justice Stevens' broad condemnation of the Court's substantive due process jurisprudence.[181] Lastly, Justice Stevens' inclusion of government interests, whether national, state, or local, in considering whether a certain right is encompassed within the meaning of Due Process is misplaced.[182] While federalism is a legitimate consideration in determining the constitutionality of government action,[183] such con-

175. Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968).

176. *McDonald*, 130 S. Ct. at 3096 (Stevens, J., dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

177. *See generally id.* at 3050 (Scalia, J., concurring) (contrasting Justice Stevens' view of substantive due process law with that of the Court).

178. *Supra* Section III(C)(3) and accompanying text.

179. *Compare McDonald*, 130 S. Ct. at 3092 (Stevens, J., dissenting) ("[T]he underlying inquiry is the same: We must ask whether the interest is comprised within the term liberty." (quoting Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring))), *with* Powell v. Alabama, 287 U.S. 45, 67–68 (1932) ("It is possible that some of the personal rights safeguarded by the first eight Amendments . . . may also be safeguarded against state action . . . because they are of such a nature that they are included in the conception of due process of law." (quoting Twining v. New Jersey, 211 U.S. 78, 99 (1908))). For exploration of incorporation under the Privileges or Immunities Clause of the Fourteenth Amendment, see generally *McDonald*, 130 S. Ct. at 3059–88 (Thomas, J., concurring); Neily, *supra* note 49, at 16.

180. *Id.* at 3096 (Stevens, J., dissenting) ("Our precedents have established, not an exact methodology, but rather a framework for decisionmaking.").

181. *Id.* at 3050 (Scalia, J., concurring).

182. District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (rejecting the argument that the scope of the right could be determined by interest balancing).

183. *See supra* note 161–62 and accompanying text (noting the relationship between local police powers and federalism).

siderations properly occur in balancing the offered state interest against the individual right infringed upon. Considering these interests in defining an individual right, as Justice Stevens suggests, challenges the fundamental premise of equality that our nation is built upon.[184] As a result, while Justice Stevens' approach in *McDonald* is well-intended, it is ill-advised.

D. *The Solution: Consider Federalism in the Balancing Test*

The portion of Justice Stevens' dissent in *McDonald* that reminds us that the Constitution envisions a structure of divided sovereignty where "local differences are to be cherished as elements of liberty"[185] should not be ignored. However, federalism concerns cannot always triumph and must be weighed against the fundamental rights and promise of equality protected by the Constitution.[186] This delicate balance is best achieved through a three-prong analysis: (1) a commitment to individual rights and equality in the formulation of the right, (2) the consideration of local interests in identifying the government interest, and (3) the consideration of federalism in the balancing test used to determine whether the government action is constitutional.

First, the Court must seek to define the right in terms that allow the right to be held equally by each individual.[187] In its definition, the right should not discriminate on arbitrary grounds,[188] and further, it should be established with clarity and precision.[189] Once the right at

184. *Supra* notes 142–143 and accompanying text (highlighting the constitutional promise of equality).

185. McDonald v. City of Chicago, 130 S. Ct. 3020, 3093 (2010).

186. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 679 (2002) (Thomas, J., concurring) ("By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other."); Nw. Austin Mun. Dist. No. One v. Holder, 557 U.S. 193, 223–25 (2009) (discussing the balance between federalism and protecting individual rights); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 587 (1999) ("Our Federalism does not mean blind deference to States' Rights.").

187. *Cf.* Citizens United v. FEC, 130 S. Ct. 876, 900 (2010) ("The identity of the speaker is not decisive in determining whether speech is protected."); Presley v. Georgia, 130 S. Ct. 721, 723 (2010) (noting that all individuals facing criminal prosecution have the right to a speedy and public trial); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 205–07 (2008) (Scalia, J., concurring) (noting that the Court must first identify the burden imposed on the right of all voters, not some voters, before they can "weigh it" against the state interest).

188. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("[E]numeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

189. *Cf.* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010) (defining property rights in and near navigable waters); Abbott v. Abbott, 130 S. Ct. 1983 (2010) (defining parental rights); Rothgery v. Gillespie Cnty., 554 U.S. 191, 214 (2008) (Alito, J., concurring) (defining the right to counsel); CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (identifying rights "specifically defined in terms of racial equality").

issue has been defined, the Court can determine if the individual plaintiff's right has been infringed by the government defendant.[190]

Second, the Court must elicit the interest underlying the government's actions.[191] The interest will likely be an expression of the government's police power—for the health, safety, and welfare of its citizens.[192] The Court should seek to determine the specific government interests at play in the location where the action occurs.[193] For instance, in the context of firearm regulations, a state might have a greater interest in preventing death by gunshot or armed robbery in highly urban areas, while this same interest would not be as plausible in highly rural areas.[194] Similarly, a state might have a strong interest in protecting endangered species, children, or young adults on university campuses.[195]

Finally, after the Court has determined the right at stake and the government interest, the Court must balance these two competing interests under the proper standard of review, guided by its past holdings.[196] For instance, assuming that the right to possess a handgun in the home established in *McDonald* is fundamental,[197] the Court must

190. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 445–46 (2008) (first identifying the associational right burdened and then engaging in strict scrutiny analysis).

191. *See, e.g.*, *id.* (identifying the state interest after establishing the individual right).

192. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (noting the state's interest in remedying past discrimination); Johnson v. California, 543 U.S. 499, 512 (2005) (identifying the state interest in prison security and discipline); M.L.B. v. S.L.J., 519 U.S. 102, 123 (1996) (noting the state's interest in offsetting costs of its court system).

193. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (noting Indiana's interest in combating voter registration fraud in their state); Samson v. California, 547 U.S. 843, 853 (2006) (accepting California's offered interest in supervising its large parolee population).

194. *See generally* Motion for Leave to File Brief for Law Professor and Students as Amici Curiae Supporting Respondents, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 WL 96798 (exploring various state interests in regulating firearms); Brief for Oak Park Citizens Comm. for Handgun Control as Amicus Curiae Supporting Respondents, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 WL 128013 (same).

195. *See supra* note 193 and accompanying text (discussing state interests).

196. *See, e.g.*, Campbell, *supra* note 3, at 395–96 (noting that where there is discrimination on the basis of race, the Court will require a compelling state interest to uphold government action); Jessica M. Wiles, *Have Native Americans Been Written Out of The Religious Freedom Restoration Act*, 71 MONT. L. REV. 471, 476 (2010) ("action that impinges on . . . the Free Exercise Clause must be balanced against a compelling state interest"); Mariama A. Jefferson, *Reproductive Choice: The Reproductive Choice Debate Must Include More Than Abortion*, 4 CHARLESTON L. REV. 773, 786 (2010) (discussing the balancing of state interests with the individual right to privacy).

197. *See generally* Lindsey Craven, *Where Do We Go From Here? Handgun Regulation in a Post-*Heller *World*, 18 WM. & MARY BILL RTS. J. 831, 841–44 (2010) (arguing that *Heller* indicates a move toward strict scrutiny). Further exploration of the appropriate degree of scrutiny to infringements on the Second Amendment right is beyond the scope of this Article.

then ask if the law at issue is narrowly tailored to promote a compelling interest of the government.[198] While the Court has not provided a clear definition of what actions are narrowly tailored, it is clear that the classification must be narrowly tailored to the interest in question, rather than be pursued in a far reaching, inconsistent, and *ad hoc* manner, and it must be supported by a detailed evidentiary showing.[199] In addition, the Court has provided a far-from-exhaustive list of compelling interests necessary to overcome strict scrutiny; instead, the Court engages in a case-by-case analysis of government action and the offered interest.[200] Within this case-by-case analysis, the Court may consider federalism concerns, including the strength of the state's interest in regulating within the area at issue.[201]

As applied to the incorporation of the Second Amendment addressed by the Court in *McDonald*, this approach would first find that an equal right to possess a handgun in the home is held by every citizen of every state through the Fourteenth Amendment.[202] Second, although this right is equally possessed by all, some states might have more compelling interests than others in regulating the possession of handguns.[203] Finally, federalism principles will be used in the balancing test to determine whether the government action is constitutional, as the court will ask whether the state's actions are narrowly tailored to a compelling interest.[204] At a minimum, based on the Court's holdings in *Heller* and *McDonald*, it is clear that a regulation that practically eliminates any individual's ability to possess a handgun is not narrowly tailored.[205] In some states, this interest may be so compelling and narrowly tailored as to override the individual's right, and the state government may restrict what type of gun the individual can own

198. *Compare supra* note 36 and accompanying text (holding of *McDonald*), *with supra* notes 150–151 and accompany text (standard of review for fundamental right).

199. Campbell, *supra* note 3, at 397 & nn.79–80.

200. *Id.* at 397, n.79.

201. *See generally* Ryan Griffin, *Litigating the Contours of Constitutionality: Harmonizing Equitable Principles and Constitutional Values When Considering Preliminary Injunctive Relief*, 94 MINN. L. REV. 839 (2010) (noting federalism interests at stake in a case concerning medical professional regulations); *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 192 (2009) (discussing federalism concerns at stake in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

202. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (finding that the right to possess a handgun in the home for the purpose of self-defense applies equally to the states).

203. *See supra* notes 194–95 and accompanying text (noting possible state interests).

204. *See supra* notes 196 and accompanying text.

205. *Compare supra* text accompanying notes 36 (incorporating the Second Amendment right), *with* District of Columbia v. Heller, 128 S. Ct. 2783, 2821–22 (2008) (striking down a District of Columbia law that banned the possession of handguns in the home). *See also* Jeffrey M. Shaman, *After* Heller: *What Now for the Second Amendment?*, 50 SANTA CLARA L. REV. 1095, 1105 (2010) (noting that the Second Amendment "preclud[es] laws that prohibit possession of handguns that may be used for self-defense in the home").

or where they may carry it.[206] As a result, while the individual right is consistent from state to state, local interests may dictate that the regulations on handguns differ from state to state, and a citizen may not be able to exercise his right to that same degree in every state.[207]

This proposed three-prong method of analysis will allow the Court to maintain the delicate balance between the constitutional promises of fundamental rights, equality, and local interests. As weight is given to each relevant consideration, the full promise of federalism will be realized, protecting both individual and state autonomy.[208]

IV. CONCLUSION

The framers of the Constitution not only believed strongly in the importance of a limited government, with a system of checks and balances for the prevention of tyranny,[209] but also appreciated the delicate balance between the rights of individuals and the powers of their government.[210] They knew that if the individual rights secured by the Bill of Rights were to have meaning, then every individual must have the ability to challenge practices that interfere with the equal application of those rights.[211]

The majority's opinion in *McDonald* and the Court's recent jurisprudence leave little doubt that the Court's commitment to equality before the law is no different than that of the founders.[212] Further, at least a majority of the Court is unwilling to find that rights may differ in scope from one location to another as Justice Stevens advocates.[213] When the proper case[214] comes before the Court, the Court would be well advised to clarify that the proper role of federalism in individual rights cases is in determining the state interest, not in defining the right.[215]

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206. *See supra* notes 162, 197 and accompanying text.

207. Craven, *supra* note 197, at 844–55 (exploring regulations likely to be challenged on Second Amendment grounds).

208. *See supra* notes 157–66 and accompanying text.

209. *Cf.* Richards, *supra* note 2, at 91 (identifying federalism, separation of powers, and judicial review as the "three great structures of American constitutionalism").

210. *See id.* at 75 ("The American idea of constitutionalism rests on . . . equal inalienable rights and a constitutional theory of the constraints on political power required for those rights to be respected.").

211. *See supra* note 142 and accompanying text.

212. *Compare* McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 (2010), *with* Campbell, *supra* note 3, at 421 (beliefs of the original framers). *See also* Cahn, *supra* note 48, at 3 ("What America promised must be nothing less than a new kind of society—fresh, equal, just, open, free . . . .").

213. *See supra* note 31 and accompanying text.

214. "Proper" is used to mean a case where the individual right at issue has been incorporated through the Due Process Clause of the Fourteenth Amendment, and there is disagreement among lower courts as to the content of the individual right at issue.

215. *See supra* Part III.D.