
# The Second Amendment and Incorporation: An Overview of Recent Appellate Cases

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# Summary

The Supreme Court in *District of Columbia v. Heller* held that the Second Amendment protects an individual's right to possess a firearm, unconnected to service in a militia, and protects the right to use that firearm for traditional lawful purposes such as self-defense within the home. The Court conducted an extensive analysis of the Second Amendment to interpret its meaning, but the decision left unanswered other significant constitutional questions, including the standard of scrutiny that should be applied to laws regulating the possession and use of firearms, and whether the Second Amendment applies to the states. Three federal appellate circuits have since addressed whether the Second Amendment applies to the states. Two of these circuits, the Second and Seventh, both held that the Second Amendment did not apply to the states, whereas the Ninth Circuit has initially held that the Second Amendment is applicable to the states, although a rehearing *en banc* is scheduled and may affect that decision.

This report presents an overview of the principles of incorporation, the early Supreme Court cases that addressed the application of the Second Amendment to state governments, and the federal appellate cases that have addressed incorporation of the Second Amendment since the *Heller* decision.

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# Background

On June 26, 2008, the Supreme Court issued its decision in *District of Columbia v. Heller*,[1] holding by a 5-4 vote that the Second Amendment protects an individual's right to possess a firearm, unconnected to service in a militia, and protects the right to use that firearm for traditional lawful purposes such as self-defense within the home. In *Heller*, the Court affirmed a lower court's holding that declared three provisions of the District of Columbia's Firearms Control Regulation Act to be unconstitutional.[2] Although the Court conducted an extensive analysis of the Second Amendment to interpret its meaning, the decision left unanswered other significant constitutional questions, including the standard of scrutiny that should be applied to laws regulating the possession and use of firearms, and whether the Second Amendment applies to the states. It is the latter issue that has been most commented upon by lower courts in post-*Heller* cases.

This report presents an overview of the principles of incorporation, the early Supreme Court cases that addressed the application of the Second Amendment to state governments, and the federal appellate cases that have addressed incorporation of the Second Amendment since the *Heller* decision.

## What Is Incorporation?

An incorporation analysis asks whether the protections provided for in the first eight amendments of the Bill of Rights apply to state governments in the same manner that they directly apply to the federal government.

Initially, in the early 19th century, the Supreme Court had ruled in *Barron v. Mayor & City Council of Baltimore* that the protection of individual liberties in the Bill of Rights applied only to the federal government, not to state or local governments.[3] Chief Justice John Marshall, writing for the Court, stated: "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[4] He further stated that had the framers intended the Bill of Rights to apply to the states, "they would have declared this purpose in plain and intelligible language."[5] Although application of the Bill of Rights solely to the federal government would mean that state and local governments could then be free to infringe upon these individual protections, Chief Justice Marshall observed that "[e]ach state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the power of its particular government, as its

[1] 554 U.S. __; 128 S. Ct. 2783 (2008). For more on the Supreme Court's decision, *see* CRS Report R40137, *District of Columbia v. Heller: The Supreme Court and the Second Amendment*, by Vivian S. Chu.

[2] Specifically, the three provisions ruled unconstitutional were (1) D.C. Code § 7-2502.02, which generally barred the registration of handguns; (2) D.C. Code § 22-4504, which prohibited carrying a pistol without a license, insofar as the provision would prevent a registrant from moving a gun from one room to another within his home; and (3) D.C. Code § 7-2507.02, which required that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device. 128 S. Ct. at 2817-19.

[3] 32 U.S. (7 Pet.) 243 (1833).

[4] *Id.* at 247.

[5] *Id.* at 250.

judgment dictated."[6] Although the argument continued to be made that the Bill of Rights applied to the states, the Court rejected this contention time and time again.[7]

It was not until after the Civil War when the Fourteenth Amendment was ratified that claimants resorted to the Privileges or Immunities Clause of Section 1 of the amendment for judicial protection.[8] In the *Slaughter House Cases*, the Supreme Court rejected the plaintiffs' argument that a state law, which granted a monopoly to the City of New Orleans, created involuntary servitude, denied them equal protection of the laws, and abridged their privileges or immunities as citizens under the Thirteenth and Fourteenth Amendments.[9] In rejecting the plaintiffs' challenge, the Court narrowly construed all of these provisions. With respect to the Privileges or Immunities Clause, the Court held that this clause was not meant to protect individuals from state government actions and was not meant to be a basis for federal courts to invalidate state laws.[10] Specifically, the Court stated that "it is only the [privileges and immunities of the citizens of the United States] which are placed by this clause under the protection of the Federal Constitution, and that the [privileges and immunities of the citizen of the State] whatever they may be, are not intended to have any additional protection by the paragraph of this amendment."[11] Furthermore, the Court stated that "privileges and immunities relied on in the argument are those which belong to the citizens of the States as such, and that they are left to State governments for security and protection, and not by this article [the Fourteenth Amendment] placed under the special care of the Federal government."[12] This ruling has never been expressly overturned, and therefore continues to preclude use of the Privileges or Immunities Clause to apply the Bill of Rights.[13]

In the early 20th century, the Supreme Court in *Twining v. New Jersey*[14] recognized the possibility that the Due Process Clause of the Fourteenth Amendment[15] incorporates provisions of the Bill of Rights, thereby making them applicable to state and local governments. The Court observed that:

> [I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law ... not because those rights are enumerated in the first eight Amendments, but because they are of such nature that they are included in the conception of due process of law.[16]

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[6] *Id.* at 247.

[7] *See* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469 (1833); Permoli v. First Municipality, 44 U.S. (3 How.) 589 (1845); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Withers v. Buckley, 61 U.S. (20 How.) 84 (1858); Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1867); Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321 (1869).

[8] U.S. Const. amend. XIV, § 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *See also* Constitution Annotated, 1001 (2004).

[9] Slaughter House Cases, 83 U.S. (16 Wall.) 36, 85 (1873).

[10] *Id.* at 77-78.

[11] *Id.* at 74.

[12] *Id.* at 78.

[13] The Court, however, did revive the Privileges or Immunities Clause in Saenz v. Roe, 526 U.S. 489 (1999), by using it to protect the right to travel.

[14] 211 U.S. 78 (1908).

[15] U.S. Const. amend. XIV, § 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[16] Twining, 211 U.S. at 99.

Although the Court acknowledged that the Due Process Clause included "principles of justice so rooted in the tradition and conscience of our people as to be ranked fundamental,"[17] and therefore "implicit in the concept of ordered liberty,"[18] the Court, despite debate, has never endorsed total incorporation of all of the Bill of Rights. Rather, the Court embraced what is known as the doctrine of "selective incorporation," which holds that the Due Process Clause incorporates the text of certain provisions of the Bill of Rights.[19] It was in *Gitlow v. New York* that the Supreme Court for the first time said that the First Amendment's protection of freedom of speech applies to the states through its incorporation into the Due Process Clause of the Fourteenth Amendment.[20] Although the Court held that New York's criminal anarchy statute did not violate the Fourteenth Amendment because the state was properly exercising its police power, the Court, in finding incorporation, stated, "[F]reedom of speech and of the press ... are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[21]

Thus far, the Supreme Court has found the following provisions of the Bill of Rights to be incorporated:

- The First Amendment's establishment clause,[22] free exercise clause,[23] and protection of speech,[24] press,[25] assembly,[26] and petition.[27]
- The Fourth Amendment's protection against unreasonable searches and seizures and the requirement for a warrant based on probable cause; also the exclusionary rule, which prevents the government from using evidence obtained in violation of the Fourth Amendment. [28]
- The Fifth Amendment's prohibition of double jeopardy,[29] protection against self-incrimination,[30] and requirement that the government pay just compensation when it takes private property for public use.[31]
- The Sixth Amendment's requirements for speedy[32] and public trial,[33] by an impartial jury,[34] with notice of the charges,[35] and for the chance to confront

[17] Palko v. Connecticut, 302 U.S. 319, 325 (1937) (citations omitted).

[18] *Id.*

[19] *See also* Constitution Annotated, 999-1008 (2004).

[20] Gitlow v. New York, 268 U.S. 652 (1925).

[21] *Id.* at 666.

[22] Everson v. Board of Ed., 330 U.S. 1 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948); Wallace v. Jaffree, 472 U.S. 38 (1985).

[23] Hamilton v. Regents, 293 U.S. 245, 262 (1934); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[24] Gitlow v. New York, 268 U.S. 652 (1925); Fiske v. Kansas, 274 U.S. 380 (1927); Stromberg v. California, 283 U.S. 359 (1931).

[25] Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931).

[26] DeJonge v. Oregon, 299 U.S. 353 (1937).

[27] DeJonge v. Oregon, 299 U.S. 353 (1937); Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); Bridges v. California, 314 U.S 252 (1941).

[28] Wolf v. Colorado, 338 U.S. 784 (1949); Mapp v. Ohio, 367 U.S. 643 (1961).

[29] Benton v. Maryland, 395 U.S. 784 (1969).

[30] Malloy v. Hogan, 378 U.S. 1 (1964); Griffin v. California, 380 U.S. 609 (1965).

[31] Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

adverse witnesses,[36] to have compulsory process to obtain favorable witnesses,[37] and to have assistance of counsel if the sentence involves possible imprisonment.[38]

- The Eight Amendment's prohibition against excessive bail[39] and cruel and unusual punishment.[40]

Over time, the Court has articulated various tests for deciding whether a provision of the Bill of Rights is incorporated through the Due Process Clause of the Fourteenth Amendment. The Supreme Court in *Duncan v. Louisiana* summarized these formulations, stating, "the question has been asked whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' whether it is 'basic in our system of jurisprudence,' and whether it is a fundamental right, essential to a fair trial.'"[41] The Court also noted, in discussing state criminal processes, that "the question is ... whether given this kind of [common-law] system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."[42]

## Has the Supreme Court Addressed Incorporation of the Second Amendment?

Over 100 years ago, the Supreme Court held in *United States v. Cruikshank*[43] that the Second Amendment does not act as a constraint upon state law. In its brief treatment of the Second Amendment, the Court in *Cruikshank* stated that "it is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."[44] Furthermore, it held that "this is one of the amendments that has no other effect than to restrict the powers of the national government."[45] This holding was reaffirmed in *Presser v. Illinois*.[46] In *Presser*, it is interesting to note that the Court further commented that because "all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States," the "States cannot, even laying the constitutional provision [aside], prohibit the people

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[32] Klopfer v. North Carolina, 386 U.S. 213 (1967).

[33] In re Oliver, 333 U.S. 257 (1948).

[34] Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. Louisiana, 379 U.S. 466 (1965). *See also* Duncan v. Louisiana, 391 U.S. 145 (1958) (holding that the Sixth Amendment is incorporated to the states and guarantees a jury trial for serious criminal offenses).

[35] In re Oliver, 333 U.S. 257 (1948).

[36] Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

[37] Washington v. Texas, 388 U.S. 14 (1967).

[38] Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

[39] Schilb v. Kuebel, 404 U.S. 357 (1971).

[40] Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Robinson v. California, 370 U.S. 660 (1962).

[41] Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968) (citations omitted).

[42] *Id.* at 149-50 n. 14.

[43] 92 U.S. 542, 553 (1875).

[44] *Id.*

[45] *Id.*

[46] 116 U.S. 252, 265 (1886).

from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government."[47] Both of these decisions were decided prior to the advent of modern incorporation principles (discussed above).

In *Heller*, the Court commented upon the issue of incorporation, stating:

> 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 decisions in *Presser v. Illinois* (citation omitted) and *Miller v. Texas*, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed. 812 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.[48]

This statement could be viewed as indicating that the Court would continue with long-standing precedent, or it could be interpreted as indicating that the Court would support the application of modern incorporation doctrine principles to the Second Amendment.

# Analysis of Post-*Heller* Appellate Decisions on Incorporation

Since the *Heller* decision, three federal appellate circuits have addressed whether the Second Amendment applies to the states. Two of these circuits, the Second and Seventh, both held that the Second Amendment does not apply to the states, whereas the Ninth Circuit held that the Second Amendment is applicable to the states.

The United States Court of Appeals for the Second Circuit was the first to address and rule on this issue in *Maloney v. Rice*.[49] In *Maloney*, the plaintiff sought a declaration that a New York penal law that punishes the possession of nunchukas[50] was unconstitutional. On appeal, the plaintiff argued that the state statutory ban violates the Second Amendment because it infringes on his right to keep and bear arms. Here, the court, citing *Presser*, held that the state law did not violate the Second Amendment because "it is settled law ... that the Second Amendment applies only to limitations the federal government seeks to impose on this right."[51] The court noted that, although *Heller* might have questioned the continuing validity of this principle, Supreme Court precedent directed them to follow *Presser* because "[w]here, as here, a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.'"[52]

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[47] *Id.*

[48] Heller, 128 S. Ct. at 2813, n.23.

[49] 554 F.3d 56 (2d Cir. 2009) (petition for *writ of certiorari* pending).

[50] A "chuka stick" (or "nunchuka") is defined as "any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain ... capable of being rotated in such a manner as to inflict serious injury upon a person." *Id.* at 58 (citing N.Y. Penal Law § 265.01(1)).

[51] Maloney, 554 F.3d at 58.

[52] *Id.* at 59 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (affirming a Fifth (continued...)

On June 2, 2009, the United States Court of Appeals for the Seventh Circuit issued its decision in *National Rifle Association of America v. City of Chicago and Village of Oak Park*.[53] The Seventh Circuit's decision came after the United States Court of Appeals for the Ninth Circuit decided *Nordyke v. King* (discussed below). In the Seventh Circuit case, the National Rifle Association appealed the decision of the lower court to dismiss its suits against these two municipalities on the ground that *Heller* dealt with law enacted under the authority of the national government, while Chicago and Oak Park are subordinate bodies of a state.[54] The Seventh Circuit followed the Second Circuit and also held that the Second Amendment does not apply to the states in affirming the lower court's decision to dismiss the suits against the municipalities. Like the Second Circuit, the Seventh Circuit also stated that the Supreme Court's decisions in *Cruikshank*, *Presser*, and *Miller* still control, as they have direct application in the case. The court noted that, although *Heller* questioned *Cruikshank*, this "[did] not license inferior courts to go their own ways.... If a court of appeals may strike off on its own, this not only undermines the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision."[55]

On April 20, 2009, the United States Court of Appeals for the Ninth Circuit in *Nordyke v. King* held that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment and applied it against the states and local governments.[56] On July 29, 2009, Chief Judge Alex Koszinski issued an order stating that upon a vote of a majority of nonrecused active judges, the Ninth Circuit will rehear this case *en banc* and that the three-judge panel decision issued in April 2009 shall not be cited as precedent by or to any court of the Ninth Circuit.[57] Despite this recent development in the Ninth Circuit, this report proceeds to examine the April 2009 opinion, as it may influence how this circuit or other circuits examine the issue of incorporation and the Second Amendment.

*Nordyke* stated that there are three doctrinal ways the Second Amendment could apply to the states: (1) direct application, (2) incorporation by the Privileges or Immunities Clause of the Fourteenth Amendment, or (3) incorporation by the Due Process Clause of the Fourteenth Amendment. The court held that it was precluded from finding incorporation through the first two options. It acknowledged that Supreme Court precedent foreclosed the first option, as its decision in *Barron* held that the Bill of Rights applies only to the federal government.[58] It also acknowledged that the *Slaughter House Cases* preclude analysis through the Privilege or Immunities Clause of the Fourteenth Amendment, citing that the clause "protects only those rights that derive from United States citizenship, but not those general civil rights independent of

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Circuit Court of Appeals decision but stating "We do not suggest the Court of Appeals on its own authority should have taken the step of renouncing *Wilko* [v. Swann]. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.")).

[53] Nat'l Rifle Ass'n v. City of Chicago, Illinois and Village of Oak Park, Illinois, 567 F.3d 856 (7th Cir. 2009) [hereinafter NRA] (petition for *writ of certiorari* pending).

[54] *Id.* at 2.

[55] *Id.* at 4.

[56] Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).

[57] Nordyke v. King, No. 07-15763, 2009 U.S. App. LEXIS 16908 (Jul. 29, 2009).

[58] *Id.* at 446 (*citing* Barron, *supra* note 3, at 247-51).

the Republic's existence."[59] The court explained that the "rights independent of the Republic's existence" refer to rights pre-existing the Bill of Rights, and that the Second Amendment is one such right that "pre-dates the Constitution," making it a right not granted by the Constitution.[60] The Ninth Circuit concluded that a Privileges or Immunities Clause analysis was precluded because the clause did not extend to the Second Amendment, as it was not a right of the United States.[61]

The court then embarked on an analysis under the Due Process Clause of the Fourteenth Amendment.[62] It began by noting that "[s]elective incorporation is a species of substantive due process, in which the rights the Due Process Clause protects include some of the substantive rights enumerated in the first eight amendments of the Constitution."[63] The court stated that addressing either selective incorporation, which addresses enumerated rights, or substantive due process, which addresses unenumerated rights, requires the court to answer if "a right is so fundamental that the Due Process Clause guarantees it."[64]

To answer this, the Ninth Circuit, although acknowledging other standards used by the Supreme Court in selective incorporation analyses, applied another standard the Supreme Court used "outside the context of incorporation" to determine whether an individual right unconnected to criminal or trial procedures is a fundamental right protected by substantive due process.[65] Specifically, the Ninth Circuit inquired "whether the right to keep and bear arms ranks as fundamental, meaning 'necessary to an *Anglo-American* regime of ordered liberty' ... [which compelled them] to determine whether the right is 'deeply rooted in this Nation's history and tradition.'"[66]

After engaging in a historical analysis of the right during the Founding era, the post-Revolutionary years, and the post-Civil War era, the court concluded that the Second Amendment was incorporated and applies against state and local governments because "the crucial role [of this] deeply rooted right ... compels us to recognize that it is indeed fundamental [and] necessary to the Anglo-American conception of the ordered liberty that we have inherited."[67]

When a right is deemed fundamental, the court must use the strict scrutiny test as the standard of review, meaning that "a law will be upheld if it is necessary to achieve a compelling government

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[59] *Id.* (*citing* Slaughter House Cases, *supra* note 9, at 74-5).

[60] *Id.* at 447.

[61] *Id.*

[62] The court addressed an earlier Ninth Circuit case, *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992) which held that the Second Amendment applies only to the federal government. The court found that *Fresno Rifle* only decided that the Second Amendment was not incorporated via direct application of the Privileges or Immunities Clause of the Fourteenth Amendment, and that the decision did not reach the question of whether the Second Amendment could be incorporated via the Due Process Clause of the Fourteenth Amendment.

[63] *Id.* at 449.

[64] *Id.*

[65] *Id.* at 451.

[66] *Id.* The inquiry "deeply rooted in this Nation's history and tradition" stems from *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), where the Supreme Court recognized a fundamental right to keep family together that includes an extended family. Noting that "incorporation is logically a part of substantive due process," (Nordyke, 563 F.3d at 450) the court in *Nordyke* applied the standard from *Moore* because that case noted "the similarity between ... general substantive due process and the incorporation inquiry stated in *Duncan.*" Moore, 431 U.S. at 503 n.10.

[67] Nordyke, 563 F.3d at 457.

purpose."[68] Although the Ninth Circuit concluded that the Second Amendment was a fundamental right, it did not apply the strict scrutiny test to the challenged county ordinance.[69] Rather, it noted that the Supreme Court in *Heller* did not announce a standard of review and held that the challenged ordinance, which prohibited the possession of firearms or ammunition on county property, "fits within the exception from the Second Amendment for 'sensitive places' that *Heller* recognized."[70] Judge Gould in his concurrence made a point of noting that "the recognition of the individual's right in the Second Amendment, and its incorporation ... is not inconsistent with the reasonable regulation of weaponry... [I]mportant governmental interests will justify reasonable regulation of rifles and handguns, and the problem for our courts will be to define ... what is reasonable and permissible and what is unreasonable and offensive to the Second Amendment."[71]

It is interesting to note that the Seventh Circuit decision (discussed above), in addition to holding that the Second Amendment is not incorporated because of precedent, also commented upon the use of the selective incorporation doctrine. In particular, the Seventh Circuit wrote "[h]ow the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict."[72] In stating that selective incorporation "cannot be reduced to a formula," the court pointed out that the Supreme Court has not held that states are bound by the Seventh Amendment's civil jury trials even though that "institution also has deep roots."[73] Because it is uncertain what states will think is best for their citizens—for example, a state might think it best that people cornered in their homes surrender rather than fight back, thus making self-defense a crime—or the fact that many states have altered their common-law self-defense statutes[74] to require persons to use non-lethal force when retreat is not possible, the court felt that these evaluations should be made in scholarly journals and the political process "rather than invocation of ambiguous texts that long precede the contemporary debate."[75] Furthermore, the Seventh Circuit stated that another theme stressed in the debate over incorporation is "[t]hat the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule."[76] Stating that "[f]ederalism is an older and more deeply rooted tradition than is a right to carry any particular kind of concealed weapon," the Seventh Circuit felt that these types of arguments that could affect a court's analysis of incorporating the Second Amendment are best left to the Justices

[68] Erwin Chemerinsky, Constitutional Law: Principles and Policies §§ 6.5, 10.1.2 (3d ed. 2006).

[69] The Alameda County ordinance that was challenged was one that "makes it a misdemeanor to bring onto or to possess a firearm or ammunition on County property." Nordyke, 563 F.3d at 442.

[70] Nordyke, 563 F.3d at 460 (*citing* Heller, 128 S.Ct. at 2816-17, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms").

[71] *Id*. at 465.

[72] NRA, at 858-9.

[73] *Id*. at 859.

[74] The common-law doctrine of self-defense within the home, sometimes referred to as the Castle Doctrine, generally holds that a person is not bound to retreat when assaulted in his own house, but such person may not be entitled to kill the assailant unless he has reason to believe that he is in danger of great bodily harm from the assault. Over time, jurisdictions have altered the common-law. For example, some require the accused to retreat if practicable before using lethal force if the assailant is somebody who is also entitled to be on the premises. *See* 40 Am. Jur. 2d *Homicide* §§ 163 *et seq*. (2008).

[75] NRA, at 859-60.

[76] *Id* at 860.

rather than a court of appeals.[77] Whether the Ninth Circuit in rehearing the *Nordyke* case *en banc* chooses to follow the sentiment of the Seventh and Second Circuits or to analyze the Second Amendment in a manner similar to the three-judge panel in their own circuit remains to be seen.

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[77] *Id.*