University of Chicago Law School

Chicago Unbound

Coase-Sandor Working Paper Series in Law and Economics Coase-Sandor Institute for Law and Economics

2009

NRA v. City of Chicago: Does the Second Amendment Bind Frank Easterbrook?

Richard A. Epstein
dangelolawlib+richardepstein@gmail.com

Follow this and additional works at: https://chicagounbound.uchicago.edu/law_and_economics

Part of the [Law Commons](#)

Recommended Citation

Richard A. Epstein, "NRA v. City of Chicago: Does the Second Amendment Bind Frank Easterbrook?" (John M. Olin Program in Law and Economics Working Paper No. 496, 2009).

This Working Paper is brought to you for free and open access by the Coase-Sandor Institute for Law and Economics at Chicago Unbound. It has been accepted for inclusion in Coase-Sandor Working Paper Series in Law and Economics by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 496
(2D SERIES)

NRA v. City of Chicago
Does the Second Amendment Bind
Frank Easterbrook?

Richard A. Epstein

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

November 2009

This paper can be downloaded without charge at:
The Chicago Working Paper Series Index: <http://www.law.uchicago.edu/Lawecon/index.html>
and at the Social Science Research Network Electronic Paper Collection.

NRA v. City of Chicago
Does the Second Amendment Bind Frank Easterbrook?

Richard A. Epstein*

Abstract

In *NRA v. City of Chicago*, Judge Easterbrook held that the Second Amendment, which protects the right to keep and bear arms, did not bind state governments. This article examines the reasoning that he uses to reach that result, which it contrasts with the style of argumentation that led to the opposite conclusion in Judge O'Scannlain's decision in *Nordyke v. King*. Easterbrook's approach emphasized the imperative need for lower court deference to the Supreme Court's explicit Reconstruction Era holdings that the Second Amendment does not bind the states, even after the Supreme Court's game-changing decision in *District of Columbia V. Heller* and thus gave only scant attention to the various historical authorities that O'Scannlain referred to in *Nordyke*. On balance it appears that Easterbrook is against incorporation on a variety of historical and federalism grounds, none of which are likely to prevail when the Supreme Court addresses the issue of incorporation when it hears the case later in the 2009 October Term.

There is little doubt that Frank Easterbrook will go down as one of the great appellate judges in the history of the United States. As those of us who know him well can testify, he is a judge who brings his immense intelligence and fierce dedication to his judicial work. Easterbrook also produces opinions that are always a pleasure to read – short and incisive, without pointless verbiage. One can disagree with their conclusion. But it is impossible to mistake their meaning. I agree wholeheartedly with just about everything he writes on a wide range of issues that deal with antitrust, contracts, corporations and securities law. I have had more disagreements on his approach to constitutional law. Easterbrook does not like, nor does he need praise. So I shall write about constitutional law.

* James Parker Hall Distinguished Professor of Law, The University of Chicago, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and a visiting professor of Law, New York University School of Law. I would like to thank Caroline Van Ness, NYU Law School, Class of 2011, for her valuable research assistance.

Easterbrook sports a distinctive approach to constitutional law whose key elements quickly come to the surface in his powerful, but ultimately unpersuasive, opinion in *National Rifle Association v. City of Chicago* (NRA)¹ on which the Supreme Court has granted certiorari.² Because stare decisis casts a powerful spell over Easterbrook's work, *NRA* is in some sense an aberration: for a man accustomed to blunt talking, it is not clear whether Easterbrook agrees with his own argument. More specifically, Easterbrook sounds two separate themes in *NRA* that point in radically different directions. The first speaks of the reflexive institutional deference that all inferior court judges should show on matters on which the Supreme Court has spoken. On this issue, Easterbrook deploys his powerful pen in the defense of the rule that explicit holdings must be followed even if, in the interim, subsequent Supreme Court decisions have ripped its constitutional foundations to shreds. The second of his arguments goes to the merits of the underlying dispute on whether the Second Amendment right to keep and bear arms applies to the states through the action of the Fourteenth Amendment. It takes little imagination to see that the first point only invites the Supreme Court to consider the entire matter, while the second demands an exhaustive review of the historical arguments for and against incorporation, which will necessarily range far afield after the Court's key decision in *District of Columbia v. Heller*.³ As everyone by now knows, the Second Amendment, which Easterbrook does not bother to quote in *NRA*, is drafted like the topic of a bad law school examination question when it states that: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."⁴ *Heller* read the Amendment to protect the right of an individual to keep and bear arms within his own home. In order to reach that conclusion, Justice Scalia had to treat the initial thirteen words of the Amendment as precatory, after which he concluded that the substantive command in the remainder of the text created an individual right that could only be limited by a showing of some state interest stronger than any normally required under the

¹ 567 F.3d 856 (7th Cir. 2009), cert. granted .

² *McDonald v. City of Chicago, Ill.*, --- S.Ct. ----, 2009 WL 1631802, (U.S. Sep 30, 2009) (NO. 08-1521)

³ ____ U.S. ____, 128 S Ct 2783 (2008).

⁴ U.S. Const. Amend. II.

rational basis test.⁵ Judge Easterbrook did not, and would not, pause to inquire into the soundness of *Heller*, which I think is subject to many weaknesses.⁶

Academic writers don't take marching orders from the Supreme Court so they can address the question without risking court martial. In my view, the key concern here is that the initial clause in speaking about a well-regulated militia addresses the ability of states to organize local military operations in ways that resist overreaching by the federal government. As such, the Amendment has to bind only the federal government. That point was held explicitly in *United States v. Cruikshank*,⁷ and, more significantly, in *Presser v. Illinois*,⁸ which reads the Second Amendment as part of the overall Constitutional scheme including the division of authority set out in Article I, § 8 of the Constitution.⁹ Under this approach, ironically, the only place to which the Second Amendment does *not* apply is Washington D.C., where there is no state militia of any sort to regulate. Justice Scalia necessarily rejects that argument by stripping the preamble of any substantive bite. Once that decision is settled in the wrong way, incorporation against the states surges to the top of the agenda. In order to see Easterbrook's constitutional style in action, it is instructive to contrast his view on both topics with the far longer and more complex decision of Judge Diarmuid O'Scannlain in *Nordyke v. King*,¹⁰ which went quickly to the substantive issues and found that the Second Amendment did bind the states as a regulator, but did not limit its power to exclude guns from county fair grounds which it owned and operated.¹¹ Let us take the two points up in order.

I. SHOULD THE CIRCUIT COURTS REVISIT THE INCORPORATION QUESTION

Easterbrook's opening gambit shows his keen awareness of his circumscribed role as an appellate court judge. He thus quotes Supreme Court precedent to the effect that lower court judges are duty bound to apply holdings that are squarely on point

⁵ *Heller* 128 S Ct 2817, at note 27.

⁶ For an account see, Richard A. Epstein, A Structural Interpretation of the Second Amendment: Why *Heller* Is (Probably) Wrong on Originalist Grounds, 59 Syracuse L Rev 171 (2008).

⁷ 92 US 542 (1876).

⁸ 116 US 252 (1886),

⁹ U.S. Const. Art. I, §8, cls. 16 & 17 (outlining coordination mechanisms between the United States and the various states).

¹⁰ 563 F3d 429 (9th Cir 2009).

¹¹ *Id.* at 2817, note 27, cited in *Nordyke*, 563 F3d at 458.

“even if the reasoning in later opinions has undermined their rationale.”¹² To say that subsequent decisions have “undermined” the logic of *Cruikshank* and *Presser* is to belittle the huge constitutional top-to-bottom revolution that took place over the course of more than 100 years. *Cruikshank* was a Reconstruction Era decision in which the federal government sought to prosecute for conspiracy a group of white individuals for their efforts to “hinder” the assertion of rights, including the right to keep and bear arms, by southern blacks guaranteed to them under the Privileges of Immunities clause of the Fourteenth Amendment: “no state shall make or enforce any law that abridges the privileges or immunities of the citizens of the United States.” These broad words had been narrowly read in the then-recent authority of the *Slaughter-House Cases*,¹³ which concerned the validity of a statutory monopoly afforded by the state of Louisiana to the Crescent City Live-Stock Landing and Slaughter-House Company. According to Justice Miller, that clause only applied to the rights that persons had as federal citizens, most notably to petition the United States for redress of grievances under the first Amendment.¹⁴ After *Cruikshank*, the tragic effect of *Slaughter-House* was to sharply limit federal criminal oversight on local governments in the South through a decision that held that none of the Bill of Rights to the United States, including Second Amendment, was binding on the states.¹⁵ In three years, we moved from a potential economic risk to a breakdown in constitutional government. But for Easterbrook these epochal institutional matters do not inform the discussion. To him the key point was the explicit holding on incorporation. It did not matter that the only Clause the Supreme Court considered in *Cruikshank* was the Privileges Or Immunities Clause. Nor did it matter that within a generation, the Supreme Court recouped much of the ground that had been ceded in *Slaughter-House* by starting to read the Due Process Clause of the Fourteenth Amendment to incorporate a wide range of rights found in the Bill of Rights against

¹² *NRA*, 563 F.3d at 857.

¹³ 83 US 36 (1872).

¹⁴ *Id* at 79-80 .

¹⁵ *Id* at 82.

the States.¹⁶ Judge O'Scannlain thought that this constitutional revolution fairly invited a reconsideration of *Cruikshank* and *Presser*, and conducted an exhaustive inquiry from Blackstone on forward, which concluded that the right to keep and bear arms had been regarded as a fundamental right at the time of the American Revolution, which had been carried forward through the Due Process Clause.

Judge Easterbrook was brusque in his rejection of the O'Scannlain authority, preferring to rely on the decision of the Second Circuit in *Maloney v Cuomo*,¹⁷ which held that no constitutional challenge could be lodged against a New York Law that forbade the use of "nunchakus" in the home.¹⁸ But the Per Curiam panel decision (on which now Supreme Court Justice Sonia Sotomayor sat) never addressed incorporation explicitly, but only concluded that the New York statute could pass the traditional rational basis test for the Fourteenth Amendment that Justice Scalia had in fact rejected in *Heller*. To my mind, Judge O'Scannlain was right to conclude that nothing in the earlier decisions precluded the circuit courts to see how the current Supreme Court construction of incorporation applied to the particular case. He chose to apply the current framework in part because the entire incorporation doctrine had been cast into utter confusion by *Slaughter-House*. Unlike Easterbrook, he did not think he usurped any Supreme Court prerogatives to offer his best opinion on an issue which he well knew will land in the lap of the Supreme Court. He read the Supreme Court's announcement in *Heller* that the case did not resolve the incorporation question¹⁹ as an invitation to lower courts to consider the matter on the merits, so as to let the high court benefit from its deliberations.

Easterbrook looks elsewhere to justify his decision to elevate the passive virtues on this incorporation question. One of the worse of many bad Supreme Court antitrust decisions of the 1960s was *Albrecht v Herald Co*,²⁰ which had held, quite inexcusably, that the antitrust laws imposed a per se rule against letting a publisher

¹⁶ See, eg, *Butchers' Union and Slaughter-House & Live-Stock Landing Co. v Crescent City Live-Stock Landing and Slaughter-House Co*, 111 US 746, 750 (1884)(using Due Process to replace Privileges or Immunities).

¹⁷ 554 F3d 556 (2d Cir 2009).

¹⁸ N.Y. Penal Law § 265.01.

¹⁹ *NRA*, 567 F3d at 858, citing *Heller*, 128 S Ct at 2813, note 23.

²⁰ 390 US 145 (1968).

set maximum price restraints on its distributors. When a challenge to *Albrecht* came to the Seventh Circuit in *Khan v. State Oil Co.*,²¹ Judge Posner (on a panel on which Easterbrook did not sit) eviscerated the decision but refused to overrule it, citing the need to respect his role as the judge on an inferior court. His advocacy was promptly rewarded when Supreme Court unanimously overruled *Albrecht* the next year, thanking the Seventh Circuit for its patience.²² That decision could have set the pattern for Easterbrook to understand his role while voicing his opinions on the merits.

There is also the further question of whether judges on inferior courts should use antitrust cases as a template for constitutional litigation. As a matter of general atmospherics, the gap between a technical antitrust issue and hot bottom constitutional issue looks large. Just look at how the two cases tee up. According to Easterbrook, the great flaw of *Albrecht* was that it failed to consider how consumer welfare could be advanced by these maximum price limitations. This is no small matter in antitrust law. But compare transformation in constitutional theory between *Cruikshank* and *Presser* on the one hand and *Heller* on the other are not accurately measured by some missed line of argument. Rather, this difference represents a full scale constitutional revolution that invoked a different portion of the Fourteenth Amendment, the Due Process Clause, whose substantive contours did not start to develop until at least a generation after *Slaughter-House*.²³ Since that time, moreover, we have moved from the world of selective incorporation under *Palko v. Connecticut*²⁴ which was overruled by the Warren Court decision in *Benton v. Maryland*,²⁵ which adopted the present test which requires incorporation of those rights without which “a fair and enlightened system of justice would be impossible.”

Judge O’Scannlain did not pause to worry about institutional role when he offered his defense of incorporation. Easterbrook, however, was wholly unfazed by the constitutional revolution. Far from going into a detailed historical argument, he

²¹ 93 F3d 1358 (7th Cir 2009).

²² *State Oil Co v Khan*, 522 US 3 (1997).

²³ See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

²⁴ 302 US 319 (1937)(denying incorporation of double jeopardy protection of Fifth Amendment).

²⁵ 395 US 784 (1969).

contents himself with the observation that incorporating the Second Amendment under *Heller* is in fact a more questionable step than the overruling of *Khan*. He notes that incorporation of the Bill of Rights through the Fourteenth Amendment still remains selective, and that neither the Third Amendment, involving the quartering of soldiers, nor the Seventh Amendment, requiring jury trials in actions at common law for more than \$20, has been applied to the states. He does so without mentioning, however, that one year before *Benton*, the Due Process Clause was read, in *Duncan v Louisiana* to require the use of a jury in state criminal cases.²⁶ Easterbrook also noted that incorporation status has been denied to the Fifth Amendment requirement of Grand Jury indictment or Presentment, or the Eighth Amendment prohibition on excessive bail.²⁷

It is instructive to note that Judge O'Scannlain considered none of these particular provisions, but directed his exclusive attention to an exhaustive examination of the historical treatment of the right to keep and bear arms in both England and the United States. That approach does appear to be more consistent with the general rule in *Benton*, which Easterbrook, however, dismisses as a case that itself "paid little heed to history."²⁸ At this point, Easterbrook could have called a halt to his opinion, for there is no reason for him to consider the underlying merits of the matter once his role as a judge on an inferior court remains clear. Nonetheless, Easterbrook does not take the austere line, but without missing a beat continues to discuss the substantive issue in a way intended to widen the gulf between himself and O'Scannlain. My best guess is that he thinks that incorporation is the likely Supreme Court result, even though he would rule otherwise. Putting the pieces together is a fascinating inquiry.

II. DOES THE SECOND AMENDMENT BIND THE STATES *History and Text* In approaching this question, Easterbrook well understands that he cannot prevail by appealing to the limited scope of authority of inferior federal court judges. Immediately, therefore, after his belittling of *Benton*, he launches into his own

²⁶ See, eg, 391 US 145 (1968).

²⁷ *NRA*, 567 F3d at 859.

²⁸ *Id* at 859.

account of the history, which is far briefer than that undertaken by O'Scannlain. Indeed the contrast could not be more apparent. O'Scannlain, obviously under the influence of the originalist view of constitutional interpretation, goes to great pains to quote and analyze all the key texts that address the disputed right to keep and bear arms. His decision in *Nordyke* quotes or refers to Blackstone with approval some 28 times, while weaving together a web that shows the fundamentality of the right to keep and bear arms to the American Revolution. In so doing, he conscientiously gave Blackstone the same pride of place that the Supreme Court had attached to it in *Duncan*, which pertains to the right to a jury trial,²⁹ and of course in *Heller* itself, which refers to Blackstone. O'Scannlain's historical effort is not entirely successful because many of the passages he quotes from the revolutionary period could be sensibly read as showing a resentment of the efforts of the British government to restrain the use of arms in the colonies. That surely applies to the quotations that deal with the opposition to "royal infringements" of colonial prerogatives.³⁰

Nonetheless at this point, Easterbrook, whose own strong brand of textualism is averse to these historical exercises, puts Blackstone into his place by noting that all of his English speculations deal with *political* and not *constitutional* rights, given the British practice of parliamentary supremacy.³¹ And he continues his denigration of Blackstone by noting that Blackstone regarded fixed sentences as a bulwark of individual liberty, a position that has been roundly rejected by the Supreme Court. But surely his belittling of Blackstone proves too much in light of the extensive, if selective, Supreme Court reliance on Blackstone's work. What is therefore required is a closer examination of his particular views on this question to

²⁹ *Nordyke*, 563 F3d at 449 (noting how in *Duncan* the Supreme Court "cit[ed] the English Declaration and Bill of Rights, Blackstone's Commentaries, early state constitutions, and other evidence from the Founding era").

³⁰ *Id.* at 452. O'Scannlain also notes that many academics have taken the view that the introductory clause makes reference to "the security of a free State," to stress the state independence from the federal government, *Nordyke*, 563 F3d at 450-51 & note 10, which Justice Scalia (unconvincingly in my view) tries to avoid by rewriting that language to refer to "security of a free polity," *Heller*, 182 S Ct at 2800, thereby deemphasizing the federalist angle.

³¹ *NRA*, 567 F3d 859.

see the extent to which they are congruent with *Heller*, which of course cited Blackstone profusely. That single fact suggests that the O'Scannlain approach is more in tune with the Supreme Court on this substantive issue than that of Easterbrook, who shows no reluctance to deviate from the current Supreme Court's preferred interpretive practices.

The waters are, as ever, muddled by the further complication that the relevant date for assessing any argument on incorporation is 1868, with the adoption of the Fourteenth Amendment. But the point seems incorrect for two reasons. First, as Judge O'Scannlain observes, there is strong evidence that the drafters of the Fourteenth Amendment also read their Blackstone and took the same favorable attitude to the right to keep and bear arms as did the framers of the Second Amendment.³² That point does not go to the question of whether the right to keep and bear arms deserves the title of a fundamental right, but whether incorporation was achieved through one or another of the clauses of the Fourteenth Amendment. At this point, the weaknesses of Scalia's *Heller* decision become more apparent. By reading out the initial clause, Scalia has knocked the props out from the structuralist claim that the Second Amendment was intended to protect the state militias against federal overriding, without limiting their power for internal regulation.

On this point, moreover, *Cruikshank* and *Presser* show just how difficult it is for any judge or justice to make the relevant judgments. As O'Scannlain notes, there is some evidence to the effect that the drafters of the Fourteenth Amendment were concerned about the dangers that state governments would disarm their citizens.³³

³² *Nordyke*, 563 F3d at 455-56: "Representative James Wilson, a supporter of the Fourteenth Amendment, described Blackstone's scheme of absolute rights as synonymous with civil rights, in a speech in favor of the Civil Rights Act of 1866 (a precursor to the Fourteenth Amendment). Similarly, Representative Roswell Hart listed 'the right of the people to keep and bear arms,' among other rights, as inherent in a 'republican government.'" Note too that the reference to a "republican government" echoes the language in the body of the Constitution: "The United States shall guarantee to every State in this Union a Republican Form of Government." US Const art IV, § 4.

³³ *Nordyke*, 563 F3d at 456. "While the generation of 1789 envisioned the right as a component of local resistance to centralized tyranny, whether British or federal, the generation of 1868 envisioned the right as

That fear seemed far-fetched in *Cruikshank*, to say the least, where white gangs appeared to operate with the implicit blessing of state authorities to terrorize the newly freed black citizens in their exercise of their individual rights. The elaborate discussion in the case to the effect that nothing in the Fourteenth Amendment interfered with the state's right and duty to protect the civil rights of its citizens appears naïve given that only the federal government was prepared to protect black citizens from abuses or indifference by local officials.

In contrast, in *Presser*, the practical dispute was whether Illinois could punish members of a group known as Lehr & Wehr Verein (A union to teach and defend) that wanted to organize its own paramilitary group in Illinois, which could have easily been viewed as a threat to the liberty and property of other individuals within the state. As noted earlier, *Presser* pushed hard on the structural view of the Second Amendment, going so far as to hold that the provisions that allowed the state to disarm the group was constitutional, even if they had to be severed from other portions of the statute.³⁴

Cruikshank and *Presser* thus tell very different tales about the operation of local militias outside the direct control of the state. In *Cruikshank* the passive behavior of the state officials in reconstruction Louisiana meant that local groups had taken steps to strip members of black groups from their right of keeping and bearing arms. The refusal to incorporate the Second Amendment (along with all other provisions of the Bill of Rights) thus left these individuals powerless to count on the federal government to forestall abuse. The entire episode showed why the Fourteenth Amendment included section 5, which allowed for the Congressional enforcement of all citizens of the United States. Holding that the Second Amendment did not apply to the states let the local forces of disruption have their way.

In contrast, in *Presser*, the diligent enforcement by state officials appears to

safeguard to protect individuals from oppressive or indifferent local governments. See Akhil Amar, [The Bill of Rights, 1998], at 257-66.”

³⁴ *Presser*, 116 US at 263-64 (1886)

have protected state citizens against local abuse, so that in this case, the incorporation of the Second Amendment could easily have blocked state governments from disarming rascals who wanted to strip other citizens of their civil rights. The threat of misconduct by fringe groups is a constant in both cases, and the differential in responses of Louisiana and Illinois suggests that incorporation speaks with two voices. It offers real benefits, as in *Cruikshank*, insofar as it allows the federal government to protect the right of isolated racial minorities to keep and bear arms. Yet by the same token, it would have hampered Illinois from dealing with its own dissidents, depending on how broadly any police power protection to the basic rule was read. We see here in microcosm the structural difficulty with the full system of incorporation. We are never sure whether the constitutional protections so afforded will help the guys in the white or the black hats.

Positive versus Natural Law Easterbrook does not deal with any of these historical complexities, but instead launches into a digression on the structuralist theme. At no point does he seek to link up the natural law strand of American constitutionalism. Instead he invokes a crude positivism—the law is what the sovereign says it is—that, on this point at least, works at cross-currents with both *Heller* and our broader constitutional traditions. His initial premise is that “the second amendment protects only the interest of law-abiding citizens. The recent case that he cites to support this proposition is *United States v. Jackson*,³⁵ that quite sensibly denies that any individual has a constitutional right to keep guns in hand when distributing illegal drugs. That decision of course falls within the narrowest conception of the police power, which has always prohibited the use of force to assist in criminal activity, which drug distribution surely is.

Jackson does not, however, raise the salient question which is whether the state may manipulate its definitions of lawful conduct in whatever way it sees fit. Thus Easterbrook first asks whether the militia clause would prohibit the ownership of long guns but not handguns, but offers no answer to his own query. He

³⁵ 555 F3d 635 (7th Cir 2009).

then switches to a much more controversial hypothetical whereby a state decides “that people cornered in their homes must surrender rather than fight back—in other words that burglars should be deterred by the criminal law rather than self-help.”³⁶ He regards this hypothetical as a hard case because he thinks that the state may alter the law of self-defense in whatever fashion it sees fit. But, if so, then suppose the state insists that all individuals have to rely on police enforcement, even if they must let others kill them in the home or on the streets, rather than risk the possibility of harming some third person, or even the assailant himself. At this point, he runs smack into a long tradition dating back to Hobbes, if not earlier, that treats the right of self-preservation as the primary natural right that no state can restrict, even if it wanted to.³⁷ After all, the worst punishment for self-defense would be death, so that the rational victim would always take his chances on resistance if the law were valid.³⁸

The harder question is whether any man could ever be put to that grim choice under the Constitution. Justice Scalia’s view of the matter in *Heller* seems to preclude that horrific possibility by observing quite simply that “the inherent right of self-defense has been central to the Second Amendment right,”³⁹ and further that the nature of this specific guarantee is not bounded by the low rational basis test.⁴⁰ What possible sense does it make to provide a constitutional protection to keep and bear arms that the state can negate by statute that eviscerates the rights of self-defense? One may as well say that the adoption of the Alien and Sedition Act trumps the constitutional protections for freedom of speech and the press, or that private property can be occupied in perpetuity by strangers so long as the state says that no individual is entitled to remove trespassers from his own land. The only the way to conduct this constitutional inquiry is against the natural law background that prominently permeated the debates of 1868 as it did those of 1791.

³⁶ *NRA*, 567 F3d at 859.

³⁷ See, eg, Thomas Hobbes, *Leviathan* ch 14 “A man’s covenant not to defend himself is void.”((1651) Michael Oakeshott ed 1962).

³⁸ *Id.*

³⁹ *Heller*, 128 S Ct at 2817.

⁴⁰ *Heller*, 128 S Ct at 2818 n.27.

Judge Easterbrook senses, perhaps, that he is on thin ice when he notes, quite correctly, that the common law rules of self-defense are not immutable, but can be varied “by requiring people to retreat when possible, and to use non-lethal force when retreat is not possible.”⁴¹ But no one questions the efforts to tweak the rules in ways that respect the integrity of the person while seeking to prevent unnecessary harms to others. Nor does it help in this context to observe with respect to these variations that the optimal use of guns is a hotly disputed empirical question, which is not presented in *NRA*.⁴² Just about everyone understands that the common law of self-defense is necessarily subject to both evolution in its details and to variation across states. In addition to the retreat theme, other rules of criminal and civil liability restrict the use of lethal force in defense of property. But one can look high and low in both the civil and criminal law of self-defense without finding a single statute or case that abrogates the right of self-defense in the face of deadly force. It is that core of the self-defense right that is inconsistent with Easterbrook’s explicit positivism.

The concern with total abrogation is not unique to the Second Amendment. The workers’ compensation laws in all states limit the common law cause of action, but they do not abolish it altogether. Every workers’ compensation action preserves the tort action in cases of criminal conduct, and they supply a statutory remedy in those cases where the tort cause of action for negligence is abrogated. Indeed, the key Supreme Court decision affirming their constitutionality, *New York Central R.R. v. White*,⁴³ explicitly stressed this quid pro quo rationale by noting that workers compensation substituted a limited but certain remedy for a risky negligence action promising high damages. Both of these features are key to upholding the constitutionality of the statute, and this same logic carried over to sustain the constitutionality of the automobile no-fault statutes over 50 years later.⁴⁴ There is

⁴¹ *NRA*, at 859.

⁴² *NRA* at 860.

⁴³ 243 US 188 (1916).

⁴⁴ See, eg, *Pinnick v Cleary*, 271 NE2d 592 (Mass 1971), which notes that the Massachusetts no-fault statute, c 670, which limited the right to sue in tort, did not impact any fundamental rights protected by the first ten amendments of the Constitution.

quite simply no precedent that allows the state to just eliminate all forms of self-protection

Incorporation Easterbrook's last point addresses, albeit briefly, the ultimate issue in the case, the incorporation of the Second Amendment through the Fourteenth in the wake of the *Slaughter-House Cases*, which eviscerated the incorporation through Privileges or Immunities. Early on in his opinion, Easterbrook mentions in passing that the plaintiffs raised the possibility of overruling that decision, which no circuit could do. But even if that could be done, it would still be necessary to show that the right to keep and bear arms counts as a fundamental liberty under the clause. The most authoritative enumeration of those rights prior to 1868 is the list of privileges and immunities offered by Bushrod Washington in *Corfield v. Coryell*⁴⁵ which covers a lot of ground but does not include the right to bear arms on its list. *Corfield* is, of course, not conclusive in light of the subsequent evolution of Supreme Court doctrine with its stress on the preservation of fundamental individual rights against government intrusion.

Easterbrook does not wade into these difficulties, but instead seeks to slow down the incorporation bandwagon by invoking Justice Brandeis's famous dissent in *New State Ice Co. v. Liebmann*⁴⁶: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁴⁷ That passage supports the proposition that decentralized authorities pose less threat to the liberties of ordinary people than a single national government. But its application to this current problem is highly doubtful. Brandeis wrote his aphorism before the 1937 Supreme Court revolution expanded the scope of the Commerce Clause so that it covered all economic activities, no matter how local they might appear.⁴⁸ At this point the laboratory image collides with the implicit premise of the modern commerce clause cases, which trumpet

⁴⁵ 6 F Cas 546 (E D Pa 1823)

⁴⁶ 285 US 262 (1932).

⁴⁷ Id at 311.

⁴⁸ See, *National Labor Relations Board v. Jones & Laughlin Steel Co*, 301 US 1 (1937).

comprehensive uniformity as the goal, even as their inevitable indirect, cross-border effects undercut any laboratory argument. At best, the Brandeis insight operates to create a default provision against the federal intervention in internal state activities in the absence of a clear statement to the contrary in any federal law.⁴⁹

More to the point, *New Ice* had nothing at all to do with incorporation. Its underlying issue was whether Oklahoma could by statute allow its state corporation commission to issue permits for the “manufacture, sale, or distribution, of ice,” only when it found that the existing licensed facilities were not sufficient to meet local demand, “except on proof of necessity.” *New Ice* thus let states protect incumbent firms against new competition. In this last pre-New Deal decision, Justice Sutherland struck a low against the state creation of monopolies or cartels. But the props under his position were effectively dashed with the Court’s decision in *Nebbia v New York*⁵⁰ which upheld an anticompetitive criminal statute that set minimum prices for milk. I agree with Justice Sutherland that there is little or no reason to allow the experimentation in state cartels. But even Brandeis’s view accepted the incorporation of the Fourteenth Amendment, and only argued for a lenient standard of review. *New Ice* could never be cited to block the incorporation of the Second Amendment. Nor could it be used to promote the rational basis standard now used to decide challenges to economic regulation under the Due Process Clause of the Fourteenth Amendment, given that *Heller* has embraced some, as yet undefined, higher standard of review. I very much doubt that mentioning four provisions of the Bill of Rights that are not incorporated will slow down any Supreme Court justice who thinks that *Heller* was rightly decided. Easterbrook did not elaborate on his brief suggestion given his belief that these matters “are for the justices rather than a court of appeals.”⁵¹ But it is highly unlikely that his straws into the wind will survive Judge O’Scannlain’s gale force arguments for incorporation.

⁴⁹ See, eg, *Gregory v Ashcroft*, 501 US 452 (1990)(adopting a “plain statement” principle to avoid potential constitutional collisions).

⁵⁰ 291 U.S. 502 (1934).

⁵¹ *NRA*, 563 F3d 860.

CONCLUSION Let me state a few words to place *NRA* in a larger constitutional framework. Both Easterbrook and O’Scannlain count, in some broad sense, as conservative judges. But that similarity conceals the gulf that arises when the former is standoffish to the originalist tradition that the latter embraces. This contrast reveals just how unsympathetic Judge Easterbrook is to the new dominant method of the Supreme Court. Left to his own devices, he would either ignore this evidence or dwell on its limitations. In this regard, stare decisis notwithstanding, I see no way that his cavalier dismissal of Blackstone and similar luminaries can be squared with the near reverence that these sources hold for justices on every side of many constitutional questions.

In *NRA*, Easterbrook’s reticence derives from his deep belief in judicial hierarchy. But unlike his powerhouse commercial and regulatory decisions, this style will not make him an appellate court opinion leader in constitutional law. By virtue of his conception of his role, *NRA* pales in comparison to his magnificent opinion in *American Booksellers Association v Hudnut*⁵² that invalidated its overbroad antipornography ordinance. In the end, it does not seem wise to try to split the baby by cutting off substantive discussions by hiding behind the apparent restrictions in the role of lower court judges. The better approach by far is to take your best shot on the issue, and leave it for the Supreme Court to decide whether you have misspoken.

Ironically, Judge Easterbrook should have followed the Posner strategy in *Khan* by first announcing that he would deny incorporation, and then offering his complete analysis of the case on the merits. Half measures don’t work. The Supreme Court would have been ideally positioned to decide this case if Judge Easterbrook had decided to join issue by taking on Judge O’Scannlain’s decision in *Nordyke*. The lesson of *NRA* is to beware of a half-hearted commitment to judicial restraint.

⁵² 771 F2d 323 (7th Cir 1985).

Readers with comments should address them to:

Richard A. Epstein
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
repstein@uchicago.edu

Chicago Working Papers in Law and Economics (Second Series)

For a listing of papers 1–399 please go to Working Papers at <http://www.law.uchicago.edu/Lawecon/index.html>

400. Shyam Balganesh, Foreseeability and Copyright Incentives (April 2008)
401. Cass R. Sunstein and Reid Hastie, Four Failures of Deliberating Groups (April 2008)
402. M. Todd Henderson, Justin Wolfers and Eric Zitzewitz, Predicting Crime (April 2008)
403. Richard A. Epstein, *Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments (April 2008)
404. William M. Landes and Richard A. Posner, Rational Judicial Behavior: A Statistical Study (April 2008)
405. Stephen J. Choi, Mitu Gulati, and Eric A. Posner, Which States Have the Best (and Worst) High Courts? (May 2008)
406. Richard H. McAdams and Janice Nadler, Coordinating in the Shadow of the Law: Two Contextualized Tests of the Focal Point Theory of Legal Compliance (May 2008, revised October 2008)
407. Cass R. Sunstein, Two Conceptions of Irreversible Environmental Harm (May 2008)
408. Richard A. Epstein, Public Use in a Post-*Kelo* World (June 2008)
409. Jonathan R. Nash, The Uneasy Case for Transjurisdictional Adjudication (June 2008)
410. Adam B. Cox and Thomas J. Miles, Documenting Discrimination? (June 2008)
411. M. Todd Henderson, Alan D. Jagolinzer, and Karl A. Muller, III, Scienter Disclosure (June 2008)
412. Jonathan R. Nash, Taxes and the Success of Non-Tax Market-Based Environmental Regulatory Regimes (July 2008)
413. Thomas J. Miles and Cass R. Sunstein, Depoliticizing Administrative Law (June 2008)
414. Randal C. Picker, Competition and Privacy in Web 2.0 and the Cloud (June 2008)
415. Omri Ben-Shahar, The Myth of the “Opportunity to Read” in Contract Law (July 2008)
416. Omri Ben-Shahar, A Bargaining Power Theory of Gap-Filling (July 2008)
417. Omri Ben-Shahar, How to Repair Unconscionable Contracts (July 2008)
418. Richard A. Epstein and David A. Hyman, Controlling the Costs of Medical Care: A Dose of Deregulation (July 2008)
419. Eric A. Posner, *Erga Omnes* Norms, Institutionalization, and Constitutionalism in International Law (August 2008)
420. Thomas J. Miles and Eric A. Posner, Which States Enter into Treaties, and Why? (August 2008)
421. Cass R. Sunstein, Trimming (August 2008)
422. Cass R. Sunstein, Second Amendment Minimalism: Heller as Griswold (August 2008)
423. Richard A. Epstein, The Disintegration of Intellectual Property (August 2008)
424. John Bronsteen, Christopher Buccafusco, and Jonathan Masur, Happiness and Punishment (August 2008)
425. Adam B. Cox and Thomas J. Miles, Judicial Ideology and the Transformation of Voting Rights Jurisprudence (August 2008)
426. Daniel Abebe and Jonathan S. Masur, International Agreements and Internal Heterogeneity: The “Two Chinas” Problem (August 2008; updated September 2009)
427. William Birdthistle and M. Todd Henderson, One Hat Too Many? Investment Desegregation in Private Equity (August 2008)
428. Irina D. Manta, Privatizing Trademarks (abstract only) (September 2008)
429. Paul J. Heald, Testing the Over- and Under-Exploitation Hypothesis: Bestselling Musical Compositions (1913–32) and Their Use in Cinema (1968–2007) (September 2008)
430. M. Todd Henderson and Richard A. Epstein, Introduction to “The Going Private Phenomenon: Causes and Implications” (September 2008)
431. Paul Heald, Optimal Remedies for Patent Infringement: A Transactional Model (September 2008)
432. Cass R. Sunstein, Beyond Judicial Minimalism (September 2008)
433. Bernard E. Harcourt, Neoliberal Penalty: The Birth of Natural Order, the Illusion of Free Markets (September 2008)

434. Bernard E. Harcourt, Abolition in the U.S.A. by 2050: On Political Capital and Ordinary Acts of Resistance (September 2008)
435. Robert Cooter and Ariel Porat, Liability for Lapses: First or Second Order Negligence? (October 2008)
436. Ariel Porat, A Comparative Fault in Defense Contract Law (October 2008)
437. Richard H. McAdams, Beyond the Prisoners' Dilemma: Coordination, Game Theory and the Law (October 2008)
438. Dhammika Dharmapala, Nuno Garoupa, and Richard H. McAdams, Belief in a Just World, Blaming the Victim, and Hate Crime Statutes (October 2008)
439. M. Todd Henderson, The Impotence of Delaware's Taxes: A Short Response to Professor Barzua's *Delaware's Compensation* (October 2008)
440. Richard McAdams and Thomas Ulen, Behavioral Criminal Law and Economics (November 2008)
441. Cass R. Sunstein, Judging National Security post-9/11: An Empirical Investigation (November 2008)
442. Eric A. Posner and Adrian Vermuele, Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008 (November 2008)
443. Lee Anne Fennell, Adjusting Alienability (November 2008)
444. Nuno Garoupa and Tom Ginsburg, Guarding the Guardinas: Judicial Councils and Judicial Independence (November 2008)
445. Richard A. Epstein, The Many Faces of Fault in Contract Law: Or How to Do Economics Right, without Really Trying (December 2008)
446. Cass R. Sunstein and Richard Zeckhauser, Overreaction to Fearsome Risks (December 2008)
447. Gilbert Metcalf and David Weisbach, The Design of a Carbon Tax (January 2009)
448. David A. Weisbach, Responsibility for Climate Change, by the Numbers (January 2009)
449. M. Todd Henderson, Two Visions of Corporate Law (January 2009)
450. Oren Bar-Gill and Omri Ben-Shahar, An Information Theory of Willful Breach (January 2009)
451. Tom Ginsburg, Public Choice and Constitutional Design (January 2009)
452. Richard Epstein, The Case against the Employee Free Choice Act (January 2009)
453. Adam B. Cox, Immigration Law's Organizing Principles (February 2009)
454. Philip J. Cook, Jens Ludwig, and Adam M. Samaha, Gun Control after *Heller*: Threats and Sideshows from a Social Welfare Perspective (February 2009)
455. Lior Jacob Strahilevitz, The Right to Abandon (February 2009)
456. M. Todd Henderson, The Nanny Corporation and the Market for Paternalism (February 2009)
457. Lee Anne Fennell, Commons, Anticommons, Semicommons (February 2009)
458. Richard A. Epstein and M. Todd Henderson, Marking to Market: Can Accounting Rules Shake the Foundations of Capitalism? (April 2009)
459. Eric A. Posner and Luigi Zingales, The Housing Crisis and Bankruptcy Reform: The Prepackaged Chapter 13 Approach (April 2009)
460. Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate (April 2009)
461. Adam B. Cox and Eric A. Posner, The Rights of Migrants (April 2009)
462. Randal C. Picker, The Google Book Search Settlement: A New Orphan-Works Monopoly? (April 2009, revised July 2009)
463. Randal C. Picker, The Mediated Book (May 2009)
464. Anupam Chander, Corporate Law's Distributive Design (June 2009)
465. Anupam Chander, Trade 2.0 (June 2009)
466. Lee Epstein, William M. Landes, and Richard A. Posner, Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument (June 2009)
467. Eric A. Posner, Kathryn Spier, and Adrian Vermeule, Divide and Conquer (June 2009)
468. John Bronsteen, Christopher J. Buccafusco, and Jonathan S. Masur, Welfare as Happiness (June 2009)
469. Richard A. Epstein and Amanda M. Rose, The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow (June 2009)
470. Douglas G. Baird and Robert K. Rasmussen, Anti-Bankruptcy (June 2009)
471. Bernard E. Harcourt, Alon Harel, Ken Levy, Michael M. O'Hear, and Alice Ristroph, Randomization in Criminal Justice: A Criminal Law Conversation (June 2009)

472. Bernard E. Harcourt, Neoliberal Penalty: A Brief Genealogy (June 2009)
473. Lee Anne Fennell, Willpower and Legal Policy (June 2009)
474. Richard A. Epstein, How to Undermine Tax Increment Financing: The Lessons of *ProLogis v. City of Chicago* (June 2009)
475. Randal C. Picker, Online Advertising, Identity and Privacy (June 2009)
476. M. Todd Henderson, Credit Derivatives Are Not “Insurance” (July 2009)
477. Lee Anne Fennell and Julie Roin, Controlling Residential Stakes (July 2009)
478. Douglas G. Baird, The Holmesian Bad Man’s First Critic (August 2009)
479. Douglas G. Baird, The Bankruptcy Exchange (August 2009)
480. Jonathan Masur and Eric A. Posner, Against Feasibility Analysis (August 2009)
481. Lee Anne Fennell, The Unbounded Home, Property Values beyond Property Lines (August 2009)
482. Bernard E. Harcourt, Henry Louis Gates and Racial Profiling: What’s the Problem? (September 2009)
483. Stephen J. Choi, Mitu Gulati, Mirya Holman, and Eric A. Posner, Judging Women (September 2009)
484. Omri Ben-Shahar, One-Way Contracts: Consumer Protection without Law (October 2009)
485. Ariel Porat, Expanding Liability for Negligence *Per Se* (October 2009)
486. Ariel Porat and Alex Stein, Liability for Future Harm (October 2009)
487. Anup Malani and Ramanan Laxminrayan, Incentives for Surveillance of Infectious Disease Outbreaks (October 2009)
488. Anup Malani, Oliver Bembom and Mark van der Laan, Accounting for Differences among Patients in the FDA Approval Process (October 2009)
489. David Gilo and Ariel Porat, Viewing Unconscionability through a Market Lens (October 2009)
490. David Weisbach, Instrument Choice Is Instrument Design (October 2009)
491. M. Todd Henderson, Justifying *Jones* (November 2009)
492. *ProCD v. Zeidenberg* and Cognitive Overload in Contractual Bargaining (November 2009)
493. Randal C. Picker, Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement (November 2009)
494. Richard A. Epstein, Against Permittitis: Why Volunteer Organizations Should Regulate the Use of Cancer Drugs (November 2009)
495. Richard A. Epstein, Heller’s Gridlock Economy in Perspective: Why There Is Too Little, Not Too Much, Private Property (November 2009)
496. Richard A. Epstein, *NRA v. City of Chicago*: Does the Second Amendment Bind Frank Easterbrook? (November 2009)