

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

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INTRODUCTION

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 conclusions. 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.

Easterbrook sports a distinctive approach to constitutional law whose key elements quickly come to the surface in his powerful, but ultimately unpersuasive, opinion in *NRA v City of Chicago*,¹ on which the Supreme Court 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

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¹ 567 F3d 856 (7th Cir 2009).

² *McDonald v City of Chicago*, 130 S Ct 48 (2009).

have ripped their constitutional foundations to shreds.³ 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.⁴ 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*.⁵ As everyone by now knows, the Second Amendment, which Easterbrook does not bother to quote in *NRA*, is drafted like the object 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."⁶ *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 Antonin 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 rational basis test.⁷ Judge Easterbrook did not, and would not, pause to inquire into the soundness of *Heller*, which I think is subject to many weaknesses.⁸

Academic writers do not 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*,⁹ and, more significantly, in *Presser v Illinois*,¹⁰ which read the Second Amendment as part of the overall constitutional scheme, including the

³ See *NRA*, 567 F3d at 857–59.

⁴ *Id.* at 859–60.

⁵ 128 S Ct 2783 (2008).

⁶ US Const Amend II.

⁷ *Heller*, 128 S Ct at 2817 n 27 (explaining that if a rational basis was all that was necessary to overcome the right to bear arms, the Second Amendment "would have no effect").

⁸ For an account, see generally Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller Is (Probably) Wrong on Originalist Grounds*, 59 *Syracuse L Rev* 171 (2008) (urging that the Second Amendment does not apply to Washington, DC, which has no militia that needs to be shielded from federal usurpation).

⁹ 92 US 542, 553 (1875).

¹⁰ 116 US 252, 267–68 (1886) (preserving a zone of autonomous authority for the states to regulate the use of firearms for public safety purposes).

division of authority set out in Article I, § 8 of the Constitution.¹¹ Under this approach, ironically, the only place to which the Second Amendment does *not* apply is Washington, DC, 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*,¹² which went quickly to the substantive issues and found that the Second Amendment did bind each state as a regulator, but did not limit its power to exclude guns from county fairgrounds that it owned and operated.¹³ 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 "even if the reasoning in later opinions has undermined their rationale."¹⁴ 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 one hundred years. *Cruikshank* was a Reconstruction-era decision that arose out of a political struggle in Louisiana, which escalated into violence, resulting in the death of about one hundred black citizens.¹⁵ Thereafter, the federal government prosecuted for conspiracy a group of white individuals for their efforts to "hinder" the assertion of rights,¹⁶ including the right to keep and bear arms, by southern blacks guaranteed to them under the Privileges or Immunities Clause of the Fourteenth Amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."¹⁷ These broad words

¹¹ US Const Art I, § 8, cls 16–17 (outlining coordination mechanisms between the United States and the various states).

¹² 563 F3d 439 (9th Cir 2009), rehearing en banc granted, 575 F3d 890 (9th Cir 2009).

¹³ 563 F3d at 458–60 (concluding that the Second Amendment right to own firearms does not extend to possession on government property).

¹⁴ *NRA*, 567 F3d at 857 (respecting the limited scope of an appellate judge's purview).

¹⁵ For a detailed account, see generally Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (Henry Holt 2008).

¹⁶ *Cruikshank*, 92 US at 544–45.

¹⁷ US Const Amend XIV, § 1.

had been narrowly read in the then-recent authority of the *Slaughter-House Cases*,¹⁸ 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.¹⁹ According to Justice Samuel 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.²⁰ *Cruikshank* held that the prosecutions were beyond the power of the federal government, thereby freeing the killers. The tragic effect of *Slaughter-House* was to sharply limit federal criminal oversight of local governments in the South through a decision that held that none of the Bill of Rights of the United States, including the Second Amendment, was binding on the states.²¹ 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 the states.²² On these technical issues, the bulk of the legal authority goes against the Easterbrook opinion, because *Cruikshank* did not consider the due process arguments, which raise different issues. In other instances, intermediate courts have reconsidered old decisions, without drawing any rebuke from the Supreme Court.²³ Judge O'Scannlain was clearly untroubled by the institutional limitation, and readily concluded that this constitutional revolution fairly

¹⁸ 83 US 36 (1872).

¹⁹ *Id.* at 60.

²⁰ *Id.* at 78–80.

²¹ *Id.* at 82.

²² See *Butchers' Union Slaughter-House & Live-Stock Landing Co v Crescent City Live-Stock Landing & Slaughter-House Co*, 111 US 746, 750 (1884) (using the Due Process Clause to replace the Privileges or Immunities Clause).

²³ For a discussion, see Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L Rev 185, 198–99 & n 73 (2008). Lund mentions *Latimore v Sielaff*, 561 F2d 691, 693 n 2 (7th Cir 1977) (finding a Sixth Amendment right to public trial without acknowledging the Supreme Court precedent to the contrary), prior to *Gannett Co, Inc v DePasquale*, 443 US 368, 379 (1979) (affirming that the Sixth Amendment is applicable to the states). Lund cited this and other cases in Amicus Curiae Brief of Sixty-Nine State Legislators from Illinois, Indiana, and Wisconsin Supporting Appellants' Prayer for Reversal of the Judgment, *NRA v City of Chicago*, Nos 08-4241, 08-4243, 08-4244, *15–16 (7th Cir filed Feb 9, 2009) (available on Westlaw at 2009 WL 462552). They were not discussed in the Easterbrook opinion.

invited a reconsideration of *Cruikshank* and *Presser*, and conducted an exhaustive inquiry from Blackstone on forward. He 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.²⁴

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*,²⁵ which held that no constitutional challenge could be lodged against a New York law that forbade the use of “nunchakus” in the home.²⁶ 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*.²⁷ To my mind, Judge O’Scannlain was right to conclude that nothing in the earlier decisions precluded the circuit courts from seeing 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 by offering his best opinion on an issue that he well knew would 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 question²⁸ as an invitation to lower courts to consider the matter on the merits, so as to let the high court benefit from their deliberations.

Easterbrook looks elsewhere to justify his decision to elevate the passive virtues on this incorporation question. One of the worst of many bad Supreme Court antitrust decisions of the 1960s was *Albrecht v Herald Co*,²⁹ which held, quite inexcusably, that the antitrust laws imposed a per se rule against letting a publisher set maximum price restraints on its distributors.³⁰ When a challenge to *Albrecht* came to the Seventh Circuit in *Khan v State Oil Co*,³¹ Judge Richard 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

²⁴ See *Nordyke*, 563 F3d at 457.

²⁵ 554 F3d 56 (2d Cir 2009).

²⁶ *Id* at 60 (upholding NY Penal Law § 265.01(1) (McKinney)).

²⁷ *Maloney*, 554 F3d at 59–60 (concluding that the legislative history of the statute provides a rational basis for the ban on nunchakus).

²⁸ See *Heller*, 128 S Ct at 2813 n 23.

²⁹ 390 US 145 (1968).

³⁰ *Id* at 152–53.

³¹ 93 F3d 1358 (7th Cir 1996).

judge on an inferior court.³² His advocacy was promptly rewarded when the Supreme Court unanimously overruled *Albrecht* the next year, thanking the Seventh Circuit for its patience.³³ That decision could have set the tone 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 a hot-button constitutional issue looks large. Just look at how the two cases tee up. According to Posner, the great flaw of *Albrecht* was that it failed to consider how consumer welfare could be advanced by these maximum price limitations.³⁴ This is no small matter in antitrust law. But the transformation in constitutional theory between *Cruikshank* and *Presser* on the one hand and *Heller* on the other is 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*.³⁵ Since that time, moreover, we have moved from the world of selective incorporation under *Palko v Connecticut*³⁶ (though overruled by the Warren Court decision in *Benton v Maryland*³⁷), which adopted the present test that requires incorporation of those rights without which “a fair and enlightened system of justice would be impossible.”³⁸

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 contents himself with the observation that incorporating the Second Amendment under *Heller* is in fact a more questionable step than the overruling of *Khan*.³⁹ He

³² Id at 1362–64 (expressing “considerable sympathy” for the arguments against *Albrecht* but refusing “to read the sibylline leaves of the *U.S. Reports* for prophetic clues to overruling”).

³³ See *State Oil Co v Khan*, 522 US 3, 20, 22 (1997).

³⁴ See *Khan*, 93 F3d at 1363 (observing that the Supreme Court had not adequately considered in *Albrecht* that “a price ceiling is a natural and procompetitive incident to a scheme of territorial exclusivity”).

³⁵ See, for example, *Allgeyer v Louisiana*, 165 US 578, 589 (1897) (holding that the Fourteenth Amendment protects economic liberty against state regulation).

³⁶ 302 US 319, 322 (1937) (denying incorporation of the double jeopardy protection of the Fifth Amendment).

³⁷ 395 US 784, 794 (1969) (recognizing that Fifth Amendment double jeopardy protection “represents a fundamental ideal in our constitutional heritage”).

³⁸ *Palko*, 302 US at 325.

³⁹ See *NRA*, 567 F3d at 858–59 (explaining that the proper outcome of *Khan* was much more straightforward).

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.⁴⁰ He does so without mentioning, however, that one year before *Benton*, the Due Process Clause was read in *Duncan v Louisiana*⁴¹ to require the use of a jury in state criminal cases.⁴² Easterbrook also notes that incorporation status has never been granted to the Fifth Amendment requirements of grand jury indictment and presentment, and the Eighth Amendment prohibition on excessive bail.⁴³

It is instructive to note that Judge O’Scannlain considered none of these specific constitutional guarantees, 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 is consistent with the general reasoning in *Benton*, which explicitly refers to historical sources.⁴⁴ Easterbrook overstates the matter when he dismisses *Benton* as a case that itself “paid little heed to history.”⁴⁵ If he had been right on that issue, at that, he could have called a halt to his opinion, for there would have been 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.

⁴⁰ *Id.*

⁴¹ 391 US 145 (1968).

⁴² *Id.* at 148–49.

⁴³ *NRA*, 567 F3d at 858–59.

⁴⁴ 395 US at 795:

The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation’s independence. . . . As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries.

⁴⁵ *NRA*, 567 F3d at 859.

II. DOES THE SECOND AMENDMENT BIND THE STATES?

A. 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 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 twenty-eight times, while weaving together a web that shows the fundamentality of the right to keep and bear arms to the American Revolution.⁴⁶ In so doing, he conscientiously gives Blackstone the same pride of place that the Supreme Court attached to it in *Duncan*, which pertains to the right to a jury trial,⁴⁷ and of course in *Heller* itself, which refers to Blackstone.⁴⁸ 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.⁴⁹

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 dealt with *political* and not *constitutional* rights, given the British practice of parliamentary supremacy.⁵⁰ 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

⁴⁶ 563 F3d at 449–56.

⁴⁷ See *id.* at 448–49 (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").

⁴⁸ See *Heller*, 128 S Ct at 2798 (explaining that Blackstone described the right to bear arms as "one of the fundamental rights of Englishmen").

⁴⁹ *Nordyke*, 563 F3d at 452–54. 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 state independence from the federal government, *id.* at 450–51 & n 10, which Justice Scalia (unconvincingly in my view) tries to avoid by rewriting that language to refer to "security of a free polity," *Heller*, 128 S Ct at 2800, thereby deemphasizing the federalism angle.

⁵⁰ *NRA*, 567 F3d at 859.

Supreme Court.⁵¹ 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 Easterbrook's particular views on this question to 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, muddied by the further complication that the relevant date for assessing any argument on incorporation is 1868, with the adoption of the Fourteenth Amendment. But that 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.⁵² 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 Justice Scalia's *Heller* decision become more apparent. By reading out the initial clause, Justice Scalia knocked the props out from the structuralist claim that the Second Amendment was intended to protect the state militias against federal overriding, without limiting the power of the federal government to impose the uniform standards needed when the militia was called into the service of the national government.

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 danger that state governments would disarm their citizens.⁵³ That fear

⁵¹ *Id.*

⁵² See *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.

⁵³ See *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 safeguard to protect individuals from oppressive or indifferent

seemed farfetched 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.⁵⁴

By contrast, in *Presser*, the practical dispute was whether Illinois could punish members of a group known as *Lehr und Wehr Verein* (a teaching and defense union) that wanted to organize its own paramilitary group in Illinois,⁵⁵ which could have easily been viewed as a threat to the liberty and property of other individuals within the state. As noted earlier,⁵⁶ *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 were constitutional even if they had to be severed from other portions of the statute.⁵⁷

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-era Louisiana meant that local groups had taken steps to strip members of black groups of 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 unable to count on the federal government to forestall abuse. The entire episode showed why the Fourteenth Amendment included § 5, which allowed for the congressional enforcement of the basic rights of all citizens of the United States.⁵⁸ Holding that the Second Amendment did not apply to the states let the local forces of disruption have their way.

By contrast, in *Presser*, the diligent enforcement by state officials appears to have protected state citizens against local abuse, such that 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

local governments.”). See also Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 148 (Yale 1998) (arguing that “a maxim like the preamble to the Second Amendment could warn the people of any state to be wary of any legislature, even a state legislature, that sought to disarm them”).

⁵⁴ See *Cruikshank*, 92 US at 550–55.

⁵⁵ See *Presser*, 116 US at 254.

⁵⁶ See note 10 and accompanying text.

⁵⁷ 116 US at 263–64.

⁵⁸ See US Const Amend XIV, § 5.

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.

B. Positive versus Natural Law

Easterbrook does not deal with any of the 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.”⁵⁹ The recent case that he cites to support this proposition is *United States v Jackson*,⁶⁰ which quite sensibly denies that any individual has a constitutional right to keep guns in hand when distributing illegal drugs.⁶¹ 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.⁶² He 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.”⁶³ 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.⁶⁴ But, if so, then suppose the state insists that all individuals have to rely on police enforcement, even if they

⁵⁹ *NRA*, 567 F3d at 859.

⁶⁰ 555 F3d 635 (7th Cir 2009).

⁶¹ *Id.* at 636.

⁶² See *NRA*, 567 F3d at 859.

⁶³ *Id.*

⁶⁴ *Id.* at 859–60.

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, Easterbrook runs smack into a long tradition dating back to Hobbes, if not earlier, which treats the right of self-preservation as the primary natural right that no state can restrict, even if it wanted to.⁶⁵ After all, the worst punishment for self-defense would be death, perhaps after torture, so that the rational victim would always take his chances on resistance if the law were valid.⁶⁶

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,"⁶⁷ and further that the nature of this specific guarantee is not bounded by the low rational basis test.⁶⁸ What possible sense does it make to provide a constitutional protection to keep and bear arms that the state can negate by a statute that eviscerates the rights of self-defense? One may as well say that the adoption of the Alien and Sedition Acts 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 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.

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."⁶⁹ 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*.⁷⁰ Just about everyone understands that the common law of self-defense is necessarily subject both to evolution in its details and to variation across

⁶⁵ See, for example, Thomas Hobbes, *Leviathan* 98 (Cambridge 1991) (Richard Tuck, ed) ("A Covenant not to defend my selfe from force, by force, is alwayes voyd.")

⁶⁶ See *id.*

⁶⁷ 128 S Ct at 2817.

⁶⁸ *Id.* at 2817 n 27 (noting that if a rational basis test were used for enumerated rights, these rights would amount to no more than redundant prohibitions on irrational laws).

⁶⁹ *NRA*, 567 F3d at 859.

⁷⁰ See *id.* at 860.

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. Most modern statutes do not differ much from the New York statute that was sustained against constitutional challenges in *New York Central Railroad Co v White*.⁷¹ Every workers' compensation action preserves the tort action in cases of willful misconduct, and they supply a statutory remedy in those cases where the tort cause of action for negligence is abrogated.⁷² Indeed, in affirming the constitutionality of the New York statute, *White* 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.⁷³ 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 more than fifty years later.⁷⁴ There is quite simply no precedent that allows the state to just eliminate all forms of self-protection.

C. 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 *Slaughter-House*, which eviscerated incorporation through the Privileges or Immunities Clause. Early on in his opinion, Easterbrook mentions in passing that the plaintiffs raised the possibility of overruling that decision, which no circuit could do.⁷⁵ But even if that could be done, it would still be necessary to

⁷¹ 243 US 188 (1917).

⁷² See, for example, *id* at 192.

⁷³ *Id* at 201:

If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages.

⁷⁴ See, for example, *Pinnick v Cleary*, 271 NE2d 592, 611 (Mass 1971) (noting that the Massachusetts no-fault statute, which limited the right to sue in tort, did not impact any fundamental rights protected by the first ten amendments of the Constitution).

⁷⁵ See *NRA*, 567 F3d at 857–58. See also *Agostini v Felton*, 521 US 203, 237–38 (1997).

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*,⁷⁶ which covers a lot of ground but does not include the right to bear arms. *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 Louis Brandeis's famous dissent in *New State Ice Co v Liebmann*:⁷⁷ "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."⁷⁸ 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. Justice 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.⁷⁹ At this point the laboratory image collides with the implicit premise of the modern Commerce Clause cases, which trumpet 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.⁸⁰

More to the point, *New State Ice* had nothing at all to do with incorporation. Its underlying issue was whether Oklahoma could by statute require "proof of necessity" before its state corporation commission could issue permits for the "manufacture, sale or distribution of ice."⁸¹ In this late pre-New Deal decision, Justice George Sutherland struck a blow against the state creation of monopolies or cartels by refusing to let states protect incumbent firms against new competi-

⁷⁶ 6 F Cases 546, 551–52 (CC ED Pa 1823).

⁷⁷ 285 US 262 (1932).

⁷⁸ *NRA*, 567 F3d at 860 (defending the use of states as laboratories for legal experimentation), citing *New State Ice*, 285 US at 311 (Brandeis dissenting).

⁷⁹ See *NLRB v Jones & Laughlin Steel Corp*, 301 US 1, 36–37 (1937) (invoking an expansive conception of the Commerce Clause).

⁸⁰ See, for example, *Gregory v Ashcroft*, 501 US 452, 460–61 (1991) (adopting a "plain statement" principle to avoid potential constitutional collisions).

⁸¹ *New State Ice*, 285 US at 271–72 (explaining that the statute allowed denial of a permit where existing facilities were sufficient).

tors. But the props under his position were effectively dashed with the Court's decision in *Nebbia v New York*,⁸² which upheld an anticompetitive criminal statute that set minimum prices for milk.⁸³ 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.⁸⁴ *New State 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."⁸⁵ But it is highly unlikely that his straws into the wind will survive Judge O'Scannlain's gale force arguments for incorporation.

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, Inc v Hudnut*,⁸⁶ which invalidated the City of

⁸² 291 US 502 (1934).

⁸³ *Id.* at 538–39 (asserting that price control "is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt").

⁸⁴ *New State Ice*, 285 US at 311.

⁸⁵ *NRA*, 567 F3d at 860.

⁸⁶ 771 F2d 323 (7th Cir 1985).

Indianapolis's overbroad antipornography ordinance.⁸⁷ 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 do not 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.

⁸⁷ *Id.* at 332. See Geoffrey R. Stone, *American Booksellers Association v Hudnut*: "The Government Must Leave to the People the Evaluation of Ideas," 77 *U Chi L Rev* 1219, 1219 (2010).