

McDonald's Paradoxical Legacy: State Restrictions of Non-Citizens' Gun Rights

David S. Cohen

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Second Amendment Commons](#)

Recommended Citation

David S. Cohen, *McDonald's Paradoxical Legacy: State Restrictions of Non-Citizens' Gun Rights*, 71 Md. L. Rev. 1219 (2012)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol71/iss4/16>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**McDONALD'S PARADOXICAL LEGACY:
STATE RESTRICTIONS OF NON-CITIZENS' GUN RIGHTS**

DAVID S. COHEN*

The gun rights movement could not have found a better plaintiff than Eoin Pryal to challenge Massachusetts' citizenship requirement for possessing firearms. Pryal is a citizen of the United Kingdom, where he was a rifleman in the British Territorial Army and obtained both a shotgun certificate and international dealer's license, which allowed him to travel internationally with his own weapon for hunting.¹ Now a lawful permanent resident of the United States living in Massachusetts, Pryal is an assistant firearms instructor at the Massachusetts Firearm School and a customer service representative at a local firearms manufacturer.² Christopher Fletcher joined Pryal as a plaintiff in the challenge.³ Fletcher, also a lawful permanent resident, had lived in the United States for over fifteen years and had completed firearms safety courses in both California and Massachusetts.⁴

Pryal and Fletcher sued Massachusetts for their right to own and possess firearms, claiming that the state's prohibition on lawful permanent residents owning and possessing firearms conflicted with the right found in the Second Amendment.⁵ Relying on the Supreme Court's recent decisions in *District of Columbia v. Heller*⁶ and *McDonald v. City of Chicago*,⁷ the United States District Court for the District of Massachusetts ruled that the Second Amendment's individual right to possess a gun for self-defense, which the Supreme Court found in *Hel-*

Copyright © 2012 by David S. Cohen.

*Associate Professor of Law, Earle Mack School of Law at Drexel University. Thank you to Stephanie Huffnagle for excellent and speedy research assistance and Krysten Connon for incredibly valuable overall feedback.

1. *Fletcher v. Haas*, No. 11-10644-DPW, 2012 WL 1071713, at *2 (D. Mass. Mar. 30, 2012).

2. *Id.*

3. *Id.* at *1.

4. *Id.*

5. *Id.* Massachusetts is not alone in restricting non-citizens' access to guns. See generally Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 895 & nn.11-14 (2007) (summarizing state restrictions on non-citizens' access to guns).

6. 554 U.S. 570 (2008).

7. 130 S. Ct. 3020 (2010).

ler and incorporated against the states in *McDonald*, protected a lawful permanent resident's right to bear arms⁸ and that the Massachusetts statutory scheme with respect to non-citizens violated that right.⁹ The district court found that the Second Amendment applies to non-citizens because the court read *McDonald* as incorporating the Second Amendment through the Due Process Clause, which protects against states infringing on the rights of "persons."¹⁰

However, the court erred when it ignored the voting paradox within the *McDonald* decision. In fact, because of the voting paradox in *McDonald*, determining how to apply *McDonald* in a case such as *Pryal* and *Fletcher*'s is a complex endeavor.¹¹ Here, I attempt to resolve *McDonald*'s paradox in the context of non-citizens by applying a modification of the familiar rule for dealing with fragmented Supreme Court opinions. Under that modified rule, there is no basis for finding that the Second Amendment, applied to the states through the Fourteenth Amendment, protects non-citizens from gun restrictions. There may be other reasons to find that states cannot restrict non-citizens from owning or possessing firearms,¹² but based on Supreme Court precedent, incorporation of a fundamental right is not one of them.

I. THE VOTING PARADOX IN *MCDONALD v. CITY OF CHICAGO*

McDonald v. City of Chicago is an example of a voting paradox.¹³ The issue before the Court in *McDonald* was whether the individual

8. *Fletcher*, 2012 WL 1071713, at *8, *13.

9. *Id.* at *14.

10. *Id.* at *8 ("The Supreme Court . . . chose the option of protecting Second Amendment rights under the Due Process clause and eschewed deployment of the Privileges and Immunities clause, which is limited to citizens."); see also *State v. Ibrahim*, 269 P.3d 292, 297 (Wash. Ct. App. 2011) (holding that incorporated Second Amendment rights protect non-citizens).

11. Whether, in evaluating *federal* restrictions on non-citizens' access to guns, the Second Amendment itself applies directly to non-citizens is a separate issue outside the scope of this Essay. See Pratheepan Gulasekaram, "The People" of the Second Amendment: *Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521 (2010).

12. See, e.g., *Ibrahim*, 269 P.3d at 297 (acknowledging that the state's constitution guaranteed the right to bear arms); *People v. Bounasri*, 915 N.Y.S.2d 921, 922–23 (N.Y. City Ct. 2011) (relying on the Equal Protection Clause to analyze a statute prohibiting a non-citizen's possession of a weapon).

13. See generally David S. Cohen, *The Paradox of McDonald v. City of Chicago*, 79 GEO. WASH. L. REV. 823, 825–30 (2011) (explaining that a "voting paradox" occurs when the Court issues a decision with splintered opinions, such as *McDonald*, and the resulting groups of Justices are split such that the outcome of the case is the opposite of the outcome that should arise from the majority's resolution of the controlling issues" and concluding that *McDonald* constituted a voting paradox within this framework).

right to own and possess guns, which the Supreme Court found in *Heller* to be protected under the Second Amendment, was incorporated against the states through the Fourteenth Amendment.¹⁴ The Court concluded, by a 5-4 margin, that the Fourteenth Amendment does incorporate the Second Amendment against the states.¹⁵ In that sense, *McDonald* was very clear, and the Chicago prohibition on handgun ownership at issue in *McDonald* violated this constitutional protection.

However, underneath the surface of this straightforward outcome lies a voting paradox that complicates the question of whether states can restrict the gun rights of non-citizens. The voting paradox arose because the five Justices who voted to incorporate the Second Amendment against the states could not agree on the basis of incorporation. Justice Alito, writing the plurality opinion for himself and three others, found that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment individual gun right.¹⁶ Justice Thomas, who was the fifth vote for incorporation, took a different route. Instead of relying on the Due Process Clause, Justice Thomas found that the Privileges or Immunities Clause incorporated the Second Amendment gun right.¹⁷ Importantly, Justice Alito's opinion rejected the Privileges or Immunities theory,¹⁸ and Justice Thomas's opinion rejected the Due Process theory.¹⁹ Because the two dissenting opinions each rejected both theories,²⁰ a voting paradox arose. The following chart illustrates the paradox:

14. The Second Amendment, like all of the Bill of Rights, directly applies only to the federal government and its territories. See *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833) (concluding that the Bill of Rights applied only to the federal government and not the states). Only through the doctrine of incorporation do the principles of the Second Amendment apply to state and local governments. See generally *McDonald*, 130 S. Ct. at 3028–36 (Alito, J., plurality opinion) (discussing the history of incorporation of the Bill of Rights and theories about the relationship between the Bill of Rights and the Fourteenth Amendment).

15. *McDonald*, 130 S. Ct. at 3026.

16. *Id.* at 3050.

17. *Id.* at 3088 (Thomas, J., concurring in part and concurring in judgment).

18. *Id.* at 3030–31 (Alito, J., plurality opinion).

19. *Id.* at 3062 (Thomas, J., concurring in part and concurring in judgment).

20. *Id.* at 3089 (Stevens, J., dissenting) (agreeing with the plurality that the meaning of the Privileges or Immunities Clause is “not nearly as clear as it would need to be to dislodge 137 years of precedent”); *id.* at 3119 (analyzing incorporation of the right to bear arms on Due Process Clause grounds and asserting that “the Second Amendment does not apply to the States”); *id.* at 3132 (Breyer, J., dissenting) (agreeing with the plurality opinion's refusal to revisit the Privileges or Immunities Clause); *id.* at 3136 (rejecting the Due Process Clause as an avenue for incorporation of the Second Amendment).

Opinion author (number of Justices joining opinion)	Does the Due Process Clause incorporate?	Does the Privileges or Immunities Clause incorporate?	Is the Second Amendment incorporated?
Alito (4)	Yes (4)	No (4)	Yes (4)
Thomas (1)	No (1)	Yes (1)	Yes (1)
Stevens (1)	No (1)	No (1)	No (1)
Breyer (3)	No (3)	No (3)	No (3)
Total	No (5-4)	No (8-1)	Yes (5-4)

The bottom line of the chart illustrates why this case is a voting paradox and not just a run-of-the-mill split opinion. As the tallies indicate, majorities of the Court rejected each of the two theories of incorporation for the Second Amendment gun right. Five Justices rejected incorporation through the Due Process Clause (Justice Thomas and the four dissenters), and eight Justices rejected incorporation through the Privileges or Immunities Clause (Justice Alito and the three Justices who joined him in his plurality opinion along with the four dissenters). Nonetheless, five Justices held that the Second Amendment was incorporated. Thus, the case presents a paradox: the right is incorporated, but majorities of the Court rejected each theory of incorporation.²¹

II. WHEN THE VOTING PARADOX MATTERS

For Otis McDonald, the United States citizen challenging the Chicago handgun ban, the voting paradox led to a favorable outcome. The difference in the two theories was irrelevant, as both theories of incorporation applied the Second Amendment right to him. However, because of a textual difference between the two clauses, the underlying disagreement that led to the voting paradox matters for non-citizens like Eoin Pryal and Christopher Fletcher.

The Due Process Clause of the Fourteenth Amendment states that “[n]o state shall . . . deprive any person of life, liberty, or proper-

21. For a more detailed description of the *McDonald* paradox, see generally Cohen, *supra* note 13.

ty, without due process of law.”²² Although the Bill of Rights technically applies only to the federal government,²³ longstanding Supreme Court precedent has used the Due Process Clause as the vehicle for applying almost all, though not every one, of the rights protected by the Bill of Rights to the states.²⁴

The Privileges or Immunities Clause of the Fourteenth Amendment states that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”²⁵ Very soon after the Fourteenth Amendment was ratified, the Supreme Court limited the Privileges or Immunities Clause’s effect, holding that it protected only a small set of rights that “owe their existence to the Federal government, its National character, its Constitution, or its laws.”²⁶ Scholars have long criticized the Supreme Court for almost completely eviscerating the Privileges or Immunities Clause and have suggested that the Clause was a better way to incorporate the rights guaranteed in the Bill of Rights.²⁷ Although Justice Black supported this idea when he was on the Court,²⁸ it never gained traction with a majority of Justices.²⁹

Nonetheless, the attorneys for McDonald strongly urged the Court to breathe new life into the Privileges or Immunities Clause by incorporating the Second Amendment through this Clause.³⁰ As noted above, Justice Alito’s plurality opinion rejected this plea, relying on the traditional method of incorporation through the Due Process

22. U.S. CONST. amend. XIV, § 1.

23. See *Barron v. Mayor of Baltimore*, 32 U.S. 243, 247 (1833) (explaining that the question of whether the Bill of Rights applied to the states “is, we think, of great importance, but not of much difficulty” and that it did not).

24. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (cataloguing rights from the Bill of Rights that courts have applied to the states under the Fourteenth Amendment and holding in favor of incorporation of the right to a jury trial).

25. U.S. CONST. amend. XIV, § 1.

26. *Slaughter-House Cases*, 83 U.S. 36, 79 (1872).

27. See, e.g., Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL’Y 443, 444 (1996) (explaining that as a matter of ordinary language, and according to its plain meaning at the time of its adoption, the Privileges or Immunities Clause is an obvious mechanism for incorporating the Bill of Rights).

28. *Duncan*, 391 U.S. at 166 (Black, J., concurring) (“I suggest that any reading of ‘privileges or immunities of citizens of the United States’ which excludes the Bill of Rights’ safeguards renders the words of this section of the Fourteenth Amendment meaningless.”).

29. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 728 (6th ed. 2009) (explaining that the Court has generally rendered the Privileges or Immunities Clause superfluous).

30. Brief for Petitioners at 9–65, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

Clause.³¹ However, Justice Thomas agreed with McDonald's attorneys and wrote an opinion rejecting Due Process incorporation and adopting Privileges or Immunities incorporation.³²

Although the result for McDonald was the same regardless of the method of incorporation, there are two important substantive differences between relying on the Due Process Clause and the Privileges or Immunities Clause. First, the rights protected under the Privileges or Immunities Clause may differ from the rights protected under the Due Process Clause. For instance, Justice Thomas was partially motivated to rely on the Privileges or Immunities Clause rather than the Due Process Clause because of his belief that the Due Process Clause had been the basis for *Roe v. Wade*,³³ a decision that, presumably, his understanding of the Privileges or Immunities Clause would not countenance.³⁴ Also, as noted above, when he was on the Court, Justice Black argued that the Privileges or Immunities Clause incorporated all of the Bill of Rights, which the Due Process Clause did not.³⁵ Furthermore, scholars on both ends of the political spectrum see the Privileges or Immunities Clause as possibly protecting new rights, with scholars on the left suggesting that the Clause may protect rights to education, health care, and other liberal concerns, and scholars on the right theorizing that the Clause may protect rights to contract, property, and other economic concerns.³⁶

Second, and more importantly for Eoin Pryal and Christopher Fletcher, the clauses differ in their scope of who is protected. While the Due Process Clause protects "any person," the Privileges or Immunities Clause refers to rights held by "citizens."³⁷ Thus, longstanding precedent has applied the Due Process Clause to non-citizens with a sufficient connection to the United States.³⁸ In contrast, although

31. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (Alito, J., plurality opinion).

32. *Id.* at 3062–88 (Thomas, J., concurring in part and concurring in judgment).

33. 410 U.S. 113 (1973).

34. *See McDonald*, 130 S. Ct. at 3062 (Thomas, J., concurring in part and concurring in judgment) (arguing that the Court has used the Due Process Clause to apply rights against states that are not mentioned in the Constitution "without seriously arguing that the Clause was originally understood to protect such rights" and referring to *Roe v. Wade*, 410 U.S. 113 (1973)).

35. *Compare Duncan*, 391 U.S. at 166 (Black, J., concurring), *with id.* at 148–49 (White, J., majority opinion).

36. *See generally* Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 390–95, 407–14 (2010).

37. U.S. CONST. amend. XIV, § 1.

38. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (referring to the Equal Protection and Due Process Clauses of the Fourteenth Amendments as "universal in their application,

some scholars have suggested that the Privileges or Immunities Clause's reference to "citizens" is merely a description of the type of substantive rights protected and not a reference to who is protected,³⁹ most agree that the word "citizens" is a limitation on who can gain the protection from the Clause.⁴⁰ Thus, Pryal and Fletcher, both lawful permanent residents and not citizens of the United States, would be protected by the Fourteenth Amendment's Due Process Clause but would not be protected by the same Amendment's Privileges or Immunities Clause. If there had been a majority in *McDonald* for one method of incorporation over the other, the answer to Pryal and Fletcher's claim would be clear; however, because of the voting paradox, the resolution is anything but.

III. A PROPOSED RESOLUTION OF THE PARADOX

The voting paradox raises many troubling issues about appellate decision making. Most of the concerns about the voting paradox relate to the process and legitimacy of appellate decision making, such as whether the judges have manipulated the outcome of the case, whether litigants have gamed the system, and whether the result is fair given the apparent resolutions of the sub-issues.⁴¹ However, there is also an issue related to how subsequent courts should apply the paradoxical decision.

The settled Supreme Court rule for handling the precedential value of plurality opinions comes from *Marks v. United States*.⁴² In that case, the Court spelled out the method for determining which part of a fragmented decision is considered precedent for future cases. The

to all persons within the territorial jurisdiction, without regard to any differences of . . . nationality").

39. See Ho, *supra* note 36, at 405–06.

40. See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1222 (1992) ("Can we really say that the Bill's 'rights' and 'freedoms' are truly privileges and immunities of 'citizens of the United States?' Of course we can."); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 341 (2005) ("The more dubious position of the Fourteenth Amendment is that it accepted the preferred position of citizens relative to outsiders, by denying to the latter the privileges and immunities afforded to citizens.").

41. See generally David S. Cohen, *The Precedent-Based Voting Paradox*, 90 B.U. L. REV. 183, 224–31 (2010); David G. Post & Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1069, 1069 (1996); John M. Rogers, "Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals, 49 VAND. L. REV. 997, 999 (1996); Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1045, 1050 (1996).

42. 430 U.S. 188 (1977).

Court explained that the narrowest opinion that supports the outcome of the case is binding precedent for future cases.⁴³ For instance, *Regents of the University of California v. Bakke*⁴⁴ contains fragmented opinions that *Marks* helps resolve. Although a majority of the Court held that the medical school's affirmative action plan was not lawful, there were three separate groupings of Justices.⁴⁵ The four-Justice plurality opinion would have prohibited almost all affirmative action plans.⁴⁶ Justice Powell's concurring opinion took a narrower position, as he found that the medical school's plan was not lawful but would have allowed some affirmative action plans.⁴⁷ The four-Justice dissent would have permitted affirmative action at the medical school and in most instances.⁴⁸ Thus, Justice Powell's concurrence became future binding precedent because it was the narrowest opinion that supported the outcome of the case.⁴⁹

Maxwell Stearns has explained the theoretical basis for this method of determining the controlling opinion when the Court has no clear majority: "If we were to plot each of the published opinions [] along a [single issue] continuum, from broadest [] to narrowst[], we could derive the Court's implicit consensus position."⁵⁰ In *Bakke*, the opinions address one issue, whether affirmative action is lawful, so both the dissent and the plurality would prefer the middle-ground approach taken by Justice Powell to the approach taken by the opposite opinion.

As *McDonald* is a fragmented opinion, *Marks* seems like the appropriate rule to apply to determine what the precedent is for future cases. However, as I have explained elsewhere, *Marks* cannot solve the

43. *Id.* at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (Stewart, J.))). For an excellent, thorough explanation of the *Marks* rule, see Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000).

44. 438 U.S. 265 (1978).

45. *Id.* at 271-72 (Powell, J., judgment of the Court).

46. *Id.* at 416, 421 (Stevens, J., plurality opinion).

47. *Id.* at 314-15 (Powell, J., judgment of the Court).

48. *Id.* at 324-26 (Brennan, J., concurring in the judgment in part and dissenting in part).

49. This discussion of *Bakke* simplifies the opinions for the sake of analysis. For a fuller discussion of the application of *Marks* to *Bakke*, see MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 130-33 (2000).

50. *Id.* at 127.

mystery of what precedent comes from *McDonald*.⁵¹ The opinions in *McDonald* contain multiple issues—whether the Due Process Clause incorporates and whether the Privileges or Immunities Clause incorporates.⁵² Thus, unlike in *Bakke*, there is no natural ordering of opinions from broadest to narrowest. For instance, in one respect, Justice Alito's opinion is broader than Justice Thomas's opinion because, as mentioned above, the Due Process Clause applies to "any person" whereas the Privileges or Immunities Clause applies to "citizens."⁵³ However, in another way, Justice Thomas's opinion is possibly broader than Justice Alito's opinion because the Privileges or Immunities Clause could incorporate all of the Bill of Rights, which the Due Process Clause does not,⁵⁴ and could also include other substantive rights that have not been found under the Due Process Clause, such as economic or social justice rights.⁵⁵ In theory, Justice Thomas's Privileges or Immunities Clause could cover fewer rights than the Due Process Clause, but *Marks* does not leave the controlling opinion analysis to guesswork. "Rather, the answer comes by looking to which rationale is logically entailed by broader reasoning. In *McDonald*, the analysis described in *Marks* is unhelpful because the rationales [address multiple issues]."⁵⁶

Though *Marks* cannot answer the question of which opinion is the general controlling opinion from *McDonald*, a modified form of the *Marks* rule could solve the problem of how to apply a decision involving a voting paradox. Rather than looking for the narrowest opinion that supports the outcome of the case, which is an impossible task in a case involving a voting paradox,⁵⁷ the modified *Marks* rule would look for the narrowest opinion that supports the outcome of the case *with respect to the issue presented in the future case*.⁵⁸

Thus, consider a future case that addresses the question whether the Third Amendment is incorporated, something the Supreme Court has yet to resolve.⁵⁹ As the issue in the case would be what subs-

51. See Cohen, *supra* note 13, at 832–33.

52. See *supra* notes 16–21 and accompanying text.

53. See *supra* notes 37–40 and accompanying text.

54. See, e.g., *Hutardov v. California*, 110 U.S. 516 (1884) (finding that the Fourteenth Amendment did not incorporate the Fifth Amendment's grand jury right).

55. See *supra* notes 33–36 and accompanying text.

56. See Cohen, *supra* note 13, at 833 n.58.

57. See generally STEARNS, *supra* note 49, at 134–35 (discussing situations in which *Marks* does not work).

58. See Rogers, *supra* note 41, at 1008 (describing a similar solution to the *Marks* problem for voting paradoxes).

59. See *McDonald*, 130 S. Ct. at 3035 n.13.

tantive rights are incorporated, Justice Thomas's opinion would most likely be the broadest because the Privileges or Immunities Clause would, presumably, incorporate all rights under the Bill of Rights.⁶⁰ Justice Alito's opinion would be narrower, as the Due Process Clause does not incorporate all rights under the Bill of Rights, only those that are fundamental.⁶¹ Therefore, under the modified *Marks* rule, Justice Alito's opinion would control the outcome in the later case.

The opposite would result on the issue of who is guaranteed the incorporated right. That is exactly the issue in *Pryal and Fletcher*'s case—whether non-citizens are protected from state infringements on the right to gun ownership. The case is not about the content of the gun right, as that was decided in *Heller*. The case is not about whether states are bound to respect the right for citizens, as that was decided in *McDonald*. Rather, the case is precisely about who, beyond citizens, is guaranteed the protection of the incorporated right. On this point, Justice Alito's opinion would be the broadest opinion, as Due Process incorporation guarantees the right to "any person." Justice Thomas's opinion, most likely the broadest opinion with respect to the content of what rights are incorporated, is now the narrower opinion, as the Privileges or Immunities Clause protects a subset of "any person"—"citizens." Therefore, under the modified *Marks* rule, Justice Thomas's opinion would control on this issue. And under that opinion, *Pryal and Fletcher* would not prevail in their claim to strike down Massachusetts' restriction on non-citizen gun possession because the right is not incorporated for non-citizens.

This modified *Marks* rule makes analytic and theoretical sense. Using the issue of non-citizen gun ownership as illustrative, because the dissent rejects incorporation of the gun right in any form, there are four votes against incorporating the right for non-citizens. Adding Justice Thomas's vote, which does not incorporate the right for non-citizens, to those four gives a majority of five votes. The modified *Marks* rule, looking just at the issue presented in this future case, allows us to isolate the votes in this way. It also allows us to view a case containing multiple issues as having just one issue. Viewing the case in that way, the *Marks* rule can address the problem because judicial preferences regarding that one issue can be arrayed from broadest to narrowest.

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

61. See *id.* at 148–49 (majority opinion).

This modified rule is not perfect.⁶² The rule resembles tea-leaf reading, a practice that is unreliable at best. Further, the rule does not necessarily accurately capture the embedded but unknown preferences of the individual Justices. For instance, despite arguing against it in his opinion, Justice Thomas may actually prefer Due Process incorporation for “any person” to no incorporation at all, in which case that option would prevail against the option of no incorporation for non-citizens.⁶³ Finally, given the nature of the paradox, the modified *Marks* rule would always result in a denial of a claim because the dissenting votes would always add with one of the opinions supporting the outcome to create a majority denying the claim.

However, despite these imperfections, the modified *Marks* rule might be the best option for determining how to apply a Supreme Court decision that contains a voting paradox. Lower courts need guidance when addressing cases before them that require resolution, and this proposed rule can give some, as there is otherwise no straightforward way to use a paradoxical decision given current protocols for determining precedential value. Moreover, the modified rule appears to make analytical and theoretical sense while approaching new claims cautiously. After all, without a majority of the Court adopting a position on a particular issue, it makes no sense for a lower court to determine that it is bound by a minority position.

IV. CONCLUDING THOUGHTS

The fragmented opinions in *McDonald* do not help Eoin Pryal and Christopher Fletcher's Second Amendment claim. Contrary to how the district court analyzed *McDonald*,⁶⁴ there is no reasonable way to conclude that the case stands for the proposition that non-citizens' individual gun rights are protected against state infringement. Rather, because of the voting paradox in the case, lower courts cannot apply *McDonald* beyond the specific context of that case: a citizen's claim that a state has infringed on her Second Amendment gun ownership right. Here, I have shown that a modified version of the familiar *Marks* rule, though not without its drawbacks, has analytical and theoretical appeal and, at the very least, gives lower courts something

62. Cf. STEARNS, *supra* note 49, at 140–41 (discussing some of the problems with tallying votes on a per-issue basis when one issue arises independently).

63. Justice Thomas's second preference in this hypothetical scenario would combine with the first preference of Justice Alito's plurality to form a majority over the dissent's preference for no incorporation.

64. Fletcher v. Haas, No. 11-10644-DPW, 2012 WL 1071713, at *8 (D. Mass. Mar. 30, 2012).

to work with. It does not, however, give Pryal or Fletcher, or any other non-citizen, a winning Second Amendment claim.

But all is not lost for non-citizens and gun rights. As some courts have held, the Equal Protection Clause can form the basis of a viable claim,⁶⁵ as might state constitutions.⁶⁶ However, because of the voting paradox in *McDonald*, the incorporated Second Amendment claim does not protect non-citizens such as Eoin Pryal and Christopher Fletcher.

65. *See, e.g.*, *People v. Bounasri*, 915 N.Y.S.2d 921, 922–23 (N.Y. City Ct. 2011).

66. *See, e.g.*, *State v. Ibrahim*, 269 P.3d 292, 297 (Wash. Ct. App. 2011).