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HELLER AS HUBRIS, AND HOW MCDONALD v. CITY OF CHICAGO MAY WELL CHANGE THE CONSTITUTIONAL WORLD AS WE KNOW IT

William G. Merkel*

I. INTRODUCTION

Supreme Court prognostication is famously tricky business. As would-be landmark cases loom on the horizon, doctrinal revolutions are sometimes imagined into existence by the most informed Supreme Court watchers, only to fail to materialize once the Justices speak and their opinions are published. *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Dickerson v. United States* come readily to mind as the most famous recent instances of constitutional revolutions that never were.¹ But *District of Columbia v. Heller*,² in which the Supreme Court, for the first time, announced that the Second Amendment protected a right to weapons possession unconnected to service in the lawfully established militia, did not disappoint those who

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1. *Dickerson v. United States*, 530 U.S. 428 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

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

anticipated momentous doctrinal change. *Heller* was not, as Cass Sunstein³ and others⁴ would have it, an act of humility on the part of Justice Scalia, or a case of judicial minimalism. Indeed, claims by some gun rights enthusiasts that *Heller* did not change, or expand beyond recognition, the doctrine proclaimed sixty years ago in *United States v. Miller*⁵ are hard to accept at face value, given that under *Miller*, it was all but impossible to plead that arms possession of any sort merited judicially enforceable constitutional protection.⁶

Heller changed the constitutional landscape boldly and significantly. The majority decision and the opinion that supports it were, in my view, acts of hubris, and the right they created—I do not say recognized—threatens to become absolutist rather than limited in its application once it is incorporated against the states as it almost certainly will be in *McDonald v. City of Chicago*. Notwithstanding Justice Scalia's famous disclaimers in *Heller*, which were perhaps inserted solely to bring Justice Kennedy on board to create a

3. See Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008).

4. See, e.g., Mark Tushnet, *Permissible Gun Regulations After Heller: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425 (2009); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, ILL. PUB. L. & LEGAL RES. PAPER SERIES, FEB. 9, 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1241655.

5. *United States v. Miller*, 307 U.S. 174 (1939).

6. Justice Scalia endorses this claim in *Heller*, 128 S. Ct. at 2813–16, maintaining that the *Miller* Court's decision to deny Second Amendment protection to an unregistered short-barrel shotgun depended on that weapon's lack of any reasonable relationship to the preservation or efficiency of well regulated militia, rather than the fact that the two individuals possessing the weapon were neither doing militia duty nor active members of the militia. Thus, for Justice Scalia, *Miller* was entirely consistent with affording Second Amendment protection to weapons not actually used in militia service. Because he believed *Miller* had been misapplied by the numerous federal appellate courts that had uniformly rejected Second Amendment challenges over the seven decades prior to the D.C. Circuit's decision in *Parker v. District of Columbia*, 478 F.3d 370 (2007), it was therefore not necessary for Justice Scalia to overturn *Miller* in order to uphold the D.C. Circuit's decision in *Parker* by holding in favor of *Heller* and against the District of Columbia. In dissent, Justice Stevens vigorously disagreed respecting the meaning of *Miller*, *Heller* at 2844–46. Justice Scalia's argument that *Miller* is consistent with constitutional protection for weapons not used in militia service and held by persons not serving in the militia echoes the claims of commentators such as Nelson Lund, *The Second Amendment, Political Liberty, and the Right Self Preservation*, 39 ALA. L. REV. 103, 109 (1987), and Brannon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, LAW & CONTEMP. PROBS., Spring 2002, at 113, 114 (2002).

majority, the case is likely to spawn progeny that substantially undermines the gun control and anti-crime policies now embraced by the democratically elected legislatures and councils of numerous urban and suburban jurisdictions throughout the land.⁷ This process will begin when *McDonald* is decided, likely on the last day of the 2010 term.

Writing for a 5–4 Court over strongly worded and passionate dissents by Justices Breyer and Stevens, Justice Scalia claimed to rely on originalism of the original public meaning stripe as he read a private right to arms into the Second Amendment.⁸ His alleged reliance on originalism paid homage—in name, if not in fact—to the celebrated faith in neutral principles of judging that he most famously articulated in his 1997 manifesto, *A Matter of Interpretation*.⁹ There, he embraced the position that by cleaving to the original public meaning of constitutional text, judges could review and invalidate legislative and executive acts at odds with constitutional precepts based on a wholly objective standard that did not require, in Alexander Hamilton's famous phrase from *The Federalist No. 78*, substituting will for judgment.¹⁰ Some commentators¹¹ and a very small

7. According to Justice Scalia:

Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.”

Heller, 128 S. Ct. at 2816–17 (citations omitted). On Justice Kennedy's posture in *Heller* (reflected in his comments during oral argument), see William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 364–65 (2009).

8. *Heller*, 128 S. Ct. at 2788.

9. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997).

10. Justice Scalia explained his rejection of original intent in favor of original meaning during a speech at Catholic University the year before he published *A Matter of Interpretation*:

The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent,

number of historians¹² have expressed sympathy or even admiration for original public meaning focused jurisprudence. Yet the more common practice among historians expert in the founding and Reconstruction eras is to lampoon the practitioners of original public meaning jurisprudence as historically naïve, politically calculating, and results oriented.¹³ This has certainly been the case respecting historians who have commented on *Heller*, and while Justice Scalia's opinion has its fans in the gun rights advocacy

because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.

Justice Antonin Scalia, Remarks at The Catholic University of America Washington, D.C.: A Theory of Constitution Interpretation (Oct. 18, 1996). On the difference between intent-focused originalism and original public meaning focused originalism, see also Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999). In *The Federalist*, Hamilton wrote:

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

THE FEDERALIST NO. 78, at 487 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

11. See, e.g., Barnett, *supra* note 10, at 613; Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

12. See, e.g., David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009). While highly critical of *Heller's* application of history, Konig accepts, at least for the sake of argument, the legitimacy of original public meaning-focused constitutional interpretation. See *id.*

13. See, e.g., Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625 (2008); Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT L. REV. 103 (2001); The New York Times.com, <http://topics.blogs.nytimes.com/2008/06/26/qa-jack-rakove-on-heller-and-history> (June 26, 2008, 18:55 EST).

community and among libertarian-leaning legal scholars,¹⁴ historians of the founding era have been joined by numerous other public intellectuals in condemning *Heller* as an unprincipled exercise of judicial law-making.¹⁵ Indeed, some of *Heller's* strongest critics are conservative judges and jurists with unimpeachable movement conservative credentials.¹⁶

II. THE HUBRIS OF *HELLER*

My own objections to Justice Scalia's work product in *Heller* focus on the fact that his allegedly history-driven method depends fundamentally on numerous false historical claims. According to Justice Scalia and the *Heller* majority, the Second Amendment's language about the militia and the State is prefatory and non-operative while the plain meaning of the functional text respecting the right to bear arms—as understood at the time of its creation—is that the

14. See, e.g., Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127 (2009); Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

15. Prominent historians of late-eighteenth-century political thought in the United States who have criticized Justice Scalia's opinion as results driven include Jack Rakove and Saul Cornell. See Cornell, *supra* note 13; The New York Times.com, *supra* note 13 (featuring a Q&A with Rakove); see also Merkel, *supra* note 7. Over a dozen leading historians of the late eighteenth century joined an amicus brief in *Heller* highly critical of the private rights reading of the Second Amendment. Brief of Amici Curiae Jack N. Rakove et al. in support of Petitioners at 9–13, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290). The brief was signed by leading eighteenth-century specialists Jack N. Rakove, Fred Anderson, Carol Berkin, Saul Cornell, Paul Finkelman, R. Don Higginbotham, Stanley N. Katz, David Konig, Pauline R. Maier, Peter S. Onuf, Robert E. Shalhope, John Shy, and Alan Taylor, as well as historians whose work focuses on other periods. See *id.* David Konig, a highly respected legal historian with particular expertise in the founding period is willing to take original public meaning at face value as a philosophy of constitutional interpretation, but argues that the Scalia opinion disingenuously imports nineteenth-century concepts into the eighteenth century in order to prop of the desired reading. Konig, *supra* note 12. Academics in other disciplines who have expressed skepticism of the *Heller* majority opinion include law professors Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 215–26 (2008), Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551 (2009), and legal and public policy scholars Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows form a Social Welfare Perspective*, 56 UCLA L. REV. 1041 (2009).

16. See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32–33 (labeling Justice Scalia's opinion "faux originalism").

Constitution protects a personal right to carry commonly held weapons for purposes of confrontation.¹⁷ Having read out of the equation the pivotal introductory language about the militia, Justice Scalia and the majority conclude that the core meaning of the constitutional text is that individuals have the right to armed self-defense, and that any secondary meaning related to performing armed service in the militia is trivial and idiosyncratic.¹⁸ These claims depend on haphazard assumptions rather than historically supportable deductions. In fact, the surviving historical record demonstrates quite conclusively that just the opposite of what Justice Scalia asserts is true. Not only was discussion of the right to bear arms almost invariably linked to discussion of the virtues of the militia and the dangers of standing armies in the late eighteenth century, but the “operative” phrase “bear arms” carried an overwhelmingly martial meaning when the Second Amendment was debated and ratified.¹⁹

As recorded in the Annals of Congress, twelve members of the House of Representatives spoke when the text that became the Second Amendment was under consideration in 1789. All discussed militia- and military-related issues, principally conscientious objection.²⁰ Not one mentioned private self-defense, hunting, or gun collecting.²¹ Senate debates were not transcribed until 1794, when the Senate first opened its proceedings to reporters and the public, but an electronic search of the Library of Congress database (containing all extant official records of the Continental and U.S. Congresses between 1775 and 1791) reveals forty-one additional uses of the phrase “bear arms” or “bearing arms” in contexts other than discussion of the proposed Bill of Rights.²² In all but four instances, the use is unambiguously military and collective.²³

Of course, aficionados of original public meaning have been known to shrug off damning evidence taken from the

17. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

18. See *id.* at 2794.

19. See 1 ANNALS OF CONG. 778–781, 796 (Joseph Gales ed., 1834).

20. See *id.*

21. See *id.*

22. Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUBLIC 585, 587 (2009).

23. See *id.*

deliberations of legislative or constitution-making bodies²⁴ on the grounds that the intent of a collective body is a mysterious and elusive thing, not well calculated to be clearly ascertainable, and not likely to map on to the common sense understandings of the good people out of doors whose act of ratification gave constitutional text binding authority in the first place.²⁵ But when usage in legislative and constitutional chambers contrasts overwhelmingly with the meaning espoused by advocates preaching original public meaning, surely the burden rests on the original public meaning adherents to show that their preferred understanding—while inconsistent with that of the text’s authors—is nonetheless in harmony with that of its ratifiers.

The problem for Justice Scalia is that the record respecting public usage of the phrase “bear arms” overwhelmingly supports a dominant military meaning just as clearly as do the records from legislative chambers. As reported by careful historian Nathan Kozuskanich in the peer-reviewed and highly respected *Journal of the Early Republic*, an electronic search of Charles Evans’s *American Bibliography*, a comprehensive collection of surviving books and pamphlets from 1690 to 1800, yields 210 hits for “bearing arms” and its cognates other than those contained in reprints of the Bill of Rights and other government papers.²⁶ According to Kozuskanich, 202 of these uses (96.2 percent) are unambiguously military and collective, not private and personal.²⁷ The same search on Early American Newspapers, a database of over 120 American newspapers from 1690 to 1800, yields 143 hits, 140 of which (97.9 percent) Kozuskanich describes as clearly related to rendering military service or performing militia duty.²⁸ In ignoring this record (cited by several amici in *Heller*), Justice Scalia elevated what was in the late eighteenth century a decidedly eccentric and outlying meaning to the summit of constitutional orthodoxy.

Not only is Justice Scalia’s *Heller* opinion unsupported by the historical record, it also has been savaged by several

24. See Scalia, *supra* note 10.

25. See *id.*

26. Kozuskanich, *supra* note 22, at 587.

27. See *id.*

28. See *id.*

leading historians of late eighteenth-century American political thought, including Jack Rakove and Saul Cornell.²⁹ To my knowledge, Justice Scalia's interpretation is considered historically accurate by only two PhD historians whose expertise focuses on the late-eighteenth-century United States: Robert Churchill and James Henretta.³⁰ Granted, at least two additional prominent *Heller* enthusiasts, Joyce Lee Malcolm and Robert Cottrol, hold PhDs in history, but Malcolm's expertise is in seventeenth-century England and Cottrol wrote his PhD on black communities in Providence, Rhode Island in the antebellum period before he embarked on a law teaching career.³¹

On the other side, a veritable honor roll of prominent historians of the late-eighteenth-century United States joined other distinguished scholars in an amicus brief in *Heller* highly critical of the private rights reading of the Second Amendment.³² These historians object to the conclusions endorsed in the *Heller* opinion not simply on the grounds that they are irreconcilable with historical facts, but because they depend on a disingenuous interpretation of constitutional language. Indeed, for those who understand that the meaning of language is historically inflected rather than suspended out of time, the opinion's linguistic assumptions and purported conclusions beggar belief.³³ Justice Scalia broke the Second Amendment down into its component parts, arbitrarily labeled the text that did not comport with his predilections a "preface," and the part he found more

29. See *supra* note 11.

30. For informed historical analyses consistent with Justice Scalia's position (neither one of which takes Kozuskanich's empirical work into account), see Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139 (2007), and James A. Henretta, *Collective Responsibilities, Private Arms, and State Regulations: Toward the Original Understanding*, 73 FORDHAM L. REV. 529 (2004).

31. See George Washington University Law School Faculty Homepage for Robert J. Cottrol, <http://www.law.gwu.edu/Faculty/Profile.aspx?id=1721#> (last visited Feb. 11, 2010); George Mason University Law School Homepage for Joyce Malcolm, http://www.law.gmu.edu/faculty/directory/fulltime/malcolm_joyce (last visited Feb. 11, 2010).

32. See *supra* note 15.

33. See Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095 (2009); Konig, *supra* note 12.

congenial “operative.”³⁴ In the process, he relied on mid- and late-nineteenth-century interpretive conventions that allegedly downplay the significance of preambles, and ignored the dominant interpretive paradigms of the late eighteenth century that accord preambles substantial weight.³⁵ He then distilled the language he called operative down into its constituent subparts, and ruled that the essence of the amendment, the right to bear arms, meant the right to carry weapons for confrontation in the late-eighteenth-century United States. He did so even as he ignored the fact that well over ninety percent of surviving recorded uses from the colonial and early national period’s concern service in the military or militia as opposed to private uses of weapons.³⁶

Thus, it is not only the counter-factuality of Justice Scalia’s opinion that strikes historians as wrongheaded: from the perspective of specialists in late-eighteenth-century American political thought, the most disturbing feature of the *Heller* opinion is that it is militantly a-contextual. Deliberate avoidance of context, in turn, depends on tuning out the preamble which, when crafted, highlighted the context and helped crystallize the meaning to late-eighteenth-century eyes and ears. As a theoretical matter, Justice Scalia abhors context because it muddies the waters of the fictive world of objective interpretive simplicity that he finds congenial.³⁷ According to Justice Scalia, Randy Barnett, and other leaders of the original public meaning school, neutral interpretation requires recovering constitutional meanings without recourse to anything that might inject subjective values into the process.³⁸ But in the Second Amendment context, this approach is inherently dishonest to the extent it purports to be based on fidelity to the understanding of the ratifying public, precisely because that public chose to ratify the whole text of the Amendment, not just the part Justice Scalia arbitrarily classified as significant. Indeed, those who voted to ratify the language at issue two hundred and twenty years ago had subjective values, and tried very hard to ensure that those values were written into the language that presented

34. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008).

35. See Cornell, *supra* note 33, at 1106–12; Konig, *supra* note 12, at 1297.

36. See Cornell, *supra* note 33; Konig, *supra* note 12.

37. See Cornell, *supra* note 33; Konig, *supra* note 12.

38. See Barnett, *supra* note 10; Scalia, *supra* note 10.

itself for ratification before they allowed themselves to be satisfied it merited approval.³⁹

As historians of American political thought know all too well, an enormous amount of scholarly effort has gone into rediscovering all the nuanced meanings of political discourse of the revolutionary and founding periods. That effort yielded what historians call the republican synthesis, and aspects of the synthesis were absorbed into law schools some twenty years ago when people like Bruce Ackerman and Cass Sunstein became intrigued with the concept.⁴⁰ But something was lost in translation. To historians, the anti-army trope was always at the center of the republican paradigm. To anyone who spent long years in graduate school reading the works of J.G.A Pocock, Bernard Bailyn, and pre-1992 Gordon Wood,⁴¹ there can be no doubt that the Second Amendment's language signaled to late eighteenth century Americans a desire to be free of the baneful effects of standing armies that had absolutely nothing to do with hunting or shooting burglars.⁴²

It is crucial for Justice Scalia to keep Pocock and

39. On the role of popular politics and opinion in the struggle to create the Bill of Rights, with a particular emphasis on popular opinion's effect on James Madison's drafting, see RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* (2006).

40. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Cass Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988).

41. See e.g. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); *PAMPHLETS OF THE AMERICAN REVOLUTION* (Bernard Bailyn & Jane N. Garrett eds., 1965); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); J.G.A. POCOCK, *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* (6th ed. 1971); *THREE BRITISH REVOLUTIONS: 1641, 1688, 1776*, (J.G.A. Pocock ed., 1980); *THE VARIETIES OF BRITISH POLITICAL THOUGHT, 1500-1800* (J.G.A. Pocock, et al. eds., 1993); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969) [hereinafter WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*]; but see also GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION: HOW A REVOLUTION TRANSFORMED A MONARCHICAL SOCIETY INTO A DEMOCRATIC ONE UNLIKE ANY THAT HAD EVER EXISTED* (1992) [hereinafter WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION*], in which Wood maintained a republican outlook respecting the early revolutionary period, but mapped out a course towards liberal democracy as he discussed the transition from the revolutionary period to the early republic. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 41; WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION*, *supra* note 41.

42. See H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002).

company out of the picture because once they are on the scene, Scalia's interpretive gambit and that of private rights enthusiasts collapses. Hence, Justice Scalia emphasizes that the task of the judge applying original public meaning originalism is to interpret text according to its everyday and ordinary meaning, and not probe into its secret or technical meanings.⁴³ But in this instance at least, this process of reliance on reconstructed simple self-evidence is unfaithful to original understanding. This is because the language of the Second Amendment was actually originally understood by the average, everyday American on the streets or in the fields in 1789–1791 in the anti-army, anti-corruption idiom elucidated by Pocock and company, as the empirical work of Kozuskanich makes abundantly clear.⁴⁴ To be sure, Joyce Appleby, Daniel T. Rogers, James Kloppenberg, T.H. Breen and others have challenged the ascendancy of the republican synthesis.⁴⁵ But even those who argue that the republican case was pressed too far acknowledge its power at its core and question merely its application at the edges, stressing that there are some things it does not explain. And historians skeptical of republicanism's explanatory power for the individualistic Age of Jackson still accept its explanatory power for the Revolutionary period.⁴⁶ To the overwhelming

43. As Justice Scalia writes, "normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008).

44. See Kozuskanich, *supra* note 22.

45. See JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S* (1984); T.H. BREEN, *THE LOCKEAN MOMENT: THE LANGUAGES OF RIGHTS ON THE EVE OF THE AMERICAN REVOLUTION* (2001); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992).

46. The limits of the liberal reaction to republicanism and the validity of the core republican insights even under liberal scrutiny are discussed in Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3 (1988), and Linda K. Kerber, *The Revolutionary Generation: Ideology, Politics and Culture in the Early Republic*, in *THE NEW AMERICAN HISTORY* 31–59 (Eric Foner ed., 2d. ed. 1997), which both suggest that multiple modes of discourse animated American politics in the early nineteenth century, with republicanism predominating up until a contested point that falls sometime after ratification of the Bill of Rights. On this point, see also Konig, *supra* note 12. I developed my own argument respecting the survival of republicanism as the dominant paradigm in American political

majority of professional historians, there remains little doubt that for non-elites and nascent individualists, as well as classically trained planters and urban lawyers, language about militia and bearing arms sounded in terms of civic virtue and not private rights to hunt or shoot burglars when the Bill of Rights was debated and ratified.⁴⁷

Notwithstanding Justice Scalia's rhetoric about neutral principles of judging, to historians of the late eighteenth century (other than Robert Churchill), *Heller* is self-evidently a case of a judicially invented right or, at the very least, a mid-nineteenth-century right transposed backwards in time to the late eighteenth century.⁴⁸ There is, however, a larger issue at stake in *Heller*, and it concerns the legitimacy of judicial invalidation of legislation—not just on grounds of violation of a judicially invented private right to weapons possession, but on any judicially enforced grounds whatsoever. When Chief Justice Marshall asserted the authority of law courts to strike down legislation and executive action in *Marbury v. Madison*⁴⁹ and *McCulloch v. Maryland*,⁵⁰ he was at great pains to explain two things: first that the invalidation amounted (again, in Hamilton's words) to an act of judgment, not of will, and second, that invalidating acts of the democratic branches of federal and state government was not usurpation of the rights of the peoples' representatives, but rather intervention authorized by the higher authority of the Constitutional Convention, in which the people themselves set up a system to delimit the powers of their legislative and executive agents.⁵¹ And perhaps this claim of Marshall's—legitimizing judicial review by reference to the super-majoritarian authority of the ratifying conventions—had some validity in 1803. But Jefferson's famous time-window of nineteen years—the time, using contemporary demographic data, during which half the generation of adults who had ratified a Constitution would pass on—was hard at work. By the time Marshall decided

thought during the ratification period in UVILLER & MERKEL, *supra* note 42, at 248–52.

47. See *supra* notes 14–15 and accompanying text.

48. See Konig, *supra* note 12.

49. *Marbury v. Madison*, 5 U.S. 137 (1803).

50. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

51. *Id.*; *Marbury*, 5 U.S. at 176.

McCulloch, relatively few who had voted to ratify remained, and by the end of the antebellum years, all had passed.⁵²

It is more than counterintuitive that originalists would still rely implicitly on the same supermajoritarian rationale as Marshall to justify judicial review, for the founding generation's capacity to license agents surely does not escape the confines of the Rule Against Perpetuities. To invoke a long-dead principal to veto the acts of agents of the living is not an appeal to democracy or to popular sovereignty. It is an appeal to defunct authority. The question of the basis for judicial review remains analytically distinct from that of ensuring the neutrality of judicial review, should judicial review be found appropriate. While Justice Scalia claims that originalism of the original public meaning stripe can keep subjective values out of the invalidation process, as far as I can tell, he has nothing other than vague hints at ancestor worship (and let's face it, they are not even his ancestors) to offer to justify recourse to the process at all.

With this analytic ground work laid, let us unpack the absurdity of Justice Scalia's interpretive claim in *Heller* in all of its dimensions. His reasoning, in its express and implicit dimensions, closely tracks the following schematic:

It is legitimate for the Supreme Court of the United States to intervene, and by a one-vote majority, strike down a gun control statute enacted in the 1970s by the democratically elected legislature of the District of Columbia because:

- a. 220 years ago, about 500,000 voters, all of them long since dead, ratified a Constitution
- b. That does not expressly establish judicial review in the Supreme Court
- c. But can be creatively read to do so
- d. And was amended within a few years to

52. On Jefferson's theory that constitutions lost their legitimacy once half the generation that had ratified the instrument passed away, see HERBERT E. SLOAN, *PRINCIPLE AND INTEREST: THOMAS JEFFERSON AND THE PROBLEM OF DEBT* 50–85 (1995). Sloan's masterful book draws on many sources, but his focus is on Jefferson's famous letter to Madison of 6 September 1789, in which Jefferson explained that "*the earth belongs in usufruct to the living; the dead have neither powers nor rights over it.*" *Id.* at 50. In the same letter, Jefferson explained his demographic calculations that yielded the nineteen-year time-frame for constitutional legitimacy. *Id.* at 51–53.

contain language

e. That overwhelmingly, at the time it was used, signified nothing whatsoever about private self-defense

f. But as interpreted today by Justice Scalia, clearly had a principally private self-defense significance at the time it was ratified.

In a path-breaking article in the *Yale Law Journal*,⁵³ Jeremy Waldron made several trenchant and controversial points about judicial review generally, and judicial review in the United States in particular. As Waldron remarked, Americans tend to celebrate judicial review as the great national contribution to political science, and perhaps as a consequence, they may overestimate its philosophical significance and—more importantly—fail to realize how profoundly anti-democratic the device is.⁵⁴ This problem is compounded, in Waldron's eyes, because there is neither an empirical nor a principled case that judges are better suited than legislators to take rights seriously and to protect their exercise by minorities.⁵⁵ I disagree with Waldron to the extent that he feels judicial review cannot be justified, but I agree that the burden is on those who would justify it.⁵⁶ And, if originalism is to justify judicial intervention, I would like to hear a far better explanation of how the supermajority of 1788 trumps the majority of today than that which underlies Justice Scalia's reasoning.

On the most basic level, conventional justifications for judicial intervention in the name of originalism make little

53. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006).

54. *Id.* at 1348–49, 1353.

55. *Id.* at 1349, 1405.

56. My sense is that at least in the extended federal republic, there is something to be said for judicial intervention as an added bulwark against abuse of local and regional minorities, for precisely the reasons articulated by Madison in *The Federalist No. 10*. THE FEDERALIST NO. 10 (James Madison). The more diverse and extended the polity, the less likely it becomes that a national majority will agree to reduce any particular minority to second class citizenship. That said, Madison's system celebrated in *The Federalist No. 10* is also rigged against change and in favor of the status quo. *Id.* In this light in particular, Waldron's point that it may be merely a function of historical contingency—rather than the nature of judging—that led the federal judiciary to take African-American rights more seriously than state legislatures during the 1950s and 1960s cannot readily be dismissed.

sense, as aptly illustrated by their application to the *Heller* majority opinion: people we never knew, who are long since dead, made rules to bind us and we must follow them because they said so. (Of course, as a historical matter, it is anything but clear that the framers or ratifiers did say we must follow their rules, but originalists have never been concerned with historical accuracy.) And, in following the rules they made, we must interpret the rules exactly as they intended, because they said so. (Once again, the truth of the matter is that they did not say so, seeing as the Constitution did not come with an owner's manual or an interpretive handbook.) And Justice Scalia is here today to interpret the language exactly as those people 220 years ago would have interpreted it, because he says so. (They certainly never said so, for there are no founding era prophecies that a judge would one day rise to restore the fallen nation to true constitutional understanding.) Having established, at least implicitly, this foundation as a warrant for neutral judging, Justice Scalia then gets the interpretation patently wrong, embracing a meaning that was, at best, a fringe outlier when the text was created. On the whole, it is a farcical exercise.

Fans of originalism or variants of originalism as diverse as Bruce Ackerman⁵⁷ and the tandem of John McGinnis and Michael Rappaport⁵⁸ have sometimes argued—on grounds partly instrumental and partly directed towards legitimizing constitutional principles by reference to popular sovereignty—that the Constitution merits greater deference than simple legislation because the former was ratified by a supermajority of an animated populace rather than by a narrow legislative majority acting on behalf of a largely disengaged electorate.⁵⁹ This premise, too, is perhaps more alluring on casual first impression than on closer inspection. To be sure, the consent of nine out of thirteen states was required to bring the Constitution into operation, but the convention votes in such populous states as Virginia, Massachusetts, and New York were very close, ratification

57. See ACKERMAN, *supra* note 40; BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

58. See John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007).

59. See generally ACKERMAN, *supra* note 57; ACKERMAN, *supra* note 40; McGinnis & Rappaport, *supra* note 58.

failed in North Carolina and Rhode Island, and numerous groups (comprising an overwhelming majority of the population) were excluded from the electoral process and ratification conventions in every state.⁶⁰ The claim that the Constitution was ratified by a supermajority of the people is, therefore, much less clear than the case that it was ratified by a supermajority of the states.

Assuming originalism-inspired judicial review could overcome the democratic deficit problem, there arises the perhaps more fundamental issue of whether the revolutionary generation possesses any moral authority to govern beyond the grave. The Constitution of 1787–1788 and the Bill of Rights of 1789–1791 are at once eloquent and elegant, and over the course of more than two centuries' use they have shown themselves eminently workable, but these documents and the institutions they bequeathed originated in a violent and in many respects unjustifiable revolution. The revolutionary generation led a revolt on behalf of a minority with highly questionable grievances, and in the process, initiated a war that killed 40,000 and drove 100,000 into exile.⁶¹ What principles did the war vindicate, and were the human costs of victory justified by the gravity of the alleged wrongs the revolutionary Americans sought to overcome?

The Declaration of Independence intones incontrovertible and compelling precepts of human rights and good government, but the bill of particulars it recites against the British government do not appear especially persuasive in the fullness of time. There are essentially two classes of

60. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 94–160 (1996), for a trenchant analysis of the ratification process. The role and extent of popular participation is analyzed cogently in SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 81–157 (1999).

61. On casualty figures for the American Revolution see MICHEAL CLODFELTER, *WARFARE AND ARMED CONFLICTS: A STATISTICAL REFERENCE TO CASUALTY AND OTHER FIGURES, 1618–1991*, at 197–99 (1992), and on total numbers of loyalist refugees, see 1 *THE AMERICAN REVOLUTION: AN ENCYCLOPEDIA* 963–64 (Richard L. Blanco & Paul J. Sanborn eds., 1993), which estimates that between a fifth and a third of the white population remained loyal to the Crown and that between eighty and one hundred thousand whites and blacks fled the thirteen colonies to British-controlled territories during or immediately after the War. Substantial numbers of additional American refugees were attracted in the British territory of Lower Canada by government land bounties during the 1780s and 1790s. 1 *THE AMERICAN REVOLUTION*, *supra* note 61, at 972–74.

grievances against the King—one consisting of executive orders to enforce the law against smugglers, tax evaders, and rioters, and the other of repeated failures to veto parliamentary legislation deemed undesirable by colonists who disputed the subject matter jurisdiction of Parliament in North America.⁶² The first class of grievance then merely chides an executive for enforcing the law—perhaps overzealously, perhaps recklessly—and in the process costing loss of property and small-scale loss of life. The colonial response initiated a war that cost more lives by orders of magnitude, perhaps by several thousand fold.⁶³ The second class of complaint, concerning failure to use the negative, is in large measure fanciful because the power of the Crown to veto acts of the Westminster Parliament had long lied in abeyance, and had not been asserted since Queen Anne vetoed the Scottish Militia Bill of 1708 one year after the Union.⁶⁴ This larger class of grievance did not, in truth, concern failure of regal duty, but objection to parliamentary policy. Yet many of the parliamentary acts deemed particularly offensive now appear more enlightened than the colonists' preferred alternatives. These included the "right" to remove Indians more aggressively than Britain thought prudent or just, "security" against the exercise of Catholicism by Quebecois who chose to remain true to the faith and civil law they had inherited, "freedom" from repealed taxes that had confiscated a trivial portion of colonial wealth, and the "duty" of a violent and at times terroristic minority to impose radical political change on a passive majority. In point of fact, these are hardly the well springs of binding moral obligations to descend to the tenth generation and beyond.

To be sure, the fighting done and independence achieved or imposed, depending on one's perspective, the framers did

62. See, e.g., THE DECLARATION OF INDEPENDENCE (U.S. 1776); DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 54–55 (2007).

63. Cf. CLODFELTER, *supra* note 61 (noting that five people died in the "Boston Massacre" and an estimated forty thousand or more died during the Revolutionary War).

64. See, e.g., JOHN ROBERTSON, THE SCOTTISH ENLIGHTENMENT AND THE MILITIA ISSUE 6 (1985); J.R. WESTERN, THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY: THE STORY OF A POLITICAL ISSUE: 1660–1802, at 162 (1965); David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 132 (2004).

propose, and the public did ratify, a well-conceived and workable system of constitutional governance in a federal republic. Mr. Justice Scalia is also quick to laud them for having the foresight to leave us (their successors in interest) free to change⁶⁵ that system—if we can overcome its deep barriers of entrenchment and amend by two-thirds majority in each federal house and with the concurrence of each house of the legislature in at least thirty-eight states; that is, avoid veto of the proposed amendment by a coalition that could be as feeble as a single-vote majority in thirteen of the 101 legislative chambers in the federal republic.⁶⁶ For this, the living generation is supposed to be grateful to Mr. Madison? We can change the rules that govern our lives because a cabal who lived 220 years ago proposed that we might, and a small majority of the voting-eligible population, in a then sparsely populated country embracing less than half the territory, and one hundredth of the people of the present United States said we can—but if, and only if, we can achieve majorities in at least seventy-seven of the 101 legislative chambers in the current federal republic? For this so-called gift, I will not thank Mr. Madison or his almost-chosen generation.⁶⁷ From the perspective of first principles of democracy and constitutionalism, it would seem much more legitimate to assert in pointedly Jeffersonian terms that those now living could change the rules that govern our lives today if a substantial majority of voters now living agree to do so.⁶⁸

65. See *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

66. The Constitution states:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof, as the one or the other Mode of ratification may be proposed by the Congress.

U.S. CONST. art. V. All states but unicameral Nebraska have two chambers; the ninety-nine state chambers plus the federal chambers make 101.

67. The reference is to Lincoln's famous description of the flawed American nation as God's "almost chosen people," which Lincoln employed in his Address to the Senate of New Jersey on February 21, 1861 during the journey to Washington for his first inauguration. See generally ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 575 (Roy P. Basler ed., 2001).

68. On Jefferson's theory that the dead cannot bind the living, see SLOAN,

More concretely, it is not at all clear as a matter of moral duty that the opinions of people living 220 years ago should have anything to do with whether the people of the District of Columbia can decide to ban handguns in our own lifetimes. It is even less clear that Justice Scalia's patently false gloss on what people living 220 years ago meant by enacting the Second Amendment should trump what the democratically elected government of the District of Columbia clearly and self-evidently meant when it duly enacted a statute banning handguns on behalf of an electorate who still favor that legislative choice over the alternative selected for them by the Supreme Court.⁶⁹

III. HOW *MCDONALD* MAY CHANGE THE CONSTITUTIONAL WORLD AS WE KNOW IT

So much for the *Heller* decision, Justice Scalia's handiwork, and the generation of '76. What about *McDonald v. City of Chicago* and incorporation? And what about intergenerational fealty owed to those who fought and died four score and some years after the colonists rebelled? This, to me, is a decidedly different question, and one that might be answered in the affirmative without recourse to nationalism and patriotic fervor to steer one's judgment. On grounds of human rights and collective responsibility alone it should be less problematic that the generation that ratified the Fourteenth Amendment has a greater moral claim on posterity than the revolutionaries of 1776, who merely asserted what Harvard history professor David Armitage calls "settler grievances" against the colonial metropolis.⁷⁰

Nearly four hundred thousand Union soldiers died during the Civil War.⁷¹ And what did they die for? Not for the right

supra note 52.

69. See D.C. CODE § 7-2507.02 (1973); see also District of Columbia Mayor's Office, District Government Reacts to *Heller* Ruling (June 26, 2008), <http://www.dc.gov/mayor/news/release.asp?id=1325&mon=200806>; Paul Duggan & David Nakamura, *D.C. Government Faces a New Reality*, WASH. POST, June 27, 2008, at A09, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/26/AR2008062603988.html>.

70. See ARMITAGE, *supra* note 62, at 135–36 (describing a historical pattern of colonial settlers of European descent growing to resent restrictions and obstacles imposed by the imperial protective power on the exploitation of aboriginal peoples).

71. Union losses in combat combined with deaths from disease while in military or naval service or in enemy captivity during the War totaled over

to be free from Catholicism in Quebec, or easily affordable taxes on tea, or to obtain unhindered access to Indian lands beyond the crest of the Appalachians. They fought to save the Union and, as the Civil War wore on, more and more clearly, they fought to end slavery.⁷² The Reconstruction Congress that assembled when the soldiers' work was done proposed not only recognition of slavery's end, but also state obligations to uphold equal protection, due process, and privileges or immunities as amendments to the Constitution, and the nation ratified the language Congress had drafted.⁷³ Four hundred thousand died for a noble cause, one of unassailable importance even under modern human rights law. The figure four hundred thousand is significant for one, perhaps, less obvious reason as well. It is roughly the number of persons transported from Africa to mainland British North America and the United States—this country's share of the larger toll of ten million survivors of the African slave trade to the Americas over nearly four centuries, an "execrable commerce" that cost many millions more lives in Africa and on the Atlantic journeys to the principal New World slave societies of Brazil, St. Dominique (now Haiti), and Jamaica.⁷⁴

364,000. Over 281,000 more suffered what the Department of Veterans Affairs classifies as non-mortal wounds during the Civil War. See Department of Defense, Principal Wars in which the United States Participated: U.S. Military Serving and Casualties, <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/WCPRINCIPAL.pdf> (last visited Apr. 27, 2010). Many of this number, including amputees, doubtless died prematurely owing to the primitive state of medical care and merciless economic realities during the late nineteenth century. The eminent Civil War historian James McPherson estimates that at least fifteen percent of those wounded during the Civil War later died as a result of injuries sustained on the battlefield. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 347, 854 (1988).

72. See MCPHERSON, *supra* note 71, at 490–510.

73. See U.S. CONST. amends. XIII–XIV. See generally ACKERMAN, *supra* note 57, at 99–252; DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 353–481 (2d ed. 2005).

74. On the total numbers of victims of the Atlantic Slave Trade, and the number of persons transported from Africa to British North America and the United States see PHILIP D. CURTIN, *THE ATLANTIC SLAVE TRADE: A CENSUS* 268 (1969), HUGH THOMAS, *THE SLAVE TRADE: THE HISTORY OF THE ATLANTIC SLAVE TRADE, 1440–1870*, at 805 (1997), and DAVID ELTIS, *THE RISE OF AFRICAN SLAVERY IN THE AMERICAS* 208 (2000). The phrase "execrable commerce" is Jefferson's, from the "original Rough draught" of the Declaration of Independence. 1 *THE PAPERS OF THOMAS JEFFERSON* 426 (Julian P. Boyd et al. eds., 1950). Jefferson's charge that the "CHRISTIAN king of Great Britain. determined to keep open a market where MEN should be bought & sold . . . has prostituted his negative for suppressing every legislative attempt to prohibit or

Perhaps, then, four hundred thousand Union dead represents the first great step in expiating the guilt associated with the forced transport of four hundred thousand Africans in the slave trade to the United States, and certainly the sacrifice of the Grand Army of the Republic was conceived in precisely these terms at the time.⁷⁵ In this light, I am prepared to acknowledge a personal debt to that generation of 1861–1876, utterly unlike the lesser debt owed to the generations of 1776 or 1789.

Accepting a special sense of duty to the Civil War dead and the constitutional amendments they made possible need not require conceding to Akhil Amar or Robert Cottrol that the Fourteenth Amendment privatized the Second Amendment right to arms.⁷⁶ Evidence regarding the meaning of the Privileges or Immunities Clause of 1868—while certainly not clear, one-sided, or unambiguous—does admit of a non-trivial claim that those voting to ratify the Fourteenth Amendment intended to recognize a right to self-defense for freed persons and for other Union sympathizers facing terrorism and violence in the South. It bears emphasis, however, that the suddenly fashionable claim for total incorporation of a very privatistic Bill of Rights is much less strong than some in the academy currently assume.⁷⁷ The

restrict this execrable commerce” was struck before the Continental Congress approved the Declaration. *Id.*

75. Lincoln’s words from the Second Inaugural poignantly reprise the theme of national sin, sacrifice, and redemption:

Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away . . . Yet if God wills that it continue, until all the wealth piled up by the bondman’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so it must be said, “the judgments of the Lord, are true and righteous altogether.”

RICHARD J. CARWARDINE, *LINCOLN* 240–42 (2003); MCPHERSON, *supra* note 71, at 844 (quoting and analyzing Lincoln’s text).

76. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 262 (1998); Robert Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, in *THE BILL OF RIGHTS IN MODERN AMERICA: REVISED AND EXPANDED* 88–107 (David J. Bodenhamer & James W. Ely, Jr. eds., 2d ed. 2008).

77. Apart from Amar who argues for “refined incorporation” of virtually the entire Bill of Rights through the Fourteenth Amendment, AMAR, *supra* note 76, at 215–30, prominent academics to advance a total incorporation model in recent decades include Michael Kent Curtis and Richard L. Aynes, both of whom challenged the then-dominant selective incorporation paradigm, which

Thirty-Ninth Congress included forty-nine Senators and 183 Representatives during the debates on the Fourteenth Amendment.⁷⁸ Unlike the Annals of Congress containing excerpts from the First Congress's debates on the Bill of Rights, the Congressional Globe is complete and comprehensive in its coverage of the debates on Reconstruction. It is highly probative then that of the 232 members seated when the Fourteenth Amendment was under discussion, only one Senator and five Representatives uttered what can be construed as endorsements of a total incorporation theory.⁷⁹ Advocates of total incorporation and champions of a reconstructed, privatized right to arms inevitably cite the speeches of John Bingham, a member of the Joint Committee on Reconstruction, and principal spokesperson for the pending amendment in the House.⁸⁰ In

rested in part on the historical work of Raoul Berger and Charles Fairman cited below. See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57 (1994). As well as the older works by Fairman and Berger, Fourteenth Amendment scholarship skeptical of Justice Black's total incorporation model includes RONALD M. LABBE & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION AND THE FOURTEENTH AMENDMENT* (2003), WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988), Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 *WAKE FOREST L. REV.* 909 (1998), and George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 *OHIO ST. L.J.* 1627 (2007). Fairman and Berger's classic critiques of incorporation are set out in Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 5 (1950), and Forrest McDonald, *Forward to RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 157-66 (2d ed. 1997).

78. See *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005*, at 170-73 (2005) (listing all members of Congress by session and state). Congress debated the Fourteenth Amendment intermittently from January 12, 1866, when John Bingham and Thaddeus Stevens introduced separate motions in the Joint Committee on Reconstruction that formed the earliest drafts of the future Amendment, until June 13, 1866, when the final version of the Amendment was adopted by the House (the Senate had passed the Amendment on June 8) and forwarded to the states for ratification. See 1 BERNARD SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS* 187, 325 (1970). My numbers slightly undercount membership because I counted only once seats occupied by more than one person during the period on account of death or resignation. I did not count non-voting territorial delegates, of whom there were nine in the House of Representatives.

79. See Thomas, *supra* note 77, at 1644.

80. See, e.g., STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876*, at 35, 63, 110, 121,

particular, those favoring total incorporation rely on Bingham's comments of February 28, 1866 when he said an early version of the Fourteenth Amendment he introduced in the House aimed to "secure to the citizens of each State all the privileges and immunities of citizens of the United States in the several States."⁸¹ Earlier that day, in introducing the new draft of the Amendment, Bingham stated with apparent clarity "the proposition . . . is simply . . . to arm the Congress . . . with the power to enforce the bill of rights as it stands in the constitution today. It hath that extent—no more."⁸²

But this is hardly all Bingham said about the pending Fourteenth Amendment. The deeper one delves into the debates, the clearer it becomes that Charles Fairman and Raoul Berger had good reason to characterize Bingham as a haphazard and inconsistent thinker who frequently said one thing only to retract it when pressed to elucidate his most recent remarks.⁸³ At times, Bingham happily endorsed the view that the Privileges or Immunities Clause was intended to do no more than ensure non-discrimination and equal access to whatever civil rights a particular state granted white inhabitants, and it is anything but clear that he was concerned with substantive rights, except insofar as he wished to ensure that any substantive rights applied equally in favor of all adult male citizens.⁸⁴ He could not give a principled and consistent answer regarding the impact of the Fourteenth Amendment on state police powers, or explain whether it created national police powers, how it affected

125–26, 131, 188 (1998); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 346 (1991).

81. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

82. *Id.* at 1088. Bingham proceeded to read the Amendment as it then stood: "The Congress shall have the power to make all laws which shall be necessary and proper to secure to the citizens of the several States, and all persons in the several States, equal protection in the rights of life, liberty, and property." *Id.* It is hardly obvious that Bingham's gloss of this language should apply equally to the final version of Sections One and Five of the Amendment, which uses different language and goes beyond the February formula to divest the states of powers of rights abuse even as it vests the federal government with new powers to secure the same rights that the states could no longer legally violate.

83. See BERGER, *supra* note 77, at 160–65; Fairman, *supra* note 77, at 25–26.

84. See NELSON, *supra* note 77, at 117–18; CONG. GLOBE, *supra* note 81, at 1094–95.

women's rights, and whether it applied only in former Confederate states or throughout the Union.⁸⁵

Citing Bingham does little to demonstrate the sense of the House or of Congress; it does absolutely nothing to prove the plain meaning of Privileges or Immunities at the time they were voted into the Constitution by the people, for despite constant prodding, Bingham proved unable to offer an intelligible definition—whether plain or sophisticated—of Privileges or Immunities. Indeed, on February 28, 1866, shortly after introduction of the new draft of the Amendment, an exchange between Bingham and the experienced lawyer and legal academic Robert Hale, Republican of New York, reached its denouement when Hale labeled Bingham's peroration on natural law and that "justice which is the highest duty of nations as it is the imperishable attribute of the God of nations" a "calm, lucid, and logical vindication of the amendment . . . [by] an able constitutional lawyer."⁸⁶ Hale then proceeded to dismantle the inconsistencies and incongruities in Bingham's emotive appeal in favor of his early version of the Fourteenth Amendment, and mercilessly abused Bingham for not being able to answer consistently whether the amendment created a national police power.⁸⁷ Hale's label "able constitutional lawyer" was, to borrow a phrase from Chief Justice Marshall, "solemn mockery."⁸⁸

Bingham did not get much clearer after the House took up a revised proposal in the spring that ultimately ripened into the familiar and still-contested text of the Fourteenth Amendment's famous Section One. On May 10th, he offered his final explanation of the amendment's meaning:

the words of the Constitution that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several states" include, among other privileges, the right to bear true allegiance to the Constitution and laws of the United States, and to be protected in life, liberty, and property. Next, sir, to the allegiance which we all owe to God our Creator, is the allegiance which we owe to our common country.⁸⁹

85. See CONG. GLOBE, *supra* note 81, at 120.

86. *Id.* at 1094.

87. *Id.*

88. *Id.*; *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

89. CONG. GLOBE, *supra* note 81, at 2542.

Fuzzy as Bingham's sentiments may be from the standpoint of those seeking interpretive guidance, they at least appear to rule out incorporation of Sanford Levinson's insurrectionary Second Amendment⁹⁰ (and James Madison's Establishment Clause⁹¹). That, though, is probably the extent of the wisdom they afford on the question of total incorporation.

As William Nelson has documented, anti-discrimination was the dominant theme that arose during Congressional debates on the Fourteenth Amendment.⁹² The twentieth century's obsessive attentiveness to the doctrinal limits of procedural due process, substantive due process, equal protection, and privileges or immunities was not foreshadowed when the Fourteenth Amendment was under consideration in Congress or by the ratifying public out of doors. Sections Two through Four of the Fourteenth Amendment—which imposed disabilities on former Confederates who could not take the iron-clad oath, diminished the representation of states that disenfranchised on account of race, and disowned the Confederate debt—were of cardinal importance from 1866–1868, even though they are now of purely historical interest. When contemporary legislators and voters turned their attention to the proposed Section One, with its Due Process, Equal Protection, and Privileges or Immunities Clauses, they were far more likely to concern themselves with anti-subordination as an overarching concept than with the specific contours of what later became three separate branches of Fourteenth Amendment jurisprudence. Indeed, it was frequently assumed that those concepts were nontechnical and overlapping, rather than legalistic, rigid, and fully defined. John Bingham was hardly the only member of Congress or of the public unable to offer a completely theorized and consistent account of the meanings of due process, privileges or immunities, or equal protection. As Nelson argues, the narrow—but by no means untenable or even surprising—

90. The argument that the Second Amendment protects a right to use force against an oppressive government was famously argued in Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1990). For a critique of the insurrectionary theory, see UVILLER & MERKEL, *supra* note 42, at 170–78.

91. On the importance of disestablishmentarianism to Madison and Madison's thinking regarding the First Amendment, see LABUNSKI, *supra* note 39, at 223–24.

92. See NELSON, *supra* note 77, at 71–80.

reading the Supreme Court gave Privileges and Immunities in *The Slaughterhouse Cases* initiated a long historical process in which the different components of Section One acquired distinct meanings through judicial interpretation.⁹³ As long as Congress remained committed to Reconstruction, its focus was as much on federal legislative remedies for Southern misdeeds as it was on judicially enforced disabilities. And after Reconstruction ended, it was many years before the Supreme Court's shift in focus from economic to non-economic liberties accelerated the evolution of doctrinally distinct branches of Fourteenth Amendment law. *The Slaughterhouse Cases*,⁹⁴ and even the classic Harlan dissents of the late nineteenth century,⁹⁵ appear to assume a Thirteenth and Fourteenth Amendment working in tandem for general anti-subordination purposes rather than the constitutionalization of particular limits on legislative authority when applied with an even hand.

Michael Kent Curtis,⁹⁶ Richard Aynes,⁹⁷ and others have doubtless succeeded in unsettling a once orthodox understanding that Justice Black⁹⁸ lacked any academically credible case for total incorporation. Yet three particular points Charles Fairman and Raoul Berger relied on in rejecting Black's total incorporation theory remain very difficult for champions of incorporation to counter. If the Privileges or Immunities Clause incorporated the Bill of Rights:

- a. Why did no member of either House object to the Blaine Amendment that would have prohibited state taxes to support religious schools on grounds of redundancy (seeing as, under the incorporation theory, the First Amendment Establishment Clause would have already applied against the states)?⁹⁹

93. *Id.* at 155-74.

94. *The Slaughter-House Cases*, 83 U.S. 36 (1873); *see also* NELSON, *supra* note 77, at 156-74.

95. *See* *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); *Civil Rights Cases*, 109 U.S. 3, 33 (1883) (Harlan, J., dissenting).

96. *See* CURTIS, *supra* note 77.

97. *See* Aynes, *supra* note 77.

98. *See* *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting).

99. *See* Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435, 464 (1981).

b. Why were there no objections on incorporation grounds against the many Reconstruction Era state decisions to replace grand jury indictment with presentment?¹⁰⁰

c. And why did Congress ratify several constitutions submitted by southern states seeking readmission that did not contain all the guarantees of the federal Bill of Rights?¹⁰¹

Aynes concedes that these are (at least superficially) hard charges for the incorporationists to answer, but suggests that the contradiction between incorporation and toleration of state violations of the Federal Bill of Rights would not have been readily apparent during the 1860s and 1870s because most people were not thinking in terms of federal judicial enforcement of the Bill of Rights against the states, and those that were did not know the contents of state law.¹⁰² Aynes's answer was, perhaps, more satisfactory when he first made it nearly twenty years ago, when the dominant paradigm of originalism still focused on the intent of the framers. After all, a secret intent might be an intent all the same, even if it remained a mystery to the public at large. But in this age of Scalia-esque original public understanding, the failure of the general public to appreciate John Bingham's alleged incorporationist intent is telling indeed. If the people out of doors did not know about incorporation and its intended impact on the laws of their states, how could they have understood that their support for ratification amounted to endorsement of the mysterious doctrine?

Even admitting total incorporation (something I am not inclined to do) leaves the question of whether the allegedly incorporated right to arms was understood to vest in individuals in their private capacity, or as members of the militia. Those who stress the former underestimate the importance of black and integrated militia to supporters of Reconstruction who voted in favor of the Fourteenth Amendment. The militia, understood in pointedly civic terms, had not wholly morphed (as Akhil Amar maintains¹⁰³) into the Ku Klux Klan or like organs of terror by the time the

100. See Fairman, *supra* note 77, at 82–85, 97–99, 101, 103–06, 111.

101. See *id.* at 126–32.

102. See Aynes, *supra* note 77, at 94–96.

103. AMAR, *supra* note 76, at 257–67.

Fourteenth Amendment was ratified. The volunteers who comprised the Union Army and the citizens (black and white) who served in the militia units of Reconstruction governments in the South have far stronger militia credentials under terms of the 1792 Militia Act (still on the books in 1866–1868) than the masked night riders who rallied for the outlaw cause of violent restoration of a system of racial subordination. Legal academics and the general public have lost sight of the extent to which the collapse of Reconstruction was a consequence not simply of violence, but of the defeat of black and integrated militia loyal to the Republican Party and Reconstruction by extralegal white militia loyal to the Democratic Party and Redemption.¹⁰⁴ The failure of Reconstruction was not (as Woodrow Wilson, Ulrich Bonnell Phillips, or William Dunning would have it) that it was tried at all, or—as Robert Cottrol or Stephen Halbrook would have it—that it was too statist and insufficiently libertarian.¹⁰⁵ If the federal government had succeeded in preserving the ability of black persons and others loyal to Republican governors to bear arms in the lawfully constituted state militia established by Reconstruction governments, Reconstruction might have endured. Likewise, an integrated police force in the late nineteenth and early twentieth centuries could have altered the face of Jim Crow, or perhaps precluded it altogether.¹⁰⁶

We cannot know the contours of the history that never was. But speaking in the spirit of the hypothetical past

104. See STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* 265–313 (2003); OTIS A. SINGLETARY, *NEGRO MILITIA AND RECONSTRUCTION* (1957).

105. Cf. Robert J. Cottrol, *Introduction* to *GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT* (Robert J. Cottrol ed., 1994); 22 WILLIAM ARCHIBALD DUNNING, *THE AMERICAN NATION: A HISTORY* (1907); HALBROOK, *supra* note 80; ULRICH BONNELL PHILLIPS, *LIFE AND LABOR IN THE OLD SOUTH* (1929); Woodrow Wilson, *The Reconstruction of the Southern States*, 87 *ATLANTIC MONTHLY* 1 (1901).

106. The thesis that Reconstruction's "failure" is that it was not pursued long enough and hard enough by the federal government was famously advanced by ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877* (1988). To whatever extent it may be fair to characterize Reconstruction as a failure rather than a partial success, it is perhaps worth noting that the unquestionably successful reconstructions of Germany and Japan after World War II did not pursue a libertarian course, or rely on private arms to stave off a violent resurgence of the old order and its oppressive ways.

invoked by Amar, Halbrook, and Cottrol, I am skeptical that the counterfactual narrative they prefer would have played itself out in quite the halcyon manner they suppose, had their chosen parameters actually held sway. The ability of individual black persons to arm themselves in a private capacity may have facilitated the defeat or intimidation of the Klan, but it could also have led to a ratcheting up of violence and the coming of a prolonged and highly destructive race war. The perceived likelihood of either scenario depends in large part on one's faith in the deterrent effect of guns balanced against their potential to bring catastrophic harm in the hands of the passionate, the hateful, or the frightened. On those questions, my inclinations are rather different than the ones John Lott brings to bear in his controversial analysis of public safety in our own times.¹⁰⁷ In the debates over the relationship between access to guns and the level of crime, some rely on manipulated figures, others on articles of faith, and some few on solid research and reasoning, but there is no shortage of authorities for either of the mutually exclusive propositions that more guns mean less crime or that more guns mean more death. When it comes to restoring the original understanding of the right to arms during Reconstruction, both camps appear to project backwards into a remade and altered historical landscape their favored vision of the present.

One telling objection to the preferred gun rights vision of a rewritten post-bellum past focuses on the practical unenforceability of any legal right in favor of African-Americans in the old New South that actually existed. Since post-Reconstruction, judicial enforcement of non-economic individual liberties—particularly enforcement in favor of socially disadvantaged groups—did not return to the United States until the 1930s at the earliest, it is not clear what a reconstructed private right to arms could have done for individuals confronting redeemed state governments and white power apparatuses bent on ensuring subordination. The subtext for Halbrook, Cottrol, and company, I suppose, is ultimately not that courts would have protected black access to arms had the Privileges and Immunities Clause been

107. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (2d ed. 2000).

properly enforced to incorporate a private right to guns, but that death in a gun fight is better than subjugation. Cottrol and Halbrook's vision was rejected by black America in the 1870s: confronted with the reality of the end of Reconstruction, millions of black southerners opted for accommodation rather than race-based civil war.¹⁰⁸ Their grandchildren and great-grandchildren lived to see the end of second-class citizenship and the coming of formal equality. Perhaps the accommodationist option was less heroic than that favored by the National Rifle Association (and in this and any other context, the supposition that the NRA cares deeply for the welfare of black America is rather difficult to swallow),¹⁰⁹ but in the longer term, the strategy of accommodation attained results that are arguably more desirable than race war to the point of extirpation.

The Second Amendment, as originally understood, is a poor basis for recognizing a private right to weapons possession. The Privileges or Immunities Clause of 1868 is a more plausible alternative, but one not dictated by original understanding or history. That said, there may well be several viable avenues towards legitimizing judicial intervention to veto legislation or executive action adversely impacting the putative right of individuals to own guns for purposes of private self-defense. These might include popular constitutionalism, the Ninth Amendment, substantive due process, living privileges and immunities as opposed to privileges or immunities frozen in time, or privatistic and defense emanations from various provisions of the Bill of Rights, including the Second Amendment. And perhaps some of these theories more accurately explain the result (if not the opinion) in *Heller* and the likely result in *McDonald* than Justice Scalia's theory of original meaning. I have much sympathy for popular constitutionalism, but at least on the national level, it is not entirely clear what function popular constitutionalism really serves. Legislative choices cannot

108. On the non-violent (but far from passive and acquiescent) settlement that black southerners negotiated with the re-emergent white power structure at the end of Reconstruction, see FONER, *supra* note 106, at 281-91, HAHN, *supra* note 104, at 312-13, and LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY*, 525, 529-32, 537-38 (1980).

109. On the essentially racist appeal of the NRA, see Siegel, *supra* note 15, at 215-26.

long be out of sync with popular constitutional values without the electoral and legislative processes bringing the two back into harmony, leaving little work for judges who might otherwise be inclined to invalidate legislation that does not square with the nation's constitutional sensibilities. On the local or regional legislative level, the question with respect to popular constitutionalism is whether national norms should trump local variations. The new democratic experimentalists, as well as Louis Brandeis, might answer not to the extent local experimentation is snuffed out, but rights enthusiasts of any particular stripe would retort: *experiment with anything you like; just not our rights.*

The American people as a whole feel that there is a right to own guns, and that this right applies against the states. I am confident the Court will not disappoint them. My hope is that it preserves a wide swath for local regulatory options, including substantial restrictions. Brandeis's experimentalism appeals to me.¹¹⁰ If Stephen Halbrook wants to live in a society with easy access to guns, and I want to live in one where access to guns is controlled, with fifty-one principal jurisdictions and innumerable municipalities and counties with independent legislative authority in the United States, there should be room for each of us. Of course, many gun enthusiasts, Mr. Halbrook among them, will say D.C.'s draconian solution was wrongheaded. After all, D.C.—with the toughest gun laws in the country—also has often had the highest murder rate in the country.¹¹¹ But Hawaii has the lowest murder rate, and it also has tough laws.¹¹² New York City has strong gun control laws and a moderate murder rate by American standards, lower than that of many less

110. As Justice Brandeis famously remarked: "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." *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). Brandeis's insight helps inform the contemporary movement for democratic experimentalism, which favors pursuit of multiple market and regulatory approaches to social and economic problems with a view to fostering the emergence of past practice solutions. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 431 (1998).

111. See The Disaster Center, United States Crime Rates 1960–2008, <http://www.disastercenter.com/crime/uscrime.htm>.

112. See Federal Bureau of Investigation, Crime in the United States by State 2007, http://www.fbi.gov/ucr/cius2007/data/table_05.html.

populous states.¹¹³ Japan, England, and Northern Ireland have very few guns at all, and lower murder rates than any American jurisdiction.¹¹⁴ Germany and France have many guns, but lots of restrictions, and lower murder rates than any American jurisdiction.¹¹⁵ There seem to me many rational choices democratic legislatures could make. Let them make them.

What concerns me more is projection,¹¹⁶ that is, the desire of some in gun culture states to impose their values of easy access and wide ownership on people living in states that have opted for tighter controls. In a somewhat unorthodox maneuver in 2009, gun rights enthusiasts in the House of Representatives tried to attach—as a rider on unrelated legislation—a Congressional statement proclaiming that the Article IV Privileges and Immunities Clause protected the ability of anyone who carried a licensed firearm in any state to carry that weapon in any other state, local laws notwithstanding.¹¹⁷ The legislative gambit failed, but gun rights enthusiasts, including Alan Gura, lead counsel in *Heller* and *McDonald*, are eagerly pursuing a judicial alternative. Historically, the beauty of Brandeis-style experimentation in the pluralistic federal republic has been that people are free to move to states where the regulatory regime harmonizes with their preferences. But one litigious person being able to impose the value system of one

113. *See id.*

114. *See* UNITED NATIONS OFFICE ON DRUGS AND CRIME, TENTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS, COVERING THE PERIOD 2005–2006, at 28, 58 (Dec. 19, 2008) [hereinafter UNITED NATIONS OFFICE], available at <http://www.unodc.org/documents/data-and-analysis/CTS10%20homicide.pdf>; World Health Organization, Numbers and Rates of Registered Deaths 2006, <http://apps.who.int/whosis/database/mort/table1.cfm> (follow the “Japan” hyperlink; then follow the “2006” hyperlink).

115. *See id.* at 32; World Health Organization, *supra* note 114.

116. Justice Cardozo famously employed this term in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935), in the context of New York’s attempt to project its authority across state lines by dictating the price of milk to Vermont producers who dealt with New York dealers.

117. *See* Bernie Becker & David M. Herszenhorn, *Gun Rights Expansion Fails in Senate*, N.Y. TIMES, July 23, 2009, at A18, available at http://www.nytimes.com/2009/07/23/us/politics/23guns.html?_r=1&scp=3&sq=thune%20concealed%20carry%20amendment&st=cse; Paul Kane, *Senate Narrowly Defeats Concealed-Carry Measure*, WASH. POST, July 23, 2009, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/22/AR2009072202893.html>.

community on another by relocating is a different matter. For those who value easy access to guns, residency in or relocation to an easy access state is the natural and time honored solution. Asking Justice Scalia to mandate easy access on persons living in jurisdictions where the majority favors tight control is a wholly distinct and thoroughly anti-democratic approach. It begs a result neither dictated by terms of the Second Amendment nor required by the language of the Fourteenth, in either the Due Process or Privileges or Immunities Clauses. It is, in essence, dictatorship by the officious libertarian intermeddler.

Pundits and prognosticators—Cass Sunstein, Mark Tushnet, and Lary Slolum among them—have labeled the *Heller* decision minimalistic, indeed quintessentially minimalistic, in keeping with what some describe as the Roberts Court's commitment to moderation.¹¹⁸ These characterizations of *Heller* invest much capital in Justice Scalia's disclaimer in favor of presumptively valid classes of gun restrictions, allegedly not called into question by the *Heller* holding. But was *Heller*, at its core, really minimalistic? And is the *McDonald* decision likely to be similarly minimalistic in its implications? There is ample reason to fear not, as illustrated by the claims of prominent gun rights advocates Alan Gura, Don B. Kates, Stephen Halbrook, Nelson Lund, and David Kopel.¹¹⁹ As several of these commentators point out, Justice Scalia did not do a particularly good job of explaining how the presumptively valid forms of gun restriction he appeared to endorse in *Heller* square with his more general pronouncement that the Second Amendment, as originally understood, protects a private right to carry weapons for purposes of confrontation.

118. See *supra* notes 3 & 4.

119. See Brief of Petitioner-Appellant, *McDonald v. City of Chicago*, No. 08-1521 (Nov. 16, 2009) (urging that most state gun control legislation violated the Privileges or Immunities Clause as well as the Due Process Clause of the Fourteenth Amendment); Brief for Respondents the National Rifle Association of America, Inc. et. al. in support of Petitioners, *McDonald v. City of Chicago*, No. 08-1521 (Nov. 16, 2009); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343 (2009) (urging that *Heller* conceded too much to the regulators and that the original understanding of the Second Amendment permits virtually no regulation); David B. Kopel, *Amicus Brief in McDonald v. Chicago: On Behalf of the International Law Enforcement Educators and Trainers Association, et al.*, U. DENV. LEGAL STUD. RES. PAPER (Nov. 22, 2009), <http://ssrn.com/abstract=1511425>.

To the extent that conflicts arise between his dicta in favor of presumptively valid restrictions and his grand theory in favor of gun rights, it is presumably the restrictions that will be required to yield. Both in terms of preferred policies and perceptions of constitutional dictates, the claims of the hardcore gun champions named above are radical and absolutistic, and the cadre remains committed to litigating until the Supreme Court announces an iron clad rule that they deem truly worthy of celebration.

Little if any legislation—with the possible exception of prohibitions against gun possession by convicted felons—would likely stand if the Court embraced the positions favored by the NRA's chosen band of advocates in *McDonald*. Once the slave power conspiracy won what ultimately proved its greatest victory in *Dred Scott v. Sandford*,¹²⁰ and the Supreme Court announced that the federal government lacked the power to restrict slavery in federal enclaves, moderates like Abraham Lincoln immediately suspected that a second *Dred Scott* decision was in the offing, and that the Supreme Court harbored designs of currying further favor with the slave power by announcing that the states themselves (including progressive enclaves like Wisconsin and Massachusetts) lacked the capacity to interfere with the rights of slave owners to bring their human property where they would, including to communities inimically opposed to slavery.¹²¹ The notion that the black man had no rights the white man need respect threatened to expand into the proposition that the black man had no rights any white men or communities could respect, even if they wished. This spring, the nation may well stand on the threshold of another second *Dred Scott* decision, which is to say it faces a bolder and more expansive *Heller* decision, holding that no community has any rights the gun wielding libertarian need

120. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

121. The most insightful and damning historical account of the slave power conspiracy as architect of secession is 2 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT: 1854–1861* (2007). The *locus classicus* for Lincoln's anticipation of a second *Dred Scott* decision announcing that states lacked the power to prohibit slavery within their own territories are the debates with Douglas, particularly the fifth debate at Knox College in Galesburg on October 7, 1858. On the northern public's reaction to *Dred Scott*, see generally MCPHERSON, *supra* note 71, at 176–81, and DAVID M. POTTER, *THE IMPENDING CRISIS: 1848–1861*, at 267–96 (Don E. Fehrenbacher ed., 1976).

heed. If Alan Gura gets all he wants from the high court, a five-justice majority will announce precisely this doctrine on the last day of the term in June.

Alan Gura's view, however, is by no means the most radical gun rights view harbored by mainstream, influential thinkers in the gun power conspiracy. In my capacity as a skeptical outsider to the gun rights movement, the most startling testimony regarding the unlimited right to arms I have heard was uttered by Sandra Froman, one time Chief Counsel and President of the NRA, speaking a mere fifteen miles from NRA headquarters in that *sanctum sanctorum* of the recast and reanimated Second Amendment, George Mason University School of Law in Arlington, Virginia.¹²² On October 17, 2007, when *Heller* was docketed, but not yet argued in the Supreme Court, I was among the featured speakers at a Second Amendment conference at Mason, home to some of the loudest and proudest NRA spokespersons in the legal academy.¹²³ During the late afternoon panel discussion, a question (perhaps rhetorical) was raised concerning how many persons gathered in the lecture theatre would feel safer if every person in the arena were armed. One member of the audience (I believe David Kopel, perhaps scheduled to appear on a panel later that evening) immediately raised his hand to volunteer an affirmative answer. But it was another member of the audience, soon identified as Sandra Froman, who offered the most elaborate

122. For a biographical sketch of Froman, see Kevin Cool, *Top Gun*, STAN. MAG., Mar./Apr. 2006, <http://www.stanfordalumni.org/news/magazine/2006/marapr/features/froman.html>.

123. See William Merkel, Remarks at the George Mason University Civil Rights Law Journal Symposium: The Second Amendment and Twenty-First Century Jurisprudence (Oct. 17, 2007). The transcript can be viewed at the George Mason University website. George Mason University Civil Rights Law Journal, Symposium 2007, http://www.law.gmu.edu/gmucrj/symposium_2007.php. It would be difficult to conceive of an institution more closely wedded to gun rights than George Mason Law School. The NRA itself endowed the grotesquely named Patrick Henry Professorship of Constitutional Law and the Second Amendment held by Professor Nelson Lund, and Robert Levy, a George Mason alumnus who was the leading mover behind the *Heller* case, has twice made million dollar gifts to his alma mater. See *NRA Endows Chair at George Mason U. Law School*, CHRON. HIGHER EDUC., Mar. 14, 2003, <http://chronicle.com/article/NRA-Endows-Chair-at-George-/19835>; *George Mason Law School Receives a Gift of \$1 Million from Robert A. Levy*, GEO. MASON U. SCH. L., June 24, 2006, <http://www.law.gmu.edu/news/2006/473>; see also John Gibeaut, *A Shot at the Second Amendment*, A.B.A. J., Nov. 2007, at 50.

response. There seemed to be an implicit sense in the room that the individual members of an armed populace would need some sort of queue to know precisely when to intervene with lethal force to forestall a crazed, violent person doing something drastic, and in the aftermath of Virginia Tech, all sensed that on academic premises this matter was of immediate, pragmatic import. Before anyone could formulate this question concretely, Froman was ready with the announcement that though she no longer spoke for the NRA, she was certain a pamphlet and an educational program could be made available to teach right-thinking people the signs to look for among those with itchy triggers, so that good citizens would be prepared to intervene preemptively before the violence prone should choose to shoot. For the right-leaning, Froman anticipated the best of all possible worlds: a universally armed community living pursuant to a privatized Bush Doctrine, in which the decent folk would know not only that they should and could shoot first, but precisely when it was most appropriate. Froman did not descend into particulars at the time, but those with active imaginations could doubtless quickly conjure some of the characteristics and criteria that would make a person more like Iran than Britain on the scale of preemption worthy dangerousness.¹²⁴

President Froman's invitation to regress into the Hobbesian state of nature actually attempts to bring about one of the outcomes that the Fourteenth Amendment—and the Civil Rights Act for which it provided permanent constitutional footing—aimed to preclude. The right of a citizen to governmental protection, and the duty of citizens to

124. The controversial Bush Doctrine was announced as the National Security Strategy of the United States of America in September 2002. As the White House explained:

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if the uncertainty remains as to the time and place of the enemies attack.

MARY ELLEN O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* 293 (2d ed. 2009). The Bush Doctrine served as a principal internal justification in the administration's choice to attack Iraq in 2003 and as the basis for failed efforts to rally domestic and international support for preemptive strikes against Iran. See W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006).

show allegiance to the government that affords them such protection, were bedrock principles asserted by members of the Thirty-Ninth Congress during debates on the Civil Rights Act and the constitutional amendment that it spawned.¹²⁵ Those members spanned the entire political spectrum of persons loyal to the Union. The reciprocal individual right to protection and governmental duty to protect were founded on natural law, and in their domestic dimensions had clear analogues and parallels to the international law concept of diplomatic protection enabling and binding states to protect the rights of their citizens against violation by foreign sovereigns.¹²⁶ Democratic Senator Reverdy Johnson of Maryland, Senator Lyman Trumbull of Illinois (multiple and changing party affiliations), Republican U.S. Representative John Marshall Broomall of Pennsylvania, Republican Representative Samuel Shellabarger of Ohio, Republican Representative James Wilson of Iowa, and Republican U.S. Representative Martin Russell Thayer of Pennsylvania all made clear during debates on the Civil Rights Act that the reciprocal concepts of protection and duty were central to the constitutional compact and central to citizenship. Indeed, Hobbes himself had famously made the same point after the English Civil War, urging disenchanted royalists to make their peace with the Republican government as he himself had done precisely because it offered tranquility and stability.¹²⁷ Hobbes was no fan of the state of nature, and having lived through a long succession of brutal wars in England and on the continent, he preferred peace to anarchy.¹²⁸ Two centuries later, Lyman Trumbull's vision was even less equivocal:

How is it that every person born in these United States owes allegiance to the Government? Everything the he is or had, his property and his life, may be taken by the Government of the United States in its defense . . . and can it be that . . . we have got a Government which is all-

125. See FARBER & SHERRY, *supra* note 73, at 423–54.

126. On diplomatic protection, see ANTONIO CASSESE, *INTERNATIONAL LAW* 143–44, 231–32, 366–68 (2d ed. 2005).

127. See THOMAS HOBBS, *LEVIATHAN* 147–48, 469–70 (J.C.A. Gaskin ed., 1996). On the political context in which Hobbes appealed to royalists to avow allegiance to the Commonwealth, see QUENTIN SKINNER, *HOBBS AND REPUBLICAN LIBERTY* 178–82, 198–208 (2008).

128. See SKINNER, *supra* note 127, at 178–82, 198–208.

powerful to command the obedience of a citizen, but has no power to afford him protection? Is that all this boasted American citizenship amounts to? . . . Sir, it cannot be. Such is not the meaning of our Constitution. Such is not the meaning of American citizenship. The Government, which would go to war to protect its meanest—I will not say citizen—inhabitant . . . in any foreign land whose rights were unjustly encroached upon, has certainly some power to protect its own citizens in their own country. Allegiance and protection are reciprocal rights.¹²⁹

Trumbull makes patent what is so enticing to Froman: the claim that the government cannot protect me is in fact a claim that I have no duty to the government. In this light, Froman's violence-inflected vision of the good life is perhaps not all that surprising. The psycho-drama of allegiance renounced generally simmers not far below the smooth surface of the gun rights movement's rhetorical invocations of the spirit of '76.

IV. CONCLUSION

Notwithstanding the craziness of the radical gun rights preference for private violence over public security, Second Amendment enthusiasts are in the majority in the country, perhaps even in a super-majority. Why do they fear the democratic process and local outcomes that do not ape their preferences? Why do they, like the slave-power conspirators of old, demand constitutional protection for anti-social behavior that is under no threat from national popular majorities? Why do they demand, like the slave-power conspirators of old, that dissent from their absolutistic vision be read out of the constitutional compact? Why do they insist on perpetualism and absolutism when it comes to the right to guns? Why does the Froman vision have appeal, and why has the NRA—which in theory does not object to enforcement of existing reasonable regulations—never encountered a regulation that its members accept as reasonable?

I can think of at least two answers, each of which is more than a little troubling. One explanation for the gun community's absolutist approach is captured best in Stephen Halbrook's mono-causal and mono-maniacal *The Founder's*

129. CONG. GLOBE, *supra* note 81, at 1757.

Second Amendment: The Origins of the Right to Keep and Bear Arms, in which the author sets out his secular case that a private right to gun possession is the summa bona of American Revolutionary eschatology.¹³⁰ For Halbrook, the Revolutionary War was fought to vindicate the right to arms. The revolutionaries prevailed without mention of foreign or professional assistance because of that celebrated right to arms, and then the Constitution was authored to vindicate the right to arms that had been won by the Revolution. Later, the Bill of Rights, with its capstone Second Amendment, was added to remove threats to the right to arms that the Constitution created. There are other, lesser elements to the Bill of Rights, and they merit some mention. First Amendment freedoms, for instance, have a certain utility, because they secure the right to discuss the right to arms. (Halbrook stops short of mentioning the right to worship guns free of governmental interference.) Likewise, the Fourth Amendment doubly protects the right to arms against unreasonable search and seizure. And the Sixth Amendment ensures that one can have counsel in federal court to vindicate the right to arms. In sum, guns cease in Halbrook's analysis to be tools, but become the end all and be all of earthly existence. In a near inversion of Immanuel Kant's celebrated categorical imperative that no person is a mere means to a greater end, people and constitutionalism in Halbrook's account threaten to become bare instruments to protect guns.¹³¹

A second rather more disturbing and impious answer to the question of why the NRA has launched the most absolutistic, driven, paranoid, and obsessive campaign to warp the constitutional compact since the days of the slave power sounds in terms of false religion, ancestor worship, and idolatry. Under the gun enthusiast's post-modern version of covenant theology, the Founding Fathers (with Constitution-hater Patrick Henry taking front and center, and Constitution-drafter James Madison fading into the distance)¹³² were a prophetic and indeed sainted generation,

130. STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008).

131. See William G. Merkel, 114 *AM. HIST. REV.* 1074 (2009) (reviewing HALBROOK, *supra* note 130).

132. On Patrick Henry's intense but unsuccessful campaign to sabotage the

who received a divine dispensation to cherish, worship, and employ the gun in pursuit of a heightened state of libertarian piety, from which later lesser generations have tragically fallen away. As in the Old Testament's cycles of declension—during which the people of God took to serving Baal and lesser false foreign gods in between times of prophetic revelation and reaffirmation of God's Covenant with Israel—the people of America have taken to serving liberalism, statism, socialism, and lesser non-gun related rights in these late degenerate times. The mission of the gun rights movement is to restore the nation to its true foundations, and to cast off the blasphemous and faddish perversions of the Warren, Burger, and insufficiently righteous Rehnquist Courts in favor of true gun-focused and godly principles. This sacred duty commands obedience; in the eyes of the true believers, that obedience is a consequence of historical fidelity and Christian faith. Indeed, in the eyes of the most ardent believers, restoration of the lost gun-centered Constitution comes close to being a necessary precondition for the Rapture. Sadly for the rest of us, these modern day Pharisees are quite blind to the absurdity of their fervent vision for which neither Holy Scripture, late-eighteenth-century political thought, or Reconstruction Era politics provide firm support.¹³³

More sadly still, barring unforeseen and nearly unforeseeable momentary spasms of insight among one of the five members of the *Heller* majority, the United States may well stand mere weeks away from a judicial fiat endorsing a new constitutional dispensation of universal and unfettered access to arms utterly unlike any secular or pious

Constitution and prevent its ratification see LABUNSKI, *supra* note 39, at 27–28.

133. I was somewhat surprised to learn that the editors of the Santa Clara Law Review read this paragraph as an unwarranted attack on Christianity. The author is a moderate Episcopalian, with a fondness for traditional liturgy and progressive sermonizing. Rather than casting aspersions on believers, I intended to draw an implicit contrast between the pacific message of the Beatitudes and the violence inflected secular rhetoric of the contemporary American right. That rhetoric frequently elides untenable originalist assumptions about American history with idolatrous ancestor worship and often takes on Christian cadences and pretends to make a Christian appeal. To point out these characteristics of one of the dominant tropes of our times is hardly to disparage Christian beliefs. My argument was developed in more detail in William G. Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 STAN. L. & POL'Y REV. 671, 696–98 (2006).

understanding that animated the national mainstream during the age of independence or during that most Godly epoch of anti-slavery and national constitutional regeneration that produced the Fourteenth Amendment. The nation lives in troubled times, and the triumph of the constitutional freak show looms near at hand. May it prove as fleeting as the slave power conspiracy's ascendancy after *Dred Scott*, and may its demise come much more gently and with precious little loss of life.
