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McDonald v. Chicago, Self-Defense, the Right to Bear Arms, and the Future

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MCDONALD V. CHICAGO, SELF-DEFENSE, THE RIGHT TO BEAR ARMS, AND THE FUTURE

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The Supreme Court's five to four decision applying the Second Amendment to the states through the Fourteenth Amendment has produced paradoxical reactions.[1] *The New York Times* calls the ruling

* John F. Seiberling Chair of Law and Director of the University of Akron Constitutional Law Center, established by the U.S. Congress in 1987. *See* http://www.uakron.edu/law/constitutionallaw/. Comments and questions may be sent to raynes@uakron.edu. For a general analysis of applying the Fourteenth Amendment to the states, see Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57 (1993) [hereinafter Aynes, *On Misreading John Bingham*]. For my prior work on the confluence between the Second and Fourteenth amendment, see Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, especially 1319-20 (2009), available at http://www.pennjcl.com/issues/11/11.5/11-5%20Aynes.pdf [hereinafter Aynes, *Ink Blot or Not*] and Richard L. Aynes, McDonald v. Chicago, *the Fourteenth Amendment, the Right to Bear Arms and the Right of Self-Defense*, 2010 CARDOZO L. REV. DE NOVO 170 (2010), available at http://www.cardozolawreview.com/index.php?option=com_content&view=article&id=143:aynes20101170&catid=20:firearmsinc&Itemid=20 [hereinafter Aynes, *The Right to Bear Arms and the Right of Self-Defense*]. This symposium was also reproduced in a limited print edition.

1. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

"an enormous symbolic victory for supporters of gun rights" and the *Washington Post* says it may be "more symbolic than substantive."[2]

On the one hand, it is the first time the Court has enforced a new provision of the Bill of Rights against the states in forty years.[3] On the balance scale between the views of Justice Black and those of Justice Frankfurter, it puts another weight on Black's side of the scales.[4]

On the other hand, it has been observed that *McDonald* "did come out . . . as predicted . . . ."[5] As I have observed before,[6] *McDonald's* end

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2. Debra Cassens Weiss, *Supreme Court Extends Second Amendment to the States, Casts Doubt on Chicago Handgun Ban*, ABA JOURNAL (June 28, 2010, 9:14 AM), http://www.abajournal.com/news/article/supreme_court_extends_second_amendment_to_the_states/. Douglas Berman wrote in a blog for *Sentencing Law and Policy* that McDonald v. Chicago was "as big as it gets." *A Gun Case or Pandora's Box?: Ruling Could Trigger the Unhinging of American Culture*, (Dec. 11, 2009), http://sentencing.typepad.com/sentencing_law_and_policy/2009/12/a-gun-case-or-pandoras-box-ruling-could-trigger-the-unhinging-of-american-culture.html (citing *A gun case or Pandora's box?*, WASH. TIMES (Dec. 11, 2009, 5:45 AM), http://www.washingtontimes.com/news/2009/dec/11/a-gun-case-or-pandoras-box-55900250/.

3. Benton v. Maryland, 395 U.S. 784 (1969) (no double jeopardy).

4. *See* Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring) *and id*. at 68 (Black, J. dissenting). .

5. Michael Dreeben, *Supreme Court Review*, THE NAT'L L.J. 22 (Aug. 2, 2010). *See also*, Scott Piepho, *Privileges and Immunities in* McDonald v. Chicago, AKRON LEGAL NEWS 1 (July 21, 2010) ("The decision itself seemed pretty much fore-ordained . . . .") *and* Pat Oliphant, Editorial, *Closing Arguments*, AKRON BEACON J., June 30, 2010, at A6 ("The ruling hardly surprises, following the logic of the earlier decision."). While some believed that *McDonald* might be the "blockbuster" of the 2009 Term, in retrospect, it was argued that the Court's decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), "dominated the term." *See* Sri Srinivasan, *Supreme Court Review*, *supra*. In a review of the whole term, *Law Week* concluded that *Citizens United* and *McDonald v. Chicago* "hogg[ed] the term." 79 U.S.L.W. 3033 (July 2010). Randy Barnett indicated that "most . . . observers believed [McDonald] would succeed" in his challenge against the Chicago statutes. Randy Barnett, *The Differences Between McDonald and the Challenge to Economic Mandates*, THE VOLOKH CONSPIRACY BLOG (Oct. 17, 2010, 2:11 PM), http://volokh.com/2010/10/17/the-differences-between-mcdonald-and-the-challenge-to-economic-mandates [hereinafter Barnett, *The Differences Between McDonald and the Challenge to Economic Mandates*]. Certainly, it was a "landmark ruling." David M. O'Brien, SUPREME COURT WATCH 2010: HIGHLIGHTS OF THE 2007, 2008, AND 2009 TERMS AND PREVIEW OF THE 2010 TERM, 77 (2011). Of course it was not always so. Besides opposition from Justice Frankfurter and his acolytes, some prominent scholars thought that intent of the Fourteenth Amendment was to the contrary. *E.g.*, Daniel A. Farber, *Disarmed By Time: The Second Amendment and the Failure of Originalism*, 76 CHI-KENT L. REV. 167, 169 & 194 n.8 (2000) ("Regardless of how the framers of the Fourteenth Amendment viewed the right to bear arms, it seems doubtful that it should apply to the states.").

6. Richard Aynes, McDonald v. Chicago*: The Blockbuster of the 2009 Term?*, SCOTUS BLOG (June 29, 2010, 2:19 PM), www.scotusblog.com/2010/06/mcdonald-v-chicago-the-blockbuster-of-the-2009-term/, and cross-posted *at* AKRON LAW CAFÉ BLOG (July 1, 2010), http://www.ohioverticals.com/blogs/akron_law_cafe/2010/07/mcdonald-v-chicago-the-blockbuster-of-the-2009-term/ [hereinafter Aynes, *The Blockbuster of the 2009 Term?*]. The history of the Second Amendment is less than clear. At common law and since at least the Assize of Arms

result merely reigns in the City of Chicago as a renegade and outlier,[7] just as *Heller* reined in the renegade and outlier Washington, D.C.[8] To the extent we can judge the effect of *Heller* and *McDonald*, they are consistent with all fifty states' constitutional provisions and most of the existing state laws.[9] Furthermore, they are consistent with what polls tell us is the view of the American people: some people should have the right to have guns, but there should be limitations.[10] Moreover, David Koppel reports that "[i]n every state where the people have had the opportunity to vote directly, they have endorsed the right to arms by landslide margins."[11]

Alan Gura, the attorney who successfully argued both *Heller* and *McDonald*, surely has "it right" when he implicitly declared victory (it was a victory—he won both cases) and put the decision in a positive light:

> Critically, Justice Thomas's [concurring] opinion provides an excellent platform for restoring the Fourteenth Amendment's original public meaning. That today's result has a strong historical basis may have increased the plurality's comfort level in utilizing substantive due process, but Justice Thomas demonstrated that concern for the constitutional text's original public meaning was actually necessary to achieve the result. In 1868, the public meaning of the Fourteenth Amendment's Privileges or Immunities Clause commanded the

(1181), all men of the tithing were required to have and to bear arms to respond to the "hue and cry." JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW 27 (2009). On the other hand, the lack of personal weapons by private individuals was exemplified by the fact that during Confederate General John Hunt Morgan's raid through Indiana and Ohio, while many men showed up to defend those states with their own weapons, others said to be in the militia were not able to be used because of a lack of arms. A COMPLETE ACCOUNT OF THE JOHN MORGAN RAID THROUGH KENTUCKY, INDIANA AND OHIO, IN JULY 1803 26 (n.p., Flora E. Simmons, publisher 1868) (several hundred militiamen were "on hand, but without arms . . . ."). At the same time, at common law, both tort and criminal law recognize the right of an individual to act in self-defense, with or without arms.

7. The only known cities to have the type of restrictive gun law that existed in Chicago and Washington, D.C., beside those two cities, are five Chicago suburbs. KOPEL, *infra* note 8, at 132.

8. David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 122 (2010).

9. What Professor Adam Winkler wrote of *Heller* is equally applicable to *McDonald*. Dennis A. Henigan, Book Review, 60 J. LEGAL EDUC. 321, 332 (2010) (reviewing MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS (2007) ("[T]he *Heller* case is a landmark decision that has not changed very much at all.")).

10. Kopel, *supra* note 8, at 117 n.68.

11. *Id.* at 122.

> support of a ratifying nation. After today, no one should doubt that it will yet command a majority of the Supreme Court.[12]

I. CHANGES

Though I am suggesting the changes will be small, there will be changes.[13] Both *Heller* and *McDonald* have demonstrated to all that the political leaders of states and the District of Columbia do not have "unfettered" leave to restrict the ownership of guns any more than they have "unfettered" leave to restrict the right of free speech. There are limits and people drafting legislation to regulate gun ownership will have to follow those limitations.

McDonald affects not just the Chicago case, but also others that were pending at the time. One of the most prominent of these is the Ninth Circuit case in *Nordyke v. King*,[14] where the court held the Fourteen Amendment, through its Due Process Clause, required the enforcement of the Second Amendment against the states; but in that particular case the county ordinance did not violate those rights. The panel opinion in *Nordyke* was vacated and remanded for reconsideration by the trial court in view of *McDonald*.[15]

II. JUSTICE ALITO'S OPINION

In many ways, the majority opinion authored by Justice Alito is a very modest one. The Brief of the Respondent NRA[16] was powerful in outlining the way in which *Heller* foreshadowed the result to be taken in *McDonald*.[17] Indeed, even though some complained that *McDonald* had

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12. Alan Gura, McDonald—*A Victory for the Second Amendment*, SCOTUS BLOG (June 29, 2010, 11:08 AM), http://www.scotusblog.com/2010/06/mcdonald-a-victory-for-the-the-second-amendment/.

13. David Cohen and Maxwell Stearns have indicated that *Heller* and *McDonald* "will dramatically alter legal policy in *vital urban centers*." David S. Cohen & Maxwell Stearns, McDonald *Typifies Need for Consensus*, THE NAT'L L.J. 35 (July 12, 2010) http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463394661&slreturn=1&hbxlogin=1 (emphasis added). *But see supra* notes 5, 6, 12 & 15 for a contrary view as to its effects upon the nation as a whole.

14. 563 F. 3rd 439 (9th Cir. 2010) (judgment vacated). *See also* Maloney v. Ricea, 5545 F. 3d 56, 77 U.S.L.W. 1473(2d Cir. 2009) (judgment vacated).

15. Nordyke v. King, 575 F.3d 890 (9th Cir. 2009).

16. Under Supreme Court of the United States Rule 12, the NRA, a party below whose petition for certiorari was not granted, was treated as a respondent. *See* Sup. Ct. R. 12.

17. Even historian Saul Cornell, who opposed both *Heller* and *McDonald*, concluded "even if" Chicago's ordinance were to be declared unconstitutional, "nothing else will likely change." Saul Cornell, *A Possible Win for both Sides* (Mar. 2, 2010, 7:17 PM) http://roomfordebate.blogs.nytimes.com/2010/03/02/states-rights-vs-gun-rights/?hp.

a surprising result,[18] Justice Alito's opinion states that on the question of enforcing the Second Amendment against the states, "our decision in *Heller* points unmistakably to the answer."[19]

One part of the conservatism of the opinion is utilizing the Due Process Clause rather than the more historically accurate Privileges and Immunities Clause. Though, personally, I would have preferred Justice Thomas's "more straightforward path,"[20] one can understand a desire to use established approaches. As Justice Scalia said, in addressing a slightly different aspect of the case: "This case does not require me to consider [his misgivings over the concept of substantive due process], since straightforward application of settled doctrine suffices to decide it."[21] Justice Thomas made the same point in his concurring opinion. The plurality opinion by Justice Alito used "what is now a well-settled test . . ." in determining that the Due Process Clause would be a vehicle through which the Court would apply the Second Amendment against the states.[22]

Yet, Justice Alito's opinion is not perfect. Most notably is the misunderstanding of the *Slaughter-House Cases*.[23] In its famous five to four decision in the *Slaughter-House Cases*,[24] a bare majority of the Supreme Court, in dicta, gave a very narrow reading to the Fourteenth Amendment.[25] The issue before the Court was whether butchers could be required to use a state-provided slaughter-house as a health measure to prevent contamination of the drinking water of the City of New Orleans. There is language in Justice Miller's opinion itself suggesting that his discussion of the Privileges and Immunities Clause is dicta.[26] In the opening portion of his opinion, Justice Miller wrote: "[W]e now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to

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18. *See* Patrick Charles, *The Second Amendment Standard of Review After* McDonald*: "Historical Guideposts" and the Missing Arguments in* McDonald v. City of Chicago, 2 AKRON J. CONST. L.& POL'Y 7 (2011).

19. McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010).

20. *Id.* at 3058 (Thomas, J., concurring).

21. *Id.* at 3050 (Scalia, J., concurring).

22. *Id.* at 3059 (Thomas, J., concurring).

23. I have previously written a more thorough analysis in Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI-KENT L. REV. 627 (1994) [hereinafter Aynes, *Constricting the Law of Freedom*].

24. Slaughter-House Cases, 83 U.S. 36 (1872).

25. *Id.* at 67. *See Constricting the Law of Freedom*, *supra* note 23.

26. Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES 77, 111 (2009) [hereinafter Aynes, *Enforcing the Bill of Rights Against the States*].

the decision of the cases before us, and beyond that we have neither the inclination nor the right to go."[27]

Justice Miller's opinion talks about being "excused from defining the privileges and immunities of citizens of the United States . . . until some case . . . may make it necessary to do so."[28]

Miller did not specifically speak to the issue of applying the Second Amendment or any of the amendments to the states, but, in dicta, he suggested a narrow reading for the Privileges and Immunities Clause.[29] Nevertheless, Miller himself later approved moving away from his narrow reading of the Amendment in the *Slaughter-House Cases*.[30]

What is odd about this is that there are other provisions of Miller's opinion, which have been readily ignored. For example, Miller said in a case, in which the plaintiffs were white butchers, that it would be hard to believe that the Fourteenth Amendment Equal Protection Clause would ever apply to anyone except African Americans.[31] As Dean John Norton Pomeroy noted shortly after the decision, Miller's conclusion "contradicts at once the meaning of the language and the facts of history."[32] Further, the legislative history demonstrates that the Equal Protection Clause was also designed to protect white Unionists, from both the South and the North, in their free speech and other rights in the South.[33] The courts have not been reluctant to ignore the privileges and immunities dicta.[34] No one today doubts that the Equal Protection Clause applies to people of all races, not just African Americans.

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27. *Slaughter-House Cases*, 83 U.S. at 67.

28. *Id.* at 78 . Though this is speculation, one wonders whether an earlier draft stopped there and it was the dissenting justices that prompted him to go further.

29. *See* RONALD M. LABBE & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 12 (2003) ("It might be more accurate to view Miller's comments on privileges and immunities as dicta rather than doctrinal holding." (citation omitted)).

30. *See id.* at 248 n.51.

31. *See Slaughter-House Cases*, 83 U.S. at 80-82. *See* Pomeroy, *infra* note 32, at 565 (some portions of the opinion "seem[] to us utterly unnecessary to the decision of the case or to the main argument upon which the decision is based . . . ." (omission added)).

32. JOHN NORTON Pomeroy, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW BY THEODORE SEDGWICK 564, (2d ed. 1874).

33. Aynes, *Constricting the Law of Freedom*, *supra* note 23, at 644-46 and especially 645 ("[T]he debates are replete with indications that the Fourteenth Amendment was also intended to protect Southern white Unionists, Northerners moving South, and aliens." (footnote omitted)).

34. For example, just a few years later Judge Sawyer, in writing about the Fourteenth Amendment, stated that because of the way the amendment was written, "its benefits could not have been intended to be limited to the [N]egro." The R.R. Tax Cases, 13 F. 722, 761 (C.C.D. Cal. 1882) (Sawyer, Circuit Judge, concurring).

Similarly, one key part of the Court's dicta in *Slaughter-House* is that the butchers did not have a *federal* (Fourteenth Amendment) right to pursue the occupation of a butcher.[35] Yet many subsequent decisions of the Court have recognized among the individual's "fundamental rights which must be respected" the right "to engage in any of the common occupations of life . . . ."[36]

This differing treatment of dicta on privileges and immunities and what is more central to the holding in the *Slaughter-House Cases* with respect to the race of the beneficiaries of the Equal Protection Clause suggests that more is at work here than simply trying to follow Supreme Court dicta. One has to wonder why this dicta of *Slaughter-House* was not ignored with equal ease.

In a pre-*McDonald* essay, David Hardy suggested: "There are some things in the Bill of Rights that various Justices over the years have just not liked, and it seems to me to be no more elegant than the individual prejudices against said rights being put into practice whenever possible."[37]

Of course, whatever one thinks of *Slaughter-House*, the *Cruikshank*[38] case clearly rejected the application of the Second

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35. Slaughter-House Cases, 83 U.S. 36, 80-81 (1872). Given the health considerations behind the underlying legislation and the fact that the monopoly was not over who could be a butcher, but rather where butchering could take place, it is more logical to believe this too was dicta. Michael Ross has demonstrated that rather than creating a monopoly of who could be a butcher, the act in question actually destroyed the monopoly of the Gascon butchers and opened the occupation up to others, including African Americans. *See* MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS, SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR Era (2003).

36. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting liberty under the Fourteenth Amendment includes the right to "engage in any of the common occupations of life . . . ."); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972). *See also* Justice Marshall's dissenting opinion in *Roth* indicating that "liberty to work . . . is the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment." *Id.* at 588-89. *See also* David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 936 (2007) ("If an important aspect of citizenship is the individual's freedom to shape his or her destiny in society, choices about the work one performs daily should be protected as part of the freedom inherent in citizenship." (citations omitted)). In the context of Article IV, the Court has stated: "Certainly, the pursuit of a common calling is one of the most fundamental of those privileges provided by the Clause . . . ." United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 219 (1984).

37. David Hardy, *Thoughts on the 14th Amendment Cases*, (Feb. 23, 2009, 7:36 PM) http://armsandthelaw.com/archives/2009/02/thoughts _on_the_5.php (last accessed July 31, 2010).

38. United States v. Cruikshank, 92 U.S. 542 (1876). *See generally*, CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008); NICHOLAS LEHMANN REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2006); *and* LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008). One would hope that if any of the current Justices were to explore the facts of the Colfax Massacre, a battle fought in the name of white supremacy, the Justices would condemn the *Cruikshank* case as a miscarriage of justice

Amendment to the states. Yet, *Cruikshank's* First Amendment views had been rejected and overruled.[39] What reason is there to think its Second Amendment views are deserving of any more respect?

A further matter on which the Court could be criticized is focusing upon the "Due Process" Clause instead of considering Section 1 as a whole. In his seminal dissenting opinion in *Adamson v. California*,[40] Justice Black refused to limit his analysis to the Due Process Clause, but rather emphasized that he was in favor of finding the Bill of Rights applied to the state based upon the entire content of Section 1 of the Fourteenth Amendment.[41]

III. JUSTICE THOMAS'S CONCURRING OPINION

Justice Thomas used the Privileges and Immunities Clause as a vehicle through which to apply the Second Amendment against the states.[42] Justice Thomas termed this "a more straightforward path" to the enforcement of the Second Amendment against the states than that adopted by the majority.[43] This is probably the most faithful to the intent of the framers and the people. As did Justice Alito, Justice Thomas ignored the "holistic" approach of using the entire section one to reach the same result.[44]

There is such congruence between my scholarship and the concurring opinion that it is rather like one is replicating a scientific experiment and both times obtaining virtually the same result. The fact that Justice Thomas's opinion is consistent with that of many scholars looking at the same information is confirmation of its correctness.[45] It also makes it difficult for me to offer any critique of the opinion.

The one area in which Justice Thomas is in error is in his approach, in dicta, to the application of the Establishment Clause to the states.[46]

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instead of a precedent to be followed. It would be akin to citing *Dred Scott* or *Plessy v. Ferguson*, not to document some historical fact, but because it was precedent and the Court chose to follow its dicta or its decision.

39. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (citing Gitlow v. New York, 268 U.S. 652, 666 (1925)).

40. 332 U.S. 46, 68-93 (1947) (Black, J., dissenting).

41. *Id.*; *See, e.g.*, Akhil Amar, Heller, *HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008); Gans, *supra* note 36.

42. *McDonald*, 130 S. Ct. at 3058-88 (Thomas, J., concurring).

43. *Id.* at 3058.

44. *See id.* at 3058-88.

45. *See e.g.*, AKHIL AMAR, THE BILL OF RIGHTS, CREATION AND RECONSTRUCTION 231-57 (1988).

46. *McDonald*, 130 S. Ct. at n.20 (Thomas, J., concurring).

In *McDonald*, Justice Thomas is willing to cite Kurt Lash's work arguing for a narrow view of the Article IV Privileges and Immunities Clause.[47] But, as far as I can determine, even though Professor Lash appears to be the only person who has made an in-depth analysis of the Establishment Clause motivations of the Fourteenth Amendment framers,[48] Justice Thomas has not cited it in any of his written opinions while on the Court.[49] It is one thing to read Lash's Establishment/Fourteenth Amendment work and reject it with reason and citations. But it is something quite different to ignore the very work of someone he cites as an authority.

Further, as far as I can determine, Justice Thomas has evidenced no knowledge of the fact that several national churches split into northern and southern branches when the southern members seceded in order to maintain an "established" church that would support slavery.[50] Not treating the national breakdown of the churches over the issues of "establishing" slavery as part of the orthodoxy, it follows that Justice Thomas did not discuss the breakup of individual churches over the question of whether the Christian religion authorized slavery or not.[51] Nor does Justice Thomas acknowledge in any of his opinions that the slave-holding states used a "licensing" system both before and during Reconstruction to try to ensure that only the "established view" of

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47. Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L. J. 1241, 1256-57 (2010), *cited in* McDonald v. City of Chicago, 130 S. Ct. at 3064 (Thomas, J., concurring).

48. Kurt Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1089 (1995) (Southern establishment of proslavery religion was one of the problems meant to be remedied by the Privileges or Immunities clause). For a somewhat more detailed treatment of Lash's work in this area and the interrelationship between the Free Exercise and the Establishment Clause, see Aynes, *Ink Blot or Not*, *supra* at note *. *See also*, DANIEL W. STOWELL, REBUILDING ZION: THE RELIGIOUS RECONSTRUCTION OF THE SOUTH, 1863-1877 (1998).

49. This is a result of a LEXIS search using the terms "Thomas and Lash" conducted on September 26, 2010.

50. For an account of this breach within the national Methodist Church, see GEORGE R. CROOKS , THE LIFE OF BISHOP MATTHEW SIMPSON OF THE METHODIST EPISCOPAL CHURCH (1891).

51. WILLIAM E. BARTELT, THERE I GREW UP: REMEMBERING ABRAHAM LINCOLN'S INDIANA YOUTH 12 (2008) (referencing the split over slavery of the South Fork Baptist Church in Hardin County, Kentucky in 1816 and the Little Mount Baptist Church's "clearly anti-slavery stand" in Indiana). For an account of the division in churches in Mississippi before the Civil War, see the autobiographical account of a Mississippi Unionist who escaped from a Mississippi prison, [Rev] JOHN B. AUGHEY, THE IRON FURNACE: OR, SLAVERY AND SECESSION 247 (1863) ("The Methodist Church South is expunging from the discipline everything inimical to the peculiar institution . . . . The Church South refused to abide by the rules of the Church, and hence the guilt of the schism lied with her," noting that founder of the Methodist Church, John Wesley, "regarded [slavery] as the 'sum of all villainy.'").

slavery and white supremacy was preached.[52] This is one of the dangers of dicta: Justice Thomas evidences no familiarity with this portion of the history of the Fourteenth Amendment and the Establishment Clause himself, and, by not waiting until a case which briefed those issues came before the Court, he expressed an opinion that seems to be opposite of what the facts would support.[53]

One can only hope that, notwithstanding his expressions in dicta and his prior dissents, Justice Thomas will reserve his judgment until after a case-in-controversy has raised this issue, the parties have briefed the issue, the Court has heard oral argument, and he has examined the record in the controversy of an actual case.

As for *McDonald*, with the exception of the dicta noted above, Thomas's opinion, while it can and will no doubt be critiqued, presented a reasonable view of the Amendment as contemplated by the people proposing and ratifying the Amendment.

IV. JUSTICE SCALIA'S CONCURRING OPINION

Given the indications in *Heller* that were predictive of the result in *McDonald*, it is not surprising that Justice Scalia joined Justice Alito's opinion. Indeed, it would have been surprising if Scalia had repudiated the *Heller* dicta so quickly after the opinion that he had authored. His dissent adds little to the position articulated by Justice Alito. Instead, it was written "*only* to respond to some aspects of Justice Steven's dissent."[54] While Justice Steven's dissenting opinion and Justice Scalia's concurring opinion make nice bookends for a discussion of their

52. Lash, *supra* note 48, at n.234.

53. For example, it would not be surprising if we were to learn that Justice Thomas has no knowledge that as part of the efforts to establish a pro-slavery church, the Northern Methodist Church was labeled by a convention in Bonham, Texas as "[a] secret forces lurk[ing with] . . . the manifest intention [was] . . . to do away with slavery" and, unlike the proslavery Southern Methodist Church which was welcomed, the Northern Methodist Church was condemned. This sentiment spread to include the state of Arkansas and by 1860 "[a] number of the [Northern Methodist] ministers and many lay members fled the State." HISTORY OF BENTON, WASHINGTON, CARROLL, MADISON, CRAWFORD, FRANKLIN, AND SEBASTIAN COUNTIES, ARKANSAS 786-87 (Goodspeed Pub. Co., Chicago, 1889). This is inconsistent with the many religious arguments made against slavery. For example, William Jay (1789-1858), the son of Chief Justice John Jay, argued that the southern laws prohibiting African Americans from reading or writing were "tantamount to prevent[ing] him from having a direct revelation of God." CARTER G. WOODSON, THE EDUCATION OF THE NEGRO PRIOR TO 1861: A HISTORY OF THE EDUCATION OF THE COLORED PEOPLE OF THE UNITED STATES FROM THE BEGINNING OF SLAVERY TO THE CIVIL WAR 169 (1919).

54. McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) (emphasis added).

differing philosophies and the history of the Court, they add little to our understanding of the Court's opinion or predicting its consequences.

However, in some ways Justice Scalia's opinion is the most disappointing of the lot. In other cases and in other contexts, Justice Scalia purports to be a respecter of history and tradition.[55] Yet, we see no evidence of those values here. Even if the usually outspoken Scalia had a momentary need to be cautious, one would have expected him to at least make some slight bow to the concurring opinion of his oft-ally, Justice Thomas.[56]

V. THE DISSENTERS

Previously, I have suggested that the City of Chicago made a tactical mistake in attempting to re-argue *Heller*.[57] In such a situation, the best tactical approach from the Respondent's side is to embrace *Heller*, however reluctantly, and try to limit it to the applications to the federal government.

Yet, such a view does not apply to the minority in *Heller* and *McDonald.* They have the right and, perhaps, the duty to express their views and it may be in time their dissents will be landmarks which guide future decisions.

A. Justice Stevens

Justice Stevens had a long and distinguished career on the Court. *McDonald* is one of the last major decisions in which he participated. Unfortunately, his "swan song" failed to do justice to his career. This Illinois Republican had established a reputation for both independence and moderation.[58] Whether affected by the intensity of the debate, frustration over his inability to command a majority, the burden of too many dissents that have yet to become law, or the effects of age and health, the dissent is mostly a hodgepodge of personal beliefs and

55. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, J., dissenting).

56. For example, he might have said: "Though there is much to commend in Justice Thomas' view, the current due process analysis suffices for the case before us and I will defer consideration of the privileges and immunities clause until a more propitious moment."

57. Aynes, *The Blockbuster of the 2009 Term?*, *supra* note 6. *But see* Mike Scarcella, Heller *II: The Sequel*, NAT'L L.J. 17, 18 (Oct. 25, 2010) (In litigation over Washington D.C.'s post-*Heller* legislation, Solicitor General Todd Kim of the D.C. Office of the U.S. Attorney General, who will argue the case in the U.S. Court of Appeals for D.C., said that: "The District of Columbia fully respects the Heller decision.").

58. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 836 (Kermit L. Hall et al eds., 1992).

jurisprudential commentary without the force or weight one would expect of a senior dissenting Justice.[59] Nevertheless, Justice Stevens makes an important point that apparently escaped the majority: "[E]ven if *Heller* had never been decided –indeed, even if the Second Amendment did not exist—we would still have an obligation to address the petitioner's Fourteenth Amendment claim."[60]

Yet he never really addresses that claim, which is "more compelling" under the Fourteenth Amendment than under the Second.[61]

Justice Stevens sounds very much like Justice Miller in the failed *Slaughter-House Cases*, saying that "the burden is severe for those to seek radical change in such an established body of constitutional doctrine."[62] Over a hundred years ago, Justice Swayne answered Justice Miller in sentences that should also be an admonishment to Justice Stevens: "It is objected to that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted."[63] Justice Stevens evidences no knowledge that Justices like Swayne supported the adoption of the Fourteenth Amendment, while Justice Miller, who he perhaps was unaware he was mimicking, and others in the *Slaughter-House* majority opposed it.[64]

Justice Stevens gives only a passing nod to the history of the Fourteenth Amendment.[65] He cites no statements, speeches, or other work of the framers or the ratifiers of the Fourteenth Amendment. He takes no look at the legal treatises published between the proposal of the Amendment and its ratification.[66] The closest he comes is his citation to the very weak 1965 work of Justice Frankfurter where Justice

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59. Though there are no doubt different views of the opinion, my impression is consistent with that expressed by David Hardy: "In sum, the dissent bears the hallmark of a work that was rushed through rather than thought out." David T. Hardy, *Ducking the Bullet:* District of Columbia v. Heller *and the Stevens Dissent*, 2010 CARDOZO L. REV. DE NOVO 61, 68, *available at* http://www.cardozolawreview.com/content/denovo/HARDY_2010_61.pdf.

60. McDonald v. City of Chicago, 130 S. Ct. 3020, 3103 n.26 (2010) (Stevens, J., dissenting).

61. Aynes, *The Right to Bear Arms and the Right to Self-Defenses*, *supra* note *, at 202.

62. *McDonald*, 130 S. Ct. at 3089 (Stevens, J., dissenting).

63. Slaughter-House Cases, 83 U.S. 36, 129 (1872) (Swayne, J., dissenting).

64. Aynes, *Constricting the Law of Freedom*, *supra* note 23, at 660 & n.228.

65. *McDonald*, 130 S. Ct. at 3089 and n.2 (Stevens, J., dissenting). Justice Stevens cites none of the well-known Fourteenth Amendment scholars who have spent decades in studying the Amendment who would support his view, such as Raoul Berger or Charles Fairman. This is, perhaps, because their views have long since been discredited and this was demonstrated to the Court in the Amicus Brief of Calguns, whose whole focus was upon scholars who had taken the Fairman/Berger position.

66. Aynes, *Constricting the Law of Freedom*, *supra* note 23, at 83-94 (discussing treatises by Justice Paschal, Dean Pomeroy, Judge Farrar, and Justice Cooley).

Frankfurter attempts to do a one-sided survey of the legislative history of the Fourteenth Amendment.[67]

Stevens, born in 1920, ignores the first Justice Harlan (1833-1911), Chief Justice Chase (1808-1873), Justice Swayne (1804-1884), and others, but seems to have nostalgic feelings for the days of his youth when Justice Harlan II (1899-1971) was on the Bench.[68] He states that he "can hardly improve upon the many passionate defenses of this position that Justice Harlan penned during his tenure on the Court."[69]

The fact that Justice Stevens is out of touch with both our history and current views is shown by his reaction to the fact that a super majority (31) of the states filed an amicus brief supporting *McDonald*: "It is puzzling that so many state lawmakers have asked us to limit their option to regulate a dangerous item."[70]

Part of the Respondent Chicago's argument before the Court was that applying the Second Amendment to the state would spawn litigation.[71] This same theme was sounded in Justice Steven's dissenting opinion[72] and even in an editorial of the *New York Times*, referring to "a bog of lawsuits that could take many years to clear."[73] This approach may be superficially appealing, but it is logically flawed.

We have had the Constitution since 1787. Should we refrain from enforcing the Constitution because it is too much trouble? The First Amendment has been applied to the states since 1925,[74] and yet we still have suits about its meaning. One can understand the large amount of litigation that raises questions on the Fourth Amendment right against search and seizure and yet we still apply it. This is like saying that if we did not have a right to jury trial, or a right to cross-examine witnesses the state could more easily win its criminal cases. That may be true, but it is not a reason to deny constitutional rights. The fact that people may want to litigate the contours of the Second Amendment, as applied to the states, is no reason to violate the Constitution and refuse to apply the Amendment. There are some people who believe (wrongly I think) that the First Amendment rights to free speech and free press should not be applied to the states by way of the Fourteenth Amendment. If someone

67. *McDonald*, 130 S. Ct. at 3092 (Stevens, J., dissenting) (citation omitted).

68. *Id.* at 3093 n.11 (Stevens, J., dissenting).

69. *Id.*

70. *Id.* at 3115 n.47.

71. Brief for Respondent at 19-20, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), 2009 WL 5190478.

72. *McDonald*, 130 S. Ct. at 3105 n.30 (Stevens, J., dissenting).

73. Editorial, *The Hard Work of Gun Control*, N.Y. TIMES, July 11, 2010, at 7.

74. Gitlow v. New York, 268 U.S. 652 (1925).

raised such an argument in litigation against the *Times*, one can be very sure that the *Times* would not abandon those cases in order to protect against future litigation.

One can respect Justice Stevens and yet be disappointed in the quality of his opinion.

B. Justices Breyer, Ginsburg and Sotomayor

Justice Breyer's dissent is joined by Justices Ginsburg and Sotomayor. While he writes generally about history with respect to *Heller*, there is no historical analysis with respect to the Fourteenth Amendment, which is the issue before the Court.[75] While Justice Breyer's opinion cites sources concerning the Second Amendment, it does not make any effort to determine what the framers and ratifiers of the Fourteenth Amendment intended and cites no sources on that topic.[76] Breyer claims that "there is no reason here to believe that incorporation of the private self-defense right will further any other or broader constitutional objective."[77] Further, Justice Breyer posits that "the private self-defense right does not significantly seek to protect individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority."[78] Members of "a majority" or a minority might well argue with that analysis. Surely, the right of self-defense is designed to "protect individuals who might otherwise suffer unfair or inhumane treatment" by being robbed, shot, or murdered, whether the denial was caused by a majority or a minority.

VI. THE FUTURE?

There are many unanswered questions about how *Heller* and *McDonald* will be applied to future cases. Among those, Lyle Denniston, summarizing Justice Breyer's dissent in *McDonald*, has listed nineteen unanswered questions in a blog for SCOTUS.[79]

As Professor Randy Barnett wrote, the First Amendment jurisprudence did not all come at once, but rather developed over time.[80]

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75. *See McDonald*, 130 S. Ct. at 3120-38 (Breyer, J., dissenting).

76. *See id.*

77. *Id.* at 3125.

78. *Id.*

79. Lyle Denniston, *Analysis: Gun Rights Go National*, SCOTUS BLOG (June 28, 2010, 5:09 PM), http://www.scotusblog.com/2010/06/analysis-gun-rights-go-national.

80. E-mail from Randy Barnett, to Richard L. Aynes, (Aug. 25, 2009) (on file with author) ("The complexity of First Amendment doctrine took decades to develop case by case in response to different problems arising in different contexts. There is no reason to doubt that, if the courts take a

He suggested the same would be true of the Second Amendment post-*Heller* cases.[81] I am not troubled by the Court moving slowly and developing these tests over time. Indeed, had the majority moved more quickly, they would have been criticized for dicta and even for deciding matters in which there was no case in controversy. It is a worthy project for one to try to fill in some of the blank spaces and help the courts decide what they can and cannot uphold in the future.

Yet, some of the issues to be faced stemmed from the Court's insistence on deriving a right to self-defense from the Second Amendment right to bear arms. The right of self-defense applies to people who do not use weapons and could easily be recognized under the Fourteenth Amendment Privileges or Immunities Clause, the Article IV, Section 2, Privileges and Immunities Clause, the Fourteenth Amendment Due Process Clause,[82] or as a right reserved to the people under the Ninth and Tenth Amendments.

Patrick Charles has suggested that we focus upon history, using, in part, English practices.[83] At the same time, how do we tell what English practices to use and which not to use? For example, we know that in the First Amendment area, English freedom of speech was largely restricted to prior restraint,[84] but our First Amendment was not;[85] we know that English practice allowed writs of assistance for general warrants,[86] but our Fourth Amendment does not;[87] the early American treatises distinguish part of Blackstone's treatise as inapplicable to the U.S. because sovereignty was in the Crown in England and in the people in the U.S.[88] This history tells us we cannot import English practice wholesale. Does one need to acknowledge that and then provide some "test" on how we know what to use?

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right to keep and bear arms just as seriously as they do the freedom of speech they will not eventually develop the same sort of nuanced doctrines that take account of the difference between speech and weapons."). *See also* Commonwealth v. Blanding, 20 Mass. 304, 314 (1825) (drawing an analogy between the First and the Second Amendments and indicating that both could be punished for abuses, such a libel).

81. E-mail from Randy Barnett, to Richard L. Aynes, *supra* note 80.

82. *E.g.*, State v. Hardy, 60 Ohio App.2d 325, 397 N.E.2d 773 (1978) (if the State were to order someone to die rather than act in self-defense, that would be a violation of the Fourteenth Amendment Due Process Clause).

83. *See* Charles, *supra* note 18.

84. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.3(c) (4th ed. 2008).

85. *Id.*

86. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 66 (1998).

87. *Id.*

88. *See* Randy E. Barnett, *Who's Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1 (2006) [hereinafter Barnett, *Who's Afraid of Enumerated Rights?*].

McDonald promises to be one of the standard cases studied by lawyers.[89] Jon Roland of the Constitution Society has referred to it as a "landmark" decision.[90]

What the majority and the dissent seem to have in common is the extent to which the Justices are "Court-centric." None of them have ever played a major role in the legislative process—such as Justice Black—nor in the executive branch—such as Justice Douglas. They all seem overly concerned about what the Court has done (precedent) rather than what the Constitution requires.

There is a second aspect of this argument. The unresolved questions pointed out by several academics, the dissent, and Lyle Denniston all go to the fact that the Court is not a legislature. Yes, if this were the Chicago City Council one would expect a full, detailed explanation of the legislation and where we go from here. But it is not. It is a Court charged with deciding the case before it, not with creating dicta without the benefit of a concrete case before it or without the benefit of briefing by opposing sides.

The *New York Times* whimpers: "[The Court] provided very little guidance as to what is reasonable, leaving lawmakers and judges to thrash it out. . ."[91] No, like everyone else, the *Times* will have to wait for a tangible case that presents real issues for the Court to consider after two disputing parties have done their best to brief both sides of the issue. This is how the Court works – not like the editorial pages of a newspaper.

Just four days after the *McDonald* decision, the Chicago City Council passed, 45-0, a set of new gun regulations that can only be

89. The supplements to Constitutional Law casebooks include excerpts from *McDonald*, as well as its rival for attention for this term, *Citizens United*. *See, e.g.*, CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: 2010 SUPPLEMENT 30-38 (*McDonald)* and 74-92 (*Citizens United);* JEROME A. BARRON, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS, SEVENTH EDITION, 2010 SUPPLEMENT 84-104 (*McDonald*) and 228-46 (*Citizens United*); WILLIAM D. ARAIZA, PHOEBE A. HADDON, DOROTHY E. ROBERTS & M. ISABEL MEDINA, CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES, THIRD EDITION, 2010 SUPPLEMENT 35-68 (*McDonald)* and 179-91 (*Citizens United); and* DOUGLASS W. KMIEC, STEPHEN PRESSER, JOHN C. EASTMAN & RAYMOND B. MARCIN, THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES AND PHILOSOPHY; THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION; INDIVIDUAL RIGHTS AND THE AMERICAN CONSTITUTION, THIRD EDITION, COMBINED 2010 SUPPLEMENT v (referring to *McDonald* as "highly controversial and jurisprudentially fascinating"), vi (noting that *Citizens United* was the case President Obama discussed in his State of the Union message and to which Justice Alito mouthed the words "Not true."), 1-53 (*McDonald)* and 137-66 (*Citizens United).*

90. E-mail posted to conlawprof@lists.ucla.edu on June 28, 2010.

91. *The Hard Work of Gun Control*, *supra* note 73.

designed to create another round of litigation.[92] Having just lost its case, Chicago enacted what the *Chicago Sun-Times* calls the ordinance the "most restricted in the nation" and neither Mayor Dailey nor Maria Georges disputed the claim.[93] To its credit, the *Times* recognized the confrontational nature of the ordinance, noting, perhaps diplomatically, that it "edged right up to the line drawn by the court."[94] But the *Times* never acknowledge that it was Chicago's extreme ordinance in the first place that prompted the initial litigation and that it is Chicago's "in your face" extremism that prompts a new round of litigation.

The *Times* believes the fault here lies with "the gun lobby" and not with the people who provide the opportunity to win cases by extreme ordinances.[95] Yet, though it may be sent in code, the editorial of the *Times* actually ends in good advice and a somewhat hidden rebuke to the Chicago City Council: "Lawmakers need not match the [gun] lobby's obduracy. Cities and states should counter with tough but sensible laws designed to resist legal challenges . . . ."[96]

Ordinances that go to what legislators think is "the edge" are unlikely to do this.[97] Statements attributed to Mayor Dailey, if true, make it clear that he thinks of this as a policy issue rather than constitutional issue: "[The Justices] don't seem to appreciate the full scope of gun violence in America."[98] One could just as easily say that Mayor Daley does not appreciate the constraints of the Constitution.

There is no question that cities like Chicago and D.C. have very serious challenges with crime.[99] One way of looking at this is that

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92. The very minimal time, itself, shows that no serious attention was given to the issue by the Council. The Court's opinion itself is over 120 pages. It takes a full ½ day to read the full opinion with any degree of seriousness. To contemplate a proper response would take more than four days. The rush to pass the ordinance and the vituperative language used by the City Council shows a lack of seriousness. The City Council was obviously quite willing to spend taxpayer money in litigation. It would have been money better spent on convening a group of experts to help them establish ordinances that comply with the Court's decisions or putting more police officers on the streets.

93. Abdon M. Pallasch, *Chicago Approves New Gun Restrictions*, CHI. SUN-TIMES, July 4, 2010.

94. Since the *Times* editorial writings "strongly disagreed" with *McDonald*, it is not clear that they could accurately assess what was the "edge" of the Court's holding. Reading *McDonald* with the proverbial "jaundiced eye", they are likely to read the holding as more restrictive than it actually is. *The Hard Work of Gun Control*, *supra* note 73.

95. *Id.*

96. *Id*.

97. *Id.*

98. Steve Chapman, *Defenseless in Chicago, or the Flaws in Gun Control*, CHICAGO TRIBUNE, *reprinted in* AKRON BEACON JOURNAL, July 2, 2010, at A-7. (describing mainly the different views on the effectiveness of handgun registration).

99. The Amicus Brief of the Rutherford Institute in *McDonald* indicates that in 2008, Chicago experienced 412 homicides and 92% of them occurred in a home. Brief for Rutherford Institute as

Chicago wants to solve its problems in the cheapest way possible: by violating the Constitution rather than by providing more police protection, increasing high school and college graduation rates, providing good jobs for its people, and other related matters.

This past gun ban obviously did not work in preventing homicides. Whether it contained a problem that could have been worse or not is a matter over which criminologists argue. But it is like saying we would have more safety if there was no protection against searches and seizures and police could wiretap at will, or if the burden of proof was on the defendant to prove his/her innocence.

VII. THE *MARKS* RULE

Patrick Charles and others have been concerned about the *Marks* question and whether the plurality of four Justice opinions was the "narrowest" which would control or whether Justice Thomas's concurring opinion would control.[100] Some have concluded that the Alito plurality rejected Justice Thomas's concurring opinion.[101]

However, as Randy Barnett emphasized, the plurality never denied that Justice Thomas's concurring opinion was correct.[102] Rather, the plurality simply indicated that it was not necessary to decide the case to reach the question of the approach taken by Justice Thomas.[103] For example, Justice Scalia, in talking about his own misgivings over the concept of substantive due process and the Court's precedent, indicates: "This case does not require me to consider that view, since straightforward application of settled doctrine suffices to decide it."[104]

Standards of Review

One of the unanswered questions that apparently cause people the most anguish is: what will the standard of review be?[105]

Amici Curiae Supporting Petitioners at 11, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4030385.

100. *See* Charles, *supra* note 18.

101. Cohen & Stearns, *supra* note 13 at 35.

102. Barnett, *The Differences Between McDonald and the Challenge to Economic Mandates*, *supra* note 5.

103. *McDonald*, 130 S. Ct. at 3085-86 (Thomas, J., concurring).

104. *Id*. at 3050 (Scalia, J., concurring).

105. *See* Lawrence B. Solum, *Charles on* McDonald v. City of Chicago *& the Standard of Review*, LEGAL THEORY BLOG (Aug. 9, 2010), http://lsolum.typepad.com/legaltheory/2010/08/Charles-on-mcdonald-v-city-of-chicago-the-standard-of-review.html. *See also* Eugene Volokh, *What Burden of Proof Is Constitutionally Required for Denying Gun Rights to the Allegedly Dangerous and Mentally Infirm?*, THE VOLOKH

Patrick Charles, who has authored many works on the Second Amendment, opposed the decision in *Heller* and then opposed its extension in *McDonald*, arguing, in part, that the Fourteenth Amendment framers only intended to protect a right to serve in the militia.[106] Charles has an impressive knowledge of the pre-Constitutional English practices and early Americans ones. Wittingly or unwittingly, he takes a position essentially taken by those who argue that the Due Process and Privileges and Immunities Clauses were designed to protect only equality against discrimination.

As Randy Barnett has noted, at one time the draft Fourteenth Amendment, while pending in the Joint Committee of Reconstruction, contained *both* a non-discrimination provision and the current Fourteenth Amendment, strongly suggesting that the two were different.[107] Further, the Equal Protection Clause does that job quite nicely and if that were the only goal of the Privileges or Immunities Clause, it would be superfluous.

Rather, it has long been established that the protection was not designed for the militia.[108] During the debates over the Civil Rights Act of 1866, Sidney Clarke (R-Kansas) asked: Who were to be protected by the Act? His answer was:

> *Not the present militia*; but the brave black soldiers of the Union, disarmed and robbed by this wicked despotic order. Nearly every white man in [Mississippi] that could bear arms was in the rebel ranks. Nearly all of their able-bodied [Black] men who could reach our lines enlisted under the old flag. Many of these brave defenders of the nation paid for their arms with which they went to battle . . . . [T]he "reconstructed" state authorities of Mississippi were allowed to rob and disarm our veteran soldiers and arm the rebels fresh from the field of treasonable strife. Sir, the disarmed loyalist of Alabama,

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CONSPIRACY (Oct. 8, 2010, 1:33 PM) http://volokh.com/2010/10/08/what-burden-of-proof-is-constitutionally-required-for-denying-gun-rights-to-the-allegedly-mentally-infirm/ (last visited Oct. 12, 2010).

106. Solum, *supra* note 112. *See also* Charles, *supra* note 18.

107. Randy Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, (J. OF LEGAL ANALYSIS, vol. 3, no. 1(forthcoming) (Georgetown Public Law, Research Paper No. 10-06), *available at* http://ssrn.com/abstract=1538862 [hereinafter Barnett, *Whence Comes Section One?*]. Charles' focus is upon whether the right applies to all persons or only citizens. On that issue, he may be correct: *Marks* may require that *McDonald* be read to only apply to citizens. Yet this does not preclude a majority of a future Court from accepting the view of the *McDonald* plurality over the vote of Justice Thomas as a single Justice on other issues.

108. Robert J. Cottrol, *Structure, Participation, Citizenship, and Right: Lessons from Akhil Amar's Second and Fourteenth Amendments*, 87 GEO. L.J. 2307, 2322 (1999) (book review).

> Mississippi, and Louisiana are powerless to-day, and oppressed by the pardoned and encouraged rebels of those States.[109]

Other unresolved issues involve the use of non-lethal weapons.[110] I would suggest that another issue is whether self-defense without a gun is protected under the Constitution. By deriving the right to self-defense from the Second Amendment, the Court majority seems to have carefully linked to the use of a weapon that fires bullets.[111] But may an unarmed person not fight back when attacked by someone? May a carpenter who is threatened by a person with a knife not pick up his hammer to act in self-defense?

It has long been illegal for convicted felons to possess and use weapons.[112] This seems to support the *Heller* and *McDonald* majority dicta that convicted felons may, if the state chooses, not possess arms.[113] Don Kates, a long-time advocate of the Second Amendment protection of the rights of gun owners, writes: "Everyone except perhaps the most extreme libertarians generally agrees with prohibiting possession of firearms by convicted felons, violent misdemeanants and the mentally unbalanced—as our laws currently do."[114]

However, what happens when an unarmed convicted felon is attacked by someone with arms? May the felon not take the weapon away for the attacker and use it on a second attacker who is armed? If the convicted felon knows the location of a weapon controlled by a third party, is a convicted felon to die rather than retrieving third-party's weapon and using it in self defense?[115] But then how does one determine who owned the weapon and what is a pretext for the convicted felon owning a weapon?[116]

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109. *Id.* at 2323 (emphasis added) (alteration in original) (footnote omitted).

110. *See* Craig S. Lerner & Nelson Lund, Heller *and Nonlethal Weapons*, 60 HASTINGS L.J. 1387 (2009); Paul H. Robinson, Op-Ed., *Shoot to Stun*, N.Y. TIMES, July 2, 2008, *available at* http://www.nytimes.com/2008/07/02/opinion/02robinson.html, *and* Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199 (2009).

111. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

112. District of Columbia v. Heller, 554 U.S. 570 (2008).

113. *McDonald*, 130 S. Ct. at 3047 (citing *Heller*, 554 U.S. 570).

114. Don B. Kates, *The Right to Arms: The Criminology of Guns* 2010 CARDOZO L. REV. DE NOVO 86 (2010). Kates also states that all societies have limited arms to "trustworthy" people, which does not include serious felons. In the eighteenth century, Kates indicates, the felons were "civilly dead" and were not considered part of "the people." *Id.* at 97.

115. *See* State v. Hardy, 397 N.E.2d 773 (Ohio App. Ct. 1978).

116. *See* State v. Smead, 9th Dist. C. A. No. 24903, 2010-Ohio-4462 (D. Ohio), *available at* http://www.sconet.state.oh.us/rod/docs/pdf/9/2010/2010-ohio-4462.pdf.

What about the claim that a convicted felon or one unlicensed to have a gun, found a loaded gun in his yard, at a playground, or other dangerous place when he came home and for safety reasons, picked it up, intending to turn it into the police the next day?[117]

There are some older cases that suggest that the Second Amendment protects the right to have arms by "the whole people, old and *young*, men, women, and *boys* . . . ."[118] On the other hand, the First Circuit recently upheld a federal statute that makes it a crime for a minor to have a handgun.[119]

While there are many unanswered questions, there are also solutions. Professor Adam Winkler noted in December of 2009, that there had been 150 post-*Heller* challenges in federal courts to federal gun controversy over the course of a year.[120] "Not one law has been invalidated for violation of the Second Amendment since *Heller*."[121] Similarly, Eugene Volokh notes that forty-four of the fifty states have state constitutional provisions that "expressly secure a right to keep and bear arms" and "at least 40 of them clearly protect and individual right, aimed partly at self-defense."[122] "Yet state courts interpreting those provisions have upheld the great majority of all modest gun controls that they have considered."[123]

Even Dennis Henigan of the Brady Center to Prevent Gun Violence believes that "the national experience with the Brady Act, which mandates a background check on persons buying guns from licensed dealers, also suggests that even fairly modest gun restrictions can reduce the use of guns in crime."[124] He quotes, with apparent approval, considerations of such steps as "blocking gun sales to persons on the terrorist watch list, requiring gun owners to report lost and stolen guns,

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117. *See* Plummer v. United States, 983 A.2d 323 (D.C. 2009).

118. Nunn v. State, 1 Ga. 243, 251 (1846) (emphasis added).

119. United States v. Rene, 583 F.3d 8, (1st Cir. 2009). *See also* State v. Sieyes, 168 Wash.2d 276, 225 P.3d 995 (2010) (the statute does have multiple exceptions for underage use).

120. *Heller Requires Scrutiny of Federal Ban on Guns Possession by Domestic Abusers*, 78 U.S.L.W. 1313 (Dec. 1, 2009). *But see*, United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999) (*rev'd and remanded)* (holding that a federal statute which makes it a crime to possess a firearm while subject to a domestic violence protective order violates the second amendment). On the other hand, see United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) (involving the ban on felons possessing guns).

121. Adam Winkler, Heller's *Catch-22*, 56 UCLA L. REV. 1551,1566 (2009).

122. Eugene Volokh, *States' Rights vs. Gun Rights* (Mar. 2, 2010, 7:17 PM) http://roomfordebate.blogs.nytimes.com/2010/03/02/states-rights-vs-=gun-rights.?hp (last visited July 3, 2010).

123. *Id.*

124. Henigan, *supra* note 9, at 334 (citing statistics to support the claim).

and providing more crime data to local police."[125] Further, he acknowledges that "there are many strategies for fighting crime and violence not involving gun control that should be explored and implemented . . ."[126] Henigan quotes, with apparent approval, Professor Tushnet's pre-*Heller* suggestions that what is needed is "more police on the streets, ensuring that young people have better access to education and job, more disparagement by leading public figures of violence on television and in movies, or whatever else serious inquiry into the cause of crime and violence reveals to be somewhat effective policies."[127]

Kates, based on travels in Europe, suggests that police might be dispatched in teams and not sent out for tasks as single, unsupported officers and that banks follow a European design that makes them more difficult to rob.[128]

One of the concerns about the deregulation of guns is their potential use for the unauthorized use by minors and accidents in the home. But there are solutions. For example, at this year's Heritage Festival in Kent, Ohio, the Police Department handed out 200 free firearms safety kits, which each included a gun lock.[129] Similarly, as I have previously noted, there is now on the market a "biometric safe" in which one could store a handgun and yet have ready access because it opens upon verification of a fingerprint.

There is, of course, the large question of whether *Heller* and *McDonald* are limited to the right to have guns in the home[130] or which of those cases or their later progeny will extend the right to areas outside of the home remains to be seen.

VIII. CONCLUSION

Though the changes worked by *McDonald* are slight when viewed from a national prospective, they hold open a variety of issues upon which large steps can be taken. As set forth above, there are a variety of issues which will have to be addressed and their resolution may affect the future of the people of each state and of the nation.

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125. *Id.* at 336. It is unclear what additional data he thinks should be reported to police.

126. *Id.*

127. *Id.* at 335.

128. Kates, *supra* note 114, at 96.

129. *Gun Locks*, AKRON BEACON J., June, 28 2010.

130. Professor Darrell A. H. Miller, for example, has argued that the regulatory regime for guns should be analogous to that of pornography, allowing use in the home but not outside of it. Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009).

People who view themselves as conservatives may well have to resolve the conflict between less gun regulations and the payment of more taxes for the containment or reduction of crime.

We would expect there would be normal interpretive matters with the meaning of the decision and that reasonable people may disagree. But there are also individuals of both points of view who may go beyond the pale of reason. On the one hand, one thinks of the protester who brought an AK-47 to a rally in Arizona[131] or the litigant who wanted to be able to take a handgun into the public area of the Atlanta Airport.[132]

On the other hand, one sees actions by people like the Council people of Chicago, who, having lost in the *McDonald*, defiantly pass regulations that they know or should know cannot be sustained in court.[133] Of more concern is that the strategy adopted by opponents of *Roe v. Wade*[134] will be adopted and opponents will try to use regulations, taxes, and other methods of making reasonable gun ownership as difficult as possible.

Where this will all end, no one can tell. But it will depend upon the common sense of the American people to insure that only reasonable legislation (even if debatable) is passed and the common sense of the courts to insure that a reasonably robust right to bear arms survives the attacks made upon by their opponents and can exist in fact, as well as theory.

131. *See* Rick Sanchez, *Guns at a Presidential Event?* (Aug. 17, 2009), http://www.cnn.com/2009/POLITICS/08/18/obama.protest.rifle/index.html?iref=allsearch#cnnSTCVideo.

132. Shannon McCaffrey, *Lawsuit Filed Over Atlanta Airport Barring Guns*, YAHOO! NEWS (July 1, 2008, 2:04 PM), http://news.yahoo.com/s/ap_travel/20080701/ap_tr_ge/travel_brief_airport_guns.

133. See Pallasch, *supra* note 93.

134. Roe v. Wade, 410 U.S. 113 (1973).