

POPULAR CONSTITUTIONALISM AND THE STATE ATTORNEYS
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INTRODUCTION

Popular constitutionalism is a bit like the dark matter of the constitutional universe — it seems to exert a powerful force on constitutional theory and doctrine, but even those who believe in it are not always entirely sure how it works. Do “the people” influence constitutional interpretation through elections? Impeachments? Mob rule? This Response considers another possible answer: the people act through the state attorneys general (SAGs), who have played a prominent role in the Court’s recent Second Amendment cases and the ongoing challenges to the constitutionality of health care reform.

In *Dead or Alive: Originalism as Popular Constitutionalism in Heller*,¹ her trenchant analysis of popular constitutionalism in *District of Columbia v. Heller*,² Professor Reva Siegel persuasively argued that “*Heller*’s originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.”³ Those understandings resurfaced in *McDonald v. City of Chicago*,⁴ thanks in part to SAGs, thirty-eight of whom argued that the Amendment should be incorporated against the states.⁵ Although the SAGs invoked federalism, their arguments owe more to popular constitutionalism than to the interests of the states qua states. And by effectively recasting themselves as the people’s attorneys general, the SAGs helped solve popular constitutionalism’s problem of institutional design even as they raised new questions about their own responsibilities as representatives of the states themselves.

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¹ Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

² 554 U.S. 570 (2008).

³ Siegel, *supra* note 1, at 192.

⁴ 130 S. Ct. 3020 (2010).

⁵ Brief of the State of Texas et al. as Amici Curiae in Support of Petitioners, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) [hereinafter SAG Amicus Brief], available at <http://www.chicagocunecase.com/wp-content/uploads/2009/11/08-1521-tsac-state-of-texas.pdf>.

I. POPULAR CONSTITUTIONALISM AND THE SECOND AMENDMENT

Popular constitutionalism comes in many forms, ranging from extremely strong — that “[t]he People have ultimate authority to interpret and enforce the Constitution”⁶ — to relatively weak — that the people should be free to invoke constitutional principles independent of those enforced by the courts.⁷ The theory has proven normatively and descriptively attractive in part because it recognizes a democratic element in constitutional interpretation and builds on rich social and historical accounts like Siegel’s. Though accounts of popular constitutionalism vary in their particulars, they are all connected by the notion that “the people” have a role to play in constitutional interpretation.⁸

Exactly *how* the people do so is not always clear, as both proponents and critics of popular constitutionalism have noted. David Pozen writes that “hardly any attention has been paid to questions of institutional design,”⁹ and Professors Larry Alexander and Lawrence Solum point out that “[t]he obvious question for robust popular constitutionalism is ‘How?’ How can the people themselves interpret and enforce the Constitution through direct action?”¹⁰ Mob rule is the proverbial hot porridge, but merely encouraging public dialogue seems too cold. Judicial impeachment and constitutional amendment are too cumbersome for all but the most prominent constitutional issues, while judicial elections are accessible¹¹ but create a whole new set of problems.¹²

Although popular constitutionalism’s inner workings remain largely unexplained, many scholars have argued persuasively that some form of popular constitutionalism played an important — if uncredited — role in *Heller*.¹³ Popular constitutionalism also seems to have been a

⁶ Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1603 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) and describing and criticizing this view).

⁷ Mark Tushnet, *Popular Constitutionalism As Political Law*, 81 CHI.-KENT L. REV. 991, 991 (2006).

⁸ See, e.g., Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1050 n.26 (2004) (describing popular constitutionalism as “the view that the people should have a major role to play in constitutional interpretation”).

⁹ David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2049 (2010).

¹⁰ Alexander & Solum, *supra* note 6, at 1635.

¹¹ See Pozen, *supra* note 9, at 2050.

¹² See generally David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008).

¹³ See, e.g., Siegel, *supra* note 1; Cass R. Sunstein, *Second Amendment Minimalism: Heller As Griswold*, 122 HARV. L. REV. 246, 266 (2008); Anders Walker, *From Ballots to Bullets: District of Columbia v. Heller and the New Civil Rights*, 69 LA. L. REV. 509, 510–11 (2009); Jack Balkin, *“This Decision Will Cost American Lives”: A Note on Heller and the Living Constitution*,

force in *McDonald*, thanks in part to the efforts of the thirty-eight SAGs who filed an amicus brief urging the Court to incorporate the Second Amendment against the states.¹⁴ (Thirty-one SAGs had done the same in *Heller*, even though that case involved a federal law and thus did not present the issue of incorporation.¹⁵) As in *Heller*, the Court's approach in *McDonald* was largely originalist. The plurality noted that incorporation of a right is not solely dependent on "popular consensus," but went on to say that "in this case, as it turns out, there is evidence of such a consensus."¹⁶ The plurality pointed to the SAGs' amicus brief and a similar brief filed by 58 Members of the Senate and 251 Members of the House of Representatives as providing that evidence.¹⁷ In other words, the Court read the SAGs' amicus brief as a statement of "popular" constitutional values, not as evidence of the states' own interests.

Such reliance on SAGs as a medium of popular constitutionalism has a lot of intuitive appeal. After all, SAGs are elected by popular vote in forty-three states,¹⁸ and many go on to seek other elected offices, so they have strong incentives to be seen as representing the will of the people. Those incentives certainly seemed to be at work in *McDonald* — nearly three-quarters of Americans support the individual rights interpretation of the Second Amendment that the SAGs asked the Court to apply against the states.¹⁹ And as something of a federalism bonus, recognizing the SAGs' role in popular constitutionalism gives state officials a role in the development of federal constitutional doctrine. Of course, it also means preserving federal courts' central role in constitutional interpretation, but that role is not necessarily incompatible with robust popular constitutionalism.²⁰

BALKINIZATION (June 27, 2008, 12:08 AM), <http://balkin.blogspot.com/2008/06/this-decision-will-cost-american-lives.html>; Adam Winkler, *Justice Scalia's Living Constitution*, THE HUFFINGTON POST (June 27, 2008, 9:17 PM), http://www.huffingtonpost.com/adam-winkler/justice-scalias-living-co_b_109728.html.

¹⁴ SAG Amicus Brief, *supra* note 5, at 10.

¹⁵ Brief of the State of Texas et al. as Amici Curiae in Support of Respondent at 23 n.6, *District of Columbia v. Heller*, 128 S. Ct. 2783 (No. 07-290), available at <http://www.gurapossessky.com/news/parker/documents/07-290sacTexas.pdf>.

¹⁶ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3049 (2010) (internal quotation marks omitted).

¹⁷ *Id.* (citing Brief for Amici Curiae Senator Kay Bailey Hutchison et al. in Support of Petitioners at 4, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), 2009 WL 4099522).

¹⁸ *About NAAG*, NAT'L ASS'N OF ATT'YS GEN., http://www.naag.org/about_naag.php (last visited Dec. 12, 2010) (noting that SAGs are popularly elected in forty-three states and selected by various procedures in the other seven).

¹⁹ See Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (Mar. 27, 2008), <http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-Own-Guns.aspx>.

²⁰ See generally Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004) (defending judicial supremacy).

A complete account of the SAGs' role in popular constitutionalism would need to deal with state-level separation of powers concerns, the constitutional rhetoric and informational content of SAG election campaigns, and other limitations. Even so, SAGs clearly have some potentially powerful strengths as representatives of the people's constitutional interests. Are they, at long last, a mechanism of popular constitutionalism that is both practically feasible and normatively desirable?

II. THE PEOPLE'S ATTORNEYS GENERAL?

Behind this flowery picture of SAGs representing the people's constitutional values lies a thorny question: aren't SAGs supposed to stand up for the states? They are, after all, *state* attorneys general, and usually invoke and argue for the importance of federalism and state sovereignty.²¹ By supporting incorporation in *McDonald*, however, the SAGs effectively sought to expand the federal judiciary's power over the states. What does that decision say about SAGs' relative commitments to popular constitutionalism and to federalism?

From a popular constitutionalism perspective, the SAGs' argument makes a lot of sense, for all the reasons described above. And yet their brief was also, as Justice Stevens noted in dissent, somewhat "puzzling,"²² at least if one believes that the SAGs' role is to speak for the states themselves. States do not need federal judges to stop them from passing or enforcing gun control laws, after all. And if a state wants to entrench its current opposition to gun control against future changes, it can do so through its own constitution, over which its own judges have final interpretive authority. In fact, all the states that signed the *McDonald* amicus brief (and all but a handful of the states that did not) already guarantee an "individual" right to keep and bear arms in their own constitutions, often in terms more expansive than those of the Second Amendment.²³

Perhaps the difficulty of identifying a *state* interest in incorporation led the SAGs to invoke the interests of the people instead. In an unsuccessful effort to get oral argument time in *McDonald*, the SAGs argued that states are uniquely positioned because they are both "sovereign governmental entities" and "guardians of their citizens'

²¹ Sean Nicholson-Crotty, *State Merit Amicus Participation and Federalism Outcomes in the U.S. Supreme Court*, 37 PUBLIUS 599, 604 (2007) ("Ninety three percent of *amicus* briefs filed by states were supportive of state power.")

²² *McDonald*, 130 S. Ct. at 3115 n.47 (Stevens, J., dissenting).

²³ See generally Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006).

constitutional rights.”²⁴ But those two roles are not always aligned, and the SAGs ultimately embraced the latter. That choice is why the *McDonald* plurality cited the SAGs’ brief as evidence of “popular consensus,”²⁵ while Justice Stevens was puzzled by the lack of a coherent state interest.

The SAGs attempted to minimize this tension, arguing that “amici States are particularly concerned when the Court engages in constitutional or statutory interpretation that implicates federalism issues. The incorporation of the Second Amendment presents no such concerns.”²⁶ The three amici SAGs opposing incorporation called this argument “absurd”²⁷ and noted that “incorporation would strip decision-making from state legislatures and courts and place it in the hands of federal courts,”²⁸ a federalism issue if ever there was one. Incorporation would likely impose a single federal standard on the states, thereby limiting their ability to serve as laboratories for experimentation and achieve the other benefits generally associated with federalism. If anything, the thirty-eight SAGs’ brief seems to be not an argument from federalism, but an effort to use federal constitutional law to entrench the SAGs’ preferences or impose them on other states — a form of “horizontal aggrandizement.”²⁹

Whatever the merits of the SAGs’ argument, incorporation is extremely difficult to justify on the federalism grounds they invoked. First, the SAGs argued that the states needed federal judges’ help to protect state citizens from local governments: “Unless the ruling of the court of appeals below is reversed, millions of Americans will be deprived of their Second Amendment right to keep and bear arms as a result of actions by local governments, such as the ordinances challenged in this case.”³⁰ This warning sounds ominous, but is unconvincing. It is true and unsurprising that the most stringent gun control regulations are generally found at the local level: *Heller* and *McDonald* both involved handgun bans enacted by cities, while no state has such a regulation.³¹ But the showdown between state and local authorities over gun rights is less dramatic than it sounds, since states

²⁴ Motion for Leave to Participate in Oral Argument and for Divided Argument at 2 (Dec. 17, 2009), *McDonald*, 130 S. Ct. 3020 (No. 08-1521), available at <http://volokh.com/wp/wp-content/uploads/2009/12/mcdonaldamicusmotion.pdf>.

²⁵ *McDonald*, 130 S. Ct. at 3048–49 (plurality opinion).

²⁶ SAG Amicus Brief, *supra* note 5, at 23.

²⁷ Brief for the State of Illinois et al. as Amici Curiae in Support of Respondents at 18, *McDonald*, 130 S. Ct. 3020 (No. 08-1521) [hereinafter Illinois Amicus Brief], available at <http://www.chicagocunacase.com/wp-content/uploads/2010/01/08-1521-bsac-state-of-illinois.pdf>.

²⁸ *Id.* at 7.

²⁹ Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 110 (2001) (internal quotation marks omitted).

³⁰ SAG Amicus Brief, *supra* note 5, at 1.

³¹ *Id.* at 21 (“[E]very State in the Union permits private handgun ownership.”).

can simply preempt some or all local gun control, as all of the thirty-eight states arguing in favor of incorporation (plus seven more) have done.³²

Second, the SAGs argued that “[e]nforcement of the Second Amendment right to keep and bear arms against state and local governments is especially important in an era of robust interstate travel and commerce,”³³ invoking *Saenz v. Roe*³⁴ and the constitutional right to travel. This argument is weightier than the first. Some states surely do want to make it easier for their citizens to cross borders while bearing arms, even though other states would doubtless argue that locally tailored gun control is necessary to make travel safe. But harm to robust interstate travel and commerce is not itself a strong standalone argument for incorporation. Restrictions on the right to travel can and should be litigated as such, not as infringements on other constitutional rights. Were it otherwise, *Saenz* — which struck down a California law conditioning welfare benefits on a person’s length of residence in the state³⁵ — would stand for a constitutional right to welfare benefits, rather than a right to travel.

Third, the SAGs claimed to have “an interest in the proper interpretation of the Second Amendment in order to facilitate the development of similar protections under state law. Interpretive guidance from this Court, and from other federal courts, would help the States as they construe and enforce their own, analogous state-law protections.”³⁶ This argument, too, seems misplaced. If state courts want “interpretive guidance” from federal courts, they can get it whether or not the Second Amendment is incorporated. Indeed, as a matter of practice, state courts typically interpret their own constitutional provisions in lockstep with federal doctrine.³⁷ Of course, in the specific context of the “individual” right to bear arms, the borrowing should arguably go the other way, since the state courts have a *better* developed jurisprudence on the subject than the federal courts do.³⁸

Perhaps the SAGs simply meant that an incorporated Second Amendment would create more federal cases to which state courts could look for guidance. But as a practical matter it is likely that incorporation will not “facilitate the development” of state law, but ra-

³² Illinois Amicus Brief, *supra* note 27, at 21.

³³ SAG Amicus Brief, *supra* note 5, at 1.

³⁴ 526 U.S. 489 (1999).

³⁵ *See id.* at 510–11.

³⁶ SAG Amicus Brief, *supra* note 5, at 2.

³⁷ Robert K. Fitzpatrick, Note, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1850 (2004) (“Despite . . . criticism, the lockstep approach remains the most common approach to state constitutionalism.”).

³⁸ *See generally* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

ther displace it. If, for example, the federal courts establish a Second Amendment standard of review more stringent than the “reasonableness” standard unanimously favored by state courts,³⁹ the states’ own jurisprudence will probably wither, just as it has in many other areas of constitutional law. Given the *Heller* majority’s apparent rejection of the states’ preferred reasonableness test,⁴⁰ such a result is not unlikely.

CONCLUSION

This Response attempts to show that SAGs play an important but underappreciated role in popular constitutionalism; it argues that this role may force SAGs to choose between the will of the people and the interests of the states qua states. In *McDonald*, at least, the SAGs invoked the latter but actually argued for the former. Should popular constitutionalists be celebrating, concerned, or confused? Perhaps the short shrift given to state interests in the Second Amendment context demonstrates that critics of federalism are right, and that state identity simply matters less than it used to. Perhaps we are finally getting over our “national neurosis.”⁴¹ Or perhaps federalism still matters, just not as much as gun rights.

The national constitutional debate has shifted from the Second Amendment to the constitutionality of healthcare reform, but the issues explored in this Response remain central. Once again, “the people” are debating the meaning of the Constitution, grounding their arguments in terms of federalism and individual freedom. And once again, SAGs are on the front lines, simultaneously invoking the importance of state sovereignty⁴² and the sanctity of individual liberty,⁴³ while couching their arguments in constitutional — not simply political — terms. Their participation supports the idea that SAGs may be a partial answer to the problem of institutional design in popular constitutionalism.

But the SAGs’ involvement in the health care challenges also casts further light on the potential tension between the will of the people and the interests of the states qua states. In these cases, the tension is minimized, since the will of the people (some of them anyway) and the

³⁹ *Id.* at 686–87.

⁴⁰ *District of Columbia v. Heller*, 554 U.S. 570, 631 (2008).

⁴¹ See Edward L. Rubin & Malcom Feeley, *Federalism: Some Notes on a National Neurosis*,

41 UCLA L. REV. 903 (1994).

⁴² See, e.g., *States Launch Lawsuits Against Healthcare Plan*, REUTERS, Mar. 22, 2010, available at <http://www.reuters.com/article/idUSTRE62L3B820100322>.

⁴³ See, e.g., Hank Silverberg, *Virginia AG Argues for Health Care Repeal on Hill*, WTOP (Feb. 16, 2011), <http://www.wtop.com/?nid=120&sid=2274403> (quoting Virginia Attorney General Ken Cuccinelli as saying, “[t]he litigation is not so much about health care as it is about liberty”).

interests of the states are — at least arguably — more aligned, allowing SAGs to invoke the two interchangeably. Whatever the merits of their constitutional arguments, the fact that the SAGs have sought to increase federal power over state gun regulation but limit federal power over health care demonstrates their role in popular constitutionalism and their surprisingly complex relationships with the states themselves.