

***McDonald v. Chicago*. Fourteenth Amendment Incorporation, and Judicial Role Reversals**

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Abstract: McDonald v. Chicago, which incorporated the Second Amendment right to arms, was the first Supreme Court ruling to address incorporation in many decades. It was an unusual ruling, in that the Court's "conservative wing" took what had been traditionally the liberal approach, while its "liberal wing" suddenly became very conservative. Indeed, Justice Thomas staked out the most liberal position, while Justice Stevens staked out the most conservative one, and for good measure Justice Scalia found that precedent can trump originalism.

This article outlines the virtues, and problems, of the three major opinions in *McDonald*, and suggests solutions to some of the problems uncovered. The plurality opinion by Justice Alito is certainly faithful to precedent, although it highlights some illogical aspects of substantive due process incorporation. The concurrence by Justice Thomas is faithful to legislative history and original public meaning, but would have required overruling more than a century of case law. The dissent by Justice Breyer opens by proposing a very complicated, and perhaps ultimately meaningless, legal test with no basis in precedent, and alternately sets forth a very narrow application of the existing test – an application so narrow as to call into question almost all the Court's past rulings on the issue.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment, §1.

*McDonald v. Chicago*¹ held that the Second Amendment right to arms, recognized as an individual right in *District of Columbia v. Heller*,² was incorporated and applicable to the States via the Fourteenth Amendment.

McDonald is significant in that it was the Court's first incorporation decision in over four decades,³ it represented the Court's first attempt to systematize its approach to due process clause incorporation, and it reawakened a dispute over privileges and immunities clause incorporation that had lain quiescent for a half-century. To understand *McDonald's* significance requires a digression into history.

I. *McDonald's* Historical background.

The great heyday of incorporation came in the 1960s under the generally liberal Warren Court,⁴ whose incorporation rulings had seen the Justices divide into three camps:

¹ 130 S.Ct. 3020 (2010).

² 554 U.S. 570 (2008).

³ The last ruling on the incorporation of a bill of rights provision was *Ker v. California*, 374 U.S. 23 (1963); the last one ruling that aspects of a provision already incorporated were applicable to the States was *Burch v. Louisiana*, 441 U.S. 130 (1979) (conviction, on a serious offense, based on non-unanimous six juror verdict violated the right to trial by jury).

⁴ See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Ker v. California*, 374 U.S. 23 (1963); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Benton v. Maryland*, 395 U.S. 784 (1969).

Majority Position: Selective Due Process Incorporation: The Warren-era majority employed a broad form of selective due process incorporation, holding certain Federal Bill of Rights liberties incorporated by the Fourteenth Amendment, and thus binding on the States, based upon their status as “fundamental rights.” This finding keyed upon their common law importance,⁵ or their recognition in colonial times and at the Framing.⁶ Once so incorporated, the Fourteenth Amendment right was generally treated as identical to the federal Bill of Rights one.⁷

Conservative position: no incorporation, “pure due process.” The more conservative Justices rejected incorporation as a concept, and treated the Fourteenth Amendment’s due process clause as a completely separate and narrow protection covering only matters that constituted “the very essence of a scheme of ordered liberty.”⁸ That these might mirror to a greater or lesser degree a Bill of Rights liberty was, at most, coincidental. The clearest statement of this approach is probably found in *Twining v. New Jersey*:

It is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.⁹

⁵ See *Benton v. Maryland*, 395 U.S. 784, 795 (1969); *Klopfer v. North Carolina*, 386 U.S. 213, 223-25 (1967).

⁶ See *Duncan v. Louisiana*, 391 U.S. 145, 152-53 (1968); *Everson v. Bd of Education*, 330 U.S. 1, 8-15 (1947); *Near v. Minnesota*, 283 U.S. 697, 716-19 (1931).

⁷ *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (“The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a “watered-down, subjective version of the individual guarantees of the Bill of Rights.”); *Everson v. Bd. of Education*, 330 U.S. at 15.

⁸ *Duncan v. Louisiana*, 395 U.S. at 180 (Harlan, J., dissenting) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁹ 211 U.S. 78, 99 (1908), *overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964), See also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Pierce* struck down a law forbidding parents to send their children to private (and largely religious) schools. It did not

Thus, for State agents to obtain evidence by forcibly stomach-pumping a suspect was improper, not because it was a violation of Fourth Amendment guarantees against unreasonable search and seizure, but because it exceeded all bounds of civilized conduct and could not be considered “due process of law.”¹⁰

This “pure due process” standard had prevailed before the Warren Court, and under its narrow application the Court usually refused to apply Federal Bill of Rights liberties to the States, reasoning, for example, that jury trial and immunity from self-incrimination were not essential to due process, because one could envision a “fair and enlightened system of justice” that lacked them.¹¹

Most Liberal Position: Total Incorporation Under the Privileges or Immunities Clause. The most liberal approach was taken by Justices Black and Douglas, and relied upon the Fourteenth Amendment’s privileges or immunities clause, instead of its due process clause, to argue that the privileges or immunities clause was meant to incorporate the entirety of the first eight amendments.¹²

This approach had an interesting history. In the 1870s, the Court rejected it in *The Slaughter-House Cases*¹³ and *United States v. Cruikshank*.¹⁴ Seventy years later, the issue was revived when the dissenting Justice Black, in *Adamson v. California*,¹⁵ provided an extensive discussion of the intent of its framers¹⁶ and mustered

mention the First Amendment, however, and identified the liberty interest as “the liberty of parents and guardians to direct the upbringing and education of children under their control.” 268 U.S. at 534-35.

¹⁰ *Rochin v. California*, 342 U.S. 165 (1952).

¹¹ *Id.*

¹² *See* *Duncan v. Louisiana*, 391 U.S. at 162 (Black, J. concurring).; *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J. dissenting).

¹³ *Slaughter-House Cases v. Crescent City Live-Stock Landing*, 83 U.S. 36 (1872).

¹⁴ 92 U.S. 542 (1875).

¹⁵ *Adamson v. California*, 332 U.S. 46 (1947). *overruled*, *Griffin v. California*, 380 U.S. 609, 612-13 (1965).

¹⁶ 332 U.S. at 92-123 (Black, J., dissenting).

four votes in its favor;¹⁷ Justice Frankfurter filed a concurrence taking aim at Black's dissent.¹⁸ *Adamson* inspired an academic conflict that engaged Prof. William Crosskey in support of Justice Black, and Prof. Charles Fairman (egged on by Justice Frankfurter) in opposition.¹⁹ Eventually, Prof. Raoul Berger published detailed historical critiques of privileges or immunities incorporation,²⁰ and the issue seemed settled.

That the issue rose from its ashes was due entirely to the work of one man, Michael Kent Curtis, then an attorney in private practice, who dared to engage the formidable Prof. Berger to academic debates in which Berger was (in my opinion) decidedly bested.²¹

In sum, the Warren Court era had seen the (moderately liberal) majority take a broad due process selective incorporation approach, the (very liberal, at least on this issue) concurring minority take a privileges or immunities total incorporation approach, and the (conservative) dissenters holding out for a very narrow, pure due process approach that rejected incorporation *per se*.

McDonald would see a return of the three divisions, albeit with a reversal of roles. The “conservative wing” followed Justice Alito into liberal due process incorporation, Justice Thomas took what had been the very liberal position of complete privileges or immunities

¹⁷ *Id.* at 124. (Justice Douglas joined in the majority, and Justices Murphy and Rutledge, separately dissenting, indicated their agreement with it.)

¹⁸ *Id.* at 59-68 (Frankfurter, J., concurring).

¹⁹ The debate is ably documented in Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995).

²⁰ Most notably in RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1975).

²¹ See Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L. J. 89 (1982); *Still Further Adventures of the Nine Lived Cat: A Rebuttal to Raoul Berger's Reply on Application of the Bill of Rights to the States*, 62 NORTH CAROLINA L. REV. 517 (1984). Curtis went on to join the faculty of Wake Forest University School of Law and to publish *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

incorporation, the “liberal wing” argued for a very narrow selective incorporation that was inconsistent with Warren Court precedent, and Justice Stevens surprisingly took the most conservative stance of all, pure due process. We will look at each position in turn.

II. Justice Alito’s Plurality Opinion: Liberal Selective Incorporation.

The plurality’s task was straightforward. As noted above, Warren-era due process incorporation had keyed upon the perceived importance of a right at common law and to the framing generation, with an occasional hat tip to its modern recognition, evidenced by contemporary constitutions and case law.²² The right to arms easily met both tests. As *Heller* had demonstrated, it was seen as important by the framing generation,²³ perhaps even more important than freedom of speech.²⁴ In the present, the right to arms is protected by forty-one State constitutions.²⁵

The simplicity of the incorporation decision itself left the plurality with the ability to craft a memorable ruling. Previous incorporation rulings often seemed slap-dash, with little effort toward creating an overarching understanding of the incorporation issue. The First Amendment’s Establishment Clause was, for example, incorporated based on a six page discussion of religious persecutions in the colonies.²⁶ Freedom of the press was incorporated based on five pages of very

²² *Duncan v. Louisiana*, 391 U.S. 145 (1968) (importance of criminal jury trial at time of framing, with note that it continues to garner support in the States); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule: same).

²³ 128 S.Ct. at 2798-2808.

²⁴ Three State ratifying conventions called for protection of the right of free speech; seven called for protection of a right to arms. David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J. OF L. & PUB. POL’Y 559, 607 (1986).

²⁵ Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TX. REV. OF L. AND POLITICS 191, 205 (2007). The article put the count at forty, treating Kansas as a “collective right” jurisdiction, but since the article’s publication Kansas voters have amended their constitution so that it contains a clearly individual right guarantee. See KANSAS BILL OF RIGHTS §4.

²⁶ *Everson v. Bd. of Educ.*, 330 U.S. 1, 9-15 (1947).

general legal history.²⁷ Incorporation of freedom of assembly required but three sentences of analysis; it was as fundamental as freedom of speech and of the press, which had already been incorporated.²⁸ The criminal right to compulsory process took the same route to incorporation, with the Court disposing of the question in one sentence.²⁹

The *McDonald* plurality, in contrast, traced the history of due process clause case law, describing the early evolution of pure due process, and its characteristics, including a reluctance to strike down State laws, a narrow application (often whether no civilized society could be imagined without the right in question), and a two-tiered set of standards, where State actors were held to a looser standard than Federal actors.³⁰

Rulings of the later period – largely, the Warren Court – involved true incorporation, based upon whether the *American* scheme of ordered liberty required protection of the right, and generally applying the same protections and remedies given to Federal infringements of the right at issue.³¹ Given these broader standards, it is not surprising that many of these later decisions involve overruling decisions of the earlier period.³²

The plurality further invoked the legislative history, and popular understanding, of the amendment to show that its framers and their contemporaries understood it to incorporate the right to arms. This argument did, however, face two problems.

The first was that while there was extensive legislative and popular history here, that history arose in the context of the Privileges or Immunities Clause, whose effect the plurality did not propose to assess.³³ The plurality sidestepped the problem by hinting at what Professor Aynes has termed the holistic view of the Fourteenth

²⁷ *Near v. Minnesota*, 283 U.S. 697, 713-18 (1931).

²⁸ *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937).

²⁹ *Washington v. Texas*, 388 U.S. 14, 18 (1967) (“The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.”).

³⁰ 130 S.Ct. at 3032-33

³¹ *Id.* at 3034-35.

³² *Id.* at 3036.

³³ 130 S.Ct. at 3033 n. 10 (“We take no position with respect to this academic debate.”).

Amendment:³⁴ application of the right to arms to the States is mandated somewhere in section one of the Fourteenth Amendment, and we need not worry its precise location, or locations.³⁵ This approach is not ahistoric: John Bingham, the principal drafter of §1, referred to due process as the greatest privilege or immunity of an American citizen, and others have evinced similar understandings.³⁶

The second problem is that legislative purpose and popular understanding have no role in the traditional test for selective incorporation.³⁷ That approach assumes, after all, that the Fourteenth Amendment empowered *the Court* to employ judicially-created standards to decide whether a right should be incorporated.³⁸ On the other hand, if (as is common) the Court looks to the 18th century to determine whether a right is fundamental under the Fourteenth Amendment, it is hard to see why it cannot equally well look to the 19th century and the framing of the Amendment.

III. Justice Thomas' Concurrence: Privileges or Immunities Incorporation.

The task of Justice Thomas was, if anything, even more straightforward than that of the plurality. He began with a textual demonstration that, at the time, “privileges or immunities” was understood to be synonymous with “rights.”³⁹ He then proceeds to three sets of statements by the Amendment’s framers which, he suggests, illustrate the manner in which the ratifying public would have

³⁴ Richard L. Aynes, *McDonald v. Chicago, Self Defense, The Right to Bear Arms, and the Future*, 2 AKRON J. CONST. L. & POL’Y 181, 188 (2011).

³⁵ The plurality refers to Justice Black’s argument that the “chief Congressional proponents of the Fourteenth Amendment” intended to incorporate the Bill of Rights, and cites to his sources. 130 S. Ct. at 3033 & n.9. But both Justice Black and his references related to the Privileges or Immunities Clause.

³⁶ See Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. OF PA. J. OF CONSTITUTIONAL L. 1295, 1306-08 (2009).

³⁷ See Nelson Lund, *Two Faces of Judicial Restraint (or Are There More?) in McDonald v. City of Chicago*, 63 FLA. L. REV. 487, 495 (2011) (“Alito must have taken this novel and unnecessary step in order to suggest that fidelity to precedent leads in this case to the same result as originalism.”).

³⁸ Yet another anomaly of due process incorporation: the Fourteenth Amendment must be construed without reference to the understandings of its draftsmen and ratifiers.

³⁹ 130 S.Ct. at 3063-71.

understood the Amendment's effects. The first two comprise statements by Rep. John Bingham, the Amendment's House floor manager and principal draftsman, who repeatedly and publicly stated that the Amendment would give Congress "the power to enforce the bill of rights."⁴⁰ These statements were extensively publicized while the Amendment was pending in Congress.⁴¹ The third was a floor speech by the Amendment's Senate floor manager, Sen. Jacob Howard, which was likewise extensively publicized. Howard described "privileges or immunities" as covering, *inter alia*, "the personal rights guaranteed and secured by the first eight amendments of the Constitution," specifically including "the right to keep and bear arms."⁴²

The concurrence notes that these conclusions are supported by other actions of the 39th Congress – most notably its passage of the Freedmen's Bureau Act, which guaranteed legal equality in regard to "personal liberty," "including "the constitutional right to bear arms,"⁴³ and by Congressional debates on 1871 civil rights measures, which referred to the Amendment as protecting rights secured by the Constitution.⁴⁴ In short, "This evidence plainly shows that the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms."⁴⁵

The Thomas concurrence does not deal with one pragmatic concern, which may have influenced the plurality. The due process clause protects "persons," which the Court long since has ruled included corporations as well as natural persons,⁴⁶ whereas the privilege or immunities clause protects, against State infringement, the rights of "citizens of the United States." Arguably, then, aliens and corporations may have no such protected privileges or immunities and (at least to the extent that incorporation doctrine were to be shifted *en masse* to the

⁴⁰ 130 S.Ct. at 3072-3.

⁴¹ *Id.*

⁴² *Id.* at 3074.

⁴³ *Id.* at 3075. *But see* Nelson Lund, note ___ *supra*, at 496-97 (suggesting that the reference to a constitutional right to arms likely was to State constitutional guarantees; the other rights mentioned in the Act, such as rights to contract, sue, inherit and dispose of property were primarily State-guaranteed rights).

⁴⁴ *Id.*

⁴⁵ *Id.* at 3077.

⁴⁶ *See* *Northwestern National Life Insur. Co. v. Riggs*, 203 U.S. 243 (1906).

privileges or immunities clause) no substantive protection against State action. The Court was then under taking criticism over its ruling, weeks before, that corporations had election-related expressive rights comparable to those of natural persons,⁴⁷ and may not have wished to consider whether corporations had *any* substantive constitutional protection against State action.

This concern is not insoluble. The Court has long accepted, by a series of judicial fictions (some quite staggering) that corporations are “citizens” of a State for purposes of diversity jurisdiction. First, in the days when corporations were created by special legislative act, it held that a corporation takes on the citizenship of its State of incorporation and its shareholders.⁴⁸ Then, in the case of a corporation with a body of shareholders some of whom were not diverse to the opposing party, it treated the corporation as a citizen of its State of creation, with an irrebuttable presumption that its shareholders shared that citizenship.⁴⁹ That a corporation was a State “citizen” has become so accepted that the Court today treats the matter as one of statutory construction, with the corporation able to have two State citizenships, in the State where it was incorporated, and in the State of its principal place of business.⁵⁰ The concept has somehow survived the Fourteenth Amendment, which defines a State citizen as someone “born” or “naturalized” as a U.S. citizen, and residing in a State, when corporations are not born, not naturalized, and have no necessary residence.

Next to elaborate fictions such as these, treating a corporation as a citizen for privileges and immunities purposes seems a trifling step.

⁴⁷ See *Citizens United v. F.E.C.*, 130 S.Ct. 876 (2010).

⁴⁸ *Bank of Augusta v. Earle*, 38 U.S. 519, 528-29 (1839); *Louisville, Cincinnati & Charleston Ry. Co. v. Letson*, 43 U.S. 497, 555 (1844) (“A corporation ... seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state.”)..

⁴⁹ *Ohio & Miss. RR Co. v. Wheeler*, 66 U.S. 286, 296 (1861) (“[A] suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body, and that no averment or evidence to the contrary is admissible for the purposes of withdrawing the suit from the jurisdiction of a court of the United States.”).

⁵⁰ See *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1186 (2010) (construing the diversity jurisdictional statute, 28 U.S.C. §1331(c)(1)).

IV. The Breyer Dissent⁵¹

Justice Breyer's dissent (in which Justices Ginsburg and Sotomayor joined), has two major foci: it outlines a novel and exacting test for incorporation of Bill of Rights liberties, and argues that the Second Amendment would also fail existing incorporation standards. As a preliminary matter, we might note two anomalies in the dissent's reasoning.

First, as noted above, it requires us to attribute to the Reconstruction Congress an intent to constitutionalize the legal position of the Confederacy, *i.e.* that liberty depended upon the States' power to offer military resistance to the national government. This position was not exactly popular in the North in 1866, nor with the Reconstruction Congress.⁵² Likewise, it requires us to assume that the framers of the Fourteenth Amendment meant to constitutionalize such a right of State resistance in section one, even as they labeled it "rebellion against the United States" and punished those who had exercised it in sections three and four.⁵³

Secondly, the dissent must argue that the Second Amendment cannot properly be incorporated under *either* the due process clause *or* the privileges or immunities clause. The problem here is that the Court's standard for incorporation under one clause is largely the

⁵¹ I will not deal with Justice Stevens' dissent, nor with Justice Scalia's concurrence, which answered it. Justice Stevens' dissent was joined by no other Justice, and was strangely inconsistent with the remainder of his jurisprudence, since it took a very narrow pure due process approach. Professor Aynes's summary is solid:

"Unfortunately, his 'swan song' failed to do him justice. Whether affected by the intensity of the debate, 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 jurisprudential commentary without the force or weight one would expect of a senior dissenting Justice." Richard L. Aynes, *McDonald v. Chicago, Self Defense, the Right to Bear Arms, and the Future*, 2 AKRON J. CONST. L. & POL'Y 181, 192 (2011).

⁵² The 39th Congress at the time of the Amendment's proposal had excluded all delegations from the former Confederate States, so the 39th Congress essentially represented the northern and border States.

⁵³ Section three barred most former Confederate officials or military officers from holding public office; section four forbade States to repay any debt incurred "in aid of insurrection or rebellion against the United States."

converse of the standard for incorporation under the other, so that the very fact that a right fails one standard is strong evidence that it passes the other. Under the Court's 19th century rulings, privileges or immunities incorporation requires that a right have been newly *created*, not *guaranteed*, by the U.S. Constitution. Thus, in *United States v. Cruikshank*,⁵⁴ the Court had ruled that the right to arms and the right to assemble failed privileges or immunities incorporation because they "existed long before the adoption of the Constitution of the United States," and were "found wherever civilization exists."⁵⁵

But those standards for what fails privileges or immunities incorporation are a good paraphrase for what *passes muster* under due process incorporation, *viz.*, rights "recognized by all temperate and civilized governments, from a deep and universal sense of its justice,"⁵⁶ or "'deeply rooted in this Nation's history and tradition."⁵⁷

The dissent would thus be hard put to avoid contradiction if it argued that the right to arms failed both privileges or immunities and due process incorporation.

The dissent dealt with this problem by overlooking it.

A. The Dissent's (New) Standard for Incorporation.

The dissent suggests that in determining whether a right is "fundamental," relying upon history is "both wrong and dangerous,"⁵⁸ despite the fact that reliance upon history has dominated the incorporation case law of the last seventy years.⁵⁹ Instead, the dissent suggests that the right at issue (narrowly and specifically defined, here the right to possess arms for self-defense)⁶⁰ should be evaluated in light of several criteria.

The dissent's test for whether a right is fundamental is largely novel. The Court's prior incorporation jurisprudence had focused upon the importance of a right at the time of the framing of the Bill of Rights,

⁵⁴ 92 U.S. 542 (1875).

⁵⁵ 92 U.S. at 551.

⁵⁶ *Chicago B. & O. Ry Co., v. Chicago*, 166 U.S. 226, 238 (1897).

⁵⁷ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

⁵⁸ 130 S.Ct. at 3123.

⁵⁹ *See* authorities cited notes _____, *supra*.

⁶⁰ *Id.* at 3124.

⁶¹ and (sometimes) its present importance as established by State law.⁶² Moreover, the Court tended to take a broad view of the right involved.⁶³ Rather than these simple tests, the dissent outlines a completely new test with eight elements, four of which counsel for incorporation, four of which counsel against. Balancing two sets of four factors –most of which cannot be quantized anyway, *i.e.* how is a judge to know whether there is a “consensus” that a right is fundamental -- against each other seems certain to maximize subjectivity. In the end, the eight factors seem likely to distill into one: how fond the judge is of the right in question.

1. The Criteria Which Would Argue for Incorporation under the Dissent’s Test.

a. Modern Consensus that a Right is Fundamental.

The first criteria in the dissent’s test would be whether there is an existing and modern consensus that the right is fundamental.⁶⁴ The dissent does not state how such a consensus would be determined, nor explain why, in its view, it was lacking in this case but present in past incorporation decisions. One might suspect that, in practice, consensus would be measured by acceptance by the judge in question, and by his associates – in short, a straw poll at the country club.

The issue of popular acceptance had *occasionally* arisen in prior incorporation decisions, although “consensus” was hardly required: in *Mapp v. Ohio* acceptance of the exclusionary rule by a simple majority of States sufficed.⁶⁵

By most measures, the right to arms would easily pass this test.

⁶¹ See *Duncan v. Louisiana*, 391 U.S. 145, 153-54 (1968); *Benton v. Maryland*, 395 U.S. 784, 795 (1969); *Powell v. Alabama*, 287 U.S. 45, 61-65 (1932).

⁶² *Wolf v. Colorado*, 338 U.S. 25 (1949) declined to incorporate the exclusionary rule as a remedy for Fourth Amendment violations, citing the fact that 17 States had accepted such a rule, whereas 30 had refused to adopt it. 338 U.S. at 30. When *Wolf* was overruled in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court noted that a majority of States had by then accepted the exclusionary rule. 367 U.S. at 651.

⁶³ In *Duncan*, the issue was failure to allow jury trial for a misdemeanor that had a maximum punishment of two years, but the Court considered the importance of the right to jury trial as a generality.

⁶⁴ 130 S.Ct. at 3124-25.

⁶⁵ See note ____, *supra*.

- The people of 41 States have adopted individual right to arms provisions in their State constitutions.⁶⁶
- If popular surveys are taken as an indication, 81% of Americans believe they have a constitutional right to arms.⁶⁷
- The Court had before it *amicus* briefs in support of incorporation filed on behalf of a majority of members of the U.S. House and Senate, and another filed on behalf of three-quarters of the States.⁶⁸

The dissent notes neither of the first two considerations, and to the third weakly responds that there were *amicus* briefs opposing incorporation as well.⁶⁹ Nelson Lund's rejoinder is apt:

If such large supermajorities of the people's elected representatives do not show the existence of a consensus, simply because other amici took an opposing position, consensus must mean "virtual unanimity." By that standard, there may be virtually *no* fundamental rights in America today.⁷⁰

The dissent then notes "every State regulates firearms extensively,"⁷¹ which is rather an overstatement,⁷² as well as being of doubtful relevance. If rights could not be regulated, Con Law casebooks would be printed in pamphlet form, either from lack of regulations, or from lack of rights.⁷³

⁶⁶ See note ___ *supra*, and associated text. (Volkoh article)

⁶⁷ Angus Reid United States Public Opinion Poll (2010), online at http://www.angus-reid.com/wp-content/uploads/2010/07/2010.07.07_Guns_USA.pdf.

⁶⁸ *McDonald*, 130 S.Ct. at 3049.

⁶⁹ *Id.* at 3124.

⁷⁰ Nelson Lund, note ___ *supra*, at 522.

⁷¹ *Id.* at 3124.

⁷² Three States – Alaska, Arizona, and Vermont -- do not require a permit for concealed carry, and the great majority of States do not require a permit to purchase or possess a firearm. See note ___ and associated text, *infra*.

⁷³ The regulations governing broadcast media can fairly be described as staggering. See 47 C.F.R. Subch. C.

b. Furtherance of Other Constitutional Objectives.

Next the dissent argues that “we are aware of no argument that incorporation will further any other or broader constitutional objectives.”⁷⁴ This is hardly surprising; no such requirement had been imposed in existing incorporation case law,⁷⁵ nor was it raised at oral argument. The dissent then proceeds to elaborate upon this test: “[w]e are aware of no argument that gun-control measures target or are passed with the purpose of targeting ‘discrete and insular minorities’.”⁷⁶ “We are aware of no argument” hardly negates that contention; it simply reflects that when an issue is not raised, it is unlikely to be briefed. This point substantially overlaps with the next criterion, and so both will be analyzed below.

3. Helping to Assure Equal Respect.

Next, the dissent argues that incorporation will not “help to assure equal respect for individuals,”⁷⁷ although it is unclear how that relates to incorporation or to the fundamental nature of a right. Again, since this is a novel standard, it is not surprising that the issue was not covered in briefing. In fact, it is not difficult to show that gun control frequently generates discrimination, inequality and favoritism.

Arms control measures have historically been used by those in power to disarm and weaken those out of power. Under British law, they were directed at those politically suspect, at Roman Catholics and Protestant “dissenters,” and later at the non-gentry.⁷⁸ During the American Revolution, they were directed at those who refused a loyalty

⁷⁴ 130 S.Ct. at 3125.

⁷⁵ The dissent cites *United States v. Carolene Products*, 304 U.S. 144 (1938), which was not an incorporation case, and a Brandeis concurrence in *Whitney v. California*, 274 U.S. 357 (1927), which was overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The portion of the Brandeis concurrence cited notes that the Framers were courageous men and freedom of expression is important to democratic functions; it has no relation to incorporation.

⁷⁶ 130 S.Ct. at 3125.

⁷⁷ 130 S.Ct. at 3125.

⁷⁸ See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 69-74, 78-79, 115-16 (1994).

oath.⁷⁹ After that, the Slave Codes and later Black Codes disarmed free blacks.⁸⁰ Later laws were selectively enforced to the same end. Well into the 20th century, a State Supreme Court justice saw no problem reciting the origins of a ban on carrying concealed weapons in these words:

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in the turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied.⁸¹

When recent immigrants became suspect in the early 20th century, arms laws singled them out: New York's Sullivan Act allowed sales to felons but not to noncitizens.⁸² Its rival the Uniform Pistol Act equated noncitizens with felons:

Sec. 5. ALIENS AND CRIMINALS MUST NOT POSSESS ARMS. No unnaturalized foreign-born person and no person who has been convicted of a felony ... shall own or have in his possession or under his control, a pistol or revolver. Violations of this section shall be punished by imprisonment for not less than five years.⁸³

⁷⁹ 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, 157-60 (2007).

⁸⁰ This history was extensively documented in the *McDonald* plurality opinion, 130 S.Ct. at 3038-40, and in Justice Thomas' concurrence, *id.* at 3080-84.

⁸¹ *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

⁸² 1911 N.Y. Laws ch. 195, §2, at 443 (handgun carrying or possession in a public place by "any person not a citizen of the United States" a felony).

⁸³ Report of the Committee on a Uniform Act to Regulate the Sale and Possession of Firearms to the 34th Annual Meeting of the National Conference of Commissioners on Uniform State Laws at 20-21 (1924).

At the Federal level, the Gun Control Act of 1968 barred firearms possession by several classes of persons, distinguished less by their potential dangerousness than by their unpopularity with Congress – those who had renounced American citizenship, or been given a dishonorable military discharge, or were users of marihuana.⁸⁴

Moreover, it has frequently been demonstrated that, under systems requiring firearm permits, the rich, famous, and politically connected (while generally living in secure neighborhoods) easily obtain permits while average citizens are denied them. The ease with which celebrities and the very wealthy obtain pistol permits in New York City has been noted.⁸⁵ At a time when ordinary citizens were waiting a year to submit their permit application,⁸⁶ two performers for the band Aerosmith had the head of the permit-issuing division personally fingerprint them backstage, in exchange for tickets to their show.⁸⁷ Similar problems have been alleged in California.⁸⁸ In Washington, D.C., the Department of Justice has repeatedly had to ward off attempts by the powerful to have themselves or their private bodyguards deputized as U.S. Marshals, so as to carry firearms despite D.C. law.⁸⁹ After D.C.'s handgun ban was struck down, its government substituted a complex and expensive process of licensing;⁹⁰ as a result,

⁸⁴ 18 U.S.C. §922(d)(3),(6),(7).

⁸⁵ *Lifestyles of the rich and packin': High-profile celebrities seeking gun permits on the rise*, online at http://articles.nydailynews.com/2010-09-27/local/27076445_1_gun-high-profile-celebrities-divorce-lawyer.

⁸⁶ *Federation of New York State Rifle and Pistol Clubs v. McGuire*, 101 Misc. 2d 104, 420 N.Y.S.2d 602 (1979).

⁸⁷ Jon Wiederhorn, *Janie's Got A Gun Permit? Aerosmith Flap Lands Cop In Hot Water*, MTV, December 19, 2002, online at <http://www.mtv.com/news/articles/1459226/janies-got-gun-permit.jhtml>

⁸⁸ *Calif. Sheriff Draws Fire For Conceal Gun Permit Policy*, online at <http://www.officer.com/news/10522348/calif-sheriff-draws-legal-fire-for-concealed-gun-permit-policy> (Sheriff rejects application by former policeman and present security manager, while issuing permits to the wealthy and to campaign contributors).

⁸⁹ See Memorandum for Francis J. Martin, Acting General Counsel, United States Marshals Service (May 25, 1994) Online at <http://www.justice.gov/olc/depmar.htm>. (opining that deputizing members of Congress would violate separation of powers; noting prior rulings on requests to deputize bodyguards for Henry Kissinger and Nelson Rockefeller, after they left office).

⁹⁰ Christian Davenport, *Get a Gun in D.C.—Do You Feel Lucky?*, Washington Post,

gun registrations are much more common in safe, high-income parts of the District.⁹¹

d. Part of the Democratic Process / Protection for Minorities.

Nor, the dissent suggests, is the right to arms “a necessary part of the democratic process,” like many First Amendment rights, or a protection against “individuals who might otherwise suffer unfair or inhumane treatment at the hands of a majority,” like Fourth, Fifth, Sixth and Eighth Amendment rights.⁹²

The first argument overlooks the likelihood that mass exercise of the right to arms might function as a backup to expressive rights. Just as Gandhi’s methods worked against the British Empire but would merely have added to the body count of the Nazi one, expressive liberties become less valuable when anti-democracy are willing to use outright force and fraud. This has happened in the U.S. – *vide* the 1946 “Battle of Athens.”⁹³

That criminal process rights protect minorities seems a strange proposition: they protect majorities as well as minorities,⁹⁴ and the right to trial by jury is one that is singularly unsuited to protecting a minority.⁹⁵

Sept. 2, 2009, online at http://www.washingtonpost.com/wp-dyn/content/article/2009/09/01/AR2009090103836_pf.html (“It took \$833.69, a total of 15 hours 50 minutes, four trips to the Metropolitan Police Department, two background checks, a set of fingerprints, a five-hour class and a 20-question multiple-choice exam.”)

⁹¹ Paul Duggan, *Since DC’s handgun ban ended, well-heeled residents have become well armed*, Washington Post, Feb. 8, 2011, online at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706450.html?hpid=topnews&sid=ST2011020706491>

⁹² 130 S.Ct. at 3125.

⁹³ <http://www.constitution.org/mil/tn/batathen.htm>.

⁹⁴ One might compare these to First Amendment rights against establishment of religion, which clearly does protect minorities against a majority.

⁹⁵ The only conceivable condition under which jury trial *might* protect an unpopular minority would be if there was a requirement of unanimity. But the requirement of a unanimous vote has *not* been incorporated. *Apodaca v. Oregon*, 406 U.S. 404 (1972).

The dissent's reasoning here tends, moreover, to be circular. We see warrantless search of a residence, allowing the prosecution to call a defendant to testify, or allowing the government to move for a new trial after acquittal as "unfair or inhumane treatment" precisely because we are accustomed to the Fourth and Fifth Amendments and their incorporation.

*Summary of the Dissent's Incorporation Test:
Factors Favoring Incorporation*

The dissent's proposed incorporation test mark a great departure from all past incorporation case law. It calls for an exceptionally narrow inquiry; as we shall see, its standards would call into question the decisions to incorporate a good many liberties, and certainly the decisions to recognized nonenumerated, substantive due process rights. The four criteria moreover seem at times to place a veneer of objectivity over the fundamentally subjective decision of "how much does this right comport with my likes and dislikes?"

2. Constitutional Downsides: Factors which, under the Dissent Test, Counsel Against Incorporation.

Having laid out four criteria which counsel for incorporation, the dissent then lays out four that it maintains should counsel against. Thus far, the dissent's tests have focused upon what the right proposed for incorporation may do; at this point the dissent shifts to a consideration of what it should not do, specifically "work a significant disruption in the constitutional allocation of decisionmaking authority..."⁹⁶

Most of the factors are varying phrasings of "should support federalism, in the sense of protecting State decisionmaking and flexibility." One can only note that this ran against past positions taken by two of the dissenters. Justices Breyer and Ginsberg had earlier joined the Stevens dissent in *Printz v. United States*,⁹⁷ which dissent argued that Congress had the power to create Federal programs

⁹⁶ 130 S.Ct. at 3125.

⁹⁷ 521 U.S. 898 (1997). Any violation of the relevant section of the statute was punishable by up to a year's imprisonment. 521 U.S. at 904.

(specifically, a gun control program) and force unwilling State law enforcement officials to carry them out, at their own expense, or face criminal penalties.⁹⁸ This would seem a more significant incursion upon State's decisionmaking authority than was at issue in *McDonald*. Those Justices also joined the majority in *Gonzales v. Raich*,⁹⁹ upholding the power of Congress to outlaw noncommercial possession of marihuana pursuant to a State medicinal marihuana law, and dissented in *United States v. Lopez*,¹⁰⁰ which held that the Federal commerce power did not reach simple possession of a firearm near a school. In short, some who joined the dissent came rather late to an appreciation of federalism.

a. Intrusion Upon a Traditional and Important Area of State Concern.

The dissent argues that incorporating the right to arms would mark a Federal “incursion on a traditional and important area of State concern, altering the constitutional relationship between the States and the Federal government.”¹⁰¹

The same can of course be said of all past incorporation decisions. As their result, States cannot regulate expressive activity, contraception, or abortion except within narrow limits, pat down suspects without articulable suspicion, appeal a criminal acquittal, question an arrestee without reading him a specific Court-dictated warning, use infra-red monitors to get search warrants for “grow houses,” convict for a serious offense *via* a jury of fewer than six persons, or prosecute for private gay sexual activity.

b. Requiring Determination of Complex Empirical Questions.

Second, the dissent argues, settling the parameters of the right will require “finding answers to complex empirically based questions of a type that legislatures are better able than courts to make.”¹⁰² This

⁹⁸ 521 U.S. at 941 (Stevens, J., dissenting).

⁹⁹ 545 U.S. 1 (2005).

¹⁰⁰ 514 U.S. 549 (1995).

¹⁰¹ *Id.*

¹⁰² 130 U.S. at 3126.

“fine tuning of protective rules,” it suggests, “is likely to become part of a daily judicial diet.”¹⁰³

While there may be valid reasons not to incorporate a Bill of Rights liberty under the Due Process Clause, it is hard to see how the concern that it would make too much work for the courts has much validity. By that standard, the Fourth Amendment should never have been incorporated; its elaboration and application are ongoing, fifty years after *Mapp v. Ohio*,¹⁰⁴ and comprise much of the daily work of any State criminal court.

Likewise, freedom of expression can require a court to make complex empirical determinations regarding a variety of issues. It took a 37 page opinion for the D.C. Circuit to uphold the White House sidewalk regulations,¹⁰⁵ following a trial that saw twenty witnesses testify,¹⁰⁶ over a period of weeks.¹⁰⁷ That in turn has been followed by numerous “as applied” challenges to the same regulations.¹⁰⁸

Finally, the prediction has not been borne out in practice. The great majority of post-*McDonald* challenges have not involved determination of complex empirical issues. Can New York charge \$340 to apply for a pistol possession permit?¹⁰⁹ Can Maryland require that an applicant for a carry permit show “good and substantial reason” for issuance?¹¹⁰ Can Chicago both require that permit applicants prove they

¹⁰³ *Id.*

¹⁰⁴ 367 U.S. 643 (1961).

¹⁰⁵ *White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984).

¹⁰⁶ 746 F.2d at 1525.

¹⁰⁷ At the time of the trial, I was working at Interior Department, across the hall from the National Capitol Region Park Service division of the Solicitor’s Office. My memory is that the trial consumed 2-3 weeks, and that one narrow issue – requirements limiting the size of the wood that could be used for a protest sign – required calling lumber experts to document how much the requirements affected the possible size of signs, and whether lumber above the limit would be useful as a weapon.

¹⁰⁸ *See, e.g., United States v. Cinca*, 56 F.3d 1409 (D.C. Cir. 1995); *United States v. Sheehan*, 512 F.3d 621 (D.C. Cir. 2008); *United States v. Fredricksson*, 893 F.2d 1404 (D.C. Cir. 1990); *United States v. Musser*, 873 F.2d 1513 (D.C. Cir. 1989); *Thomas v. United States*, 557 A.2d 1296, 1298 (D. C. 1989).

¹⁰⁹ *Kwong v. Bloomberg*, No. 1:11-cv-02356 (S.D.N.Y., filed Apr. 5, 2011)

¹¹⁰ *Wollard v. Sheridan*, No. 1:10-cv-02068 (D. Md. March 2, 2012) (striking the requirement).

have trained on a shooting range, and also ban all shooting ranges?¹¹¹ Can Massachusetts refuse possession permits to lawful aliens?¹¹² All of these are likely to be determined by motion practice rather than after a lengthy trial.

c. Impairment of Federalism and State Decisionmaking

Third, the dissent argues that “[T]he ability of States to reflect local preferences and conditions—both key virtues of federalism”¹¹³ will be undermined by incorporation; States have varying degrees of private gun ownership, and of crime problems. This is certainly true, but would apply with equal force to the incorporation of criminal procedure under the Fourth, Fifth, and Sixth Amendments.

d. Lack of “Offsetting Justification.”

Fourth, the dissent submits that incorporation removes decisionmaking from the democratic process without any “offsetting justification.”¹¹⁴ Exactly what might be offsetting justifications are not detailed. It cites the lengthy consideration given the handgun ban in Oak Park,¹¹⁵ suggesting that the justification referred to would be hasty rather than deliberative adoption of a restriction. Again, this does appear to have been a requirement in any prior incorporation ruling.

It is difficult to see how it can be useful consideration. Should incorporation of a Bill of Rights freedom depend upon which test case first comes before the Court, one involving a rule adopted in haste, or one adopted after careful consideration? If the hasty rule led to incorporation, could advocates of the carefully-considered rule argue that their situation was distinguishable?

Is the Dissent’s Test Consistent With Past Incorporation Precedent?

¹¹¹ *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (striking the shooting range ban).

¹¹² *Fletcher v. Haas*, ___ F. Supp. 2d ___, 2012 WL 1071713 (D. Mass., Mar. 30, 2012) (striking the restriction).

¹¹³ 130 U.S. at 3128.

¹¹⁴ *Id.*

¹¹⁵ Oak Park was also sued, and was a respondent in the Supreme Court.

The dissent’s proposed test would appear to require overruling, or at would at least cast doubt upon, a considerable body of incorporation precedent. We can compare the situation in relation to the dissent’s first three tests (comparison in relation to the fourth is impossible, since prior rulings did not assess the deliberateness of the drafters, or involved no legislative decision at all). For each criterion, “yes” would support incorporation under the dissent’s standards:

	Evidence of Popular Consensus?	Is Application Non-Complex?	Does It Preserve State Decisionmaking and Flexibility?
<i>McDonald</i>	Yes, strong ¹¹⁶	Somewhat	No
<i>Mapp v. Ohio</i>	Limited ¹¹⁷	No	No
<i>Lawrence v. Texas</i>	Limited ¹¹⁸	Yes	No
<i>Roe v. Wade</i>	No ¹¹⁹	Somewhat ¹²⁰	No
<i>Death</i>	No ¹²¹	Somewhat	No

¹¹⁶ See notes ___ and associated text, *supra*.

¹¹⁷ A simple majority of States had employed the exclusionary rule as a sanction for Fourth Amendment violations. See note ___, *supra*.

¹¹⁸ Prior to the ruling, polls asking whether homosexual relations should be legal showed 50-60% in favor. USA Today/CNN/Gallup Poll Results, online at <http://www.usatoday.com/news/polls/tables/live/2003-07-28-poll-gays-issues.htm>. Whether something should be recognized as a constitutional right is, of course, narrower than the question of whether it should be legal.

¹¹⁹ Polls taken after the opinion showed supporters outnumbering opponents by about 52% to 42%. *U.S. Attitudes Toward Roe v. Wade*, Wall Street Journal, online at <http://online.wsj.com/public/resources/documents/info-harris0503.html>. The ruling notes that 25 States then banned abortion unless necessary to save the life of the mother.. 367 U.S. at 140, n. 34.

¹²⁰ State attempts to get around the ruling have posed legal issues similar to what the dissent projects for *McDonald*.

Penalty

In short, the dissent's novel test for incorporation would call into question a considerable body of settled law, unless it is intended to be a special *ad hoc* test, applicable only to the Second Amendment.

B. The Dissent's Application of Existing Standards for Incorporation.

Having done with its own novel test, the dissent reluctantly turns to the traditional test for incorporation, the question of whether the Second Amendment is "deeply rooted in the Nation's history and traditions."¹²² It proposes a narrow frame of reference: citations demonstrating the esteem given the Second Amendment, or even that given to keeping and bearing arms, will not suffice, since they may refer to its militia clause rather than to its right to arm clause.¹²³ It then proceeds to analyze the relevant history by era, focusing upon two issues: how the nature of the right was understood, and how arms-bearing was regulated.

1. Nature of the Right as Understood in Different Timeframes

a. The Eighteenth Century

The dissent begins with the British experience in the eighteenth century, and argues that the right to arms was seen as "primarily for the purpose of protecting militia-related rights."¹²⁴ It relies upon an *amicus* brief by historians for the proposition that, when Blackstone spoke of the 1689 Declaration of Rights and of "auxiliary right of the subject ... that of having arms for their defense, suitable to their

¹²¹ Public opinion surveys indicate a 60-70% approval of the death penalty, with about 50% of those polled feeling it is not applied often enough. Gallup Poll, online at <http://www.pollingreport.com/crime.htm>

¹²² 130 S.Ct. at 3130 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

¹²³ 130 S.Ct. at 3130.

¹²⁴ 130 S.Ct. at 3131.

condition and degree and as allowed by law,”¹²⁵ he was clumsily trying to express concern over

the right of Parliament (representing the people) to form a militia to oppose a tyrant (the King) threatening to deprive the people of their traditional liberties (which did not include an unregulated right to possess guns).¹²⁶

To begin with, this view is quite anachronistic, in regard both to 1689, and Blackstone’s writings in the 1760s. In 1661, Parliament had acknowledged that the King controlled the militia:

Forasmuch as within all His Majesty’s realms and dominions the sole supreme government command and disposition of the militia and of all forced by sea and land and of all forts and places of strength is and by the laws of England ever was the undoubted right of His Majesty and his royal predecessors Kings and Queens of England and that both or either of the Houses of Parliament cannot nor ought to pretend to the same....¹²⁷

This had not changed by Blackstone’s time, a century later.¹²⁸ Far from prizing its hypothesized role as organizer of the people against the Crown, Parliament ensured complete royal control over the militia. A 1761 statute recognized that the monarch would appoint the Lords Lieutenant of the militia, who in turn would select its officers.¹²⁹ All

¹²⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *144 (1765).

¹²⁶ 130 S.Ct. at 3131/

¹²⁷ *An Act Declaring the Sole Right of the Militia to be in the King and for the Present Ordering and Disposing the Same*, 13 Car. II c. 6 (1661).

¹²⁸ JOHN WILLIAM FORTESCUE, THE BRITISH ARMY 1783-1802, at 2 (1905) (“The command of the militia was vested in the Sovereign, having been first torn from him in the Great Civil War, and then yielded back at the Restoration.”). *See also An Act to Explain and amend an Act, passed in the second year of the reign of his present Majesty*, 4 Geo. III ch. 17 (1763) (acknowledging right of the king to replace Lords Lieutenant of the militia).

¹²⁹ *An Act to explain, amend, and reduce into one Act of Parliament, the several Laws, now in being, relating to the Raising, and Training the Militia*, 2 Geo. II ch.20 §§ 1, 2 (1761).

officers would take an oath of loyalty to the monarch.¹³⁰ Only a tiny part of the male population, selected by lot, would serve;¹³¹ these would be supplied with government-issued guns, stored under lock and key by their officers.¹³² If a Lord Lieutenant judged it “necessary to the peace of the Kingdom,” Parliament authorized him to seize the arms from those officers.¹³³

In short, the idea of Parliament organizing the people into a militia in order to resist the King is romantic fiction, not history. If anything, Parliament sided with the Crown and treated the scaled-down militia as a necessary evil, something needing close royal control, down to the power of direct Crown appointees to seize its arms at will.

Nor can the English Declaration of Rights’ provision, that “the subjects which are Protestant may have arms for their defence suitable to their conditions and as allowed by law,”¹³⁴ fairly be described as militia-oriented. As Joyce Malcolm documented over a decade ago, the convention which drafted the Declaration repeatedly edited the draft to make it relate to individual arms-bearing, rather than militia-related use.¹³⁵ Moreover, Prof. Malcolm found records of the floor debates in Commons:

¹³⁰ *Id.*, §§ 36, 42. The militia thus created was quite unlike the universal militia of the American colonies. Out of an adult male population of about a million, only 28,660 men, chosen by lot, were to be enrolled. *Id.* §41. They used government-issued arms, which were collected and stored by their officers. §§104, 105.

¹³¹ Out of an adult male population of about a million, only 28,660 men were to be enrolled. *Id.* §41.

¹³² *Id.*, §104. (“the captain of each company of militia shall keep in his own custody, or leave or deposit with the several sergeants belonging to his company ... the arms, clothes and accoutrements provided for his company of militia, and the churchwardens of every parish or place where the said arms, clothes, and accoutrements are so deposition, or one of them, are hereby required to provide... a chest, in which such captain, sergeant or or other person so appointed as aforesaid, shall keep the arms in some dry part of his house or dwelling, under lock and key....”).

¹³³ *Id.* §105.

¹³⁴ 1 W. & M. ch. 2 (1689).

¹³⁵ JOYCE LEE MALCOLM, note __ *supra*, at 119-20 (“[T]he Convention retreated steadily from such a position and finally came down squarely, and exclusively, in favor of an individual right to have arms for self-defense.”).

Forcible disarmament was personally humiliating – some members had been disarmed – and politically dangerous, with its spectre of arbitrary rule. Sir John Maynard, at eighty-six the “father of the House,” was incensed that an Act of Parliament was made to disarm all England, whom the Lieutenant should suspect, by day or night, by force or otherwise – This done in Ireland for the sake of putting arms into Irish hands.” He branded it “an abominable thing to disarm a nation, to set up a standing army.” ... Mr. Boscawen complained that the militia, “under pretence of persons distributing the government, disarmed and imprisoned men without any cause,” adding “I myself was so dealt with.”¹³⁶

From there, the dissent moves on to the era of the Framing, suggesting that here, too, the primary purpose of the right to arms was to empower the militia system. As I have suggested previously,¹³⁷ the Second Amendment has two clauses because it has two purposes: to satisfy those critics of the original Constitution who desired to commemorate the militia, as part of Classical Republican thought, and to satisfy those critics who desired an individual right to arms, as part of the emerging Jeffersonianism. It is doubtful that either desire can be called “primary.” Certainly, there were many of the Founding Generation who saw the individual right to arms as very important. These included luminaries such as Thomas Jefferson,¹³⁸ Samuel Adams,¹³⁹ James Madison,¹⁴⁰ a substantial minority of the Pennsylvania

¹³⁶ *Id.* at 116.

¹³⁷ David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. OF L. & POLITICS 1 (1987); David T. Hardy, *The Rise and Demise of the “Collective Right” Interpretation of the Second Amendment*, 59 CLEVELAND ST. L. REV. 315, 322-24 (2011).

¹³⁸ Who proposed “no freeman shall ever be debarred the use of arms” for the Virginia Declaration of Rights. 1 PAPERS OF THOMAS JEFFERSON 344 (Julian P. Boyd ed. 1950).

¹³⁹ Who proposed a Federal bill of rights containing “[t]hat the said constitution shall never be construed to authorize Congress ... to prevent the people of the United States who are peaceable citizens from keeping their own arms” DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 86-87 (Boston, Peirce & Hale eds. 1856).

¹⁴⁰ Who wrote, “A Government resting on a minority, is an aristocracy not a Republic, and could not be safe with a numerical & physical force against it, without

ratifying convention,¹⁴¹ and a majority of the New Hampshire ratifying convention.¹⁴² So, too, the early American constitutional commentators St. George Tucker¹⁴³ and William Rawle.¹⁴⁴ The right to arms over this period cannot be classified as exclusively militia-related.

We might also consider what the interpretative effect would be if the right were properly categorized as militia-related, based on the fact that some proportion of Framers spoke of it in that light. Rights-consciousness usually forms around a specific background, sometimes rather narrow.

Most of the Bill of Rights is comprised of broadly-worded guarantees, discussed by the Framing generation in terms of the problems they had experienced or foreseen. Freedom of expression and association were at their outset often tied to political discussion. The Virginia Declaration of Rights provided that “the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.”¹⁴⁵ Yet the Court has had no difficulty recognizing that these rights extend far beyond the political, to cover nude dancing and computer-generated pornography.¹⁴⁶ It is hard to think of a case in which the Court has treated the broad terms of a Bill of Rights guarantee as being narrowed to the specific problems that motivated the Framers.

b. The Antebellum Period

a standing Army, and enslaved press, and a disarmed populace.” Douglass Adair, *Notes and Documents: James Madison's Autobiography*, 2 WILLIAM AND MARY QUARTERLY (3D SER.) 191, 208 (1945).

¹⁴¹ Which proposed, for a U.S. bill of rights, “no law shall be passed for disarming the people or any of them, unless for crimes committed or real danger of public injury from individuals...” 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note ___, at 597-98.

¹⁴² Which proposed, for the same purpose, “Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.” 1 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1836).

¹⁴³ 2 WILLIAM BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS 143, n.40 (St. George Tucker ed. 1803).

¹⁴⁴ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION 125 (Philadelphia, 2d ed. 1829).

¹⁴⁵ Virginia Declaration of Rights §12 (1776).

¹⁴⁶ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

The dissent notes that during this period, American courts “repeatedly upheld” bans on carrying weapons concealed.¹⁴⁷ Yet the relevant issue here is that the courts of the period almost universally accepted the right to arms as an individual right, and bans on concealed carry as reasonable “manner” restrictions on one mode of carrying. A Louisiana court, for instance, noted that the concealed carry ban “interferes with no man’s right to carry arms (to use its words) ‘in full open view,’ which places men upon an equality. This is a right guaranteed by the Constitution....”¹⁴⁸ The Alabama Supreme Court cautioned that “A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for defense, would be clearly unconstitutional.”¹⁴⁹ When Georgia prohibited possession of all but the largest handguns,¹⁵⁰ its Supreme Court struck down the measure, noting that “The right of the whole people, old and young, men, women, and boys, and not militia only, to keep and bear arms of every description, and not merely such as are used by the militia, shall not be infringed...”¹⁵¹

In short, the rulings cited by the dissent recognized individual rights to bear arms, subject to what today would be known as time, place and manner restrictions.

c. The Post Civil War Period

At last the dissent comes to what should be the most important era for Fourteenth Amendment interpretation: the timeframe which encompasses the Amendment’s passage and ratification. The dissent gives it less than three pages,¹⁵² mostly devoted to an argument that the

¹⁴⁷ 130 S.Ct. at 3132.

¹⁴⁸ See, e.g., *State v. Chandler*, 5 La. App., 52 Am. Dec. 599 (1850).

¹⁴⁹ *State v. Reid*, 1 Ala. 612, 616 (1840).

¹⁵⁰ The statute made it illegal to keep or have about one’s person a handgun other than a horseman’s pistol. Handguns were then commonly identified by how they were carried. “Horsemen’s pistols,” signified large, heavy, handguns whose holsters were fastened to the saddle. Smaller handguns were known as “belt pistols” and “pocket pistols,” again by reference to how they would commonly be carried.

¹⁵¹ *Nunn v. State*, 1 Ga. 243, 251 (1846).

¹⁵² 130 S.Ct. at 3132-34.

Fourteenth Amendment had solely or primarily an anti-discriminatory purpose. “There is thus every reason to believe that the *fundamental* concern of the Reconstruction Congress was the eradication of discrimination, not the provision of a new substantive right to bear arms....”¹⁵³

Three problems are apparent. First, the implicit reasoning is (1) the Court should only give effect to what it feels is the “fundamental concern” of the drafters and ratifiers; (2) the Reconstruction Congress’s “fundamental concern” was establishing racial equality, not creation of rights; thus (3) there is no Fourteenth Amendment violation so long as all races are equally deprived of a putative right. But this same argument is equally applicable to the First Amendment, and to any other Bill of Rights liberty. Since all races would be affected by laws forbidding political rallies, establishing a State church, or requiring a criminal defendant to testify, these presumably would pass Fourteenth Amendment muster under this approach.

Second, if racial discrimination were the only target of section one of the Fourteenth Amendment, its Framers would have made it center upon the equal protection clause, and could have omitted the due process and privileges and immunities clauses entirely. In actuality, during the floor debates, Rep. Bingham stated the Amendment was meant “to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States,” who were victims of laws taking their property or banishing them from States.¹⁵⁴

Third, there *is* considerable legislative and popular history supporting an intent to create a substantive right to arms applicable to the States. Indeed, the very evidence cited by the dissent, the Second Freedmen’s Bureau Act, bears this out. As the dissent notes, that statute provided that every person

shall have ... full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including

¹⁵³ *Id.* at 3133.

¹⁵⁴ *The Joint Resolution to Amending the Constitution*, New York Times 2, col. 2 (Mar. 2, 1866).

the constitutional right to bear arms ... without respect to race or color, or previous condition of slavery.¹⁵⁵

The dissent notes “[t]his sounds like an *antidiscrimination* provision,”¹⁵⁶ but as Professor Aynes points out, “the terms ‘full and equal’ tell us that there was both a substantive and equality guarantee. If this were only an equality provision, there would be no need for use of the term ‘full.’”¹⁵⁷ Even guaranteeing “equal benefit” of the “constitutional right to arms” makes no sense unless the 39th Congress understood that there *was* an individual “constitutional right to arms.”

Moreover, the legislation describes the right to arms as included within “personal liberty,” “personal security,” or the acquisition of “estate.” The *Heller* and *McDonald* dissents posit a right to arms that is limited to keeping and bearing while serving in State-organized militia. It is hard to see how such a right could be fit within “personal” liberty or security.

Nor was this the only indication of congressional intent and public understanding. As background, both Congress and the reading public were well-informed regarding the Black Codes, which prohibited blacks from owning firearms, and were being vigorously enforced in the former Confederate States.¹⁵⁸ For example, In April 1866, the *New York Times* reported:

The Assistant Commissioner of the Freedmen’s Bureau for the State of Florida.... called the attention of GOV. WALKER to the provisions of section 12 of an act entitled “An act prescribing additional punishments for the commission of offences against the State, and for other purposes,” which provides for disarming the freedmen of their private arms.

¹⁵⁵ 14 Stat. 176; 130 S.Ct. at 3133. The dissent speaks of the Act as assuring the rights of “each citizen,” but the Act does not use the term “citizen.” Until the Fourteenth Amendment was ratified, the legal citizenship of the freedmen was in doubt.

¹⁵⁶ 130 S.Ct. at 3133 (Emphasis in the original).

¹⁵⁷ Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. OF CONTEMP. LEGAL ISSUES 77, 81-82 (2009).

¹⁵⁸ STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 146-53 (1994); David T. Hardy, note __ *supra*, at 703-07.

He urged upon the Governor that it was unconstitutional, both as regards the United States and the State constitution, and desired to have the decision of competent authority in the case. The Governor hesitated until GEN. FOSTER informed him that the disarming of the negroes must cease, either through civil or military action. The opinion of the Attorney-General has been called for, who decided that the provisions of the section were unconstitutional.¹⁵⁹

Jacob Howard was the 14th Amendment's floor manager in the Senate, and that body heard him describe it as protecting

[T]he personal rights guaranteed and secured by the first eight amendments of the Constitution, such as freedom of speech and of the press; the right of the people peaceably to assemble and to petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms....¹⁶⁰

Likewise, the House heard Rep. John Bingham explain the Amendment as “a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights....” and ask how anyone could be “opposed to the enforcement of the bill of rights, as proposed?”¹⁶¹ These and related presentations were extensively covered in newspapers,¹⁶² and further disseminated via “franked” copies, personal contact, and campaign speeches.¹⁶³ It is hard to see how these statements can be treated as relating only to discrimination in recognition of rights, and not as

¹⁵⁹ *Special Dispatches to the New York Times*, New York Times 1, col. 1 (Apr. 22, 1866).

¹⁶⁰ Cong. Globe, 39th Cong., 1st Sess. 2765-55 (1866).

¹⁶¹ *Id.* at 1088-89.

¹⁶² David T. Hardy, note ___ *supra*;

¹⁶³ Richard L. Aynes, *Enforcing the Bill of Rights Against the States; The History and the Future*, 18 J. of Contemp. Legal Issues 77, 123-26 (2009). As Prof. Aynes points out, U.S. Senators were at this point still chosen by the legislature of their States, so the probability is that Senators had frequent contact with the legislatures that would later ratify the Amendment.

describing the substantive effect of making the Federal bill of rights applicable to the States.

The dissent then makes a remarkable historical error, asking

Indeed, why would those who wrote the 14th Amendment have wanted to give such a right [to arms] to Southerners who had so recently waged war against the North, and who continued to disarm and oppress recently freed African-American citizens? Cf. Act of Mar. 2, 1867, §6, 14 Stat. 487 (disbanding Southern militias because they were, *inter alia*, disarming the freedmen).¹⁶⁴

The question suggests a lack of familiarity with the history of the 39th Congress and, indeed, the very statute being cited. It began as a Senate Resolution calling for disbanding and disarming the militias of some former Confederate states, and met with the objection that the Second Amendment barred such legislation.¹⁶⁵

In the next session, it returned as an amendment to an appropriations bill, commanding that the militias of nine former Confederate States “be forthwith disarmed and disbanded ...”¹⁶⁶

Senator Willey raised a constitutional concern with regard the commanded disarming: ““It strikes me also that there may be some constitutional objection against depriving men of the right to bear arms and the total disarming of men in time of peace.”¹⁶⁷ Senator Hendricks cited the Second Amendment and added,

If this infringes the right of the people to bear arms, we have no authority to adopt it. This provision does not relates to the States alone; it relates to people wherever they may be under the jurisdiction of the United States.... in a time of peace, certainly the provision of the Constitution applies now, if it ever does.¹⁶⁸

¹⁶⁴ 130 S.Ct. at 3133.

¹⁶⁵ See STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 135-36 (1994).

¹⁶⁶ CONG. GLOBE, 39th Cong., 2nd Sess. at 1848 (Feb. 26, 1867).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1849.

Its sponsor responded that he was willing “to modify the amendment by striking out the word ‘disarmed.’ Then it will provide simply for disbanding these organizations.”¹⁶⁹ Senator Willey found the substitute “much more acceptable to me than it was previously.”¹⁷⁰ It passed as amended.

Thus, the 39th Congress *had* considered, and observed, the rights of former Confederates to arms. The history of the Act at issue shows clearly how far the right to arms had been de-linked from the militia system: Congress could abolish State militias, but could not disarm the individuals who had been in them. This history was no secret. Stephen Halbrook had explored it decades before,¹⁷¹ and it had been raised in the briefing.¹⁷²

d. The Modern Period.

Finally, the dissent turns to how the right to arms was considered in the 20th and 21st centuries. As noted above,¹⁷³ 41 States have individualistic provisions for a right to arms, so the dissent does not attempt to really argue this point, but switched to the question of how well arms possession is regulated. We will deal with that issue below.

In summary, the dissent’s argument that the American right to arms was at *any* period understood exclusively, or even primarily, as militia-related, seems quite weak. It is at its weakest over the period when the Fourteenth Amendment was adopted, as Congress repeatedly invoked the right to arms as an individual right, and rejected attempts to disarm even former Confederates, even as it asserted a power to disband their State militias.

2. Regulation of Arms Possession.

The dissent separately considers, for each timeframe, how extensively the right to arms was regulated.

¹⁶⁹ *Id.* at 1849.

¹⁷⁰ *Id.*

¹⁷¹ STEPHEN P. HALBROOK, note ___ *supra*, at 135-38.

¹⁷² See *Amicus* Brief for Academics for the Second Amendment in Support of the Petitioners, *Mc Donald v. Chicago*, No. 08-1521, at 30-33.

¹⁷³ See note ___ and associated text, *supra*.

How far this history takes us remains unclear. If early regulation of a right bore upon incorporation, freedom of expression would never have been incorporated. At common law, it went no farther than barring prior restraint: a person might have freedom of speech, without having freedom after the speech. Blackstone himself wrote:

In this, and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.¹⁷⁴

This understanding is mirrored in many State constitutions, which speak of liability for “abuse” of freedom of expression¹⁷⁵ but has been no

¹⁷⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE COMMON LAW OF ENGLAND *150-53 (1769). “Dangerous or offensive writings” had meaning beyond the political. A 1648 blasphemy statute made it a capital crime to deny any of a long list of beliefs, including belief in God, in the Trinity, divine perfection and omnipotence, that Christ was the son of God and had risen after death, and that listed portions of the bible were divinely inspired. *An Enumeration of several errors; The maintaining and publishing of these with obstinacy shall be felony*, online at <http://www.british-history.ac.uk/report.aspx?compid=56264>.

¹⁷⁵ See, e.g., NY CONST. art. I, §8. (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right”); CAL. CONST., art. I, §2; N.J. CONST. Art. I §6; MD DECL. OF RIGHTS Art. 40; TEX.

barrier to incorporating a broad First Amendment, or indeed, to using that incorporated Amendment to strike down blasphemy statutes.¹⁷⁶

a. The Eighteenth Century

The dissent begins by asserting that the 18th century right was “heavily regulated.”¹⁷⁷ The argument is based in large part upon Prof. Robert H. Churchill’s exhaustive survey of early gun laws. The dissent cites Churchill’s work with the notation “For example, one scholar writes that “[h]undreds of individual statutes regulated the possession and use of guns in colonial and early national America.”¹⁷⁸

It seem difficult to believe that the dissent read Churchill’s article in any depth. To put the cited passage in the article’s context:

Hundreds of individual statutes regulated the possession and use of guns in colonial America. Yet the presentist assertion that “gun control legislation” made a common appearance on colonial and early national statute books, if taken alone, offers a distorted understanding of the nature and extent of gun regulation in early America.¹⁷⁹

Churchill points out that the regulations fell into a few narrow categories. First, the military (not police) power of impressment in time of emergency, which was fading out by the 1780s.¹⁸⁰ Second,

CONST. art. I §8; IOWA CONST. art. I, §7; MICH. CONST. Art. IV, §42; WASH. CONST. art. I §5; NEV. CONST. Art. I, §9; ORE. CONST. art. I, §8.

¹⁷⁶ See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 405 (1952). The *MacDonald* dissenters pose as a paradox that firearm restrictions known to the Framers might fail the majority’s incorporated Second Amendment. The same situation exists under the incorporated First Amendment: all fourteen early States outlawed profanity and/or blasphemy, and thirteen criminalized libel. *Roth v. United States*, 354 U.S. 476, 482(1957).

¹⁷⁷ 130 S.Ct. at 3131.

¹⁷⁸ 130 S.Ct. at 3131, citing 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).

¹⁷⁹ Robert H. Churchill, *supra* note ___, at 143.

¹⁸⁰ *Id.* at 150-54. I have elsewhere noted that the Fifth Amendment’s restrictions on “takings” arose primarily from exercise of this power. See David T. Hardy, *The*

disarmament (together with loss of voting and other civil rights) for those outside the body politic, including those who refused a loyalty oath.¹⁸¹ Third, very limited time, place, and manner restrictions, such as hunting regulations and bans on shooting at night (which raised false alarms of Indian attack) or inside towns.¹⁸² He further notes that the laws required everyone to be armed, even if they were not subject to militia duty: “At no time during the period under examination was the right subject to property qualifications or actual membership in the militia. The right belonged to those citizens individually, and they exercised it individually.”¹⁸³

As a further illustration of early “heavy regulation,” the *McDonald* dissent mis-cites the Stevens *Heller* dissent, stating that it demonstrated that “after the Constitution was adopted, several States continued to regulate firearms possession by, for example, adopting rules that would have prevented the carrying of firearms in the city.”¹⁸⁴ The cited portion of the earlier dissent actually refers to a single city ordinance, that of Boston, that might have incidentally burdened carrying of *loaded* firearms. As part of the city’s fire code, it prohibited placing loaded guns within buildings; *if* enforced against day to day carrying rather than storage (there is no record of how it was applied), it would have made carrying a loaded gun at least inconvenient.¹⁸⁵

b. The Antebellum Period

The dissent turns to the antebellum period, and notes that over this period several States began to regulate the “possession of concealed

Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights, 103 Nw. U. L. Rev. 1527, 1537 (2009).

¹⁸¹ Robert H. Churchill, *supra* note ___, at 157-161. “Between 1607 and 1815, in clear contrast to English precedent, the colonial and state governments of what would become the first fourteen states neglected to exercise any police power over the ownership of guns by members of the body politic.”

¹⁸² *Id.* at 162-64.

¹⁸³ *Id.* at 166.

¹⁸⁴ 130 S. Ct. at 3132.

¹⁸⁵ 128 S.Ct. at 2850. The other examples cited in Stevens’ *Heller* dissent were bans on actual shooting inside some cities, and limits on storage of gunpowder. The black powder of the time was extremely unstable, capable of being ignited by a spark, and burning explosively.

weapons,” and State courts upheld these measures.¹⁸⁶ Actually, it cites only one example even approaching a ban on possession – a Tennessee act that forbade sale of bowie knives. All its other examples involve bans on concealed *carrying* of weapons. As discussed above, the opinions upholding bans on concealed carry generally acknowledged that the right to arms was an individual one, noted that open carry was still permitted, and sometimes cautioned that attempts to ban all carrying of arms would be unconstitutional.¹⁸⁷

c. The Postwar Period

The dissent then turns to regulation of the right to arms during the postwar era, where it makes a more obvious error, asserting that four States “banned the possession” of nonmilitary handguns.¹⁸⁸ All four statutes listed, however, refer to the carrying of such firearms, not to their possession.¹⁸⁹

It then cites *Andrews v. State*¹⁹⁰ as “upholding a ban on possession of nonmilitary handguns,”¹⁹¹ when the second sentence of that opinion makes clear that the ban was on carrying, not possession.

More astonishing (but accurate) is the dissent’s description of *Andrews* as “summariz[ing] the Reconstruction understanding of the state’s police power to regulate firearms.”¹⁹² What makes this statement stunning is that *Andrews* struck down the statute in question as violative of the right to arms, and indicated that the State’s power was narrowly limited to restricting (while not prohibiting) the routine carrying of non-military arms. The court began by treating the right to *keep* arms as absolute, and defining many aspects of *carrying* them to be within the right to keep:

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase

¹⁸⁶ 130 S.Ct. at 3132.

¹⁸⁷ See notes _____ and associated text, *supra*.

¹⁸⁸ 130 S.Ct. at 3134.

¹⁸⁹ *Id.*

¹⁹⁰ 50 Tenn. 165 (1871).

¹⁹¹ 130 S.Ct. at 3134.

¹⁹² *Id.*

and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.

But farther than this, it must be held, that the right to keep arms, involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in (p.179)times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.¹⁹³

The court then defined “arms” as “the rifle of all descriptions, the shot gun, the musket, and repeater.”¹⁹⁴ It noted that the State constitution authorized the legislature to “regulate the wearing of arms,”¹⁹⁵ but held that an absolute prohibition would go beyond the power to regulate.¹⁹⁶

In short, it is hard to see why the dissent would be willing to characterize *Andrews* as summarizing the era’s understanding of the right to arms and the police power!

d. The Modern Period

Finally, the dissent turns to firearms regulation in the twentieth and twenty first centuries. It begins by stating that by the turn of the century “in every State and many local communities high detailed and complicated schemes governed (and continue to govern) nearly every aspect of firearms ownership...”¹⁹⁷ The webpage it cites¹⁹⁸ does exhaustively list firearm laws, but hardly bears out this conclusion. Only four States require a permit to purchase any firearm, and seven more require it for a handgun.¹⁹⁹ Only one State requires all firearms to

¹⁹³ 50 Tenn. at 178-79.

¹⁹⁴ *Id.* at 179.

¹⁹⁵ *Id.* at 180-81.

¹⁹⁶ *Id.* at 181-82.

¹⁹⁷ 130 S.Ct. at 3135.

¹⁹⁸ http://www.lcav.org/publications-briefs/regulating_guns.asp.

¹⁹⁹ *Id.* at 178-79.

be registered, and only five register “assault weapons.”²⁰⁰ Seventeen States require firearm dealers to be licensed.²⁰¹ Phrased otherwise, two-thirds of the States do not even license firearm dealers, nearly four-fifths do not require a permit to buy a handgun, and over 90% do not require a permit to buy a rifle or shotgun. It can hardly be said that “every State” has “highly detailed and complicated regulatory schemes” governing “nearly every aspect of firearms ownership.”²⁰²

Next the dissent notes that State courts have rarely stricken laws as violative of the right to arms. This is hardly surprising; as noted above, few States have extensive controls on purchase and possession of firearms, and three States that do (California, New York, and New Jersey) have no right to arms guarantee in their constitutions.²⁰³

Conclusion

McDonald v. City of Chicago was surely one of the two most controversial cases of its Term,²⁰⁴ and likely the most interesting. In it, the “conservative wing” became successors to the liberal Warren Court majority, the conservative Justice Thomas became heir to the liberal Justices Black and Douglas, and the “liberal wing” took a narrow and decidedly illiberal approach to incorporation.

Its three major components varied greatly in terms of reasoning and historical support. Justice Alito’s plurality opinion expertly applied existing due process clause incorporation, giving that case law an organization and coherence which it previously lacked. Justice Thomas’ concurrence did the same for privileges or immunities “total” incorporation, which drew strong support from originalism. The Breyer

²⁰⁰ *Id.* at 190.

²⁰¹ *Id.* at 151.

²⁰² Professor Aynes has pointed out that the modern Court is “court-centric,” its Justices having little experience outside the judicial branch. Richard L. Aynes, note __ *supra* [McDonald v. Chicago, Self Defense], at 196. Along similar lines, we might note the similarity of backgrounds of the three Justices who joined the Breyer dissent. Justice Breyer spent most of his adult life in Boston or Washington, D.C.. Justice Ginsberg spent much of hers in Boston, New York City, or Washington, D.C.. Justice Sotomayer spent most of hers in New York State, Chicago, and Washington, D.C..

²⁰³ Eugene Volokh, note __ *supra*, at 194, 200.

²⁰⁴ The other being *Citizens United*.

dissent fell short of either of these efforts, proposing novel incorporation tests which would call into question much Warren Court precedent, largely ignoring the Fourteenth Amendment's history, and holding to an interpretation that would attribute to the Reconstruction Congress an intent to constitutionalize the core constitutional position of the Confederacy.