

University of Tennessee College of Law

Legal Scholarship Repository: A Service of the Joel A. Katz Law Library

UTK Law Faculty Publications

2008

Five Takes on District of Columbia v. Heller

Glenn Harlan Reynolds

Follow this and additional works at: https://ir.law.utk.edu/utklaw_facpubs



Part of the Law Commons



Legal Studies Research Paper Series

**Research Paper #67
August 2009**

Five Takes on District of Columbia v. Heller

**Do not cite without authors' permission
Copyright © 2009**

**Brannon P. Denning
&
Glenn Harlan Reynolds**

**This paper can be downloaded without charge
from the Social Science Research Network Electronic library at:
<http://ssrn.com/abstract=1339578>**

Five Takes on *District of Columbia v. Heller*

BRANNON P. DENNING* & GLENN H. REYNOLDS**

I. INTRODUCTION

It is difficult to say much definitive about the impact of a recent Supreme Court decision because, as we've pointed out elsewhere, the reach of a case depends on lots of actors who often have tremendous discretion and little effective oversight when it comes to implementation.¹ *District of Columbia v. Heller*² is undoubtedly a landmark opinion by anyone's definition, and while it remains to be seen whether its effects match the hype surrounding its announcement, there are a number of aspects of the decision that strike us as worthy of comment. In this Essay, we offer five takes on portions of the opinion or its implications that struck us as interesting.³

First, we argue that *Heller* essentially followed the prevailing national consensus on the meaning of the Second Amendment. Second, we argue that this fact furnishes an important data point for those who argue that the Court usually follows, rather than leads, public opinion on disputed matters; and that, when it invalidates laws, it does so with respect to policy outliers. Third, we speculate on what has already opened up as the second front in gun rights litigation strategy: the incorporation of the Second Amendment through the Fourteenth Amendment. Fourth, we discuss how lower courts will likely treat *Heller*—will they apply it or, as has happened with other “landmark” Supreme Court cases, ignore it? Finally, we discuss the notable incongruities among the Justices that *Heller* produced.

II. TAKE ONE: THE SUPREME COURT AND THE POPULIST UNDERSTANDING OF THE SECOND AMENDMENT

Just before the Court decided to grant certiorari in *Heller*, one of us (Denning) argued at a conference on the Second Amendment that the Court

* Professor and Director of Faculty Development, Cumberland School of Law, Samford University.

** Beauchamp Brogan Distinguished Professor of Law, The University of Tennessee. The authors thank Marc Spindelman for the kind invitation, and the editorial staff of the *Ohio State Law Journal*, especially Dylan Griffiths for her patience.

¹ See generally Glenn H. Reynolds & Brannon P. Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. 406 (2008); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369.

² 128 S. Ct. 2783 (2008).

³ See also Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915 (2005).

ought *not* take the case, because the right to keep and bear arms found fairly robust protection in the legislative and executive branches at both the federal and—with notable exceptions—state and local levels.⁴ Borrowing Mark Tushnet’s concept of the thin constitution that produced populist constitutional law, Denning argued that the Second Amendment was “thin”—the Amendment was not only not enforced in the courts, it was treated with some hostility by federal judges—and its contours had been shaped by public opinion outside the judiciary.⁵

Specifically, he noted that most Americans believed that the Second Amendment guaranteed an individual right to private gun ownership while also regarding that right as subject to reasonable governmental regulations.⁶ When one considered that the gun control debate was as much about culture as it was about constitutional law, and given the Court’s dubious ability to settle such fundamental disagreements, the case for denying certiorari and permitting these disagreements to play out in the political arena was fairly strong.⁷

Alas, the Court once again ignored sound advice and granted certiorari despite Denning’s powerful case. In a triumph of hope over experience, the article, as published, suggested that the Court ought to write its opinion in a way that tracked populist constitutional law, rather than try to change it.⁸ Thus, he argued, the Court should at least endorse the individual right

⁴ See Brannon P. Denning, *In Defense of a “Thin” Second Amendment: Culture, the Constitution, and the Gun Control Debate*, 1 ALB. GOV’T L. REV. 419 (2008).

⁵ *Id.* at 425–30.

⁶ *Id.* at 426–28; see also MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN’T END THE BATTLE OVER GUNS* 127–28 (2007) (discussing public opinion); Jeffrey 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> (reporting that “[a] solid majority of the U.S. public, 73%, believes the Second Amendment to the Constitution guarantees the rights of Americans to own guns.”).

⁷ Denning, *supra* note 4, at 430–33. Dan Kahan and Don Braman have written extensively about culture and the debate over gun control. See, e.g., Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569 (2006); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003). For an extensive critique of the Court’s tendency to seek constitutional settlement of contentious issues, see LOUIS MICHAEL SIEDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001); see also Glenn Harlan Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991) (arguing that few constitutional questions ever stayed settled in the Court).

⁸ Denning, *supra* note 4, at 434–38.

reading of the Second Amendment and do so in more than a merely symbolic way.⁹

Heller did precisely this. The first thing to note about *Heller* then, is the remarkable degree to which all the opinions in the case—even those of the dissenting Justices—took account of the thin Second Amendment.¹⁰

Because it attracted relatively little comment, it is worth emphasizing at the outset that in *Heller* the Court unanimously interred the old “collective” right interpretation of the Second Amendment, which read the right to keep and bear arms as guaranteeing only a state’s right to maintain and arm a militia free from some federal control.¹¹ Justice Stevens, for example, begins his opinion rejecting the “collective” versus “individual” rights dichotomy, writing that the Second Amendment “[s]urely . . . protects a right that can be enforced by individuals” and switching the debate to one over “the scope of that right.”¹² Justice Breyer seemed willing to go a little further, recognizing that the Amendment—in part—was intended “to help assure citizens that they would have arms available for purposes of self-defense.”¹³

On this point at least, *Heller* represented a welcome advance in the debate—at least to anyone who slogged through the academic equivalent of trench warfare between individualists and collectivists that played out in law review articles during the 1990s.

The locus of disagreement in *Heller* was the *scope* of the individual right. Here there was still plenty of room for disagreement. On this point, the majority, rather than the dissent, tended to track public opinion in concluding that the Second Amendment was *not* intended to guarantee the right to keep

⁹ *Id.* at 434, 436–39.

¹⁰ Denning, alas, can’t take credit for persuading the Court—his article was published *after* the Court released its opinion.

¹¹ See generally Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989). For a critique of the collective right theory that notes the unintended consequences of taking it seriously, see Glenn H. Reynolds & Don B. Kates, Jr., *The Second Amendment and States’ Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995).

¹² *Dist. of Columbia v. Heller*, 128 S.Ct. 2783, 2822 (2008) (Stevens, J., dissenting). Justice Stevens goes on to argue that the scope does *not* include the right to private ownership of arms for nonmilitary purposes. *Id.* (“Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”). See also *id.* at 2848 (Breyer, J., dissenting) (listing as one of “four propositions . . . to which I believe the entire Court subscribes: (1) The Amendment protects an ‘individual’ right—*i.e.*, one that is separately possessed, and may be separately enforced, by each person on whom it is conferred”).

¹³ *Id.* at 2847.

and bear arms in a military context only; rather, it “guarantee[d] the individual right to possess and carry weapons in case of confrontation.”¹⁴

Moreover, though the majority didn’t articulate the standard of review it employed in detail—an omission that garnered criticism from Justice Breyer¹⁵—it is clear from the fact that it affirmed the D.C. Circuit that some sort of heightened standard of review was used. In a footnote, for example, Justice Scalia argued that a rational basis test was not appropriate for ascertaining “the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.”¹⁶ That the Court was unwilling to defer to elected officials relying on contested empirical studies about gun control and gun crime,¹⁷ strongly suggested that the majority considered categorical bans on common weapons used for self-defense to be presumptively unconstitutional. As Justice Scalia wrote, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table,” including “the absolute prohibition of handguns held and used for self-defense in the home.”¹⁸

The majority’s robust reading of the Amendment’s individual right stands in contrast to either Justice Stevens’s or Justice Breyer’s much narrower conception. Justice Stevens devoted nearly all of his opinion to sketching an alternative historical account of the Amendment’s origin and scope. In the end, though, it is unclear what work his conclusion—that the right can be exercised only in connection with military services—would do in most cases.

By adopting a pragmatic, “interest-balancing” approach,¹⁹ Justice Breyer conceded at least the possibility that some gun control measures might unduly interfere with the assumed right to have *some* weapons available for

¹⁴ *Id.* at 2797 (majority opinion); TUSHNET, *supra* note 6, at 128 (noting that only 20% of those polled thought the Second Amendment was primarily about maintaining a militia as opposed to individual self-defense).

¹⁵ 128 S. Ct. at 2868–70 (Breyer, J., dissenting) (criticizing the lack of transparency on the part of the majority). We discuss Justice Breyer’s approach *infra* notes 108–14 and accompanying text.

¹⁶ *Id.* at 2817 n.27 (majority opinion).

¹⁷ *Id.* at 2854–60 (Breyer, J., dissenting) (Justice Breyer summarizes the data, and concludes that the “set of studies and counterstudies . . . could leave a judge uncertain about the proper policy conclusion” and that “legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact.”).

¹⁸ *Id.* at 2822 (majority opinion).

¹⁹ *See id.* at 2852 (Breyer, J., dissenting) (describing the interest-balancing approach).

some self-defense.²⁰ One suspects—though perhaps this is unfair to Justice Breyer—that he would be unlikely to find constitutional fault with many (if any) gun control regimes that made their way before him.²¹ We consider both dissents in more detail below.²²

The popular perception of rights is that they are trumps against assertions of governmental authority.²³ Rights embodied in the Constitution and the Bill of Rights represent, in the popular mind, commitments that, to paraphrase Justice Scalia, place certain policy choices beyond the discretion of government.²⁴ The problem with Justice Stevens’s dissent is that it seems to define Second Amendment rights to comprise a null set, or very nearly so. Justice Breyer’s interest-balancing approach, on the other hand, simply frames firearms regulation as a weighing of competing interests. No longer a trump, the individual’s right to keep and bear arms gains no special purchase against various claims of the necessity to regulate firearms for the public good.

Unlike, say, the Fifth Amendment’s protection against takings except for public use, where what constitutes a valid public use is left to the political process,²⁵ the *Heller* majority both articulates a right, then gives it some bite. We think that this is consistent with what citizens expect of rights generally—that they are judicially enforceable against government actors—and of a right to keep and bear arms specifically.

But *Heller* also tracks populist constitutional law on the issue of reasonable regulation.²⁶ Toward the end of the opinion, Justice Scalia listed several “presumptively lawful regulatory measures”:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or

²⁰ *Id.* at 2865–67 (discussing D.C.’s law in context of its urban setting).

²¹ Breyer’s *Heller* dissent here seems to be the mirror image of what Lucas A. “Scot” Powe described as the “classic [William] Brennan approach to deciding cases”:

He always acknowledged the legitimacy of the government’s interest; therefore . . . he never took the government head on. But having recognized the legitimacy of what government wanted to do, Brennan would then shift to conclude government had not done it appropriately in the case at bar. That always left open the possibility that, with added thought and effort, government could get it right.

LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 117 (2000).

²² See *infra* Part VI.

²³ See, e.g., RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 184–205 (1977) (discussing rights in these terms).

²⁴ See *supra* note 18 and accompanying text.

²⁵ *Kelo v. New London*, 545 U.S. 469, 480 (2005).

²⁶ See *supra* note 6 and accompanying text.

laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.²⁷

While, as Justice Breyer noted, Justice Scalia made no attempt to square these categorical exclusions with the majority's apparent heightened scrutiny of D.C.'s handgun ban,²⁸ categorically excluding certain activities from constitutional protection is not exactly unknown in constitutional law. For example, despite prescribing strict scrutiny for content-based speech regulations,²⁹ the Court excludes certain speech from First Amendment protection altogether *on the basis of its content*.³⁰

III. TAKE TWO: *HELLER* AND THE COURT AS POLITICAL INSTITUTION

To our claim that *Heller* tracks popular opinion regarding the meaning of the Second Amendment, one might respond, "So what?" In this Part, we offer a couple of responses. First, that the Court's decision was in line with popular (and much elite) opinion furnishes another example of the Court following, rather than leading, public opinion on divisive issues when it exercises judicial review. Further, it offers an example of the Court exercising judicial review to police outliers from the national consensus. Normatively, these facts suggest that the complaints that *Heller* was countermajoritarian, or an example of conservative judicial activism, are overblown.

²⁷ 128 S. Ct. at 2816–17, 2817 n.26.

²⁸ *Id.* at 2869–70 (Breyer, J., dissenting) ("I am . . . puzzled by the majority's list . . . of provisions that in its view would survive Second Amendment scrutiny.").

²⁹ See generally DANIEL A. FARBER, *THE FIRST AMENDMENT* 21 (2d ed. 2003) ("Government regulations linked to the content of speech receive severe judicial scrutiny.").

³⁰ *Id.* at 14 ("Historically, some kinds of speech were considered to be simply outside the scope of the First Amendment. . . . The list of unprotected speech included incitements to violence, libel, obscenity, fighting words, and commercial advertising."). *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), inaugurated categorization in the Court's First Amendment doctrine. A recent example of this technique can be found in *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007) (creating an exclusion from protected student speech for "expression . . . promoting illegal drug use"). For a critique of categorization, see WILLIAM M. WIECEK, *12 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953*, at 162–64 (2006). The technique is used outside the First Amendment as well. See, e.g., *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786 (2007) (excluding discrimination in favor of "public entities" from strict scrutiny under the dormant Commerce Clause doctrine).

Michael Klarman has questioned what he terms the “heroic countermajoritarian function”—the myth that the Court stands ready to vindicate the rights of minority groups against legislative restrictions by overweening majorities.³¹ The reality, he argues, is that the Court more often “takes a strong national consensus and imposes it on relatively isolated outliers.”³² Lucas Powe arrived at a similar conclusion about the Warren Court, arguing that it imposed the values of a dominant national coalition on the South and on urban Roman Catholic majorities.³³

The Court’s *Heller* opinion easily fits this narrative. There is strong—one might say overwhelming—national support among both the public and among many elites³⁴ for a right to keep and bear arms robust enough to foreclose certain (but not all) gun control policies. While the Court will sometimes ignore popular opinion, and sometimes will ignore elite opinion, it rarely ignores *both*. The District’s ban, moreover, was one of the strictest gun control regimes in the country. It was, in other words, an outlier, and ripe for judicial intervention. Viewed from this national perspective, then, claims that *Heller* was somehow activist or countermajoritarian are overstated.³⁵

³¹ Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 2 (1996).

³² *Id.* at 6; see also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 453 (2004) (“More constitutional law than is commonly supposed reflects this tendency to constitutionalize consensus and suppress outliers.”); *id.* at 454 (“Constitutional law much more frequently involves the Court suppressing outliers than rescuing powerless minorities from majoritarian oppression.”).

³³ POWE, *supra* note 21, at 493–94 (arguing that the Court “could be better seen as attacking (rather than protecting) them on a national (rather than a local) scale: the white South, the pre-Vatican II Catholic hierarchy, rural legislators, the local criminal justice system, and those remaining few who believed domestic communists were a threat to the nation”).

³⁴ Legislative and congressional support for a robust right to keep and bear arms is described in Denning, *supra* note 4, at 427–28. See also Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, HARV. L. REV. (forthcoming 2008) (noting how *Heller* corresponded with public and elite opinion).

³⁵ See, e.g., Erwin Chemerinsky, *The Supreme Court Gun Fight: A Case of Conservative Activism*, L.A. TIMES, June 27, 2008, at A27 (“In striking down the law, Justice Antonin Scalia’s majority opinion, joined by the court’s four other most conservative justices, is quite activist in pursuing the conservative political agenda of protecting gun owners.”); Douglas W. Kmiec, *Guns and the Supreme Court: Dead Wrong*, TIDINGS ONLINE, July 11, 2008, <http://www.the-tidings.com/2008/071108/kmiec.htm> (“[W]hen Justice Scalia and four other members of the Court decided *D.C. v. Heller*, they nullified D.C.’s gun law and cast doubt upon the laws of every state. From their high bench on that morning, it would not be the democratic choice that mattered, but theirs. Constitutional text, history, and precedent all set aside.”).

Heller is of a piece with cases like *Griswold v. Connecticut*,³⁶ *Lawrence v. Texas*,³⁷ and *Grutter v. Bollinger*,³⁸ to name just a few cases in which the Court either followed public opinion, forced it on outliers, or both.³⁹

Given that the political branches were pretty adept at enforcing the Amendment outside the courts, why did the Court take *Heller*? A denial of certiorari would have produced much the same effect as the Court's decision to intervene—D.C.'s outlier policy would have remained invalidated. It was not as if gun control generally, or gun control in D.C., was a political hot potato that other branches of government were eager for the Supreme Court to settle.⁴⁰

The answer here, we think, lies in the Court's drift away from shared constitutional interpretation and its embrace of judicial supremacy. Simply put, the Court's members—liberal and conservative—feel little if any consistent compunction to defer to other branches of government when it comes to constitutional interpretation.⁴¹ Sure the right to keep and bear arms had been enforced, after a fashion, through ordinary politics, but the Court's attitude of late seems to be that nothing can be considered to be a “real” right until the Court says that it is.

³⁶ 381 U.S. 479 (1965) (invalidating Connecticut prohibition on use of contraceptives); Klarman, *supra* note 31, at 10 (“*Griswold* is best understood as the Court constitutionalizing a dominant national consensus and using it to suppress a local outlier.”). See also Sunstein, *supra* note 34 (comparing the two cases).

³⁷ 539 U.S. 558 (2003) (invalidating criminal prohibition of homosexual sodomy).

³⁸ 539 U.S. 306 (2003) (upholding Michigan Law School's affirmative action admissions policy); Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 347 (2003) (observing that “rather than join forces with the politically isolated opponents of affirmative action, the Court issued a ruling that conformed to social and political forces”).

³⁹ For other examples, see Klarman, *supra* note 31, at 16–18.

⁴⁰ See, e.g., Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) (“Historically, the justices have most often exercised their power to declare state and federal practices unconstitutional only when the dominant national coalition is unable or unwilling to settle some public dispute. [In such cases,] prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would rather not address.”).

⁴¹ To be sure, members of the Court frequently urge deference to other branches when they conclude the other branches' constitutional interpretation reflect their own. As Cass Sunstein notes, “Almost no one is a universal Thayerian.” Sunstein, *supra* note 34, manuscript at 13 (footnote omitted). The reference is to James Bradley Thayer, whose article, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) is the ur-text of judicial restraint. Thayer advocated that courts defer to coordinate branches of the federal government absent evidence of a “clear mistake” in the interpretation of the Constitution.

This being an election year, however, we cannot help but add the following observation: *Heller* potentially helped Democrats this year and will continue to do so in future elections, by taking the contentious issue of gun control off the table. Much as *Roe v. Wade*⁴² has aided Republicans, enabling them to run against abortion and the Court without any real obligation to fashion a positive abortion policy, Democrats—at least those from safely anti-gun districts—can lament *Heller* and criticize the Court while using the decision as cover. Such insulation is no doubt welcome, as conventional wisdom among Democrats holds that the gun issue lost them elections in 1994, 2000, and 2004. On this issue at least, Barack Obama is probably more than a little grateful for the Court's penchant for judicial supremacy these days.

IV. TAKE THREE: *HELLER*, THE SECOND AMENDMENT, AND INCORPORATION

Within hours of *Heller*'s announcement, lawyers filed suits challenging other local gun control laws that were as restrictive as D.C.'s. Of course, because the Second Amendment has yet to be formally incorporated through the Fourteenth Amendment against the states,⁴³ these suits will likely fail initially. The million dollar question, however, is whether the Court, having taken the initial plunge, will accept one or more cases and address the incorporation issue. If it does, then, as Justice Stevens fretted, "the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table."⁴⁴ If not, *Heller*'s impact is likely to be largely symbolic, because few federal gun laws are vulnerable under *Heller*.

A. *Incorporation: A Primer*

Until the adoption of the Fourteenth Amendment, federal courts had little role as guarantor of individual liberties against violations by state or local officials.⁴⁵ Even after the Fourteenth Amendment's ratification, the Court expressed reluctance to read its provisions expansively. In the infamous *Slaughter-House Cases*, for example, the Court read the Fourteenth Amendment's provisions narrowly—so narrowly, in fact, that it all but read

⁴² 410 U.S. 113 (1973).

⁴³ *United States v. Cruikshank*, 92 U.S. 542 (1875).

⁴⁴ *District of Columbia v. Heller*, 128 S.Ct. 2783, 2846 (2008) (Stevens, J., dissenting).

⁴⁵ *See Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights applies only to federal government).

the Privileges or Immunities Clause out of the Amendment altogether.⁴⁶ But by 1945, as William Wiecek has written, “the definition and protection of liberty had become the responsibility of the national government and its courts.”⁴⁷ The Fourteenth Amendment, moreover, was the vehicle for this transfer of responsibility.

This transformation occurred gradually; in the late nineteenth century, the Court began to apply portions of the Bill of Rights to the states. In this era of property rights protection, the first incorporated provision was, fittingly, the Takings Clause of the Fifth Amendment.⁴⁸ A few years later, in *Twining v. New Jersey*, the Court affirmed that *some* provisions of the Bill of Rights might be applicable to the states through the Fourteenth Amendment, but refused to hold that *all* were.⁴⁹ Only those that were “fundamental” such that denial of them would be denial of “due process of law” would apply to states.⁵⁰

Twining’s formulation was picked up and endorsed by Justice Cardozo in *Palko v. Connecticut*,⁵¹ and “canonized” by Justice Frankfurter in the incorporation debates that roiled the Court in the late 1940s.⁵² In 1968, the Court restated the test for selective incorporation in *Duncan v. Louisiana*⁵³ as “whether a right is among those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,’ . . . [or] whether it is ‘basic in our system of jurisprudence’”⁵⁴ Is it, in other words, “fundamental to the American scheme of justice?”⁵⁵ *Duncan*’s formulation remains the test for incorporation today.

⁴⁶ 83 U.S. (16 Wall.) 36, 78 (1873); see also Kevin C. Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 646 (2000).

⁴⁷ WIECEK, *supra* note 30, at 464–65.

⁴⁸ *Chicago, Burlington and Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

⁴⁹ 211 U.S. 78, 99 (1908), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁵⁰ *Id.* at 101, 106. It would not be frivolous to argue that if the Framers put it in the Bill of Rights, then that right must be fundamental by definition. But that’s not how the Court has tended to approach the question. The Court has made clear that simply because it is enumerated in the Bill of Rights, a right is not, ipso facto, fundamental.

⁵¹ 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

⁵² WIECEK, *supra* note 30, at 473; Louis Henkin, “*Selective Incorporation*” in *the Fourteenth Amendment*, 73 YALE L.J. 74 (1963). The incorporation debates within the Vinson Court is well-told in WIECEK, *supra* note 30, at 464–532.

⁵³ 391 U.S. 145 (1968).

⁵⁴ *Id.* at 148–49 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *In re Oliver*, 333 U.S. 257, 273 (1948)).

⁵⁵ *Id.* at 149.

B. *Incorporating the Second Amendment*

Earlier, substantive provisions of the Bill of Rights more analogous to the Second Amendment, like the various provisions of the First Amendment, were incorporated largely *ipse dixit*. The Court simply declared—with no real analysis—that various provisions were fundamental and applied to the states.⁵⁶ *Duncan*, and modern selective incorporation in general, was developed during the mid-1960s, when the Court was focused on creating minimum national standards for criminal procedure.⁵⁷ Assuming that the Court would not simply declare the Second Amendment to be fundamental, and incorporate it through the Due Process Clause, what criteria would it use to determine fundamental-ness using the *Duncan* test? *Duncan* itself is not explicit, but the inquiry seems to be an historical one.⁵⁸

Not surprisingly, the answer depends on how one interprets history and one's criteria for fundamental-ness. For example, the leading contemporary historian of Reconstruction concluded that whatever else the Framers of the Fourteenth Amendment intended, “it is abundantly clear that Republicans

⁵⁶ See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“The broad meaning given the Amendment by . . . earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the ‘establishment of religion’ clause.”) (footnote omitted); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the right to free exercise: “The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.”); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (incorporating assembly and petition rights: “Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. . . . The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.”); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (incorporating free press: “It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.”); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating free speech: “For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

⁵⁷ POWE, *supra* note 21, at 379–444.

⁵⁸ 391 U.S. at 151–52 (reviewing the history of the Anglo-American jury trial).

wished to give constitutional sanction to states' obligations to respect such key provisions as freedom of speech, the right to bear arms, trial by impartial jury, and protection against cruel and unusual punishment and unreasonable search and seizure."⁵⁹

On the other hand, a recent study by Steve Calabresi and Sarah Agudo concludes that the question is a much closer one.⁶⁰ According to their survey of *state* constitutional provisions circa 1868, which they regard as proxies for fundamental rights, they found that twenty-two state constitutions protected the right to keep and bear arms.⁶¹ This represents a majority of states, but not the three-quarters threshold they set for regarding a particular right as fundamental.⁶² They do note, however, that the right was protected by the states in which 61% of the population lived in 1868.⁶³

If the Court takes up the issue of incorporation, and applies the *Duncan* standard, the opinions would likely end up rehashing the historical debate engaged in by the majority and the dissenters. Members of the *Heller* majority would emphasize the roots of the right, its importance to the Framers, their placement of it in the Bill of Rights, and subsequent imitation in state constitutions,⁶⁴ as well, perhaps, as stressing the views of the Fourteenth Amendment's Framers. The dissenters, on the other hand, would probably rely heavily on the degree of regulation at common law mentioned by Justice Breyer.⁶⁵ Whose history one accepts will, we think, largely turn on whether one supports or rejects incorporation. In the next section, we discuss alternatives to *Duncan*'s incorporation formula and the dual historical narratives it would likely produce.

⁵⁹ ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 258 (1988); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 257–66 (1998) (recounting Reconstruction-era discussions of the right to keep and bear arms).

⁶⁰ Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, TEX. L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1114940.

⁶¹ *Id.*, manuscript at 45.

⁶² *Id.*, manuscript at 11 (defining “rights . . . especially deeply rooted in history and tradition” as those embodied in three-quarters of existing states’ constitutions because “three-quarters is the number of states that Article V sets as the threshold consensus necessary for the making of federal constitutional law” and noting that “[a]rguably, rights protected by less than three-quarters of the states in 1868 were not deemed fundamental and are not deeply rooted in history and tradition”).

⁶³ *Id.*, manuscript at 46.

⁶⁴ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790–2813 (2008).

⁶⁵ *Id.* at 2848–50, 2866–68 (Breyer, J., dissenting).

Yet, it is not self-evident why the question ought to be framed as what rights were in state constitutions *in 1868*. While history is part of *Duncan*'s inquiry, the inquiry is not exhausted by it. If, as it does in other doctrinal areas,⁶⁶ the Court were to consider the presence or absence of a national consensus as relevant to the question of whether a fundamental right exists, the case for incorporation is pretty clear. If one looks to state practice *after 1868*—indeed, looking to state practice over the last two or three decades—one sees not only states explicitly protecting individual rights to private gun ownership in their state constitutions, but also revising their laws to permit concealed carry of those arms.

A study by Eugene Volokh shows that, since 1970, eighteen states have added right to keep and bear arms provisions to their constitutions, or amended existing provisions to make explicit the individual nature of the right.⁶⁷ Only eight states either lack a Second Amendment analogue in their state constitution or have interpreted the existing provisions to guarantee only a “collective” right.⁶⁸ Forty states, by contrast, either expressly or through judicial interpretation have embraced a private right to own firearms for individual self-defense.⁶⁹ Further, within the last decade, states have moved from a discretionary concealed-carry licensing regime to one in which licenses to carry a concealed weapon must be issued if the applicant meets the statutory requirements. Today, nearly two-thirds of the states have “shall-issue” licensing regimes.⁷⁰

⁶⁶ See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649–50 (2008) (assessing validity of punishments under the Eighth Amendment according to currently prevailing standards as reflected in legislative enactments and state practice); *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997) (Souter, J., concurring) (arguing that in substantive due process cases, “a court is bound to confine the values that it recognizes to those truly deserving constitutional stature, either to those expressed in constitutional text, or those exemplified by ‘the traditions from which [the Nation] developed,’ or revealed by contrast with ‘the traditions from which it broke.’” (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

⁶⁷ Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 214–17 (2006) (listing the states).

⁶⁸ *Id.* at 205. The states lacking any guarantee are California, Iowa, Maryland, Minnesota, New Jersey and New York. Kansas and Massachusetts courts have rejected an individual right reading of their state constitution’s right to keep and bear arms provision. *Id.*

⁶⁹ *Id.*

⁷⁰ See Clayton Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 685 (1995); Steven W. Kranz, Comment, *A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce the Controversy?*, 29 HAMLINE L. REV. 639, 647 (2006) (claiming that the percentage of states classified as “shall-issue” states increased from fifteen to seventy-two percent in eighteen years).

Given the current state of affairs, it seems that most (though certainly not all) state legislatures regard a private right to keep and bear arms as a necessary part of liberty. If this doesn't meet *Duncan's* standard of "necessary to an Anglo-American regime of ordered liberty,"⁷¹ then that likely says more about the inadequacy of the standard than it does about the strength of the evidence on the fundamental-ness of gun rights in the United States. In fact, Lucas Powe has speculated, correctly in our view, that the entire project of selective incorporation was driven in part by the fact that total incorporation would have required the Court to apply to the states certain provisions of the Bill of Rights "that the justices probably did not like," including the Second Amendment.⁷²

Comment [BPD1]: Y'all changed "Scot" to "Lucas" at TAN 33, so I changed it here to be consistent.

C. Alternatives to the Selective Incorporation Paradigm

There are, however, some intriguing alternatives to *Duncan's* rather unhelpful restatement of the fundamental/ordered liberty test. Specifically, the Second Amendment might also furnish a vehicle for resuscitation of the Privileges or Immunities Clause, which the *Slaughter-House Cases* rendered moribund. First, though, we consider a quite different alternative—*not* incorporating the Second Amendment.

1. Don't Incorporate

Federalism is good, we are told, because it permits experimentation and promotes competition among subnational units. Decentralization permits regulatory regimes to be tailored to local wants and needs. As long as members of subnational communities have meaningful voice and exit options, then individuals can shop around to find state and local governments to which they are suited.

If these things are true—and given the salient cultural dimension to the controversy over the right to keep and bear arms—then there are good reasons, maybe even good conservative reasons, for *not* incorporating it. According to Steve Calabresi and Sarah Agudo, these cultural differences

⁷¹ *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1967). For another argument that the Second Amendment meets this standard, and that lower courts could so hold on their own, see Nelson Lund, *Anticipating the Second Amendment Incorporation: The Role of the Inferior Courts*, SYRACUSE L. REV. (forthcoming 2008), manuscript at 14–15, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1239422.

⁷² POWE, *supra* note 21, at 415. "The Court's doctrine of 'selective incorporation,'" by contrast, "meant they could be left out even though they are part of the Bill of Rights and equally as well protected by state law as criminal juries or double jeopardy. Furthermore, given the Court's ability to control the cases it hears, those provisions could be left out without the Court's ever having to justify their exclusion." *Id.*

manifested themselves as early as the nineteenth century, with southern states' constitutions more likely to contain strong right to keep and bear arms provisions than those in other states.⁷³

The incorporation question potentially puts Court conservatives in a bind, since they often favor decentralization and policy competition in other areas of the law.⁷⁴ Justice Thomas, for example, has argued for a return to the original understanding of the Establishment Clause: prohibition on *federal* establishment, but not necessarily establishment of religion by states.⁷⁵ And critics of the Warren Court's standardization of criminal procedures, like Justice Harlan, argued that a one-size-fits-all approach ignored important regional and local variations that ought to be respected in the name of federalism.⁷⁶

One could easily deploy similar arguments against incorporation of the Second Amendment. Why should New Yorkers or Chicagoans, many if not most of whom are strong supporters of strict gun control, be forced to adopt a regulatory regime that potentially puts more guns in private hands than current laws allow? Given adequate exit options for dissenters, couldn't those citizens be permitted to entrust their personal security to the police, rather than engaging in self help? States for which the right to keep and bear arms is important have tended to include the right in their constitutions, or amended their constitutions to include it.⁷⁷ State courts have enforced those provisions, permitting some regulations, striking down others; so, why not permit such decisions to be made on a state-by-state basis?⁷⁸ Or if standardization is required, why not allow *Congress* to do it, after adequate

⁷³ Calabresi & Agudo, *supra* note 60, manuscript at 45.

⁷⁴ See, e.g., *United States v. Lopez*, 514 U.S. 549, 580–83 (1995) (Kennedy, J., concurring) (noting that the Gun Free School Zones Act preempted similar state laws).

⁷⁵ See, e.g., *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (“The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause.”).

⁷⁶ POWE, *supra* note 21, at 396–97, 403, 414, 422, 427, 441 (describing Justice Harlan's dissents in many of the Warren Court criminal procedure cases); see also Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

⁷⁷ See generally Volokh, *supra* note 67.

⁷⁸ See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 687 (2007) (discussing state court enforcement of state right to keep and bear arms provisions).

deliberation by a national legislative body, by exercising its enforcement power under Section 5 of the Fourteenth Amendment?⁷⁹

We raise this merely to cover the range of possible ways to resolve the incorporation conundrum. Application of the Bill of Rights to the states through the Due Process Clause has always presented special problems to the Court. Those problems remain—and are perhaps especially acute—when it comes to the right to keep and bear arms, the exercise of which is perceived to impose costs on governments and other citizens that might be considered unique as compared to, say, those imposed by the First Amendment. These difficulties cannot be wished away—especially by conservatives who have criticized the incorporation of other rights. On the other hand, it is certainly the case that similar arguments might support the non-incorporation of other rights, say involving sexually-themed speech or criminal procedure, raising the question of why the Second Amendment should be treated differently only because it came before the Court later.

2. *Use the Privileges or Immunities Clause*

Assuming that a conservative majority of the Court decided to take the plunge again and incorporate the Second Amendment, there is a way to avoid the nebulous inquiry prescribed by the Court's selective incorporation doctrine. As every law student knows, the Court's *Slaughter-House Cases* rendered the Privileges or Immunities Clause a constitutional dead letter soon after ratification. And despite some recent stirrings,⁸⁰ the Court has shown no inclination either to revisit the *Slaughter-House Cases* or to otherwise use that clause as an alternative vehicle for incorporation.⁸¹

Nevertheless, the Privileges or Immunities Clause has some attractive features that would make it a particularly useful vehicle for incorporating the Second Amendment. First, there is strong historical evidence that the right to

⁷⁹ For a proposal, see Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719, 762 (1998).

⁸⁰ See *Saenz v. Roe*, 526 U.S. 489, 502–04 (1999) (locating a "right to travel" in part in the Privileges or Immunities Clause of the Fourteenth Amendment).

⁸¹ Conventional wisdom holds that the *Slaughter-House Cases* would have to be overruled for the Privileges or Immunities Clause to do any real work in constitutional law, and that lower federal courts could not incorporate the Second Amendment through the Privileges or Immunities Clause on their own. See Lund, *supra* note 71, manuscript at 9–10 ("The Supreme Court . . . has consistently assumed that incorporation of the guarantees listed in the Bill of Rights may not proceed under the Privileges or Immunities Clause. The lower courts, it seems to me, are stuck with that result until the Supreme Court changes course.") But Kevin Newsom has argued to the contrary that nothing in that opinion forecloses incorporating the Bill of Rights through the Clause. See Newsom, *supra* note 46, at 733–36.

keep and bear arms was very much on the minds of the Fourteenth Amendment's framers. *Dred Scott* had invoked the right as a *reductio ad absurdum*: if African-Americans were citizens, Chief Justice Taney noted, then one of the privileges or immunities to which they were entitled was the right to keep and bear arms.⁸² The Framers understood that arms had been denied to slaves during the antebellum period, and that many southern states continued to deny freed slaves access to arms to defend themselves against insurgent violence during Reconstruction. Thus many Framers specifically mentioned the right to keep and bear arms when offering examples of protected privileges or immunities.⁸³

There are other advantages as well. As Akhil Amar has written, using the Privileges or Immunities Clause instead of the Due Process Clause allows the Court to reframe the question. "Instead of asking whether a given provision is fundamental," he wrote, "we must ask whether it is a personal privilege—that is, a private right—of individual citizens, rather than a right of states or the public at large."⁸⁴ In light of history and of *Heller*, the answer is obvious. *Heller* held that the Second Amendment guaranteed an individual right to possess arms for private self-defense. It would be radically inconsistent to maintain, despite *Heller*, the right recognized there did *not* fit the definition of a "privilege or immunity" of citizens of the U.S.

Taking this route, though, would produce difficulties. First, a lot of water has passed under the proverbial bridge since 1873. Reintegrating the Privileges or Immunities Clause into the mainstream of American constitutional law might be a difficult process. It's possible much of the Court would discount the utility of the clause heavily as against the uncertain effects that might result from its use. Moreover, it is not clear what effects incorporating the Second Amendment through the Privileges or Immunities Clause would have on the gun rights of resident aliens. After all, the clause speaks of protecting the privileges or immunities of "citizens of the United States" against state interference.⁸⁵ It seems incongruous for there to be protection for all individuals' gun rights at the federal level, but only for U.S. citizens at the state or local level—especially when resident aliens might live

⁸² 60 U.S. (19 How.) 393, 416–17 (1856) (arguing that if African-Americans were considered citizens "and entitled to the privileges and immunities of citizens," then "[i]t would give persons of the negro race . . . the right to . . . keep and carry arms wherever they went").

⁸³ See, e.g., AMAR, *supra* note 59, at 186–93; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 43, 52, 53, 56, 140, 141, 164 (1986); FONER, *supra* note 59, at 258.

⁸⁴ AMAR, *supra* note 59, at 221.

⁸⁵ U.S. CONST. amend. XIV, § 1.

in areas in which they most need guns for self-defense and where reliance on the police for protection is the most problematic.

We feel fairly confident in predicting that the Court will take up an incorporation case in the near future. When it does, it will be interesting to see (1) whether any in the *Heller* majority express federalism-based qualms about incorporation and (2) if the Court does incorporate it, *how* it does so. Though it hardly matters, given the few constitutional rights left *unincorporated*, the Second Amendment offers the Court the best opportunity in over a generation to articulate a new test for incorporating federal rights against the states. Whether the Court will seize it remains to be seen.

V. TAKE FOUR: *HELLER* AND THE LOWER COURTS—A CASE OF INDIGESTION?⁸⁶

Even an *unincorporated* Second Amendment will have precious little impact if lower courts refuse to implement it. While lower court resistance to Supreme Court decisions does not fit the traditional law school narrative that the Supreme Court decides and the lower courts dutifully implement its decisions, such resistance is a real phenomenon. Pre-*Heller* case law, for example, evinced a significant hostility toward the individual right argument, and a surprisingly deep investment in lower courts' own case law, despite its rather tenuous anchor in the Supreme Court's decision in *United States v. Miller*.⁸⁷ Which raises the question: What will lower court judges do when presented with gun rights cases post-*Heller*?

Elsewhere we have documented the lack of enthusiasm for the Court's attempt to impose limits on congressional power under the Commerce Clause,⁸⁸ in cases like *Lopez*⁸⁹ and *Morrison*.⁹⁰ Here, we briefly summarize

⁸⁶ This Part draws on, and expands, Reynolds & Denning, *Heller's Future in the Lower Courts*, *supra* note 1.

⁸⁷ 307 U.S. 174 (1939). For a discussion of what *Miller* held (and didn't hold), see Brannon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, 65 LAW & CONTEMP. PROBS. 113 (2002). For lower courts' treatment of *Miller* pre-*Heller*, see Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996).

⁸⁸ See Reynolds & Denning, *Lower Court Readings of Lopez*, *supra* note 1; see also Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003) (looking at lower court opinions following *Morrison*).

⁸⁹ 514 U.S. 549 (1995).

⁹⁰ 529 U.S. 598 (2000). One could cite examples of this from other doctrinal areas as well. See Ilya Somin, *Locked Liberties*, LEGAL TIMES, July 28, 2008, at 42–43

our earlier findings, then suggest that parallels exist between the Commerce Clause and the Second Amendment that may result in post-*Heller* resistance similar to that which we observed following *Lopez* and *Morrison*.

In *Lopez*, the Supreme Court struck down the “Gun Free School Zones Act” as being in excess of Congress’s enumerated power to regulate commerce among the several states.⁹¹ Prior to *Lopez*, the conventional wisdom was that Congress could do essentially anything it wanted under the Commerce Clause, something that, as Deborah Merritt noted, had become a law school joke by the 1980s.⁹² Observing the lower courts’ response to this change seemed likely to us to provide some insight into how lower courts respond to Supreme Court doctrine generally.

And it did, though at first things were a bit unclear. The initial installment of our project, published in the *Wisconsin Law Review* in 2000, was subtitled *What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*⁹³ There, we concluded that lower courts seemed strangely slow to respond to the *Lopez* decision, but suggested that Supreme Court clarification might improve matters.

[The] *Lopez* decisions provide a background for two very different, though not necessarily entirely inconsistent, stories. One story—not very flattering to court of appeals judges—is that of an ossified intermediate bench in the throes of “judicial sclerosis,” unable or unwilling to apply Supreme Court decisions that depart too sharply from business as usual. This story seems particularly compelling in the context of the drug and firearms cases, where the courts’ impatience with constitutional arguments that might keep unpopular offenders out of jail is palpable, and where *Lopez* issues are dismissed in terse paragraphs containing little or no analysis.

But there is another story, too; this one is not very flattering to the Supreme Court. The view of appellate judging provided in most law school classes is a fairly simple one: Higher courts select principles, which lower courts then apply faithfully. As any lawyer with even a modicum of practice experience can attest, the situation in the real world is more complex. For example, that the lower courts are supposed to apply principles articulated by higher courts presumes that the principles of the upper courts are easily identifiable and readily available for application by the lower courts. But as the multiplicity of readings to which *Lopez* has been subject suggests, higher courts (in this case, the United States Supreme Court) do not always

(comparing *Heller*’s recognition of the right to keep and bear arms to the Court’s uneven protection of property rights under the Takings Clause).

⁹¹ *Lopez*, 514 U.S. at 549.

⁹² Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 691 (1995).

⁹³ Reynolds & Denning, *Lower Court Readings of Lopez*, *supra* note 1.

fulfill this responsibility.

....

In *Lopez*, the Supreme Court struck a bold and telling blow for limited government and a return to the first principles of the Constitution. Or it didn't. Or maybe it did, but it just did not say it very well. After all, it does not matter how loudly you speak if you mumble when you do so.

How will we know which? The cynical—and, perhaps sadly, correct—answer in this case is, we will know when the Supreme Court tells us. Given the Court's decision this Term to resolve the split in the circuits over the Violence Against Women Act occasioned by the *Brzonkala* decision, as well as the scope of the federal arson statute, perhaps Supreme Court resolution is not too far away.⁹⁴

Though the Supreme Court was probably unmoved by our pleas, it did produce clear decisions in two subsequent cases, and in both it seemed to underscore the importance of the *Lopez* decision in terms that seemed to remove most excuses for lower court foot-dragging.⁹⁵

A couple of years later, we authored the next installment of our survey.⁹⁶ Once again, we found that lower courts were, in fact, doing little to put *Lopez's* reasoning into effect. Examining the large number of lower court cases addressing Commerce Clause issues, we found ample evidence of what Judge Gilbert S. Merritt lamented, in a *Yale Law Journal* Essay, as an increasing bureaucratization of the judiciary.⁹⁷ This bureaucratic mindset—what one of us once heard William Van Alstyne refer to as a “desk-clearing mentality” at work—is partially reflected in an increased concern with simply disposing of cases, as opposed to disposing of cases correctly. We concluded:

But if ideology is not the source of lower court resistance—or, if any sustained inquiry is likely to result in the old Scots verdict, “not proven”—is there an explanation for lower courts' behavior? Research by other scholars

⁹⁴ *Id.* at 397–400 (footnotes omitted).

⁹⁵ *Jones v. United States*, 529 U.S. 848, 850–51 (2000) (holding that an owner-occupied house was not “used in” interstate commerce for purposes of federal arson statute); *United States v. Morrison*, 529 U.S. 598, 617 (2000) (striking down, as exceeding the scope of the commerce power, the civil-suit provision of the Violence Against Women Act).

⁹⁶ Denning & Reynolds, *Rulings and Resistance*, *supra* note 88. This summary of our earlier work is drawn from Glenn Harlan Reynolds, *Marbury's Mixed Messages*, 71 TENN. L. REV. 303 (2004).

⁹⁷ Gilbert S. Merritt, *Owen Fiss on Paradise Lost: The Judicial Bureaucracy in the Administrative State*, 92 YALE L.J. 1469 (1983).

suggests that the problem here, to paraphrase former presidential candidate Michael Dukakis, is not ideology, but rather competence. What we are seeing in lower courts' Commerce Clause decisions may be only symptomatic of a larger problem in the federal judiciary: that of courts responding to an increasingly unmanageable caseload by resorting to corner-cutting, resulting in an overall reduction in the quality of courts' work product.⁹⁸

What will happen with *Heller's* progeny is unclear. Gun rights advocates have already commenced litigation against gun control laws in several jurisdictions,⁹⁹ and, of course, criminal defendants, for whom hope springs eternal, have already begun adding Second Amendment claims to their defenses, so far with little result. But while these defendants may well be motivated more by hope than substance, the dismissive response of lower courts bodes poorly for *Heller's* reception in more serious cases.

For example, in *United States v. Lewis*, Chief Judge Curtis Gómez dismissed a Second Amendment argument based on the pre-*Heller* caselaw of the Second Circuit, entirely omitting any discussion of the Supreme Court's 9-0 rejection of the collective right theory underlying that caselaw.¹⁰⁰ This drew criticism from Eugene Volokh, who wrote:

It may well be that the defendant didn't provide enough argument to support his motion to dismiss. I'm also pretty sure that the courts will find that the right to keep and bear arms isn't substantially burdened by the ban on knowingly possessing a firearm with an obliterated serial number; and they may well uphold the Virgin Islands license requirement, or conclude that only someone who has tried to get a license but been denied one is entitled to challenge the requirement.

But the court's reliance on precedent strikes me as quite weak: *Rybar* was decided by the Third Circuit on the theory that the Second Amendment only protects gun possession when it has a "connection with militia-related activity." *Heller* rejects that theory, which means that *Rybar* and *Willaman* are no longer good law. . . .

So I don't think the district court was entitled to punt the matter to the pre-*Heller* collective-rights precedent. It needed to do the *Heller* analysis (or, if appropriate, decline to deal with the Second Amendment question, if the litigant hadn't adequately argued it). And simply saying that under

⁹⁸ Denning & Reynolds, *Rulings and Resistance*, *supra* note 88, at 1303.

⁹⁹ See, e.g., Maura Dolan, *Gun Advocates Armed for Legal Fight*, L.A. TIMES, June 27, 2008, at A19.

¹⁰⁰ *United States v. Lewis*, Criminal No. 2008-21, 2008 WL 2625633 (D.V.I., July 03, 2008).

Heller the "right is not unfettered" isn't an adequate justification for the court's decision, either: Obviously some fetters are permissible but others aren't, so the question is why these particular gun controls are justified given the *Heller* reasoning.¹⁰¹

The *Lewis* opinion, in fact, is only three double-spaced pages long, of which only one paragraph contains any substantive reasoning; this combination of superficiality and hostility is, alas, typical of pre-*Heller* lower court caselaw, and—so far at least—of much post-*Heller* caselaw as well. A somewhat more substantive approach can be found in the case of *Mullenix v. Bureau of Alcohol, Tobacco & Firearms*, in which *Heller* is actually quoted and applied on the subject of Second Amendment protection for machine guns.¹⁰² Though the treatment is not extensive, it is fair to say that it is adequate, especially in light of the defendants' briefing.

Which approach will govern in future cases? Some are doubtful: Doug Berman comments: "I expect that we will be seeing lots and lots of plausible post-*Heller* Second Amendment claims brought by all sorts of litigants, and lots and lots of (less plausible?) rejections of these claims by lower courts."¹⁰³ Berman may be right, but it seems likely that increased public attention—at least when there are serious arguments at hand—is likely to limit the impact of the desk-clearing mentality, certainly in the context of challenges to gun control laws brought by activist groups. So will *Heller* suffer *Lopez*'s fate, serving more as casebook fodder than as actual authority? There are some reasons to think it might, and some reasons to think it might not. On balance, it seems as if "might not" is likely to be the winner.

On the "might" side, we have the institutional prejudices of the courts of appeals, in favor of status quo and a desk-clearing mentality. Like the bureaucrats they increasingly resemble, the appellate judiciary doesn't like to rock the boat. In addition, the courts of appeals have a history of more-or-less open hostility to claims of a private right to arms. The vast majority of cases suggest that, to the extent they can, they will try to rule against such a right. Further, as was true in *Lopez*, the *Heller* Court sent somewhat mixed signals regarding its commitment to its own decision. In *Heller*, for example, the Court's ambiguity regarding the standard of review that applies, along with

¹⁰¹ Eugene Volokh, *District Court Wrongly Follows Pre-Heller "Collective Rights" Circuit Precedent*, THE VOLOKH CONSPIRACY, July 8, 2008, http://volokh.com/archives/archive_2008_07_06-2008_07_12.shtml#1215558009.

¹⁰² No. 5:07-CV-145-D, 2008 WL 2620175, at *2 (E.D.N.C. July 2, 2008).

¹⁰³ Doug Berman, *The Post-Heller Litigation Headaches (and Judicial Cut-Backs) Have Begun*, SENTENCING LAW AND POLICY, July 8, 2008, http://sentencing.typepad.com/sentencing_law_and_policy/2008/07/the-post-heller.html.

the enumeration of presumptive constitutional firearms regulations, echoes the equivocal signals in *Lopez* regarding how the factors used to evaluate “substantial effects” on interstate commerce ought to be weighed or applied.

On the “might not” side, however, we have a very different situation from that relating to the Commerce Clause following *Lopez*. There was virtually no follow-up litigation to *Lopez* on the part of the public interest bar; by contrast, several follow-up lawsuits were filed, challenging gun control laws in other communities, within days of the *Heller* opinion’s publication.¹⁰⁴ There was relatively little public interest in *Lopez* or the Commerce Clause; the Second Amendment, on the other hand, is among the most significant provisions of the Bill of Rights from the standpoint of public engagement.¹⁰⁵

Which set of forces will prevail? It’s impossible to say for certain, but bureaucrats tend to take the path of least resistance and least controversy. Though some foot-dragging is likely, it’s also likely that the kind of resistance demonstrated in response to *Lopez* won’t manifest itself in response to *Heller*.

This is particularly true because, as noted above, the dissents in *Heller*, while repudiating the collective right approach, fail to articulate any coherent alternative theory.¹⁰⁶ With the collective right theory now unanimously repudiated by the Court, and the absence of any coherent alternative approach, the majority opinion in *Heller* is likely to produce more lower court compliance than did *Lopez*.

Or, perhaps, we will publish another survey of lower court compliance with Supreme Court decisions and conclude, once again, that the Supreme Court has surprisingly little influence on what actually happens in America’s judicial system. That would be a discovery with its own consequences, beyond the focus of this brief Essay.

VI. TAKE FIVE: CONSTITUTIONAL COGNITIVE DISSONANCE—JUSTICE STEVENS’S LITE BEER AND JUSTICE BREYER’S UNDUE BURDEN LITE

If the majority opinion in *Heller* can be characterized as minimalist, deciding no more than required for the resolution of the case at hand and providing only limited guidance to lower courts in future cases, then the dissents can be characterized as conflicted. Like the majority, they open by recognizing that the Second Amendment creates an individual right of some sort. Unlike the majority, however, they seem unable to imagine any

¹⁰⁴ See, e.g., Dolan, *supra* note 99.

¹⁰⁵ See *supra* note 6 and accompanying text.

¹⁰⁶ See *infra* notes 107–121 and accompanying text.

circumstance—even the District of Columbia’s draconian gun ban—that would cause that individual right to do any actual work.

Justice Stevens’s dissent opens clearly enough:

The question presented by this case is not whether the Second Amendment protects a “collective right” or an “individual right.” Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.¹⁰⁷

Unfortunately, neither does Justice Stevens’s dissent.

Indeed, Justice Stevens’s individual right view of the Second Amendment can be compared to the treatment of beer in a television commercial: you can talk about how delicious the beer is, show it in frosty glasses with foam rolling down their sides, and otherwise extol its virtues. What you are not allowed to do is to actually drink it. Likewise, Justice Stevens’s individual right appears to be a rather watery brew: “The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons.”¹⁰⁸ His conclusion:

The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court’s opinion, I could not possibly conclude that the Framers made such a choice.¹⁰⁹

In Justice Stevens’s formulation, apparently, the Second Amendment protects an individual right. It just doesn’t protect an individual right to own guns if Congress, or the D.C. City Council, feels otherwise. Whether this conception should be characterized as “tastes great” or “less filling” is a question that will be left to the reader. It does raise questions about why, exactly, Justice Stevens felt it important to declare at the outset that the Second Amendment protects an individual right, given that, ordinarily, the purpose of such rights under the Constitution is precisely to “limit the tools available to elected officials” who wish to regulate the conduct that those rights protect.

¹⁰⁷ District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008) (Stevens, J., dissenting).

¹⁰⁸ *Id.* at 2823.

¹⁰⁹ *Id.* at 2847.

Perhaps Justice Stevens recognized that explicitly adopting a “collective” or “states’ right” approach to the Second Amendment outright might have raised more troubling problems of its own,¹¹⁰ or perhaps Stevens had some conception of an individual right, not spelled out in his dissent, that would resolve this tension, though it is difficult to imagine what that might be. Nonetheless, we are left with a clear declaration that an individual right exists, but with little discussion of what that existence means. In astronomy, unseen planets are often identified by their gravitational effects. In Justice Stevens’s dissent, it is the opposite: we can see the right clearly, it just doesn’t seem to be affecting anything.

Justice Stevens’s opinion, to be fair, is mostly concerned with arguing that the majority opinion is mistaken—a normal enough role for a dissent—meaning that he spends far more time discussing what the Second Amendment, in his opinion, does not do than what work, if any, it might perform under his approach. Justice Breyer’s dissent, on the other hand, does make some effort to develop a theory of individual rights protection under the Second Amendment. Justice Breyer’s analysis would no doubt be more influential had it appeared in a concurring opinion rather than in a dissent, but it is nonetheless worthy of some attention.

Like Justice Stevens, Justice Breyer agrees—and adds that the entire Court agrees—that the Second Amendment protects an individual right of some sort: “The Amendment protects an ‘individual’ right—*i.e.*, one that is separately possessed, and may be separately enforced, by each person on whom it is conferred.”¹¹¹ But, says Justice Breyer, the Framers presumably regarded the right as compatible with some kinds of gun regulation—of the sort that existed at the time of the Framing—and thus, modern regulations of a similar character would also withstand Second Amendment scrutiny.¹¹²

Justice Breyer then surveys a number of colonial-era restrictions on firearms—often, however, having to do with the *discharge* of guns rather than their possession, or regulating the storage of gunpowder in quantity—and concludes that the District of Columbia’s law, as intrusive as it was, nonetheless did not violate the Second Amendment’s individual right. According to Justice Breyer, the proper analysis should employ “an interest-

¹¹⁰ See Reynolds & Kates, *supra* note 11, at 1743 (“states’ right” interpretation would allow state governments to nullify federal gun control laws in the exercise of state militia powers).

¹¹¹ 128 S. Ct. at 2848 (Breyer, J., dissenting).

¹¹² *Id.* (“To the contrary, colonial history itself offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the ‘right to keep and bear arms’ . . . And those examples include substantial regulation of firearms in urban areas, including regulations that imposed obstacles to the use of firearms for the protection of the home.”).

balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.”¹¹³ In other words, the Court should ask “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.”¹¹⁴

Justice Breyer appears to be groping toward a sort of “undue burden” standard for Second Amendment evaluation of firearms regulation, though it might perhaps be more fair to characterize his approach as “undue burden lite” since it seems doubtful that Justice Breyer’s approach would be employed in the context of other individual rights. Justice Breyer would have the Court defer to “a legislature’s empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional fact-finding capacity,” rather than engaging in a “more rigid approach” in which constitutional doctrine controls.¹¹⁵

Justice Breyer then looks at various items of sociological data about crime in urban areas and concludes that crime concerns outweigh such other issues as self-defense, or ensuring a populace that is familiar with firearms. Though the challenged statute made it illegal to practice or keep certain firearms in the District of Columbia, Justice Breyer concludes that the interests supporting the statute outweigh any burdens on gun owners, requiring those interested in maintaining shooting skills to go elsewhere: “The adjacent States do permit the use of handguns for target practice, and those States are only a brief subway ride away.”¹¹⁶

One wonders if Justice Breyer would regard a ban on abortions, contraceptives, or pornography within the District as being similarly vitiated by the availability of different legal regimes “only a brief subway ride away.” And, indeed, a reading of Justice Breyer’s entire dissent suggests that the balancing-of-interests that he proposes is one in which a judicial thumb is firmly placed on one side of the scale:

The reason there is no clearly superior, less restrictive alternative to the District’s handgun ban is that the ban’s very objective is to reduce significantly the number of handguns in the District, say, for example, by allowing a law enforcement officer immediately to assume that *any*

¹¹³ *Id.* at 2852.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2852–53.

¹¹⁶ *Id.* at 2862.

handgun he sees is an *illegal* handgun. And there is no plausible way to achieve that objective other than to ban the guns.¹¹⁷

Comment [BPD2]: Why wouldn't this be "id. at 2864"?

It is an odd sort of constitutional right that can be defeated by arguments that *making the object of that right presumptively illegal* is a reasonable means of regulating the right in question. Yet that is the core of Justice Breyer's position. The result would seem to be an "individual right" to have one's firearms ownership balanced away by judges whenever that right might inconvenience the authorities' regulatory schemes. What sort of a right is this?

Perhaps it is whimsy on our part, but if Justice Stevens's formulation resembles a beer commercial, then Justice Breyer's "individual right" seems reminiscent of the "right" of brother Stan (or sister "Loretta") to have babies in *Monty Python's Life of Brian*:

STAN: I want to be a woman. From now on, I want you all to call me 'Loretta'.

REG: What?!

LORETTA: It's my right as a man.

JUDITH: Well, why do you want to be Loretta, Stan?

LORETTA: I want to have babies.

REG: You want to have babies?!

LORETTA: It's every man's right to have babies if he wants them.

REG: But... you can't have babies.

LORETTA: Don't you oppress me.

REG: I'm not oppressing you, Stan. You haven't got a womb! Where's the foetus going to gestate?! You going to keep it in a box?!

LORETTA: [crying]

JUDITH: Here! I-- I've got an idea. Suppose you agree that he can't actually have babies, not having a womb, which is nobody's fault, not even the Romans', but that he can have the right to have babies.

¹¹⁷ 128 S. Ct. at 2864.

FRANCIS: Good idea, Judith. We shall fight the oppressors for your right to have babies, brother. Sister. Sorry.

REG: What's the point?

FRANCIS: What?

REG: What's the point of fighting for his right to have babies when he can't have babies?!

FRANCIS: It is symbolic of our struggle against oppression.

REG: Symbolic of his struggle against reality.¹¹⁸

Likewise, under Justice Breyer's formulation the Second Amendment provides a right to have guns, even though—under the sort of regulation Justice Breyer finds reasonable—citizens might not actually be able to *have* guns. As an example of judicial cleverness, this might win points, but one doubts that such an approach would win favor for straightforwardness among members of the general public.

And, indeed, there is something oddly labored about both dissents. One might have imagined a rejection of the individual right “Standard Model” of the Second Amendment,¹¹⁹ followed by a discussion that tracked the many lower court opinions upholding gun control laws on those grounds.¹²⁰ Yet even the dissenters apparently found the collective right approach unpersuasive, requiring that the Second Amendment be construed in a fashion that produced the same results in spite of an individual right mooring. The result is a sort of “struggle against reality” that is Pythonesque in its intricacy, if not its amusement value.

Such oddity suggests a political, rather than an analytical, basis. With polls consistently indicating that very large majorities of Americans believe that the Second Amendment protects an individual right to arms,¹²¹ and in the face of a strongly worded majority opinion on the subject, the dissenters presumably feared that taking a contrary, collective right position would

¹¹⁸ MONTY PYTHON'S LIFE OF BRIAN (Python (Monty) Pictures LTD 1979), *unofficial transcript available at* <http://www.mwscmp.com/movies/brian/brian-07.htm>.

¹¹⁹ See Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 466–71 (1995) (describing the “Standard Model” individual right theory).

¹²⁰ See generally Denning, *supra* note 87.

¹²¹ See Jones, *supra* note 6 (“A solid majority of the U.S. public, 73%, believes the Second Amendment to the Constitution guarantees the rights of Americans to own guns.”).

diminish the political prestige of the Court, or at least of the dissenting minority.

If the *Heller* minority is, in fact, trimming its rhetorical sails in the face of popular sentiment, this would merely underscore the Supreme Court's character as a political, as well as legal, institution. It does, however, suggest that such political sail-trimming does little to promote coherent or useful legal analysis.

VII. CONCLUSION

In this brief Essay, we have offered five takes on what *Heller* might mean, all subject to the notion (perhaps cynical, but certainly accurate) that it will be future decisions by the Supreme Court and the courts of appeals that will tell us what *Heller* really amounts to. One advantage of the "five takes" approach is that it increases our chance of saying something that will turn out to be true, allowing us to take credit while conveniently ignoring those other "takes" that failed to materialize. But here is one further take that is sure to be borne out: The response of lower courts to the *Heller* decision, and the response of the Supreme Court to the lower courts, will tell us much about the natures of those institutions, and the importance of Supreme Court decisions to the actual operation of our legal system.