The Second Amendment and the Myth of Neutrality: McDonald v. City of Chicago and Judicial Craftsmanship

Craig L. Jackson
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By Craig Jackson

I. Introduction

The Supreme Court’s decision last term that states may not prohibit gun ownership (McDonald v. City of Chicago\(^2\)) is interesting not just because of its landmark nature. It is also noteworthy because the new protection came about as a result of the conservative majority’s abandonment of its core principles—that of states’ rights in favor of federal supremacy (at least in this case) and a methodology of decision making requiring subjective reasoning, not the balls and strikes we were lead to expect from conservative justices.\(^3\)

Supreme Court decisions often standout because of the reasoning path taken in arriving at conclusions. The reasoning in this decision is of extra importance because the issue in the case, gun possession, is an ideological issue. The reasoning is an exercise of craftsmanship, picking and choosing sources that support a particular preference. The decision clarifies the lack of a divide between judicial philosophy and social and/or political and social ideology.\(^4\) It is a charge that can be lodged at both liberal and conservative members of the Court that have served over a period extending at least as far back to the early 20th century. But it is the conservative side that has practically made a faith of the liturgy that political and social ideology has no place in judicial decision-making. This essay hopes to demonstrate how the Court, on a matter as important as a fundamental right, managed to demonstrate the limits of judicial neutrality when important ideology is at stake.

II. Background: Rights in both National and State Dimensions

Petitioners in McDonald challenged bans in Chicago and Oak Park Illinois on the possession of hand guns and concurrent regulations making owning firearms difficult if not impossible. After determinations by the District and Seventh Circuit courts that the regulatory schemes were constitutional, the Court reversed both decisions. The Court, in an opinion authored by conservative Justice Samuel Alito, predictably chooses the conservative social policy outcome, finding that the Second Amendment protected petitioners’ rights to keep and bear arms from

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1 Professor of Law Thurgood Marshall School of Law, Texas Southern University; Visiting Scholar Rice University.
2 561 U.S.___(2010).
3 Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005), September 9, 2005:
   I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it's my job to call balls and strikes and not to pitch or bat.

Chief Justice Roberts voted with Justice Alito in both the plurality majority portions of the McDonald.

4 Professors Balkin and Siegel perhaps describe some familiar themes of conservative judicial decision making, contesting “the conservative belief that we should cleanse constitutional law of contemporary understandings and restore the Constitution to an imagined past, a time when we obeyed the founders. ‘We think this goal is inadequate; it simply disguises the values of a contemporary political movement as the framers intentions.’” The Constitution in 2020, at 2 (Jack M. Balkin & Reva B. Siegel, eds., 2009).
The holding that the right was fundamental enough to merit constitutional protection really was a virtual inevitability after 2008. Two years ago the Court held that the Second Amendment did mean that Congress could not abridge the right of citizens to bear arms—to own a handgun in the District of Columbia. The decision found that the amendment’s language connecting the existence of a citizens’ militia with the right to bear arms created a personal right to gun ownership unconnected with militia membership. The decision was limited to Congress and those jurisdictions under its direct control. Because ours is a federal system, the rights that Congress must protect have not always been the rights that the states must protect. To reach the level of a constitutionally protected right in the states, gun ownership would have to be established as a fundamental right having its roots in our history and national traditions and implicit in an Anglo American system of ordered liberty, to paraphrase language from cases decided over the past eighty years. This process is incredibly subjective and has never been employed without some level of controversy and disagreement from within the Court over the better part of a century. Furthermore, to add to the drama of this issue, the Second Amendment does not say anything about an independent right to bear arms free of militia concerns. This is not to say that such an interpretation is not plausible, but it would not be one based upon the explicit text of the document.

The bit of misdirection regarding state and federal responsibilities goes back to the beginning of this country, when concerns about federal power lead the framers of the Constitution to include a bill of rights that prohibited the federal government from abridging certain rights such as freedom of speech, press, religion, and, among others, the right against self incrimination. Included in that list is the Second Amendment, which states “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed”. However, the Supreme Court in the 1830s decided definitively that the rights in the Bill of Rights did not bind state and local governments. The Court in Barron v. City of Baltimore, held that the first eight amendments apply only to the general government and not the states. The rationale was largely textual, with Chief Justice Marshall noting that the Constitution had explicitly placed limitations on the states in Article I Section 10. In addition, Marshall reasoned, the Constitution was a general document, unless specified otherwise, approved by the general citizenry of the United States, and applicable to the general government.

The issue of the principle of state autonomy to protect the “right” of state residents to hold slaves lead to the Civil War and during the aftermath of that war

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5 561 U.S. __ (2010) at 1-4. That the municipal ordinances were unconstitutional was the decision of the Court by a five four majority. That the right was fundamental under standards from Due Process Jurisprudence was a plurality decision of 4. Justice Thomas wrote an opinion concurring in part and concurring in the judgment, arguing for a decision based on the Privileges or Immunities Clause of the Fourteenth Amendment.

6 U. S. Const. amend. 2: A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.


9 Note 6 Id.

Congress proposed the Fourteenth Amendment which bound the states to a set of human rights protections. Of those protections, the Equal Protection Clause has been the most prominent in addressing racism in government throughout U.S. history since Reconstruction. In addition, the amendment includes a Privileges or Immunities Clause and a Due Process Clause. What spurs this debate is that the during the period leading up to the ratification of the Fourteenth Amendment there is significant historical evidence that the framers of that amendment intended to protect African Americans from the kind of state discrimination and terror that was actually occurring at the time of the amendment and a predecessor civil rights act was being considered. Yet, the Fourteenth Amendment does not say “the Bill of Rights is now applicable to the States”. If it had been written this way, a lot of constitutional history would have been different.

Because of this lack of wording, the federal judiciary was forced to articulate which of those rights would be binding upon the states, and which would not. In addition the Fourteenth Amendment did not give any explicit indication of which part of the amendment would serve as the repository of national rights applicable to the states. Two theories were for a time considered in determining the location of personal rights binding upon the states. Plaintiffs in an early post war case believed that their rights to pursue their trade were protected from state infringement by the Privileges or Immunities Clause. This theory was abandoned after the Supreme Court, in one of the worst decisions in the body’s history, The Slaughterhouse Cases, eviscerated the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, ascribing a set of innocuous rights as binding on the states, a mere four years after the clause was added to the Constitution in 1868. The clause has been a dead letter ever since.

11 U.S. Const. amend. 14 sec. 1.
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.


13 The Slaughterhouse Cases, 83 U.S. 36, 129 (1872).

14 Petitioners’ brief points out that the terms privileges and immunities, whether used together or separately were understood by key members of Congress to mean fundamental natural rights. Petitioners’ Brief at 21-26. See Petitioners’ Brief at 53, referencing Eric Foner, RECONSTRUCTION AMERICA’S UNFINISHED REVOLUTION 1863-1877 530. (1989). See also John Hope Franklin, RECONSTRUCTION AFTER THE CIVIL WAR 2ED,200 (1994).

15 Justice Miller, the author of the opinion, supported his position as follows:
One of these is well described in the case of Crandall v. Nevada. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution,
to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the
It seemed at the time that there would be no means of establishing state responsibility for any of the rights in the Bill of Rights, or any other rights that might exist—the legacy of the Barron federal state distinction and the manipulation of the Privileges or Immunities Clause in Slaughterhouse. Opinions differ as to the tact taken next. Because the framers of the amendment declined to go into specifics, the Court had to decide if the Bill of Rights would be made fully binding on the states, incrementally binding on the states, whether rights in addition to the Bill of Rights would be made so binding, or whether rights other than the Bill of Rights would be passed on to the states. The focus of the Court to give the Fourteenth Amendment meaning after the thrashing of the Privileges or Immunities Clause lead to the second theory of state responsibility under the Fourteenth Amendment—the Due Process Clause with its liberty language being key to unlocking the store of rights in the amendment. This would be accomplished by a reading of the clause that included a substantive component that was separate from the obvious procedural aspects of the clause. To some members of the Court, this process was separate and not dependent upon the Bill of Rights—the determination of the contents of the Fourteenth being solely a determination of whether a right was fundamental and not whether it was included within the first eight amendments. To others the process was fully dependent upon the first eight amendments, necessitating a wholesale incorporation of the Bill of Rights into the Fourteenth Amendment and hence upon the states. The middle ground was held by those members of the Court that opted for “selective incorporation”, by which those of the first eight amendments which were determined to be fundamental were incorporated. Yet even as the Court majorities settled into the selective incorporation approach, the Court engaged in a process of discernment which, as the McDonald opinions demonstrate, is the subject of some significant disagreement to this day. That process involves a determination of which proposed rights are fundamental. Justice Cardozo’s standard, “implicit in a system

Id at 79-80.


17 See Malloy v. Hogan 378 U.S. 24 (Harlan, J., dissenting); also, see No. 08-1521 (Stevens, J. dissenting at 7-8):

Whether an asserted substantive due process interest is explicitly named in the first eight Amendments to the Constitution or is not mentioned, the underlying inquiry is the same: We must ask whether the interest is comprised within the term liberty.

Also, Justice Miller in Twinings stated:

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. Twinings at___

18 Referencing statements by Congressman John Bingham, one of the principal architects of the Fourteenth Amendment, Justice Hugo Black was of the view that total incorporation of the first eight amendments was the purpose of the Fourteenth Amendment. See Adamson v. California, 332 U.S. 46, 68 (Black, J. dissenting)(1947).

19 In Adamson, Justice Frankfurter, in concurrence challenged Justice Black’s logic and reliance on the statements of Congressman Bingham:

Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government, as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments…Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech. Thus, at the time of the ratification of the Fourteenth Amendment, the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury.
of ordered liberty” from *Palko v. Connecticut* directs an examination of political philosophy that has guided western political development. Out of concern that western concepts of liberty might be different from common law concepts of ordered liberty, Justice Cardozo’s standard was narrowed to take into account only Anglo-American concepts. 20 Finally and more recently in *Washington v. Glucksberg* 21, in a decision that was heard by six of the members of the Court that decided *McDonald* and *Heller*, emphasis on the “moral philosophy” of the previous standards was lowered in favor of a determination of whether the proposed right has deep roots in American history and national traditions. 22 It is a standard that does not enjoy universal acceptance among the members of the Court. 23 This process of discernment lead last term’s decision, over a century after it began.

III. District of Columbia v. Heller—History, Traditions and Linguistics

But first, what is the content of the right to bear arms found to be unbridgeable by the states? In 2008, the issue of the right to bear arms was before the Court. Justice Scalia’s reasoning for the majority in *District of Columbia v. Heller* relied upon a determination of fundamentality based on pick and choose historical evidence and a compound rationale. To be sure, the right’s fundamental nature was not before the court, and the discussion of that issue came dangerously close to being an advisory opinion. But by shepherding the historical sources that supported the idea that personal gun possession was a traditional right, the linguistic difficulty of finding a personal right in an amendment seemingly militia based would be lessened. To Justice Scalia, the fact that the right to bear arms was understood by the drafters of the Bill of Rights to be fundamental was clear, essentially pre-deciding the *McDonald* case. This conclusion as to the right’s fundamentality was based on historical data and writings of that period. Justice Scalia, who has described himself as a proponent of the original meaning mode of constitutional interpretation 25, is among those Justices that follows the history and traditions approach to discernment which he argues is more objective than either of the ordered liberty approaches (Justices Stephens and Breyer, writing separate dissents, produced similar kinds of historical materials drawing opposite conclusions—Justice Alito acknowledged as much. 26) Justice Scalia argued in his *McDonald* concurrence, in response to Justice Stevens’ point in his dissent on the subjectivity of historical research, that history is the best evidence of a right’s fundamentality when compared to the “moral philosophy” of the Palko approach. 27 However it does not seem quite so objective when one is given to picking and

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22 Scalia’s concurrence
24 561 U.S.____ (2010) (Stevens, J. dissenting at 14-21), (Breyer, J. dissenting). The Breyer dissent was joined by Justices Ginsburg and Sotomayor.
26 To begin, while there is certainly room for disagreement about *Heller’s analysis* of the history of the right to keep and bear arms, nothing written since *Heller* persuades us to reopen the question there decided. Few other questions of original meaning have been as thoroughly explored. 561 U.S.____ (2010) at 42.
choosing one’s history to determine original meaning. Justice Breyer chided the plurality’s decision to dismiss the conclusions of historians from several common law countries, including the United States as to the role the right to keep and bear arms had in the legal traditions of the common law. Nonetheless, the history Justice Scalia picked allowed for the conclusion that the right to bear arms preceded the Constitution as a part of traditions identified through Anglo American history as far back as the reign of the Stuarts in 17th century England.

The second basis of the Heller decision was a linguistic one. Because the right to bear arms, according to Justice Scalia’s research, was fundamental at the time of the drafting of the Second Amendment (based upon English and colonial history), it was nonetheless included in the Bill of Rights and attached to the purpose of preserving a well regulated militia the latter being a matter of significant concern for that generation raised on King George’s despotism. This reasoning puts the right to bear arms in the Bill of Rights al right, but does this make it an independent right within the Second Amendment? Using linguistic analysis (at odds with amicus filed by professional linguists) Justice Scalia suggests that the Second Amendment was written to include both a personal right detached from the militia needs of the early Republic. The more direct reading of the Amendment is the right exists to ensure a well regulated militia, and not an independent right absent a militia. This would make it a right dependent upon the purpose of maintaining a civilian militia armed and at the ready if needed. So to regard it as an independent right listed in the Bill of Rights does involve a compound rationale that says, “even if the right is attached to the need to maintain a militia, it is still in the Amendment and should be given independent affect because it is fundamental.” This is the type of reasoning that is frequently decried by conservatives. But Justice Scalia’s reasoning, assuming the accuracy of his history, leads more directly to another conclusion. If the right’s fundamentality preceded the Second Amendment according to Justice Scalia, it exists irrespective of its inclusion in an amendment outwardly concerned with a well regulated militia. As such it is at least an independent unlisted or unenumerated fundamental right under Justice Scalia’s research which just

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28 561 U.S.___ (2010), (Breyer, J. dissenting at 3).
29 The indeterminacy of this evidence and debate is evidenced by the fact that much of Justice Scalia’s English history derives from the tumultuous conflict between Catholics and Protestants, a period when disarmament by any sovereign in power had military implications. District of Columbia v. Heller, 554 U.S.___ (2008). The majority opinion in McDonald on the other hand suggests that as early as the period immediately preceding the Civil war, the country had moved away from “militia at the ready” sentiments. 561 U.S.___ (slip op. at 22). The plurality goes on to cite to popular opinion during that period as a basis for confirming the traditions and history. But that is just about taking polls to establish law. Does the popular opinion of present times have the same value? Do either promote understanding of original meaning? These rhetorical questions underscore the problems associated with the history and traditions approach to determining original meaning—the tendency would have to be to exalt public opinion of the founding generation over present day values. See generally Jamal Greene, Selling Originalism, 97 Geo. L.J. 657 (2009).
30 On the topic of the militaristic meaning of the term “to bear arms”, Justice Scalia acknowledges the conclusions of the amicus brief, but argues that the militaristic meaning applies only when the word “against” follows. District of Columbia v. Heller, 554 U.S. at___. (slip op. at 12)
31 A key component of Justice Scalia’s argument in Heller relied on the right being a pre-existing one drawn from English rights reflected in the English Declaration of Right. 554 U.S. at___. (slip op., at 19-20). Justice Breyer in his McDonald dissent notes that scholars of English history, in an amicus in McDonald, claim that the English right to bear arms had everything to do with the militia. 561 U.S.___ (slip op. at 4)(Breyer, J. dissenting). See also Brief for English/ Early American Historians in Support of Respondents at 13-24.
32 In his dissent in McDonald, Justice Stevens underscores of the inseparability of the militia to the right to bear arms by noting that the Second Amendment is really a function of federalism in the sense that the states would have at the ready a militia of armed citizens to repel a despotic federal government. Stevens decries the reasoning that an amendment created for state protection will be interpreted to deprive the states of its own authority. 561 U.S.___ (2010) (Stevens, J. dissenting) 42.
happened to be codified in the Second Amendment by the Framers. If Justice Scalia’s compound reasoning had not garnered the votes that it did, the right to bear arms still would be a fundamental right, again according to the Justice’s reading of history and national traditions. There would apparently be no reason to interfere with the natural reading of the Second Amendment, the right would apply to states and federal enclaves alike, rendering the wording of the amendment an historical curiosity. Of course this approach has its dangers. Unenumerated rights under the Due Process Clause have proven controversial in U.S. constitutional history, with the most recent and the only one remaining as binding law, being the right to privacy which produced Roe v. Wade and other rights subsidiary to the right to privacy.\(^33\) Justice Scalia’s best approach in Heller in securing the right without departing from his stated distaste for unenumerated rights\(^34\) was to read the right as an independent and enumerated one in the Constitution despite the ellipses of reasoning required.

IV. \textit{McDonald v. City of Chicago} and the impact of Heller

Because Heller defined the right two years ago as separate from the militia (and because Scalia’s included an advisory “dicta” as to the right’s fundamentality) it was certainly just a matter of time before a state case involving the same issues would arrive giving the conservative justices the opportunity to apply the Second Amendment to the states. How the amendment would be applied was indeed crucial. Scholars have been virtually unanimous that the \textit{Slaughterhouse} opinion was a wrong turn because it diminished the role of the Privileges or Immunities clause to virtual nothingness, an argument made explicit in Justice Thomas’ concurrence.\(^35\) Yet Justice Alito, in light of this body of scholarly work, summarily dismissed the Privileges or Immunities Clause argument without a thorough analysis of the history and arguments that might have supported Petitioner’s position,\(^36\) a curious gesture considering the use of history and close constitutional reading employed to address the fundamentality issue.\(^37\)

The fact that in the process Justice Alito declined to overturn \textit{Slaughterhouse} and utilize the historically more appropriate Privileges or Immunities Clause, despite the argument offered in favor of such a reversal by the petitioner’s is telling.\(^38\) It would seem that the purpose of Alito was to keep clear of the Privileges or Immunities argument in \textit{Slaughterhouse} so as not to open the door to a limitless body of rights that may be fundamental yet not enumerated. Sticking with Due Process may make some sense in this regard because that clause,

\(^{33}\) 410 U.S. 113 (1973). The privacy right was articulated as relating to procreation, family (East Cleveland), and intimate relations (Lawrence v. Texas). Seventy years before Roe, the Supreme Court ruled that a New York law regulating work hours for bakers was unconstitutional because the law interfered with the right to contract. This “right” was challenged in dissent by Justice Oliver Wendell Holmes as economic policy was not a part of any particular body of rights covered by the liberty principle. After thirty-three years during which the Court remained critical of government economic regulation, the case was implicitly overruled in _____.

\(^{34}\) BMW of North America v. Gore 517 U.S. 559, 600-602 (Scalia, J. dissenting); Tennessee v. Lane, 541 U.S. 509, 562 (Scalia, J. dissenting).

\(^{35}\) 561 U.S. ___ 2010 (Thomas, J. dissenting) 15-35.

\(^{36}\) This portion of the opinion was a plurality, joined by Justices Scalia, Roberts, and Kennedy. Justice Thomas did not join this portion.

\(^{37}\) We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the \textit{Slaughterhouse} holding. 561 U.S. ___ (2010) at 10.

\(^{38}\) See note 14 supra.
in its substantive form, has been held to mandate prohibitions on state infringement of certain enumerated rights in the Bill of Rights and only one unenumerated right, the right to privacy. Overturning the Slaughterhouse cases without a body of precedent cautioning against broad definitions of fundamental rights could open up other unenumerated possibilities and prove troublesome for the conservatives on the Court (and perhaps some of the liberals as well). 39

With the overruling of Slaughterhouse dismissed from consideration, and Heller establishing the meaning of the Second Amendment, all Alito had to do was focus on that meaning—personal right to bear arms—examine U.S. and English history (much of which was already done by Scalia in Heller and is highly subjective) and this right becomes sufficiently fundamental to incorporate upon the states under the relatively strict rules of the Due Process jurisprudence, fully enumerated (with Heller’s compound reasoning) and not the “zone of mystery” that would surround the creation of a new jurisprudence under the Privileges or Immunities Clause. In addition Justice Alito engages in the kind of discernment into the content of liberty that relies again on subjective research and scholarship in history and law (the latter and not the former being the area of specialization of the members of the Court) which is standard procedure in determining whether a right is fundamental enough to merit constitutional protection on either side of the ideological divide. 40

Justice Alito’s approach, acknowledging the ground laid by Justice Scalia in Heller, is to document proof of the right’s fundamentality using historical sources that seem to confirm its connection to the need to keep men armed for purposes of militia readiness. Neither Justice Alito or Justice Scalia avoid this point in either the McDonald or Heller analyses. The key is the leap to an independent right absent the need or sense of need of a citizen’s militia. 41

Much of Justice Alito’s evidence of tradition and history during the period preceding the Civil War is seemingly testamentary to the fact that people believed that they had a right to own and possess guns outside of the militia rationale. The evidence offered here might be likened to an antebellum opinion poll in the sense that it is a chronicle of the public perceptions of the time, a curious means of judicial reasoning and a flaw in the traditions and history approach. The tradition and history reviewed in this discussion does little to establish legal right, unless popular opinion in a particular era is sufficient for the fundamentality test.

For the period following the Civil War, the brief for petitioner McDonald as does Justice Alito’s opinion, focuses heavily, if not predominantly on the fact that blacks, especially black veterans, were routinely disarmed by the states of the former Confederacy and subjected to violence by the likes of vigilante groups,

39 561 U.S. ___ (slip op. at 2) (Stevens, J. dissenting). Justice Stevens has continually declined the label of liberal, preferring to consider himself as the conservative, claiming, in a New York Times Magazine article that since his appointment in 1975, “every judge who’s been appointed to the court since Lewis Powell…has been more conservative than his or her predecessor. Except maybe Justice Ginsburg. That’s bound to have an effect on the court.” Jeffrey Rosen The Dissenter: Justice John Paul Stevens New York Times Magazine Sept. 23, 2007.

40 It is not the purpose of this essay to claim that conservatives on the Court alone have transgressed the bounds of neutral decision-making—many examples of outcome oriented decision-making on the part of liberals can be identified, including parts of the dissents in McDonald. However, as noted, in the text, it is the conservative claim that judicial decision-making can and should be accomplished without any consideration of social or political policy preferences. This claim is not accepted by many in the constitutional law community. See note ___ infra.

41 See notes 29-32 supra.
many of which would go on to become the Ku Klux Klan. Congressmen seeking to address this understood that if blacks were to be given full citizenship rights, it would have to include a right, unbridgeable by the state, to own firearms for use in self defense. This much from the petitioners brief, if accurate, would establish a place for a protected right within the Fourteenth Amendment, and very possibly within the Privileges or Immunities Clause, a tactical hedge on the part of the Petitioners in light of the difficulty of proving the right’s fundamentality under due process standards. And even this historical analysis is not without challenges. While the dissents do not dispute the Reconstruction Congress’ desperation to ensure the freedmen the right to protect themselves, neither Justice Stevens or Breyer concede the right as fundamental, with Justice Breyer arguing that the history indicates a desire to secure equality in the enforcement of gun laws in the South.

As a result of subjectivity, compound reasoning, and a willingness to temporarily abandon anti-federalist principles of states’ rights, the Court’s conservatives have achieved the goal of enshrining gun ownership as a fundamental right that can be regulated but not abridged by the states. Paraphrasing Justice Scalia’s comment on Justice Stevens’ motives in his dissent, the approach of Justice Alito does nothing to stop him or any other jurist from arriving at the conclusion he sets out to reach.

Similarly indeterminate rulings reaching liberal outcomes have been written by liberal members of the bench as well with conservatives screaming “judicial policymaking” and “legislating from the bench”.

And that is how sausage is made.

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43 Throughout the former Confederacy, immediately following the war, black codes were enacted depriving newly freedmen, not in the military, the right to possess firearms. This disarmament did not generally affect whites. Stephen P. Halbrook, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 1-2 (1998). Id at 1-2.