

## THE RIGHT TO KEEP AND BEAR ARMS IN THE STATES: AMBIGUITY, FALSE MODESTY, AND (MAYBE) ANOTHER WIN FOR ORIGINALISM

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*District of Columbia v. Heller*<sup>1</sup> was an easy case to get right. First, there was the text of the Second Amendment, which plainly states that “the right of the people to keep and bear Arms, shall not be infringed.”<sup>2</sup> Second, there was history, much of it created by citizen-soldiers who had just won their independence—and knew they would have to keep fighting for it—with guns. Next were the reams of academic scholarship from across the ideological spectrum that had come to establish the individual rights interpretation as the “standard model” of the Second Amendment.<sup>3</sup> Finally, there was the sheer unpersuasiveness of the arguments on the other side, which Judge Alex Kozinski once described as having “the grace of a sumo wrestler trying to kill a rattlesnake by sitting on it.”<sup>4</sup>

Another question that should be easy—and for most of the same reasons—is whether the right to keep and bear arms applies against the states. The Supreme Court did not address that issue in *Heller* because the District of Columbia is a federal enclave to which the Bill of Rights, and thus the Second Amendment, applies directly. By contrast, if the federal Constitution does protect a right to keep and bear arms against state infringement, it can only be through the Fourteenth Amend-

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1. 128 S. Ct. 2783 (2008).

2. U.S. CONST. amend. II.

3. See, e.g., Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463–66 (1995).

4. *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

ment, an issue *Heller* specifically eschewed.<sup>5</sup> The question has now been presented to the Supreme Court.<sup>6</sup>

The short answer is yes, the Fourteenth Amendment does protect an individual right to keep and bear arms from state infringement—emphatically so. But there are two paths to that result, only one of which reflects the spirit of originalism for which Justice Scalia’s *Heller* opinion has been justly praised. The originalist approach would require the Supreme Court to confront a 136-year-old mistake that pits history and the text of the Constitution against the false modesty of government-favoring judicial restraint. This Article argues that the Court should take the originalist path as a matter of principle and that there may never be a better chance to do so.

## I.

Lawyers, including ones who have become judges, have a knack for finding ambiguity where convenient. But constitutions necessarily speak in terms that are often broad and conceptual rather than narrow and specific. Moreover, because language is not static, words or phrases whose meaning was clear when drafted can grow less so with time, creating opportunities for later generations to proclaim ambiguity where none originally existed. Unfortunately for the body politic, ambiguity-driven minimalism plus government-friendly judicial restraint is like mixing booze with sleeping pills: a dangerous and lethargic combination.

Take the text of the Second Amendment. There is nothing remotely ambiguous about the imperative “shall not be infringed.” Yet, until *Parker v. District of Columbia*<sup>7</sup> in 2007, no federal appellate court had ever used the Second Amendment to protect gun ownership. In fact, most circuits had rejected the individual rights interpretation either explicitly or implicitly, evidently on the basis of perceived ambiguities in the text.<sup>8</sup>

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5. 128 S. Ct. at 2813 n.23.

6. *McDonald v. City of Chicago*, 130 S. Ct. 48 (2009).

7. 478 F.3d 370 (D.C. Cir. 2007). *Parker* became *Heller* in the Supreme Court after the D.C. Circuit held that Ms. Parker and four of her co-plaintiffs lacked standing to bring suit.

8. 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, 981–99 (1996) (collecting and critiquing cases). The one clear exception is the Fifth

Two of the most commonly cited sources of ambiguity in the Second Amendment are the phrases “well regulated Militia” and “keep and bear.”<sup>9</sup>

It is fair to say that both phrases are archaic. For example, a Westlaw search for all cases containing the phrase “keep and bear” *without* “arms” or “firearms” produces twenty-nine cases, all of them involving either a “keep and bear harmless” indemnity provision, actual live bears, or, most recently, a sexual harassment case featuring a stuffed toy bear that made obscene noises when squeezed.<sup>10</sup> Similarly, the phrase “well regulated Militia” includes an adjectival phrase—“well regulated”—that is no longer used in standard English and a noun—“Militia”—that many people mistakenly equate with today’s National Guard.<sup>11</sup> The National Guard is an organized fighting force subject to federal control that founding-era Americans would likely have considered to be a standing army—precisely the force that citizen militias were meant to *oppose* if necessary to prevent tyranny.

Of course, the problem of textual ambiguity is not remotely confined to the Second Amendment. Starting with the First Amendment, exactly what does it mean to “establish[]” or permit the “free exercise” of religion, and where is the line between permissibly regulating speech and unconstitutionally “abridging” it?<sup>12</sup> The Third Amendment prohibits quartering of troops “in time of peace.”<sup>13</sup> America has occupying forces engaged in combat operations in Iraq and Afghanistan and is

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Circuit, which interpreted the Second Amendment as protecting an individual right to keep and bear arms but concluded that the right had not been violated in that case. *See* *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

9. U.S. CONST. amend. II.

10. *Borges v. City of Hollister*, No. C03-05670 HRL, 2005 WL 589797, at \*11 (N.D. Cal. Mar. 14, 2005).

11. *See, e.g.*, Richard A. Posner, *In Defense of Looseness: The Supreme Court and gun control*, THE NEW REPUBLIC, Aug. 27, 2008, at 32 (equating state militias with the National Guard). In fact, the word “Militia” as used by the Framers refers to what we now call the “unorganized militia” of the United States, which includes, among others, every able-bodied male citizen of the United States between seventeen and forty-five years old. *See* 10 U.S.C. § 311(a) & (b)(2) (2006); *see also* Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271 (prescribing enrollment of all free, able-bodied white males between the ages of eighteen and forty-five in the militia of the United States).

12. U.S. CONST. amend. I.

13. U.S. CONST. amend. III.

waging a “global war on terror” besides—so are we at war or at peace? And what exactly makes a search “unreasonable” under the Fourth Amendment?<sup>14</sup> The list goes on and on.

Simply put, ambiguity is an inescapable fact of language and law—particularly constitutional law—and very few provisions in the Constitution speak with anything approaching perfect clarity. Ambiguity would not be a problem if judges handled it consistently, but often they do not. Instead, many judges treat it as a linguistic ratchet whereby arguably ambiguous provisions that create or confer government power are given the broadest possible scope, while arguably ambiguous power-limiting provisions are often interpreted so narrowly as to render them essentially meaningless. Just consider the vastly different ways the Supreme Court has treated the power-granting Commerce Clause—interpreting it as broadly as human invention can devise<sup>15</sup>—and the power-limiting Ninth Amendment, which Judge Bork famously likened to an “ink blot,”<sup>16</sup> and which the Court has consistently treated as such. Gun rights and regulations provide an excellent illustration of that dynamic.

## II.

Shortly after *Heller* came down in June 2008, Fourth Circuit Judge J. Harvie Wilkinson published a sensational article in the *Virginia Law Review*.<sup>17</sup> The piece caused an immediate stir because Judge Wilkinson, a widely respected conservative jurist, argued that *Heller*'s interpretation of the Second Amendment as protecting an individual right to keep and bear arms was an example of judicial activism on par with *Roe v. Wade*'s discovery of the right to an abortion within the Due Process Clause of the Fourteenth Amendment.<sup>18</sup> According to Judge Wilkinson, “*Roe* and *Heller* share a significant flaw: both cases found judi-

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14. U.S. CONST. amend. IV.

15. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (reasoning that Congress could regulate even wholly intrastate, noncommercial, and individually trivial wheat production because such activity, viewed in the aggregate, would have a substantial effect on interstate commerce).

16. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990).

17. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).

18. *Id.* at 264–65.

cially enforceable substantive rights only ambiguously rooted in the Constitution's text."<sup>19</sup>

I respectfully disagree with Judge Wilkinson. As noted above, I do not believe there is anything remotely ambiguous about the Second Amendment's command that "the right of the people to keep and bear Arms, shall not be infringed."<sup>20</sup> But far more troubling to me is the very natural way in which Judge Wilkinson's critique of *Heller* flows from his conviction—widely held among modern conservatives—that "judges should be modest in their ambitions and overrule the results of the democratic process only where the constitution unambiguously commands it."<sup>21</sup> Few would quibble with the first part of that maxim, except perhaps to note that when it comes to overweening ambition on the part of government officials there seems little reason to single out judges. But the second part is deeply concerning.

As explained above, constitutions rarely speak with perfect clarity on any subject—that is simply not their function—and a maxim that requires judges to remain passive unless the Constitution *unambiguously* commands action is a recipe for virtually unbridled government power. Take gun regulations. The Constitution established a federal government of limited powers that did not include the police power—that is, no roving charter to pass laws promoting public health, safety, and welfare. But Congress wields that power anyway, regulating everything from guns<sup>22</sup> to funeral homes<sup>23</sup> to the plants we grow in our backyards.<sup>24</sup> Does the Constitution really give the federal government the power to dictate the minimum length of a shotgun barrel<sup>25</sup> or tell farmers how much wheat they can grow on their farms for personal consumption?<sup>26</sup> Certainly not.<sup>27</sup> But because those powers are, at least by some lights, not unambi-

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19. *Id.* at 257.

20. U.S. CONST. amend. II.

21. Wilkinson, *supra* note 17, at 255.

22. See, e.g., 18 U.S.C. §§ 921–929 (2006) (codifying the Gun Control Act of 1968, as amended).

23. See Funeral Industry Practices, 16 C.F.R. § 453 (2007).

24. See *Gonzales v. Raich*, 545 U.S. 1 (2005).

25. See 26 U.S.C. § 5845 (2006).

26. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

27. See U.S. CONST. art. I, § 8.

guously *denied* to Congress by the Constitution, judges have allowed Congress to exercise them. And because the right to grow plants and consume them is not unambiguously *protected* by the Constitution, Congress gets to regulate that, too. (Short-barreled shotguns remain an open question for now.) So if you have ever wondered how it is that we have a federal Department of Education and a National School Lunch Program,<sup>28</sup> it is not because the *Constitution* authorizes them; instead, judges have done so by refusing to enforce clearly expressed limits on federal power.

Thus, the problem with the ostensibly value-neutral brand of judicial minimalism espoused by Judge Wilkinson in his *Heller* critique is that it is not remotely value-neutral. Instead, it reflects a very clear bias in favor of majoritarianism, a bias that is only magnified by an interpretive methodology in which textual ambiguity always favors the government. Is it really “modest”<sup>29</sup> to demand of our Constitution something—that is, to speak with incontrovertible clarity about limits on government power—that it was never designed to do or to impose upon it a spirit of majoritarianism that is distinctly belied both by its text and its structure? I think not.

Judicial minimalism’s pretensions to neutrality are powerfully refuted in a recent critique of Judge Wilkinson’s article by Professor Nelson Lund and David Kopel.<sup>30</sup> Taking Judge Wilkinson’s thesis that courts should only impose limits on government power that are based on an “incontrovertible” reading of the Constitution,<sup>31</sup> Lund and Kopel demonstrate how subjective that supposedly neutral framework really is. A particularly compelling illustration is when they apply Judge Wilkinson’s ambiguity-driven minimalism to one of the Supreme Court’s most iconic decisions, *Brown v. Board of Education*.<sup>32</sup> As Lund and Kopel demonstrate, “[o]n every single criterion [Judge Wilkinson] invokes in his attack on *Heller*, *Brown* was a far

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28. 42 U.S.C. § 1758(b) (2006) (codifying the Richard B. Russell School Lunch Act).

29. Wilkinson, *supra* note 17, at 255.

30. Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson III*, 25 J.L. & POL. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1309714](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309714).

31. Wilkinson, *supra* note 17, at 267.

32. 347 U.S. 483 (1954).

more 'activist' decision."<sup>33</sup> This includes the text of the Equal Protection Clause, which courts initially read not to "incontrovertibly" forbid segregated schools (and in fact was not understood to do so until nearly a century after it was adopted), as well as the practical implications of the *Brown* decision, which dragged the courts into the "political thickets" of an extraordinarily divisive issue that has spawned far more litigation than *Heller* ever will.

The tension between the laudable result in *Brown* and Judge Wilkinson's critique of *Heller* is the inevitable consequence of an ethic in which government-favoring judicial restraint competes uneasily with originalism. That tension is even more pronounced when it comes to unenumerated rights, which are specifically recognized in the Ninth Amendment and protected by the Fourteenth. This presents a dilemma for minimalists, who must either disavow unenumerated rights altogether or find some way to accommodate them within a doctrinal framework where they really have no place. Judge Wilkinson displays a very human ambivalence about this dilemma when he acknowledges that even though he believes judges should not enforce substantive rights on the basis of ambiguous constitutional provisions, "the point should not be pushed to extremes."<sup>34</sup> He then lists several substantive due process cases that he finds "salutary."<sup>35</sup> But Lund and Kopel are quick to pounce. They ask, quite reasonably, "What makes Judge Wilkinson's favored cases different" from decisions protecting the right to have an abortion or choose how many hours to put in at work?<sup>36</sup> Only one thing, they argue: Judge Wilkinson agrees with the outcomes of his preferred cases on policy grounds.<sup>37</sup>

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33. Lund & Kopel, *supra* note 30, at 16.

34. Wilkinson, *supra* note 17, at 258.

35. *Id.* at 258–59 (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down laws against interracial marriage); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (striking down an Oregon law against sending children to private schools); and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a Nebraska law forbidding the teaching of the German language in schools)).

36. Lund & Kopel, *supra* note 30, at 33 (citing *Roe v. Wade*, 410 U.S. 113 (1973), and *Lochner v. New York*, 198 U.S. 45 (1905)).

37. *Id.* Judge Wilkinson defends the results in *Loving*, *Pierce*, and *Meyer* on the grounds that all involved "laws that represented the worst sort of bias" toward racial, religious, and ethnic minorities. Wilkinson, *supra* note 17, at 259 n.14. That assertion is interesting because, in *Pierce* at least, there was no overt discrimination, but merely a requirement that all children attend government-run public

That charge can be directed with equal force at another venerable conservative jurist who took issue with the *Heller* decision: Judge Richard Posner.

Writing in the *New Republic* two months after *Heller* came down, Judge Posner opined that “[t]here are few more antiquated constitutional provisions than the Second Amendment.”<sup>38</sup> He chides the majority in *Heller* for imposing a “uniform rule” (by which he actually means “baseline,” like we have for speech, religion, and various criminal procedures) for gun ownership and opening the door to “many years of lawsuits that our litigious society does not need.”<sup>39</sup> Judge Posner then holds up as a laudable example of judicial restraint the notorious *Kelo*<sup>40</sup> decision, in which the Supreme Court essentially deleted from the Fifth Amendment the “public use” restriction on the government’s eminent domain power.<sup>41</sup>

Judge Posner makes clear that he believes decisions about property and guns belong in the “political arena,” where regulations can (at least theoretically) be tailored to local conditions and opinions. That is particularly so, says Judge Posner, “when the nation is deeply divided over an issue to which the Constitution does not speak with any clarity.”<sup>42</sup> But if those are really his terms, then neither guns nor property rights should be thrown to the political process. Both are protected by specific provisions in the Bill of Rights—provisions that speak with no less clarity than, say, the Eighth Amendment’s prohibition against “cruel and unusual punishments”<sup>43</sup> or the First Amendment’s requirement that the press not be “abridg[ed],”<sup>44</sup> from which Judge Posner derives blanket rules against stoning

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schools. 268 U.S. at 530. Only by looking behind the government’s asserted justification to determine what was “really” going on—something minimalists are typically loath to do and which many have criticized the Supreme Court for doing in *Lochner*—was the anti-Catholic motivation for the law evident. Moreover, the decision itself was not based on religious animus, but rather on the unenumerated right “of parents and guardians to direct the upbringing and education of children under their control,” *id.* at 534–35, a right I suspect most Americans heartily endorse and would expect judges to protect.

38. Posner, *supra* note 11, at 33.

39. *Id.* at 34.

40. *Kelo v. City of New London*, 545 U.S. 469 (2005).

41. *Id.*

42. Posner, *supra* note 11, at 34.

43. U.S. CONST. amend. VIII.

44. U.S. CONST. amend. I.

adulterers and banning the *Da Vinci Code*, respectively.<sup>45</sup> And far from being “deeply divided” about private property or gun rights, there is every indication of a national consensus that both rights reflect quintessentially American values.

Moreover, contrary to Judge Posner’s subjective belief that the Second Amendment is an “antiquated” provision, for many Americans the right to keep and bear arms is at least as important for its symbolism as for its practical effects. Like the Establishment Clause, the Second Amendment is a pledge, a commitment that no matter how historical circumstances or intellectual fashions might change, our government may not do to us what governments throughout history have so often done to their citizens: demand that we render up both our spiritual and our physical autonomy. After more than two centuries of democracy and religious pluralism, the possibility of a genuinely tyrannical government or a state-sponsored religion in America may seem remote. But for many of us, it remains not only a comfort but a source of pride that we live in a country where the government is specifically forbidden from disarming its citizens, no matter what its stated justifications.

To his credit, Judge Posner acknowledges something that most minimalists do not: that his preference for what he calls “judicial modesty” is a purely subjective one that “cannot be derived by some logical process from constitutional text or history. It would have to be imposed.”<sup>46</sup> Indeed.

Let this be absolutely clear then: There is nothing remotely “modest” about a judicial ethic that would drain the Second Amendment of all practical meaning on the basis of perceived ambiguity or obsolescence. That is particularly so when decades of judicial passivity have allowed the other branches of government to disregard the principle of enumerated powers and make a mockery of the Framers’ plan for limited government. Over the past seventy-five years, the federal government has expanded into a behemoth of unfathomable scope and complexity, wielding powers and pursuing policies in direct conflict with the text, history, and purpose of our Constitution. The ethic of restraint that allowed that to happen was, as Judge Posner candidly acknowledges, a matter of “discretionary

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45. Posner, *supra* note 11, at 34.

46. *Id.* at 35.

choice" on the part of judges who seem to have elevated their personal preference for majoritarianism above the text of the document they swore to uphold. To call that "modesty" seems, well, rather too modest.

### III.

Now is an especially important time to reflect on these matters because post-*Heller* gun litigation has presented the Supreme Court with a remarkable opportunity to revisit the scene of a constitutional miscarriage in which ambiguity, minimalism, and false modesty produced a glaring example of judicial activism that can and should be corrected. And there may never be a better vehicle for that correction than the issue of whether the Fourteenth Amendment protects an individual right to keep and bear arms against infringement by the states. For an originalist, the answer to the question whether the Fourteenth Amendment protects the right to keep and bear arms is an easy and obvious affirmative. The real question is *how* the Fourteenth Amendment protects that right. And therein lies the Supreme Court's opportunity to revisit a decision in which five Justices defied the will of the people by elevating their preferences for restraint over the nation's call for action.<sup>47</sup> The history is straightforward but critical.

When the Fourteenth Amendment was ratified in 1868, national leaders were trying to piece back together a country riven by four years of civil war and the abomination of chattel slavery. The conflict over slavery, of course, long predated the outbreak of war, and slave states had a well known history of violating basic civil liberties like free speech and assembly in their attempts to suppress abolitionist sentiment. And it quickly became evident that neither the loss of the war nor the formal abolition of slavery was going to end those practices. To the contrary, the former states of the Confederacy made clear by word and deed their intent to keep blacks in a state of con-

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47. Properly understood, "judicial activism" occurs when judges resolve cases based on their personal preferences or predilections instead of validly enacted laws or constitutional provisions that conflict with those preferences. Although it might seem anomalous to describe as "activist" a court decision that refused to strike down a challenged law, refusing to *enforce* constitutional limits on government power is every bit as "activist" as *imposing* constitutional limits where none exist.

structive servitude through the continued violation of basic civil rights—particularly including free speech, armed self-defense, and economic opportunity—the exercise of which has traditionally distinguished free citizens from enslaved subjects.

Congress moved swiftly to curb those abuses, both through legislation,<sup>48</sup> and, to answer doubts about the constitutionality of those laws, through the enactment of the Fourteenth Amendment. Simply put, the Fourteenth Amendment empowered the federal government to stamp out a culture of lawless oppression in which newly free blacks and their white supporters were systematically terrorized, marginalized, and silenced in a blatant attempt to stop the march of history toward freedom.

At the heart of the Fourteenth Amendment lies its command that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>49</sup> Unlike today, the term “privileges or immunities” was in common usage at the time the Fourteenth Amendment was drafted and appears to have been synonymous with the word “rights” as we understand it today.<sup>50</sup> Exactly which rights were included within the ambit of the “privileges or immunities of citizens of the United States” could not be fully enumerated in the Fourteenth Amendment any more than they could in the Bill of Rights.<sup>51</sup> It is not difficult to understand why: Although partially reflected in the notorious Black Codes of the time, the oppression of freedmen and their white supporters was not confined to any particular set of laws or some official policy that could be fixed, identified, and proscribed. Instead it was an ethos, a determination to maintain what amounted to a slave culture in defiance of Reconstruction Republicans’ determination to end it. The idea that a constitutional provision designed to eliminate such a culture could be drafted with perfect and comprehensive clarity is absurd. Yet, that is precisely the basis on which various scholars and judges have advocated

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48. *E.g.*, Freedman’s Bureau Act, ch. 200, 14 Stat. 176–177 (1866); Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

49. U.S. CONST. amend. XIV, § 1.

50. *See, e.g.*, MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 64–65 (1986) (noting that the “words *rights*, *liberties*, *privileges*, and *immunities*, seem to have been used interchangeably”).

51. *See* U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

ignoring the Privileges or Immunities Clause, starting with the five-Justice majority in the 1873 *Slaughter-House Cases*.<sup>52</sup>

*Slaughter-House* involved a constitutional challenge by a group of butchers to a Louisiana law that created a state-chartered monopoly on the sale and slaughter of animals in New Orleans. The law did not prevent the butchers from working, but it required them to do so in a slaughterhouse operated by a single company to which they were required to pay various fees in return for using its facility.<sup>53</sup> The butchers argued that prohibiting them from working independently constituted a violation of their rights under the Thirteenth and Fourteenth Amendments, which had not yet been interpreted by the Supreme Court.<sup>54</sup> In particular, they argued that among the “privileges or immunities” protected by the Fourteenth Amendment was the right to earn a living in the occupation of their choice free from unreasonable, and, more specifically, anticompetitive government regulations.<sup>55</sup>

In dismissing the butchers’ claims, the five-Justice majority began by rejecting the factual premise upon which they were based. According to Justice Miller, “a critical examination of the act hardly justifies [the butchers’] assertions” that it deprived them of the ability to practice their trade.<sup>56</sup> The majority did not stop there, however, as true modesty might have counseled. Instead, it went on to construe the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment as largely meaningless provisions that were not intended to significantly alter the balance of power between the federal and state governments. The majority interpreted the Privileges or Immunities Clause as protecting only a narrow and idiosyncratic set of rights of “national citizenship,” such as access to navigable waterways and the ability to invoke the protection of the federal government when on the high seas.<sup>57</sup> But, of course, those were not the rights over which we fought a Civil War, nor were they the rights whose systematic

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52. 83 U.S. (16 Wall.) 36 (1873).

53. *Id.* at 59–60.

54. *Id.* at 66–67.

55. *Id.* at 60.

56. *Id.*

57. *Id.* at 78–80.

violation provoked numerous stern responses from Congress, culminating in the Fourteenth Amendment itself.

Like Judge Wilkinson's and Judge Posner's critiques of *Heller*, Justice Miller's opinion in *Slaughter-House* is overtly consequentialist. In that opinion, Justice Miller misquotes constitutional text,<sup>58</sup> ignores both history and current events, and defies what appears to have been widespread popular understanding,<sup>59</sup> all because of his personal conviction that giving the Privileges or Immunities Clause its intended effect would cause a "radical" and improvident shift in power from the states to the federal government.<sup>60</sup> Indeed, the activist nature of the decision was readily apparent at the time, prompting constitutional scholar Christopher Tiedeman, for example, to praise the majority for having "dared to withstand the popular will as expressed in the letter of the [Fourteenth] amendment."<sup>61</sup>

Several Justices wrote powerful and, particularly in hindsight, compelling dissents. As Justice Stephen Field correctly observed, the majority's construction of the Fourteenth Amendment, particularly the Privileges or Immunities Clause, rendered the Amendment "a vain and idle enactment, which accomplished nothing."<sup>62</sup> Similarly, after conducting a far more searching (and forthright) analysis of the relevant text and history than did the majority, Justice Bradley concluded that "it was the intention of the people of this country in adopting [the Fourteenth Amendment] to provide National security against violation by the States of the fundamental rights of the citizen."<sup>63</sup> Justice Swayne too recognized the majority's activism, observing that its construction of the Fourteenth Amendment "defeats, by a limitation not anticipated, the intent of

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58. Compare *id.* at 75 (misquoting the text of Article IV's Privileges and Immunities Clause), with *id.* at 117 (Bradley, J., dissenting) (explaining the significance of Justice Miller's misquotation). The significance of Justice Miller's misquotation of Article IV is also discussed in CURTIS, *supra* note 50.

59. See David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868*, 30 WHITTIER L. REV. 695 (2009).

60. *Slaughter-House*, 83 U.S. at 77–78.

61. David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93, 121 (1990) (quoting CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 102–03 (1890)).

62. *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting).

63. *Id.* at 122 (Bradley, J., dissenting).

those by whom the instrument was framed and of those by whom it was adopted.”<sup>64</sup>

Few if any constitutional provisions have attracted more academic attention than the Fourteenth Amendment, much of it devoted to the Privileges or Immunities Clause specifically. The history of that scholarship shows remarkable parallels to that of the Second Amendment. In both cases, the respective provisions were portrayed initially as having little practical significance on the basis of limited scholarship that later proved seriously deficient. And in both cases, more rigorous scholarship would produce something very close to an academic consensus: that the Second Amendment does protect an individual right to keep and bear arms, and that the *Slaughter-House* majority’s interpretation of the Privileges or Immunities Clause “should have been seriously doubted by anyone who read the Congressional debates of the 1860s.”<sup>65</sup> In short, by draining the Privileges or Immunities Clause of any practical significance, the Supreme Court defied the will of the people as lawfully expressed in their highest governing law, and it did so under the banner of judicial restraint. So much for the idea that judicial minimalism necessarily reflects judicial modesty.

The Supreme Court’s pro-government activism in *Slaughter-House* produced a bitter harvest, including the advent of Jim Crow, a system of racial segregation and oppression that the Fourteenth Amendment was designed to prevent and that the Amendment specifically charged judges with the duty to resist—a duty they would continue to shirk for nearly a century. And although Jim Crow may have been the most flagrant abuse, it was certainly not the only one. As a result, the Supreme Court faced a difficult choice: continue to ignore the ex-

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64. *Id.* at 129 (Swayne, J., dissenting).

65. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 530 (1988); see also AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 213 (1998) (explaining “[t]he obvious inadequacy of Miller’s opinion—on virtually any reading of the Fourteenth Amendment” in *Slaughter-House*); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994) (arguing that “everyone” now agrees *Slaughter-House* was wrongly decided); Thomas B. McAfee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986) (observing that “this is one of the few important constitutional issues about which virtually every modern commentator is in agreement”).

pressed will of the people that basic civil rights—including those reflected in the Bill of Rights—be protected from government abuse, or reexamine the Fourteenth Amendment to determine the true purpose and effect of all its provisions. Unfortunately, the Court did neither. Instead, it pressed into service the obscure and, to some, paradoxical doctrine of substantive due process, with which it eventually “incorporated” against the states most of the two-dozen or so substantive provisions in the Bill of Rights, along with a handful of unenumerated rights deemed sufficiently “fundamental” to warrant meaningful judicial protection.

But substantive due process has proved unsatisfactory for a number of reasons. To begin with, there is the incongruity of the term itself, which John Hart Ely described as being akin to “green pastel redness.”<sup>66</sup> Despite a real historical pedigree derived from “law of the land” provisions in some state constitutions and English common law,<sup>67</sup> the semantic contrast between “process” and “substance” makes substantive due process an easy concept to belittle. And the Supreme Court’s delay in using the term “substantive due process” until decades after the Fourteenth Amendment’s ratification further diminishes both its pedigree and its credibility, particularly among those who are disinclined toward unenumerated rights to begin with.

Yet, contrary to the Supreme Court’s dismissive treatment of the Fourteenth Amendment in *Slaughter-House* and its progeny,<sup>68</sup> it was clearly intended to do *something*—the question is what. But that is a question from which minimalists like Judge Bork positively flee, asserting, unpersuasively, that the answer is forever shrouded in the mists of time.<sup>69</sup> To the contrary, as

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66. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980). Of course, the fact that substantive due process has been subjected to criticism does not make that criticism correct or the doctrine wholly illegitimate. See James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *CONST. COMMENT.* 315 (1999).

67. See BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 24–59 (1980).

68. *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876).

69. See BORK, *supra* note 16 (endorsing the Supreme Court’s decision to render the Privileges or Immunities Clause a “dead letter”); *cf. id.* at 185 (describing as “inconceivable” the notion that the Ninth Amendment was intended to confer upon judges the power to enforce rights not specifically enumerated in the federal or state constitutions).

explained above—and as the dissenting Justices in *Slaughter-House* understood very well—it is actually quite clear why the Fourteenth Amendment was enacted and equally clear what problem it was intended to address: namely, the wholesale violation of civil rights by Southern officials determined to keep newly free blacks in a state of constructive servitude while silencing and terrorizing anyone—white or black—who presumed to stand in the way. The Fourteenth Amendment is worded broadly because the evils it was intended to address were broad. That its framers chose to combat these many evils comprehensively, and with reference to general principles, provides no warrant to bowdlerize their handiwork.

Among those evils was the widespread disarmament of blacks and whites, including former Union soldiers, in Southern states following the Civil War. That history is indisputable, as is the fact that the thirty-ninth Congress received extensive testimony about incidents of disarmament.<sup>70</sup> Indeed, it is doubtful whether any right was mentioned more often in connection with the Fourteenth Amendment than the right to keep and bear arms.<sup>71</sup> Thus, from an originalist standpoint, the syllogism is simple and unassailable: The Fourteenth Amendment was enacted in response to a particular problem. That problem was the systematic oppression of blacks and their white supporters in the former states of the Confederacy. It was to be solved by empowering federal officials, particularly judges, to protect the fundamental

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70. See, e.g., H.R. REP. NO. 39-30, pt. 4, at 49 (1866) (relating testimony that armed patrols in Texas, acting under the supposed authority of the Governor, “passed about through settlements where negroes were living, disarmed them—took everything in the shape of arms from them—and frequently robbed them”); CONG. GLOBE, 39th Cong., 1st Sess. 915 (1866) (statement of Sen. Wilson) (“There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description.”); *id.* at 40 (1865) (statement of Sen. Wilson) (“[R]ebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them; and the same things are done in other sections of the country.”); see also STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at 7, 18, 37 (1998) (describing both congressional testimony and contemporaneous press accounts regarding disarmaments).

71. See Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007).

civil rights of American citizens throughout the nation against state infringement. Among those rights was the ability to possess guns for armed self-defense. Therefore, the federal government was empowered by the Fourteenth Amendment to remedy state violations of the right to armed self-defense. The only remaining question is which provision of the Fourteenth Amendment was intended to protect that right, and that too is an easy question from an originalist standpoint because there is only one plausible candidate: the Privileges or Immunities Clause.

In sum, it is abundantly clear from the history surrounding the Fourteenth Amendment that it was both intended and understood to protect the right to keep and bear arms for self-defense. It is equally clear that the Privileges or Immunities Clause was the provision designed to do that job. And though the Supreme Court badly misread the Privileges or Immunities Clause in *Slaughter-House* and its progeny, there is no reason why it cannot go back and correct those decisions. Indeed, many would argue that one of the Court's finest hours was when it corrected another Reconstruction-era precedent that failed to give full effect to a different provision of the Fourteenth Amendment, the Equal Protection Clause.<sup>72</sup>

Unfortunately, there is concern about whether the Supreme Court will decide to revisit *Slaughter-House* in order to recover an originalist understanding of the Fourteenth Amendment. Among the reasons for that concern is that the history of the Fourteenth Amendment—and the Privileges or Immunities Clause in particular—indicates that those who drafted and ratified it did so with a purpose that is anathema to many modern jurists: namely, to confer upon judges both the power and the duty to protect a broad range of rights that are not spelled out in the text of the Constitution. Thus, to implement the original understanding of the Privileges or Immunities Clause, judges would have to use *judgment*. They would have to confront the reality of what Southern states were doing to citizens during Reconstruction, identify the values that Southern states had sufficiently offended so as to prompt three separate amendments to the Constitution, and faithfully

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72. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896) (permitting state-mandated racial segregation on trains and announcing the “separate but equal” doctrine), with *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (repudiating *Plessy*).

protect those values against the abuses and infringements to which they remain subject today.

The duty to protect these values would include, for example, protecting the various economic freedoms that were consistently targeted by Black Codes in an effort to exclude freedmen from civil society and ensure that all aspects of their material well-being—from how they earned a living, to their ability to own property and enter into contracts, and even their freedom to move about in search of better opportunities—were a matter of white largesse and not individual self-determination. Those same freedoms are still under assault today, sometimes on the basis of racial animus, but more often from government officials seeking to promote the agenda of various interest groups at the expense of individuals who stand in the way.

The possible consequences, good or bad, of adopting a genuinely originalist interpretation of the Fourteenth Amendment should not drive the Justices' decision about whether to protect the right to keep and bear arms through the Privileges or Immunities Clause. A more humble approach would be simply to do their best to understand and apply the text of the Constitution as written, notwithstanding any personal proclivities for restraint, majoritarianism, or other values not embodied in the document.

In that regard, it should be understood that the Fourteenth Amendment was not a gesture of modesty; it was a heroic act of national will. It was specifically intended to empower judges and call them to action, not restraint. The Fourteenth Amendment is not a majoritarian text, and neither is the rest of the Constitution. Nor does anything in the Constitution stand for the proposition that uncertainties should always be resolved in favor of more government power. But that was the misguided spirit of *Slaughter-House*, and the time has come to reject it. That the best opportunity to do so should arise in the context of what many consider to be the quintessentially American right—the right to keep and bear arms in defense of oneself and of liberty—is entirely fitting.