

# Death to Tyrants: *District of Columbia v. Heller* and the Uses of Guns

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A gun is not much use unless you can do something with it. Otherwise, it's a very expensive paperweight or doorstop. Nonetheless, until recently, the gun control debate largely concerned limits on owning a gun rather than limits on actually firing it.

In *District of Columbia v. Heller*,<sup>1</sup> the Supreme Court changed that focus, probably for good. The Court held that the Second Amendment gives individuals a right not only to get a gun but also to use it for certain purposes, especially self-defense. And if the Constitution protects the right to use a gun for self-defense, then it follows that the Constitution must also protect the underlying right to self-defense itself. In other words, the Second Amendment reaches not only what we generally think of as firearms regulations—purchasing, registration, concealed carry and the like—but also what we generally think of as the bread-and-butter of criminal law. After *Heller*, the states may not eliminate the right of self-defense, and the Court may even limit their ability to trim it back. And in the future, the Court may find other uses protected by the Second Amendment—hunting and target shooting come to mind—and so the Constitution will presumably then limit what game wardens and zoning boards can and cannot do.

Despite the Court's confident pronouncement, it is not at all clear that the Second Amendment was meant to protect a personal right of self-defense. It is, however, crystal clear that the Amendment was meant to protect the right to keep and bear arms to resist tyranny—as the *Heller* Court itself concedes.<sup>2</sup> Yet strangely, by the time the sixty-four-page opinion has wound to an end, the Court has purged the Amendment of its revolutionary quality. Justice Scalia's opinion never hints that the right to resist tyranny might still be alive and well and relevant to the Amendment's interpretation, and it lays down rules that will make the right a functional nullity.

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\* John S. Hastings Professor of Law, Indiana University School of Law—Bloomington, Executive Director, Center for Constitutional Democracy in Plural Societies. Because biographical revelation has become the order of the day in this field, I should reveal that I grew up in the gun culture, that swathe of the American experiment born in the Celtic fringe of Great Britain where people always feared the English tyrant. I own twenty-seven functioning guns, and although most are of largely historical interest, I also own two heavily customized assault rifles and one modern handgun. I like guns, but that fact has nothing to do with my views on the meaning of the Second Amendment. If the state of Indiana ever ordered me to stop using my guns, I would stop—and they wouldn't have to pry them from my cold dead fingers.

<sup>1</sup> 128 S. Ct. 2783.

<sup>2</sup> See *id.* at 2800–01.

As a result, the opinion has an odd quality. Justice Scalia insists that he is being true to the language and history of the Constitution. Yet by the close of the opinion, the purpose that clearly and plainly appears in the language and history—the right of resistance—has disappeared, but the right of self-defense—which is much less clearly present, if present at all, in the language and history—has taken center stage. It is not hard to speculate why the opinion makes this move: many respectable and responsible people today want to own guns for self-defense, but talk of resistance conjures the unwashed sans-culottes, Timothy McVeighs just off-stage.<sup>3</sup> If the Court had read the Amendment on its own terms, then, it would perforce have had to reach such radical conclusions that the opinion would have come into instant opprobrium in most quarters. Some people would welcome such an opinion—those true blue sons of the Second Amendment, and they are many, who believe that some day they will have to take their governments back from the politicians<sup>4</sup>—but the justices seldom associate with such types.

And so, if I may borrow something of Justice Scalia's trenchant prose style, the Court gives us a gelded Second Amendment, a Second Amendment Lite. *Heller* offers a Second Amendment cleaned up so that it can safely be brought into the homes of affluent Washington suburbanites who would never dream of resistance—they have too much sunk into the system—but who might own a gun to protect themselves from the private dangers that, they believe, stalk around their doors at night. Scalia commonly touts his own judicial courage, his willingness to read the Constitution as it stands and let the chips fall where they may. But *Heller* is noteworthy for its cowardice.

Part I of this essay will examine the Court's claim that the Amendment protects a right of self-defense. Part II will suggest that to reach this conclusion, Scalia departs sharply from his own preferred interpretive method. Part III will examine the Court's elision of the right of resistance, detailing the tortured chain of reasoning by which Scalia unhooks the Amendment from its historical moorings to make it safe for polite company. The Conclusion will briefly consider the significance of the Court's implicit rejection of the Second Amendment's revolutionary heritage.

Few in power would actually trust the people with arms sufficient to resist tyranny, and this attitude reflects a profound shift from the world-view of the Founders. There are good reasons not to trust the people in that way: we are so diverse and divided that a war of resistance would probably

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<sup>3</sup> McVeigh blew up the federal post office building in Oklahoma City in 1994. In his own mind, he was apparently resisting an oppressive federal government and exercising Second Amendment rights. See DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 1–2 (2003).

<sup>4</sup> See *id.* at 191–219.

become a multi-party civil war, perhaps along racial or ethnic lines, of the sort so common in the world today. But moving beyond a right of resistance—if we have done that, or if we are going to—is a huge step, with implications infinitely greater than the gun control debate, implications that go to the very nature of American democracy. Such a step would represent a fundamental re-invention of the American polity, from a pre-Weberian to a Weberian condition in which the state holds a monopoly of the legitimate use of violence.<sup>5</sup> The step should not be taken as an incidental after-thought to an analysis of D.C.'s handgun prohibition.

### I. *HELLER* AND THE RIGHT OF SELF-DEFENSE

Traditionally, the debate over the Second Amendment was often described thus: some believe that the Amendment protects the right to keep and bear arms only as part of a state-organized militia, but others believe that it protects an individual right to arms for any lawful purpose. The *Heller* Court itself describes the disagreement in very much this way:

Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. . . . Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.<sup>6</sup>

The former position would allow all sorts of gun regulations so long as they do not interfere with the state militia, but the latter would protect the right of ordinary people to use firearms, even if they had no connection to the militia. As a result, gun rights proponents have often adopted this latter view, and gun control proponents have decried it.

But in fact, as thus phrased, the gun rights position would create only a very limited right: the right to own guns so as to use them for lawful purposes—in other words, for whatever purposes the legislature decides to make lawful. In this formulation, the emphasis is really on the right to own guns, not to use them, because the legislature has the power to decide how they might be used, without interference from the Constitution or the Court. Again, much of the historical material on which the *Heller* Court relies advances exactly this view. For example, they approvingly quote an 1829 opinion by the Supreme Court of Michigan: “No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose.”<sup>7</sup>

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<sup>5</sup> See WILLIAMS, *supra* note 3.

<sup>6</sup> *Heller*, 128 S. Ct. at 2789 (citation omitted).

<sup>7</sup> *Id.* at 2808, quoting *United States v. Sheldon*, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940).

Similarly, the *Heller* Court describes its own earlier opinion in *United States v. Cruikshank*<sup>8</sup> as holding that the Second Amendment protects “bearing arms for a lawful purpose.”<sup>9</sup>

If one defined the right thus, then the debate would predictably swirl around restrictions on the right to own and transport guns—licensing, registration, restrictions on purchase, forfeiture, bans on certain types of weapons, regulation of gun dealers and so forth—rather than on the right actually to drop the hammer, because the legislature has plenary power to decide when one can do that. And not surprisingly, that is exactly the kind of debate that we have in fact been having.

But in this formulation, even if the Amendment protects broad ownership rights, it protects no use rights at all, because legislatures have plenary power to decide how people may use guns. Because legislatures have generally allowed Americans to use guns in a variety of ways, owning a gun has meant something. But if a legislature decides that no-one may ever use guns under any circumstances, then the ownership rights become meaningless. Even if people can still own guns, they can never use them. And it is not even clear that people would still have the right to own guns: if one can own guns for any lawful purpose but there are no lawful purposes, then it would seem to follow that one has no right to own guns. The legislature has backed in to a prohibition on gun ownership by prohibiting gun use.

In fact, one could understand the D.C. regulation at issue in *Heller* in just this way. The District had prohibited the carrying of unregistered weapons, even in the home, and had further banned the registration of handguns.<sup>10</sup> In addition, even registered weapons had to be stored unloaded and disassembled or immobilized by a trigger lock.<sup>11</sup> In other words, in the *Heller* Court’s view, the law essentially made it impossible to use a handgun in the home for self-defense or really to use a handgun anywhere for any purpose because one cannot use a gun if one cannot carry it. The import of the law is thus that it is unlawful to use handguns for any purpose in the District of Columbia. But if the Second Amendment protects the use of guns only for lawful uses, and if it is unlawful to use handguns for any purpose, then *Heller* has no right to use his handgun. And if he has no right to use it, he may not even have a right to own it.

The *Heller* Court obviously understood this possibility. As we have seen, at some points, they do suggest that the legislature may determine the uses to which guns may be put.<sup>12</sup> The actual holding, however, is quite different: the

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<sup>8</sup> 92 U.S. 542 (1875).

<sup>9</sup> *Heller*, 128 S. Ct. at 2813.

<sup>10</sup> See D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001).

<sup>11</sup> See *id.* at § 7-2507.02.

<sup>12</sup> See *Heller*, 128 S. Ct. at 2816–17.

Constitution itself protects the use of guns for particular purposes, including self-defense, and legislatures may not infringe upon those uses. Again, much of the material on which the Court relies makes this point. For example, the Court quotes Joel Tiffany: “[T]he right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed.”<sup>13</sup> Similarly, the Court explained that the Tennessee Supreme Court held that:

the “keep” portion of the state constitutional right included the right to personal self-defense: “[T]he right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace.”<sup>14</sup>

Justice Scalia summarizes: “As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right.”<sup>15</sup>

Recall that the Court characterized *Heller*’s position as maintaining that the Amendment protects the right to own arms for all “traditionally lawful purposes.” As earlier suggested, that language could mean that the legislature has the power to determine which purposes should be lawful. But it could also mean that once a use becomes traditional, the legislature then has no power to cut back on it. Before the fact, in other words, the legislature could have proscribed the use, but no longer.<sup>16</sup>

During the course of its opinion, the *Heller* Court thus relies on two different and contradictory bodies of historical material: some of it says that the legislature has plenary power to determine the purposes for which guns may be used, but some of it says that the Constitution gives a right to use guns for certain purposes, so the legislature has no power to restrict those uses. In other words, even as developed by the *Heller* Court, the historical

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<sup>13</sup> *Heller*, 128 S. Ct. at 2807 (quoting JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 117–118 (1849)).

<sup>14</sup> *Id.* at 2809 (quoting *Andrews v. State*, 50 Tenn. 165, 178 (1871)).

<sup>15</sup> *Id.* at 2817.

<sup>16</sup> This version of the Second Amendment is thus similar to the Court’s jurisprudence on substantive due process rights, *see, e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as well as to the Court’s (now-overruled) interpretation of the Tenth Amendment in *National League of Cities v. Usery*, 426 U.S. 833 (1976), both of which look to tradition, history, and practice to define the content of the right at issue.

record is confusing and cacophonous, and the meaning of the Second Amendment may not be as limpid and transparent as Justice Scalia asserts.<sup>17</sup>

Be that as it may, the Court clearly has cast its lot with those historical sources claiming that the Second Amendment protects certain gun use rights, and so the great question that emerges from *Heller* is which precise purposes fall within the Amendment's scope. The Court puts two uses center-stage in its analysis: the right to use arms to resist tyranny, and the right to use guns for personal self-defense, especially against intruders in the home. The two have a complicated and important relationship in almost all Second Amendment thinking, and *Heller's* analysis is no exception. Bringing this relationship into sharper focus is critical to understanding the case.

The complication grows directly out of the language of the Amendment itself, which on the face of things, seems to be in some internal tension. The prefatory clause—"A well regulated Militia, being necessary to the security of a free State"<sup>18</sup>—suggests that the goal of the amendment was only to protect the state militia so that it could resist federal tyranny. Ergo, according to many gun control proponents, the Second Amendment applies only to arms bearing in an organized state militia—in other words, almost never. Justice Stevens' dissent in *Heller* follows this pattern.

But if the prefatory clause focuses only on the militia, the Amendment's operative language—"the right of the people to keep and bear Arms, shall not be infringed"<sup>19</sup>—seems to point to a broader personal right.<sup>20</sup> Many gun rights proponents have argued that the prefatory clause singles out one purpose by way of illumination, but the operative language should govern, creating an individual right to keep and bear arms. And the *Heller* majority's opinion follows exactly that pattern.

In *Heller's* account of history, the Second Amendment merely confirmed a pre-existing right long recognized by the trans-Atlantic British peoples. The

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<sup>17</sup> "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Heller*, 128 S. Ct. at 2799.

<sup>18</sup> U.S. CONST. amend. II.

<sup>19</sup> *Id.*

<sup>20</sup> Much recent Second Amendment scholarship has struggled to resolve this tension, reading the prefatory clause and the operative language as a unified whole. My own view, developed elsewhere, is that both the "militia" of the prefatory clause and the "people" of the operative language referred to a very particular eighteenth century concept: the "body of the people" which was thought to be the whole citizenry functioning as an organic whole. The Amendment gives to this body the right to keep and bear arms so as to resist tyranny. The Framers were sanguine about giving such a right to the body only because they imagined it as a body—a unified people sharing values and goals. If we no longer imagine the people that way—as the *Heller* Court clearly does not—then giving it the right of resistance might seem like suicidal folly. See generally WILLIAMS, *supra* note 3.

right was born out of a fear of tyranny. The Stuart Kings had disarmed their opponents so as to suppress political dissidence:

These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Right . . . that Protestants would never be disarmed. . . . This right has long been understood to be the predecessor to our Second Amendment.<sup>21</sup>

According to Justice Scalia, it “was clearly an individual right,”<sup>22</sup> but in this early going, it was apparently focused on resisting tyranny.

By 1787, in *Heller*'s telling, the right to arms had become fundamental. It still included the right to resist tyranny. George III had tried to “disarm the inhabitants of the most rebellious areas” so as to suppress dissent,<sup>23</sup> and even after independence, “[d]uring the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.”<sup>24</sup>

But in the century between the Declaration of Right and the American Constitution, the right had expanded its scope. No longer concerned merely with tyrants, the right now allowed people to keep and bear arms in their own personal self-defense as well: “Thus, the right secured in 1689 as a result of the Stuarts’ abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.”<sup>25</sup> The Court’s critical authority for this transformation is Blackstone, who described it as “the natural right of resistance and self-preservation” and “the right of having and using arms for self-preservation and defence.”<sup>26</sup> Indeed, according to the Court, most Americans “undoubtedly thought [the right] even more important for self-defense and hunting” than for resistance to tyranny.<sup>27</sup> The Court offers no support for the claim that self-defense was valued more highly than political resistance, and it is entirely unclear how hunting entered the scene, as the Court offers no support for the idea that hunting comes within the Amendment’s ambit. But undoubtedly, many Americans did believe in an individual right of self-defense.

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<sup>21</sup> *Heller*, 128 S. Ct. at 2798.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2799.

<sup>24</sup> *Id.* at 2801.

<sup>25</sup> *Id.* at 2798–99.

<sup>26</sup> *Id.* at 2798 (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES 136, 139–140 (1765)).

<sup>27</sup> *Heller*, 128 S. Ct. at 2801.

In dissent, Justice Stevens contends that the Amendment cannot be read to protect the right of private self-defense because the prefatory language so clearly focuses on the organized state militia rather than on individuals.<sup>28</sup> But according to the *Heller* majority, the Amendment's militia is not the organized militia at all, but rather the citizen militia, consisting of "all able-bodied men."<sup>29</sup> These individuals, carrying their own personal arms, could rise up and deliver death to tyrants: "It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."<sup>30</sup> Again: "[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."<sup>31</sup>

According to *Heller*, like the right to arms for self-defense, this right to arms for resisting unjust political authority belongs to individuals as such, not to any formal association. From the start, the right to resist tyranny "was secured to them as individuals, according to 'libertarian political principles,' not as members of a fighting force."<sup>32</sup> In other words, "militia" is just another name for all the able-bodied men of America, all of whom have the right to buy a gun and train with it in readiness to rise up against a government gone bad. The Court concedes that under the Constitution, Congress receives the power to organize the militia, and it may legitimately decide to recruit less than "the entire body."<sup>33</sup> But, according to Justice Scalia, the citizen militia (consisting of all able-bodied men, with Second Amendment rights to resist the government) and the federally organized militia are not the same thing: "Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them."<sup>34</sup>

To many, this conclusion may seem startling: after *Heller*, individuals apparently have the right to own guns in preparation for insurrection against what they consider to be a tyrannical government. *Heller*'s defenders will no doubt claim that this interpretation over-reads the opinion. It is therefore important to emphasize that *Heller* clearly does advance this conclusion, again and again. The Court holds that one purpose of the Amendment was to prevent the federal government from eliminating the militia. If we were speaking of an organized militia, "eliminating the militia" might mean

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<sup>28</sup> *Id.* at 2824 (Stevens, J., dissenting).

<sup>29</sup> *Id.* at 2800 (majority opinion).

<sup>30</sup> *Id.* at 2801.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2798 (quoting LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS*, 1689, 76 (1981)).

<sup>33</sup> *Heller*, 128 S. Ct. at 2800.

<sup>34</sup> *Id.*



disbanding them. But because the militia is nothing more than all able-bodied men with arms in their hands, “eliminating the militia” cannot mean disbanding them because they have never been enbanded in the first place. Instead, “eliminating the militia” can only mean disarming America’s men: “[H]istory showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents.”<sup>35</sup>

At another point, Scalia ridicules Stevens’ argument: if the goal of the Second Amendment was only to ensure arms-bearing in an organized militia as a check against tyranny, then why does the Constitution also give Congress the power to exclude people from the militia, thus rendering the militia completely ineffective as a check? Scalia writes:

Thus, if petitioners are correct, the Second Amendment protects citizens’ right to use a gun in an organization from which Congress has plenary authority to exclude them. It guarantees a select militia of the sort the Stuart kings found useful, but not the people’s militia that was the concern of the founding generation.<sup>36</sup>

By contrast, the *Heller* majority would extend the right of resistance to the people’s militia, which is just another name for the people—what some might consider a mob.

Only one part of Scalia’s analysis appears in some tension with this conclusion: he explains that a “well-regulated militia” is one that is under “proper discipline and training.”<sup>37</sup> But he has already explained that the militia of the Second Amendment is not the organized militia—the militia raised by the states and organized by the federal government. Instead, it is the citizens’ militia, and so it is not clear who will be imposing this “proper discipline and training” on the undifferentiated mass of American gun-owners.

Perhaps the citizens will organize themselves into armed companies, such as the contemporary Militia of Montana, so that drilling, marching, and training are some of the further uses protected by the Second Amendment.<sup>38</sup> The materials on which *Heller* relies are conflicted about this possibility, as about so many others, a conflict that the Court again fails to detect. On the one hand, Thomas Cooley argued that the people had the right to form private armed companies. He explained that if the right to arms applied only

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<sup>35</sup> *Id.* at 2801.

<sup>36</sup> *Id.* at 2802.

<sup>37</sup> *Id.* at 2800.

<sup>38</sup> See WILLIAMS, *supra* note 3, at 104–202.

to the enrolled members of the organized militia, “the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check.”<sup>39</sup> Instead, the right belonged to the whole people, and:

To bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.<sup>40</sup>

But although the *Heller* Court cites *Cooley*, it ultimately seems unwilling to endorse his view. At another point in the opinion, the Court tells us that according to its earlier *Presser* opinion, the Amendment does not protect the right to form armed associations. That case upheld a law that forbade “bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law . . . .”<sup>41</sup> The *Heller* Court apparently sides with *Presser* over *Cooley*: “[N]o one supporting that [individual rights] interpretation [of the Second Amendment] has contended that States may not ban such groups.”<sup>42</sup> Justice Scalia is actually mistaken on this point: many Second Amendment devotees do believe that the government may not ban private militias.<sup>43</sup> But apparently Justice Scalia does not share their view.

So we return to the analytical problem: if a well-regulated militia is one under discipline, then it must be organized, but Justice Scalia has told us that it is really just the equivalent of all able-bodied men, considered as individuals. Who will discipline these people, transforming them into a *well-regulated* militia? And why didn’t Justice Scalia see this problem?

As we will see in Part III, the answer may be that Justice Scalia has not thought much about the right of resistance. Indeed, he ushers it into court, offers it as Exhibit A for the proposition that the Amendment protects individual rights, and then ushers it out of court, never to be heard from again. Scalia does nothing to develop what a modern right of resistance might mean, and indeed he seems uncomfortable even discussing it. He asserts that the unorganized people have a right of resistance but *then* casually insists that they must nonetheless be under discipline but *then* offers no clues as to who might do the disciplining. As I will suggest, Scalia feels

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<sup>39</sup> *Id.* at 2811 (quoting THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 271 (1880)).

<sup>40</sup> *Heller*, 128 S. Ct. at 2811–12 (citing COOLEY, *supra* note 39, at 271).

<sup>41</sup> *Presser v. Illinois*, 116 U.S. 252, 264–265 (1886).

<sup>42</sup> *Id.*

<sup>43</sup> See WILLIAMS, *supra* note 3, at 191–219.

no need to deal with these analytical problems because he has no intention of actually recognizing a meaningful right of resistance under present circumstances.

So why does Justice Scalia assert that the Amendment protects an individual right of resistance in the first place, if he means only to abandon it later? The most likely explanation is that he can then claim that if the Amendment recognizes an individual right of resistance, it also recognizes an individual right of self-defense. If the right of resistance belonged only to some collective entity—some organization under discipline—then it would be clear that the Second Amendment is an unusual type of right, and it would be harder for Scalia to maintain that it unambiguously creates an individual right just like any of the others protected by the Bill of Rights. In other words, Scalia brought the individual right of resistance into the constitutional domain for a very particular reason: that right brought with it a friend, the right of self-defense, and Scalia could then exile the first right while allowing the friend to remain behind, becoming the heart and soul of *Heller*'s version of the Second Amendment.

## II. *HELLER* AND INTERPRETIVE METHOD

In holding that the Second Amendment protects an individual right of self-defense, Justice Scalia adopts a very particular interpretive method. First, he asserts that Blackstone and others believed in a right to resist tyranny and also a right to self-defense—which is undoubtedly true.<sup>44</sup> Second, he argues that we should read the Second Amendment to embrace both because we know that many people at the time believed in both.<sup>45</sup> Third, he insists that the Amendment's language focuses on the right of resistance—by its reference to the militia—only because the Framers were especially worried that the federal government would disarm the people so as to suppress dissent. In this version of history, all agreed that the right to guns existed; the question was whether it “needed to be codified in the Constitution.”<sup>46</sup> Ultimately, they concluded that it should because of the risk of federal tyranny; no one really worried that the federal government would deny the right of self-defense, so although that right was part of the Second Amendment, it was not the reason that the Framers felt the need to adopt it. Justice Scalia explains:

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<sup>44</sup> *Heller*, 128 S. Ct. at 2798 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 139–40).

<sup>45</sup> *Id.* at 2801.

<sup>46</sup> *Id.*

The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right . . . . But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. . . . [S]elf-defense had little to do with the right's *codification*; it was the *central component* of the right itself.<sup>47</sup>

But the holes in this analysis are plain, and they should be especially plain to Justice Scalia, whose own preferred interpretive approach is sharply inconsistent with the *Heller* style of analysis. First, let us recognize that the text of the Amendment will not help us to determine which gun uses are protected by the amendment. Even if Justice Scalia is right that the text establishes that the Amendment protects an individual right to guns, it says nothing at all about the uses to which those guns may be put. Clearly some gun uses are not covered—using a gun to rob a bank or assassinate foreign leaders—but the language does not tell us which. And even Justice Scalia does not claim otherwise.

In default of the text, Scalia turns to history. As he observes, many in the eighteenth century certainly did believe in a right to own arms for self-defense, but that is not the question. The question is whether they chose to codify that right in the Constitution. After all, as Justice Scalia himself observes, the Framers believed in many rights, but they codified only those that they feared the federal government would invade. But if Scalia's own analysis is right, then we should expect to find in the Bill of Rights only those rights that are especially vulnerable to federal meddling. And again, by the *Heller* Court's own admission, the right to resistance was thought to be vulnerable, but the right to self-defense was not.<sup>48</sup> In other words, if the Framers felt no pressing reason to codify the self-defense right, why should we think that they did? Normally, we understand the scope of the right by understanding the scope of the purpose. The simple fact that people often associated the right to self-defense with the right to resistance tells us nothing directly about whether the Framers meant to codify one, the other, or both.

All concede that the Amendment has something to do with the right to resistance, because we have abundant historical evidence to that effect. To conclude that it also covers the right to self-defense, we would also like some direct evidence, some document somewhere saying something like the following: "We adopted the Second Amendment because we were concerned that the federal government would take away the people's arms and thereby deprive them of the God-given, ancient right of defending themselves against

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<sup>47</sup> *Id.* (emphasis in original).

<sup>48</sup> *Id.*

other people.” But to borrow a phrase from the *Heller* opinion, Justice Scalia offers “not a word (*not a word*)”<sup>49</sup> of that sort of evidence. And that is because none exists, or at least none has ever been found, despite the fantastic amount of energy given to Second Amendment research in the last twenty years. Ample evidence that many people believed in a right to self-defense, yes; but no direct evidence that they meant to codify it. And if the right to self-defense really were so central and important to the Amendment’s meaning, one would expect to find at least some direct evidence.

One could offer a plausible (only plausible, because again we have no direct evidence) scenario that the Framers meant to codify the resistance right, because they worried that the new federal government would invade it, but they didn’t bother to codify the self-defense right because it never occurred to them that any government would actually meddle with that. Perhaps that scenario is wrong; perhaps they did mean to codify both. But it would be nice to have some direct evidence.

In the absence of that kind of evidence, we inevitably fall back on interpretive method: should we read the Amendment narrowly, to cover only those uses that we are sure the Framers meant to codify, or should we read it broadly, to cover those about which we cannot be sure? Some would argue that we should always read individual rights broadly, but Justice Scalia has emerged as the prophetic opponent of that approach, implacable, angry, and condemnatory. Judges should find rights in the Constitution only when they are unambiguously there because otherwise the judges are simply legislating the rights that they like. Again and again he warns his colleagues: when in doubt, leave it out. But in *Heller*, one almost feels that Justice Scalia is channeling the ghost of William O. Douglas, who once famously contended that the due process clause protects the right to “*walk, stroll, or loaf*.”<sup>50</sup>

In *Heller*, Scalia is faced with a question—which gun uses does the Second Amendment protect?—that neither the language nor the Framers’ intent definitively answers. One use, the right to resistance, clearly was protected, but we have no direct evidence whether another use, the right to self-defense, was protected. Scalia concludes that the latter right is protected as well, because the two were really part of a more general right to arms. In other words, he defines the right at issue in a very general way—the right to arms in general, for some unspecified collection of uses—rather than specifically—the right to arms for resistance alone. He concludes that

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<sup>49</sup> *Id.* at 2815 (characterizing the failure of *United States v. Miller*, 307 U.S. 174 (1939), to consider the history of the Second Amendment before ruling on its meaning) (emphasis in original).

<sup>50</sup> *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas J., concurring) (emphasis in original).

because the Framers meant to protect one specific use, they must also have meant to protect some general set of other traditional uses.

But in other contexts, Justice Scalia has warned us sternly to avoid defining rights so generally because it risks arbitrary judicial decision-making. In *Michael H. v. Gerald D.*,<sup>51</sup> Michael H. wanted to establish parental rights over a girl that was his daughter but whose mother was married to another man at the time.<sup>52</sup> California law provided that a child born to a married woman was conclusively presumed to be the offspring of the husband, except under circumstances not relevant to the case at hand.<sup>53</sup> Michael H. argued that the state law violated the due process clause because it burdened his rights as a parent.<sup>54</sup> At the time, Supreme Court precedent defined substantive due process rights as those so rooted in the traditions of the American people as to be fundamental, and so the Court had to decide whether the right asserted by Michael H. fit that description.<sup>55</sup>

But in order to do so, the Court first had to define the right at issue. In dissent, Justice Brennan defined the right broadly, asking “whether parenthood is an interest that historically has received our attention and protection.”<sup>56</sup> The answer to that question is of course yes, and so because state law burdened Michael H.’s rights of “parenthood,” Brennan thought it constitutionally void. By contrast, Scalia insisted that the right should be defined in very specific terms, whether tradition has awarded “substantive parental rights to the natural father of a child conceived within and born into an extant marital union that wishes to embrace the child.”<sup>57</sup> But the answer to that narrower question is clearly no—“[w]e are not aware of a single case, old or new, that has done so”<sup>58</sup>—and so the California law should stand. Justices O’Connor and Kennedy joined Justice Scalia’s opinion with one reservation: they rejected the idea that the Court should always define rights at the most specific level.<sup>59</sup>

In his famous footnote 6, Justice Scalia explained why it is critical for judges to define rights specifically: because “general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society’s views.”<sup>60</sup> In order to avoid “arbitrary decision-making,” the Court

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<sup>51</sup> 491 U.S. 110 (1989).

<sup>52</sup> *Id.* at 110.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 121.

<sup>55</sup> *Id.* at 122.

<sup>56</sup> *Id.* at 139 (Brennan, J., dissenting).

<sup>57</sup> *Michael H.*, 491 U.S. at 127 (majority opinion).

<sup>58</sup> *Id.*

<sup>59</sup> *See id.* at 132.

<sup>60</sup> *Id.* at 127 n. 6 (majority opinion).

must adopt “the most specific tradition as the point of reference.”<sup>61</sup> Defining rights generally allows judges simply to choose whatever rights they like: “Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.”<sup>62</sup>

A right defined generally—“parenthood”—will contain many specific sub-rights. If the general right has been traditionally protected, presumably most of the sub-rights have been protected as well. But not all: some of the sub-rights—“the rights of an adulterous natural father”<sup>63</sup>—may have not traditionally been protected, and so the Court should decline to bring them within constitutional shelter. If Courts define the right generally and conclude that in general it is protected, then they will end up extending protection to all the sub-rights, even those that have not in fact been traditionally protected. Even worse, if one defines the rights generally, then one can choose the level of generality to sweep in whatever sub-rights one wishes to sweep in: “Why should the relevant category not be even more general—perhaps ‘family relationships’; or ‘personal relationships’; or even ‘emotional attachments in general’?”<sup>64</sup>

But in *Heller*, Scalia succumbs to this precise temptation, defining the right generally so as to sweep in gun uses that have a very uncertain basis in the Constitution. To be sure, the technical legal question is not the same in *Michael H.* and *Heller*. In *Heller*, the question is whether the Framers intended to include the right to self-defense in the Second Amendment; in *Michael H.* the question is whether the tradition of the American people extends protection to the rights of an adulterous natural father. But the interpretive problem is the same: if we define the right generally, then we will surely sweep in some sub-rights that do not or may not qualify, either as within tradition or within the Framers’ intent. More specifically: in *Michael H.* tradition clearly protects the general parenthood right, but that doesn’t mean that it protects the specific sub-right of adulterous natural fathers. In *Heller*, Justice Scalia holds that the Framers clearly meant to protect a general gun right, but that doesn’t mean that they meant to protect the specific sub-right to self-defense.

So the right to self-defense cannot merely ride into the constitutional domain on the shoulders of the general gun right. Pursuant to his own approach, Justice Scalia must ask whether the Framers meant to protect the specific sub-right, and as we have seen, there is no direct evidence either

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 127 n.6.

<sup>63</sup> *Michael H.*, 491 U.S. at 127 n.6.

<sup>64</sup> *Id.*

way. Again, Justice Scalia's own method would normally counsel restraint under these circumstances. He would not, for example, give constitutional protection to bigamy because "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."<sup>65</sup> Both conditions apply in *Heller*. The text says nothing about the uses to which guns may be put, aside from its reference to the militia. And traditionally, American law has proscribed the right of self-defense, at least if we define the right specifically as Justice Scalia instructs us. Some people have enjoyed a right of self-defense in some places, under some circumstances, using some weapons, but not otherwise. The extent to which Americans have enjoyed a right to self-defense has always been defined by state legislation. Different states have defined it in different ways, and the definition has changed over time even within a single state.<sup>66</sup> States have been particularly concerned about, and have disagreed over, when one may use a gun in self-defense, as opposed to a lesser degree of force.<sup>67</sup>

Justice Scalia insists on his interpretive method so that judges will not be free merely to enact their own political preferences. Although the point is so obvious as to be almost a cheap shot, Justice Scalia certainly seems to be acting from his own political views in *Heller*. Although a famous proponent of judicial restraint, he is arguably the most activist judge on the Court in three areas: property rights,<sup>68</sup> rights against affirmative action,<sup>69</sup> and now, gun rights. If there is wisdom in Scalia's conventional warnings about elastic interpretive methods, *Heller* itself may be among the best pieces of evidence.

Scalia counsels judicial restraint not only to block judicial politics but also to allow democratic politics, keeping policy questions in the legislature where they belong: "The people know that their value judgments are quite as good as those taught in any law school—maybe better."<sup>70</sup> Or again:

The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is

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<sup>65</sup> *Planned Parenthood*, 505 U.S. at 980 (Scalia, J., dissenting).

<sup>66</sup> See, e.g., SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 750–96 (7th ed. 2001).

<sup>67</sup> *Id.* at 785–86.

<sup>68</sup> See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>69</sup> See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., dissenting).

<sup>70</sup> *Planned Parenthood*, 505 U.S. at 1001 (Scalia, J., dissenting).



destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.<sup>71</sup>

*Heller's* rhetoric could hardly be more different: “[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home. . . . [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.”<sup>72</sup> Scalia’s warning in *Planned Parenthood v. Casey* seems relevant here:

[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.<sup>73</sup>

Indeed, in practical terms, I am not at all sure what difference *Heller* will make except to confuse and inconvenience legislators. My own view is that gun control is almost completely ineffective as crime control, so even if the Court strikes down a lot of firearms regulation, we should not expect a spike in crime. Gun control might help reduce accidents, by training requirements, and suicide, by screening requirements, but the Court might actually uphold such rules. The opinion suggests that the following types of regulation would still be valid: prohibitions on ownership of firearms “by felons and the mentally ill,” on carrying firearms in “sensitive places,”<sup>74</sup> on military style firearms,<sup>75</sup> and, more broadly, “conditions and qualifications on the commercial sale of arms.”<sup>76</sup>

But the opinion explains that the list is not exhaustive,<sup>77</sup> so other regulations may (or may not) be permissible. The *Heller* Court does not even tell us what standard of review they will use in future Second Amendment cases, noting only that the D.C. ban would fall “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights. . . .”<sup>78</sup> Even Scalia acknowledges that he has given legislators few guidelines:

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<sup>71</sup> *United States v. Virginia*, 518 U.S. 515, 567 (Scalia, J., dissenting).

<sup>72</sup> *Heller*, 128 S. Ct. at 2821–22.

<sup>73</sup> *Planned Parenthood*, 505 U.S. at 1002 (Scalia, J., dissenting).

<sup>74</sup> *Heller*, 128 S. Ct. at 2816–17.

<sup>75</sup> *Id.* at 2817.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 2817 n.26.

<sup>78</sup> *Id.* at 2817.

[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . and there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.<sup>79</sup>

The words are smug: Justice Scalia may have plenty of time to "expound" in the future, but legislators are trying to set gun policy right now. One is reminded again of Scalia's own words in *Planned Parenthood v. Casey*:

[N]o government official [such as a court] is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power; and it succumbs.<sup>80</sup>

I do not mean to argue that no interpretive method would allow one to find a self-defense right in the Second Amendment, merely that Justice Scalia's would not. And even more oddly, although Scalia's method would positively require him to protect the right of resistance, *Heller* contrives to make that right a dead letter in a practical sense, as the next Part will explain. That odd inversion—resistance moving off-stage, self-defense coming center-stage—marks yet one more departure from Scalia's professed interpretive method. By Scalia's own admission, the Framers were most worried about government curbs on the right to resist, less worried about curbs on the right to self-defense. Why then does Scalia's opinion reverse the prioritization? Well, times have changed. Few today would celebrate a right of resistance, and Scalia clearly would not. But the right to self-defense has become the new focus for the gun rights movement, especially the National Rifle Association and similar organizations. In other words, Justice Scalia offers us an evolving constitution based on a Living Tradition. Yet in other contexts, when his colleagues adopt such an approach, he insists that it represents the death knell of American liberty and the birth of judicial autocracy.<sup>81</sup>

We might again borrow something of Scalia's own style to make the point. In *Huckleberry Finn*, Huck complains that the Widow Douglas tried to make him stop smoking. He is especially annoyed because for all her high-minded posturing, she took snuff! But then Huck adds: "[O]f course that was

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<sup>79</sup> *Id.* at 2821.

<sup>80</sup> *Planned Parenthood*, 505 U.S. at 981.

<sup>81</sup> *See, e.g.*, Justice Antonin Scalia, Remarks at the Woodrow Wilson International Center for Scholars (Mar. 14, 2005), available at <http://www.joink.com/homes/users/ninoville/ww3-14-05.asp>.

all right, because she done it herself.”<sup>82</sup> And that line sums up Scalia’s apparent attitude in *Heller*: when other Justices depart from Scalia’s method, he rebukes and insults them; but when Scalia departs from his own method, it’s OK because he did it himself.

### III. *HELLER* AND THE RIGHT OF RESISTANCE

In *Heller*, Justice Scalia argues that the Framers codified the Second Amendment because of a fear that the new federal government would disarm the people so that they could not resist tyranny if and when it came. As I have argued elsewhere, I think that he is right on this point.<sup>83</sup> But in the *Heller* opinion, that instant of codification is the last that we see of the right of resistance, because Scalia never suggests that it might have continuing relevance today. Of course, one would not expect an elaborate development of the right of resistance, because *Heller* was advancing his self-defense right, not his right to take up arms against the government. And so it is not a surprise that the actual holding of the case is that the D.C. regulation violates the right to keep and use arms in defense of one’s home. But because the Framers valued the right of resistance so highly, and because Justice Scalia professes always to follow the intent of the Framers as set down in the eighteenth century, one might expect a few words about how the right might apply today. The *Heller* Court quite happily anticipates other issues not technically before it, such as whether the Fourteenth Amendment incorporates the Second Amendment against the states. (The answer is yes.)<sup>84</sup> So why does it say nothing about the continuing importance of the right of resistance? *Heller* reads like *Hamlet* played without the Prince of Denmark.

But the truly puzzling fact is that the opinion not only says nothing about the ongoing relevance of the right, but also lays down rules that will make the right meaningless—in complete contradiction to the Framers’ concerns. Admittedly, a citizen militia may never have been effective against a trained army commanded by a tyrant. But the Framers of the Second Amendment were nonetheless concerned to protect the citizens’ guns so that they would

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<sup>82</sup> MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 6 (Barnes & Noble Books 2003) (1885).

<sup>83</sup> See WILLIAMS, *supra* note 3, at 45–68.

<sup>84</sup> *United States v. Cruikshank*, 92 U.S. 542 (1875), held that the Second Amendment did not apply to states. The *Heller* Court observes: “With respect to *Cruikshank*’s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.” 128 S. Ct. at 2813 n.23. In other words, because *Cruikshank* was wrong about the First Amendment and has since been repudiated, it was probably wrong about the Second Amendment as well. And it will probably soon be repudiated.

be ready to rise up should the need come. If we are good originalists like Justice Scalia, we must try in good faith to determine which gun uses would give them a fighting chance.

Two sorts of uses stand at the head of the line. First, to have any chance to combat a standing army, citizens will need to be trained, organized, and disciplined. Scalia himself argues that the Framers understood the importance of these uses: “[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”<sup>85</sup> And lest one think that Scalia is here referring to the organized state militia, recall how strongly he asserts that the Second Amendment gives rights not to the organized militia but to individuals as such. Indeed, he ridicules Justice Stevens for maintaining that the right of resistance belongs to the state militia, because Congress has power to exclude people from the militia, so that it will not be able to resist. If Scalia is not to fall into the same pit, he must be read as saying that private people have the right to train and organize themselves.

In short, under Scalia’s analysis, the people must have a Second Amendment right to form private armies, as the Militia of Montana has so clearly gleaned.<sup>86</sup> But as we have seen, Justice Scalia ultimately repudiates any such idea as dangerously unsound. And so it is, but to an originalist, the danger should be irrelevant. We should merely discern the meaning of the constitution and damn the consequences. Otherwise, we are merely enacting our own values. The outcome of *Heller* is thus strange but clear: the people have the right to own arms, and to use them in resistance, but not to prepare before the fact for resistance. Apparently they will just spontaneously turn out. If one is concerned about the right of resistance, that result makes little sense. But if one really loathes the right of resistance but loves the right of private self-defense, it is perfect. Private people may own arms and realistically use them in self-defense. They may also theoretically use them for resistance, but the resistance will predictably be wholly futile, because the citizen militia will be untrained and disorganized.

In order to combat a standing army, the people will also need to use up-to-date military style weapons. A six-shot double action revolver, of the sort commonly used in home defense, will help little against a soldier armed with a select-fire assault rifle or a .50 caliber sniper rifle. Again, though, Scalia is at pains to scotch any notion that the Amendment protects the right to own military weapons. Justice Scalia begins his analysis with a convoluted reading of *United States v. Miller*,<sup>87</sup> the most recent Second Amendment precedent before *Heller* and a case that Scalia otherwise condemns for its

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<sup>85</sup> *Heller*, 128 S. Ct. at 2801.

<sup>86</sup> See WILLIAMS, *supra* note 3, at 104–202.

<sup>87</sup> 307 U.S. 174 (1939).

casualness.<sup>88</sup> *Miller* upheld a law banning the possession of a short-barreled shotgun, on the grounds that “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”<sup>89</sup> If, as Scalia claims, the Second Amendment protects an individual right, then this part of *Miller* seems to hold that individuals have a right to “ordinary military equipment.” But not so, Justice Scalia insists, because at a later point *Miller* explains that militia members were “expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”<sup>90</sup> In other words, the Framers of the Second Amendment did not mean to protect military style weapons, which would have been useful in resisting tyranny, but just the ordinary type of weapons that people ordinarily kept in their homes for lawful purposes other than resisting tyranny. In sum: “[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”<sup>91</sup>

But for Justice Scalia, the citation to *Miller* is not enough. As an originalist, he must also find support in the history of the Amendment, and so he turns to an historical exegesis, which occupies less than a paragraph. First, he admits: “It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause [which praised the militia].”<sup>92</sup> He then reasserts that the Framers meant to protect only those firearms commonly kept at home: “But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty.”<sup>93</sup> Scalia now comes to the nub of the matter: if the Framers really wanted to protect an effective militia, they presumably would have wanted to guarantee its access to the most effective weapons. Instead, Scalia holds that they only wanted to protect access to firearms commonly kept in the home, even if they are not effective. Scalia adverts to this objection: “It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large.”<sup>94</sup>

But then, instead of actually confronting that argument, which he might not be able to win, he veers off to an argument he plainly feels that he can

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<sup>88</sup> *Heller*, 128 S. Ct. at 2814–15.

<sup>89</sup> 307 U.S. at 178.

<sup>90</sup> *Heller*, 128 S. Ct. at 2815 (quoting *Miller*, 307 U.S. at 179).

<sup>91</sup> *Id.* at 2815–16.

<sup>92</sup> *Id.* at 2817.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

win: "Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right."<sup>95</sup> Scalia here argues that even if a militia cannot be effective ("modern developments"), the Court must still guarantee the right to arms because the Constitution so requires. The Court cannot hold the Amendment empty on the grounds that history has outmoded it. But that claim is a diversion. Remember the argument to which Scalia purports to be responding: the Amendment should be read to cover military weapons because the Framers wanted the militia to be as effective as possible. That argument does not even hint that the Amendment is outmoded. In fact, it demands more gun rights than Scalia is prepared to give, not fewer. Makers of the argument would surely agree that even if a militia cannot be effective, the Court should still protect gun rights. They just think that the Framers meant the militia to have the most potent weapons possible. And Scalia offers not one word to explain why that interpretation of the intent is inaccurate.

To grasp the interpretive problem here, we must understand a little about firearms history. Justice Scalia's account of changes in patterns of firearms ownership is substantially accurate. In the eighteenth century, firearms commonly kept at home *were* militarily effective firearms. For that reason, it made sense to require the members of the militia, a military body, to bring their own guns from home. Soldiers and hunters alike carried single-shot muzzle-loading flintlock long-arms. The long-arms of the British Army were large caliber and smooth-bore for quick reloading. Some long-arms in private hands fit that description as well<sup>96</sup> (certainly there was no ban on owning large-caliber smooth bores), but some people owned weapons of smaller caliber with a rifled barrel—slower to reload but more accurate. Even these latter rifles, however, were militarily effective. In fact, these Kentucky Long Rifles have become storied in legend: canny American militia men used them to snipe long-range at British columns, easy targets in their scarlet coats and massed formations.<sup>97</sup>

Today, by contrast, people generally do not keep the most militarily effective weapons in their homes. Two factors caused this shift. First, for decades, federal law has restricted the keeping of such weapons, including fully automatic guns, grenades, and the like.<sup>98</sup> Second, weapons technology has changed so that weapons are more specialized, and a hunting rifle will no

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<sup>95</sup> *Id.*

<sup>96</sup> See CARL P. RUSSELL, GUNS ON THE EARLY FRONTIERS: A HISTORY OF FIREARMS FROM COLONIAL TIMES TO THE YEARS OF THE EARLY FUR TRADE 67–68, 150–151 (1980).

<sup>97</sup> See *id.* at 73, 175–76.

<sup>98</sup> See National Firearms Act, ch. 757, 48 Stat. 1236 (1934).

longer make a very good combat arm. Hand-held weapons in general now play a much smaller role on the battlefield. Because the Second Amendment protects the right to “arms,” it presumably cannot be read to protect a private right to the most effective military tools such as smart bombs and attack helicopters. But even focusing just on firearms, the differences between civilian and military weapons are greater than those differences were in the eighteenth century. The clearest difference is that military rifles are generally select-fire, so that they can be fired either in fully automatic or semi-automatic mode, and civilians content themselves with weapons that cannot fire in fully automatic mode. The difference between the two firing modes is that if one squeezes the trigger on a fully automatic weapon and holds it back, the gun will keep firing, shot after shot, until the magazine is empty or the trigger is released; a semi-automatic weapon requires a separate pull of the trigger for each separate shot.

Even so, the difference between modern civilian and military weapons is not as large as might be supposed. Federal law restricts but does not prohibit the private ownership of fully automatic weapons, requiring only the payment of a tax,<sup>99</sup> registration,<sup>100</sup> and background checks.<sup>101</sup> In addition, many private people own a semi-automatic version of a military arm, identical except that the shooter must keep pulling the trigger. Further, many believe that fully automatic fire is ineffective because it is inaccurate: the firing technique is to “spray and pray” that one hits something. For that reason, a semi-automatic civilian copy of a fully automatic rifle may be just as effective as the original military version. But the general point holds: civilians do not commonly own the kind of weapons generally carried by our troops.

So the *Heller* Court offers us a largely accurate history of firearms ownership in America, and that history presents us with a very specific interpretive problem. Justice Scalia sets up two categories of firearms: militarily effective guns, and guns generally kept in the home. According to *Heller*, the Amendment meant to protect only the type of guns generally brought by militia members to muster in the eighteenth century. Militia members commonly brought their own guns from home, because those guns were militarily effective. Militia weapons thus had two analytically distinguishable aspects: they were generally brought from home, and they were militarily effective. Which aspect defines the type? The Framers did not have to answer that question because militia weapons then exhibited both aspects. As a result, we have no direct evidence about how they would

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<sup>99</sup> See 26 U.S.C. §§ 5845(a)–(b), 5811 (2005).

<sup>100</sup> See *id.* at §§ 5845(a)–(b), 5841 (2005).

<sup>101</sup> See Bureau of Alcohol, Tobacco, Firearms and Explosives, Application for Tax Paid Transfer and Registration of Firearm, Form 4, Oct. 31, 2007.

answer the question. But today, we must find an answer because the two categories have grown apart: arms generally kept in the home are not militarily effective firearms. And so, without direct evidence, we must make an inference: were the Framers more concerned about protecting effective guns or home guns?

Here is the terribly strange intent that Justice Scalia ascribes to the Framers:

1. They did want to guarantee a right of resistance to the people.
2. To do so, they wanted to guarantee the right to keep the type of firearms commonly kept in private homes, which were at the time militarily effective firearms.
3. But their real goal was not to guarantee the right to keep militarily effective firearms; it was only the right to keep whatever types of firearms are commonly kept in private homes at any given period in history, whether they are militarily effective or not.
4. And so today, when home guns and militarily effective firearms are not the same, the Second Amendment guarantees only the former and not the latter.

The problem with this progression lies in step three: if the Framers intended to protect the right to keep and bear arms so as to resist tyrants, then presumably they meant to guarantee weapons useful for resistance. But instead, Scalia has them saying something like the following:

We are worried about tyrants, so we want to make sure that you can resist. And to do that, we want you to keep the kind of guns that people generally keep in the house because they will help you resist. But if some day, people do not ordinarily keep the kind of guns that will help them resist, well, then, we don't want you to have the kind of guns that will help you resist. We want you to have only the kind of guns that people ordinarily keep around, because we are not really committed to the idea that you should have the tools to resist. We are committed to the idea that you should have only garden variety guns because . . . well, just because.

But we know the reason, even if these poor hapless Framers do not: "because Justice Scalia wants to protect the type of guns that people ordinarily keep for self-defense, not guns that would better allow them to resist the government."

Assume for a moment that people in the 1770s had not generally kept militarily effective weapons in their homes. Then, because they glimpsed the threat of tyranny, they tried to procure some militarily effective firearms. Anticipating this incipient rebellion, George III then banned ownership of such arms and sent his soldiers around to confiscate all those in private homes. In other words, he disarmed the people so as to suppress dissent, leaving only the guns that were no threat to him. I believe, and I believe that



Justice Scalia believes, that the Second Amendment was aimed at exactly this sort of government action. And yet, bizarrely, he asserts that the Framers wrote the Second Amendment to allow future Georges to take the effective guns so long as they leave the ineffective ones, because the really important thing is to guarantee the right to keep the kind of guns that people generally keep, whether they are actually useful for resistance or not.

As Justice Scalia might say: “Grotesque.”<sup>102</sup>

At another point in the opinion, Justice Scalia himself seems to recognize that this kind of reasoning is grotesque when he ridicules an argument that is different in substance but similar in structure to his own. He explains:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. . . . Just as the First Amendment protects modern forms of communications . . . and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.<sup>103</sup>

That argument does border on the frivolous. It holds that because people in the eighteenth century had only flintlock rifles, the Framers must have meant to protect the right to own only flintlock rifles forever and ever, as though they had a great fondness for flintlock rifles as such. Scalia’s argument is frivolous in the same way. It holds that because people in the eighteenth century generally brought their militia weapons from home, the Framers must have meant to protect the right to own only those types of weapons generally kept at home forever and ever, as though the Framers had a great fondness for the category of weapons-generally-kept-at-home-in-any-given-era as such. In fact, it was an accident of the time that people carried flintlock rifles; and it was an accident of the time that militia weapons were also the sort of weapons that people generally kept at home. The essence of the provision was to guarantee people the kind of weapons that would serve the purpose of the provision. And these days, for the people to have any chance of resisting the government, they will need at least fully automatic assault rifles, battle rifles, long range sniper rifles, and light and heavy machine guns. The Court might have “time enough to expound”<sup>104</sup> whether they also need rocket launchers, and surface-to-air missiles.

In effect, Scalia here does what he so often accuses his colleagues of doing: he uses historical developments to render the Amendment empty as a protection of the right of resistance. Recall that there are two reasons that

<sup>102</sup> *Heller*, 128 S. Ct. at 2794 (characterizing Justice Stevens’ argument in dissent).

<sup>103</sup> *Id.* at 2791–92.

<sup>104</sup> *Id.* at 2821.

civilians generally do not keep true military weapons in their homes these days. First, the law restricts the private ownership of military arms and has done so for decades. But if the point in the Amendment was to allow the people to resist tyranny, then surely the law forbidding the private ownership of military weapons itself violates the Second Amendment. And if that law were void, many more people might in fact own machine guns, so many that they might even qualify as guns generally kept in the home. Yet far from casting doubt on the law regulating machine guns, Scalia assumes its constitutionality, and then he uses that assumption to reject the idea that one has a right to own a machine gun: interpreting the Amendment to protect “weapons useful in warfare” would be “a startling reading . . . since it would mean that the National Firearms Act’s restrictions on machineguns . . . might be unconstitutional, machine guns being useful in warfare in 1939.”<sup>105</sup> Apparently, Scalia believes that this historical development, the federal gun control laws themselves, has outmoded the right of resistance in the Second Amendment.

Similarly, in rejecting the right to own an M-16, Scalia confines the Second Amendment to those arms that people ordinarily keep in their homes “for lawful purposes.”<sup>106</sup> But under Scalia’s rendition of the Amendment, it is legal to resist tyrants, so it would follow that one would have a right to the most up-to-date tyrant-fighting tools such as an M-16. Apparently, what Scalia means is that an M-16 does not fall within the Second Amendment’s protection because federal law makes it unlawful to own an M-16. That argument is, of course, completely circular. By the same account, one would have no right to own a handgun if federal law made it illegal. As Part One explained, Scalia rejects—as he must, to reach his holding—the idea that the legislatures have the plenary power to proscribe gun uses. Instead, the Second Amendment protects the right not only to keep guns but to use them for certain purposes. According to Scalia, self-defense and resisting tyrants are among those purposes, but he treats them very differently. He rejects D.C.’s power to proscribe self-defense with a handgun, but he affirms Congress’ power to proscribe resistance with a machine gun.

The second reason that fewer people own military type guns is, in effect, fashion. As guns have become more specialized, many people have chosen to keep guns engineered for hunting, target-shooting, or self-defense, rather than full-bore combat. In other words, because many gun owners do not want military style guns, they are no longer the type of guns commonly kept at home. As a result, no gun owner may keep one—simply because they have fallen out of fashion. The scope of a citizen’s Second Amendment’s right is

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<sup>105</sup> *Id.* at 2815. Machine guns are still useful in warfare, as every soldier serving in Iraq knows.

<sup>106</sup> *Id.* at 2815.

utterly dependent on how other citizens choose to exercise their Second Amendment rights. We are all slaves to the most recent gun-owning trends. And yet throughout *Heller*, Scalia rejects the idea that historical changes should play any part in interpreting the Amendment's fundamental reach.

Once again, it is not hard to divine the reason for Justice Scalia's tortured analysis. If one were in good faith concerned about the right to resist, one would want to get an M-16 into every household in America. But if one loathed the right to resist but loved the right to self-defense, then one would look for a way to protect the ownership of only those guns most often used for private self-defense—in other words, the type of guns that Americans commonly keep around, effective against intruders but not against soldiers. The Second Amendment of Lexington and Concord is gone; the Second Amendment of suburban affluence has arrived. The *Heller* majority closes with a proclamation of loyalty to the Second Amendment as written: “[I]t is not the role of this Court to pronounce the Second Amendment extinct.”<sup>107</sup> And yet that is precisely what the *Heller* Court has done.

#### IV. CONCLUSION

I do not mean that the Second Amendment should be interpreted to give people the right to own heavy machine guns and organize private armies. I do mean to suggest that no one on the Supreme Court really wants an originalist Second Amendment. Some admit that they update the Constitution; others self-righteously deny it but do it anyway when it suits them. In dissent, Justice Breyer engages in an interest-balancing analysis to uphold the D.C. regulation.<sup>108</sup> In the majority, Justice Scalia scorns that type of analysis,<sup>109</sup> but that is what he is really doing: he clearly believes that the right of self-defense is valuable under present circumstances, but the right of resistance is too dangerous.

Like many other Second Amendment theorists, Justice Scalia writes as though the country may have changed since the adoption of the Second Amendment, but all the important social facts and concepts are the same. We read the Framers' words, and we think that we understand their meaning because we still use many of the same words. Because the Framers said some things that sound like pamphlets from the National Rifle Association, the Framers must have wanted what the NRA wants. And so that is what the Supreme Court gives us.

But the gap is vast between the Framers' conceptual universe and our own. It is not that the Amendment is extinct; it is that the world that gave the

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<sup>107</sup> *Id.* at 2822.

<sup>108</sup> *See Heller*, 128 S. Ct. at 2852–53, 2870 (Breyer, J., dissenting).

<sup>109</sup> *See id.* at 2821.

Amendment its original meaning is extinct. As Justice Scalia himself recognizes, the Second Amendment recognized the right of the people to keep and bear arms so as to overthrow a government that the people found oppressive. The Framers were concerned that if the federal government disarmed the people, then the people would not be able to bring death to tyrants. As I have developed elsewhere, the great proponents of the Amendment trusted the citizenry to use this power more than they trusted the government. The people were trustworthy because they were virtuous and homogeneous, and so any resistance campaign would be an organic, unified movement.<sup>110</sup> In this vision, any law that restricts the effectiveness of citizen resistance is *prima facie* a violation of the Second Amendment. If we cannot quite bring ourselves to support that reading, if we cannot trust the people in that way, as Justice Scalia cannot, then we cannot really call ourselves originalists.

The *Heller* opinion is saturated with fear of the darkness that lurks in men's souls. The opinion deeply sympathizes with home-owners who fear intruders. It professes to fear judicial power, claiming to strap itself to the mast of originalism to resist the siren song of judicial discretion. It also fears candor, because if it had openly avowed its value commitments—yes to self-defense, no to resistance—it would have revealed its own dark heart, sinful by its own definition. And it fears the people en masse; it promises the right of resistance but then ensures that it will be utterly ineffective. And perhaps the Court is right to fear the people in this way. If the people really had the tools to resist and believed that they had the right to resist, we might quickly disintegrate into a complex civil war. As I have suggested elsewhere, in this country, political violence has commonly been tinged with racism, religious bigotry, and political intolerance. A right of resistance would not be good for less powerful groups, especially racial minorities.<sup>111</sup>

For the last several years, I have been advising elements of the Burma democracy movement, especially the ethnic minorities that have been resisting the military government for decades.<sup>112</sup> They have learned this lesson the hard way: in a riven society, small groups cannot bring death to tyrants; frequently, they can do little more than survive. Sometimes, it is right to fear. But the Burma Democracy Movement also knows another truth: if we make a constitutional God of fear, then we will end up worshipping Him in His courts. In the midst of suffering and suspicion, the movement leaders are seeking to overcome their fear of each other, so as to find a new constitutional basis for the country, a basis that will allow them to make a

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<sup>110</sup> See WILLIAMS, *supra* note 3, at 21–96.

<sup>111</sup> See *id.* at 191–257.

<sup>112</sup> For more information on this work, see Center for Constitutional Democracy in Plural Societies, <http://ccdps.indiana.edu> (last visited Nov. 13, 2008).

better future. Realistically, the resistance armies will insist on staying under arms even after the advent of democracy because they will not entirely trust the central government with a monopoly on the use of violence. In other words, as a practical matter, they will retain the right to resist. And they know that a people with the right to resist must be deeply committed to a shared constitutional framework, because they are in effect hostages to each other.

The original Second Amendment proponents once imagined Americans that way too. That self-image has been dying for some time, but *Heller* pronounced its death knell—not openly but very effectively. Its death may be real, and it may have been inevitable. But its pronouncement should be neither casual nor misleading, because it represents a central part of our constitutional tradition. By contrast, the *Heller* Court never admits that it has effectively terminated the right of resistance, and so we can only sense its demise without having seen its funeral. The *Heller* Court never explains why it has jettisoned the right of resistance, nor have they pondered the long-run consequences for American democracy. Whether Americans have a private right of self-defense is an important but secondary issue of public policy. Whether the state has a monopoly on the use of violence is fundamental to the nature of the republic. Before we give the people the right of resistance, we might need to really trust them. But before we give the government a monopoly on violence, we might need to really trust it. Sadly, the *Heller* opinion itself gives little reason for us to trust the truthfulness of those who sit atop the pyramid of American power.

